

Article Information

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What's in a game? Technological protection measures under the Copyright Act

The recent Federal Court decision in [Take-Two Interactive Software, Inc v Anderson \(No 2\)](#) offers valuable guidance for software developers on how the Copyright Act 1968 (Cth) supports the use of “technological protection measures” to protect copyright. Software developers will benefit from this decision clarifying the operation of these provisions.

Background

The Parties

The first applicant, Take-Two Interactive Software, Inc (**Take-Two**) is an American developer, publisher and marketer of popular video games including the well-known “Grand Theft Auto” video game series.[\[1\]](#)

The respondent, Mr Christopher Anderson, is a developer of software known as the “Infamous Mod” which modifies gameplay of the PC version of the famous game “Grand Theft Auto V”.[\[2\]](#)

The Infamous Mod, when installed, allows players to perform several unauthorised actions within play, such as granting the player teleportation and other “superpowers”, providing access to weapons and creating copies of “cash bags”.[\[3\]](#) These actions were not part of the game created by Take-Two, and were only enabled through installation of the Infamous Mod.

The Infamous Mod was downloaded by a player from a website and stored on the computer. When a player wanted to use the Infamous Mod, they would double click the “Infamous Executable”, which would cause both Grand Theft Auto V and the Infamous Executable to open on their computer. The Infamous Mod would patch additional instructions to the game, permitting the player to access the actions described above.[\[4\]](#)

Take-Two's Claims

Take-Two claimed that by developing, manufacturing and selling the Infamous Mod, Mr Anderson had engaged in actionable conduct under sections 116AN and 116AO of the Copyright Act 1968 (Cth) (**Copyright Act**).[\[5\]](#)

Section 116AN applies where a copyright work is protected by an access control technological protection measure (**ACTPM**) and a person does an act resulting in the circumvention of such ACTPM, in circumstances where the person knew or ought reasonably to have known that that act would have that result.[\[6\]](#) An ACTPM is a device or technology that that controls access to copyrighted material.[\[7\]](#)

Section 116AO applies where a person manufactures, imports, distributes, offers to the public, provides or communicates a circumvention device in circumstances where the person knew or ought reasonably to have known that the device is a circumvention device for a technological protection measure (**TPM**).[\[8\]](#)

A TPM is broader than an ACTPM, and includes devices or technologies that prevent, inhibit or restrict acts comprised in the copyright of a work, not just those that control access to copyrighted material.[\[9\]](#) Examples of TPMs includes passwords or encryption, which enable copyright owners to protect their material, particularly in the online environment.[\[10\]](#)

Take-Two claimed that the following measures employed in relation to Grand Theft Auto V were both ACTPMs and TPMs:

- Measures which continually check the RAM of a player's computer for any foreign code, report detected foreign code, "crashes" a game if foreign code is detected and which ban or suspend the game player (**Real Time Memory Analysis TPMs**); and
- Measures which restrict access to "Online Mode" by prohibiting the player from transitioning from "Story Mode" when certain conditions are met, which prevent the use of certain functions in Story Mode while a player is in Online Mode and which automatically suspend or ban a player if they are found to be attempting to use a prohibited function in Online Mode (**Access Control Check TPMs**).[\[11\]](#)

Take-Two also claimed that encryption and obfuscation measures which protected the object code of the game **Encryption and Obfuscation TPMs** were ACTPMs,[\[12\]](#) however did not claim that they were TPMs.

Findings

Nicholas J, dealing first with s 116AN, had to determine whether the measures employed by Take-Two controlled access to the works in Grand Theft Auto V and were therefore ACTPMs, and whether, in developing, manufacturing and selling the Infamous Mod, Mr Anderson did an act resulting in the circumvention of such measures.

Control of Access

The term "*controls access*" is defined in the Copyright Act as requiring the application of information or a process in order to *gain access* to the work.[\[13\]](#) With reference to this definition, his Honour found that many of Take-Two's measures did not control access to the copyright works in Grand Theft Auto V as they were designed to terminate or withdraw access that was previously given, rather than controlling the giving of access in the first place.[\[14\]](#) For example, the Real Time Memory Analysis TPM which detects foreign code, crashes the game and then bans or suspends the player, is not a step in the gaining of access to Grand Theft Auto V. Instead, it terminates previously given access.[\[15\]](#)

However, his Honour found that majority of the Access Control Check TPMs did control access and were therefore ACTPMs.[\[16\]](#) For example, one of the Access Control Check TPMs employed by Take-Two is a measure which, when a player attempts to transition from "Story Mode" to "Online Mode", checks for certain prohibited factors and refuses access to Online Mode if any factors are detected.[\[17\]](#) This measure prevents the player from gaining access to works necessary for use in Online Mode and is therefore an ACTPM.[\[18\]](#)

Act Resulting in Circumvention - "Circumvention Devices"

Section 116AN applies to specific acts that result in the circumvention of ACTPMs. This is contrasted to section 116AO which applies to anterior steps enabling the circumvention to be performed, including the manufacture or distribution of the circumvention device.[\[19\]](#) His Honour therefore held that Mr Anderson's conduct in developing, manufacturing and selling the Infamous Mod was not actionable conduct under s 116AN.[\[20\]](#) As a result, all of Take-Two's claims under s 116AN failed.[\[21\]](#)

Prevention, Inhibition or Restriction of Acts

In relation to s 116AO, Nicholas J had to determine whether the measures employed by Take-Two prevented, inhibited or restricted acts comprised in the copyright of Grand Theft Auto V, and whether Mr Anderson had knowledge that the Infamous Mod was a circumvention device for a technological protection measure.

Nicholas J found that all of the Real Time Memory Analysis TPMs and Access Control Check TPMs were measures that prevented, inhibited or restricted acts comprised in the copyright of Grand Theft Auto V.[\[22\]](#) This was because each measure prevented the player from being able to reproduce parts of the copyrighted works in RAM.[\[23\]](#) For example, the Real Time Memory Analysis TPM operates by preventing the player from reproducing in RAM the parts of the work necessary to play Online Mode once foreign code is detected.[\[24\]](#)

Knowledge

Section 116AO requires knowledge that the person knew or ought reasonably to know that the device they have manufactured or distributed is a "circumvention device" for a TPM.[\[25\]](#) A device will be considered a circumvention device if it:

- is promoted as having the purpose or use of circumventing a TPM;
- has a limited commercially significant purpose or use other than the circumvention of a TPM; or
- has been primarily or solely designed or produced to enable or facilitate the circumvention of a TPM.[\[26\]](#)

As Mr Anderson had accepted that he was the senior developer of the Infamous Mod, Nicholas J inferred that Mr Anderson was ‘fully acquainted with the design and operation of the Infamous Mod and the way in which it “got around” the various TPMs against which it was deployed’.^[27] His Honour was therefore satisfied that Mr Anderson had engaged in actionable conduct under section 116AO.^[28]

His Honour ordered that Mr Anderson be permanently restrained from manufacturing the Infamous Mod and any other circumvention device with the intention of providing or distributing it to another person.^[29]

Takeaways

In this ever-evolving digital and AI world, copyright owners face challenges in protecting their works from unauthorised copying and distribution. Software developers in particular will need to consider what measures they can take to protect their copyright from those who would willingly seek to exploit it.

This decision usefully highlights the provisions under the Copyright Act which aim to encourage digital sharing of material online by promoting technological protection measures such as passwords and encryption, and prohibiting actions that aim to circumvent these measures.

Sections 116AN and 116AO offer useful methods of protecting copyright in software like video games, as they permit software developers to enforce access control technological protection measures implemented within the programs.

Piper Alderman has a nationally recognised practice in intellectual property enforcement and protection, with experience in all jurisdictions. Please contact Tim O’Callaghan and his team if you require intellectual property advice.

Footnotes

^[1] *Take-Two Interactive Software, Inc v Anderson (No 2)* [2024] FCA 1459 [2] (“*Take-Two v Anderson*”).

^[2] *Ibid* [3].

^[3] *Ibid* [15].

^[4] *Ibid* [16].

^[5] *Ibid* [3].

^[6] *Copyright Act 1968* (Cth) s 116AN (“*Copyright Act*”).

^[7] *Ibid* s 10.

^[8] *Ibid* s 116AO.

^[9] *Ibid* s 10.

^[10] *Take-Two v Anderson* (n 1) [33].

^[11] *Ibid* [14].

^[12] *Ibid*.

^[13] *Copyright Act* (n 5) s 10.

^[14] *Take-Two v Anderson* (n 1) [87], [94], [123].

^[15] *Ibid* [87].

^[16] *Ibid* [102], [115].

^[17] *Ibid* [97].

^[18] *Ibid* [102].

^[19] *Ibid* [67].

^[20] *Ibid* [145].

[\[21\]](#) Ibid.

[\[22\]](#) Ibid [89], [95], [103], [113], [120].

[\[23\]](#) Ibid.

[\[24\]](#) Ibid [88] - [89].

[\[25\]](#) Ibid [158].

[\[26\]](#) Ibid [160].

[\[27\]](#) Ibid [164].

[\[28\]](#) Ibid [190].

[\[29\]](#) Ibid [192].