



Submission to

Productivity Commission

Subject

Intellectual Property Arrangements

Date

30 November 2015

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the Productivity Commission Issues Paper on Intellectual Property Arrangements of October 2015 (the **Issues Paper**).

In our submission we have set out a brief description of IGEA and an overview of our industry in Australia, together with a general submission on the importance of intellectual property to the interactive games industry. The submission is particularly focused on copyright given its importance in the interactive games industry and provides a more detailed response on Technological Protection Mechanisms (**TPMs**) and “fair use” and “fair dealing” provisions as specific questions raised by the Issues Paper.

By way of background, IGEA also refers to its comprehensive responses to the Australian Law Reform Commission (**ALRC**) Terms of Reference for the Copyright Inquiry of 29 June 2012.¹

2. Executive Summary

By way of summary, IGEA submits that the Productivity Commission should consider the following:

1. Intellectual property (**IP**) covers a wide range of protections, each of which should be considered separately rather than simply as a whole in terms of their effectiveness, efficiency, adaptively and accountability. IGEA has focused its submission on copyright as the most commonly employed IP rights in the interactive games industry.
2. Copyright is essential to encourage innovation and creativity in the interactive games industry and provide rewards to the relevant creators.
3. It is important that the protections offered by TPMs under the *Copyright Act 1968 (Cth)* (the **Copyright Act**) are preserved as they incentivize those in the interactive games industry to innovate across digital platforms within a secure legal and technological environment.
4. IGEA’s stakeholders have varying perspectives on whether a broad, flexible fair use exception should be introduced. IGEA considers that any proposed introduction of “fair use” exceptions should be thoughtfully explored to ensure that they map to the existing legitimate expectations of interactive game creators as well as consumers.

In short, IP and its protection is critical to ensure a strong and vibrant future for Australia’s interactive entertainment industry, an industry that experienced significant growth of 39 percent in digital sales in 2014 and engages close to 70 percent of the Australian population.

3. About IGEA

IGEA is an industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA’s members publish, market, develop and/or distribute interactive games and entertainment content and related hardware. The following list represents IGEA’s current members:

¹ Available at http://www.alrc.gov.au/sites/default/files/subs/192_ org_ igea.pdf and http://www.alrc.gov.au/sites/default/files/subs/741_ org_ igea_discussion_paper_submission.pdf (accessed 5 November 2015).

- Activision Blizzard
- All Interactive Distribution
- Disney Interactive Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gamewizz Digital Entertainment
- Google
- Microsoft
- Mindscape Asia Pacific
- Namco Bandai Entertainment
- Nintendo
- Sony Computer Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- VR Distribution
- Warner Bros. Interactive Entertainment
- Well Placed Cactus
- ZeniMax Australia

4. Overview of the interactive games industry

The interactive games industry is the fastest growing entertainment industry globally² and is considered to be highly innovative both in terms of its creative content and business models. In 2014, the industry worldwide was estimated to be worth approximately US\$77 billion and forecast to grow to US\$96 billion by 2018.³ By way of comparison:⁴

- The film industry (including box office, home entertainment, sell-through, video on demand and rental, but excluding actual advertising and rental) was estimated to be worth US\$107 billion (with a 4.4 percent compound annual growth rate)
- The music industry (incorporating physical distribution, digital distribution and live music) is estimated to account for US\$52 billion by 2019, with a compound annual growth rate of 0.8 percent.

In 2014, Australia's interactive games industry reached AU\$2.46 billion in retail sales in Australia (excluding revenue generated from interactive games development or exports), a 20 percent increase from its previous year.⁵ That figure incorporated traditional retail sales of AU\$1.214 billion and AU\$1.248 billion in digital sales, the latter increasing by 39 percent. Mobile games, digital downloads and subscriptions also continued to grow significantly in 2014. The growth in digital came primarily from a 56 percent jump year-on-year in mobile game downloads. More than half of all mobile app revenue in Australia was from interactive games, of which the majority were generated through in-app purchases.

For further market data for Australia in 2014 refer to **Appendix A** of this submission.

² Entertainment Software Association of Canada, "Levelling Up: Winning Strategies to Support Canada's Dynamic Video Game Industry", March 2014, page 3 (the **ESAC Submission**).

³ DFC Intelligence, *Worldwide Video Game Forecast*, cited in Makuch, E, "Report: Xbox One and PS4 will sell 100 million units each by 2020" *Gamespot*, 12 February 2014, at <http://www.gamespot.com/articles/report-xbox-one-and-ps4-will-sell-100-million-units-each-by-2020/1100-6417687/> (accessed 3 August 2015).

⁴ PriceWaterhouseCoopers, *The Australian Entertainment and Media Outlook 2015-2019*, 14th Edition, 2015.

⁵ Research based on The NPD Group Australia, Time period December 31 2012 – Dec 29 2013, December 30 2013 – Dec 28 2014 and Telsyte, *IGEA Digital Market Monitor*, 2014, cited at IGEA, "Australian game sales surge in 2014", *Media Release*, 4 March 2015, at <http://www.igea.net/2015/03/australian-game-sales-surge-2014/> (accessed 3 August 2015).

To demonstrate the levels of engagement with interactive games by the Australian population, IGEA's Digital Australia 2016 Report released on 28 July 2015 relevantly found that:⁶

- 98 percent of Australian homes with children under the age of 18 have a device for playing interactive games
- 68 percent of Australians play interactive games, with 78 percent of the game playing population aged 18 years or older
- Older Australians continue to make up the largest group of new players over the past four years. Australians aged 50 and over now make up 23 percent of the interactive game playing population - increasing their essential digital literacy for the digital economy
- The average age of those engaged in Australian interactive games has increased from 32 to 33 years old since 2013 and nearly half (47 percent) of this population is female
- As part of the normal media usage, the daily average time spent playing interactive games is 88 minutes by Australians
- 27 percent of players have tried making interactive games using software and 9 percent have studied or plan to study interactive games subjects

Interactive games are increasingly identified for their ability to serve other purposes in addition to simply entertainment. Researchers, educators, businesses and journalists have observed the importance of serious and related interactive games. Importantly, 24 percent of Australian adults have used interactive games at work for training purposes and 35 percent of parents say interactive games are embedded in their children's school curriculum. Games can also be beneficial for healthy ageing, with 89 percent of older Australians say playing interactive games improves thinking skills, 76 percent agree interactive games increase mental stimulation, 79 percent find interactive games help improve coordination and dexterity and 61 percent state interactive games help fight dementia.

A contemporary analysis of the Australian interactive games industry is provided in the IGEA's Digital Australia 2016 Report.⁷ A historical overview of the interactive games industry in Australia can be found in a number of previous reports including Screen Australia's *Playing for Keeps*,⁸ the Australian Centre for Moving Images' *History of Games Development in Australia*⁹ and the CCI's *Working in Australia's Digital Game Industry: Consolidation Report*.^{10 11}

⁶ IGEA, *Digital Australia Report 2016*, at <http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf> (accessed 29 July 2015) (DA16).

⁷ A copy of the report at <http://www.igea.net/2015/07/games-are-present-in-almost-all-australian-family-households/> (accessed 29 July 2015).

⁸ Screen Australia, *Playing for Keeps: Enhancing Sustainability in Australia's interactive games industry*, 2011, at http://www.screenaustralia.gov.au/about_us/pub_gamesreport.aspx (accessed 27 July 2015) (Screen Australia Report).

⁹ Knight, S and Brand, J, *History of Game Development in Australia*, ACMI, 2007.

¹⁰ Australian Research Council Centre of Excellence for Creative Industries and Innovation (CCI) and Queensland University of Technology in partnership with the Games Developers' Association of Australia, *Working in Australia's Game Development Industry, A Consolidated Report*, May 2011, at <http://www.cci.edu.au/sites/default/files/shaukka/Working%20in%20Australia%27s%20Digital%20Games%20Industry%20Consolidation%20Report%20May%202011.pdf> (accessed 27 July 2015).

¹¹ Another resource is Department of Communications, Information Technology and the Arts, *From Cottages to Corporations: Building a Global Industry from Australian Creativity – Report on Access to Overseas Markets for Australia's Creative Digital Industry*, 2003.

5. The importance of intellectual property

IGEA is of the view that robust and effective IP protection, and particularly copyright, is essential to encourage innovation and creativity in the interactive games industry for the benefit of both Australian creators and consumers.

At the outset, IGEA reinforces that it is important for the Productivity Commission to consider different types of IP protection separately and flexibly.¹² For example, copyright and its effectiveness, efficiency, adaptively and accountability should be considered separately from, for example, patents given their different history, purpose, application and outputs.

For the purposes of this submission IGEA has focused its comments on copyright because it is fundamental to encouraging, protecting and rewarding innovation in the interactive games industry. There can be little doubt that the interactive games industry has embraced, and will continue to embrace, the opportunities presented by the global digital economy. The industry continues to lead the way in innovative business models to access new revenue streams and address consumer demands. Copyright is key to such innovation.

Copyright allows those in the chain of interactive games creation (games developers, publishers and distributors) to protect the fruits of their labour in order to generate appropriate commercial rewards. Game developers consist of the artists and animators that design how the game characters and the game environment will look; the game designers that will develop the game concept and the users' game experience; and the programmers who write the source code that pulls all of these elements together. Copyright protection is particularly important in the creative industries where it is difficult to "pick a winner" and can be challenging to get traditional financial investment. Moreover, any financial rewards are often reinvested into the creation of more innovative content for the benefit of Australian consumers.

Interactive game developers have traditionally earned a living through a number of sources, including entering into publishing agreements or alternatively through U.S. style work-for-hire agreements. These arrangements continue to operate today, with many Australian development studios working on blockbuster games alongside prominent international publishers. These developers depend on strong IP laws, particularly copyright and trade marks, to maintain these traditional revenue streams. Furthermore, a number of these arrangements involve international parties and therefore benefit from IP laws that compliment IP laws in an international environment.

While interactive game developers continue to benefit from the more traditional methods of earning revenue, the proliferation and continued growth of Internet-enabled game devices, including mobile devices, has provided the interactive games industry with direct access to a variety of new revenue streams and new digital goods and services on a global scale. For example, it is relatively inexpensive for developers to distribute their iPhone mobile games to a global market through the iPhone's AppStore. An example is the Australian app *Fruit Ninja*, developed by HalfBrick Studios in Brisbane. *Fruit Ninja*, which recently celebrated its fifth birthday, has had more than one billion global downloads and is the second most-purchased iPhone app of all time.¹³ Due to the success of this simple fruit-slicing game, which has even been used in the aged care community, Halfbrick Studios now employs 100 people and has released games including *Jetpack Joyride*, *Hollywood Game Night* and *Radical Rappelling*.

¹² Issues Paper, page 15.

¹³ Swan, D "Australian app success story Fruit Ninja celebrates fifth birthday" *The Australian*, 7 August 2015 at <http://www.theaustralian.com.au/business/technology/australian-app-success-story-fruit-ninja-celebrates-fifth-birthday/story-e6frgakx-1227474055464> (accessed 5 November 2015).

The introduction of low-cost, global digital distribution platforms have empowered Australian developers and caused significant growth in the independent interactive games development industry. For an overview of new and innovative business models in the interactive games industry spanning free-to-play, freemium, subscription, advertising and crowdfunding please refer to IGEA's previous submission to the ALRC.¹⁴

IP laws also provide much needed flexibility for the exploitation of creative content in the interactive games industry. While copyright rights "establish general 'exclusivity' for a specified period, which the holder may use to derive a financial benefit"¹⁵ ultimately this is at the discretion of the owner of the IP rights. There is currently a robust community of gamers legitimately sharing content online, within the framework of existing protections, enabled by copyright owners.

6. Technological Protection Measures

*What have been the impacts of the recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?*¹⁶

As the Issues Paper notes,¹⁷ measures to prevent the circumvention of TPMs were introduced into the Copyright Act as a result of the Australia-United States Free Trade Agreement. IGEA considers these amendments to the Copyright Act as both efficient and effective for the reasons set out below.

TPMs are employed by rights holders in the interactive games industry to prevent unauthorised copying of and access to interactive game software and services and are also used for a wide variety of purposes that are beneficial to consumers and parents. For instance, TPMs permit companies to differentiate products to meet varying consumer demands and offer a greater range of options and flexibility to consumers (e.g. rental vs. purchase, etc.). TPMs also facilitate "trial" and "demo" versions of video game software that enable a "try before you buy" experience for the user. Certain trial software is time-limited, others only permit a certain number of plays, while still others permit play in limited areas of a game's universe (e.g. limited to certain levels). All of these options provide consumers with information that allows them to be more informed buyers of interactive games.

TPMs also facilitate digital distribution of products and thus are a critical enabler of e-commerce. Generally, all interactive game platforms (including PlayStation 4, Wii U and Xbox One) offer services that allow users to download games and applications directly onto their consoles/devices, while Valve's Steam and Electronic Arts' Origin Store are just a few of the digital distribution services that have emerged for personal computer (PC) games. Not only do these services rely on TPMs to operate, many employ TPMs to offer value-added benefits to consumers. For instance, both the Steam and Origin services not only allows a user to purchase computer games online, but tether any purchased video game software to the user's account rather than a particular computer, so content can be downloaded to any number of internet-connected computers, allowing consumers access to games at convenient times and locations (such as when traveling). Similarly, Microsoft also offers a service where an increasing amount of content purchased for playing on the Xbox 360 can also be used on the purchasers' Xbox One which is reliant on TPMs.

¹⁴ http://www.alrc.gov.au/sites/default/files/subs/192_ org_igea.pdf page 6.

¹⁵ Issues Paper, page 3.

¹⁶ Issues Paper, page 21.

¹⁷ Issues Paper, page 19.

Importantly, IGEA and its members are also concerned about children gaining access to interactive games not suitable for their age and employs TPMs to enable enhanced parental control features. All consoles contain parental controls that permit parents to restrict access to interactive games according to their classification, allowing parents to make decisions about what is appropriate for their family. The Xbox One also contains a timer so parents can determine how long their child may play. Similarly, some Massively Multiplayer Online Games (**MMOGs**) such as Activision Blizzard's World of Warcraft include a scheduler, so parents can choose what time of day their children may play and for what period of time.

While providing the above benefits to consumers through the use of TPMs, the interactive games industry makes widespread use of a variety of TPMs to prevent the unauthorised access to, use or transmission of copyrighted materials. Such TPMs come in a wide variety of forms, from copy protection and access controls built into video game consoles and handheld devices that recognise illegally copied versions of games and refuse to play them, to various online registration and/or authentication systems for PC games such as product keys that verify that the game is original and has not been illegally copied, to new digital distribution services and online games that tether games to online accounts rather than individual computers.

Therefore, TPMs are critical to delivering a number of innovative features that benefit Australian consumers while also deterring the unauthorised access to interactive games. The ongoing support of such benefits, as well as the deterrence of unauthorised access, is dependent on the strong and effective TPM provisions provided under the Copyright Act which IGEA supports.

7. Fair Use

*How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?*¹⁸

As the Productivity Commission is aware, in 2013 the ALRC recommended the introduction of fair use copyright exceptions with its final report. IGEA initially responded to the ALRC's Issues Paper on this issue with its view on the proposed fair use exception stating that:¹⁹

IGEAs' stakeholders have varying perspectives on whether a broad, flexible fair use exception should be introduced.

IGEAs notes that the interactive games industry has been able to develop and introduce new and innovative business models in Australia without the benefit a broad fair use exception. Indeed, a number of IGEAs members believe that the introduction of a fair use exception is neither warranted nor desirable.

At the same time, some of IGEAs' US members do rely on fair use as part of their creation of new content. Amongst those who do not oppose the introduction of "fair use" exceptions, there is a consistent view that additional consultation is required given the complexity of the issues, in order to ensure that they map to the existing legitimate expectations of interactive game creators as well as consumers.

¹⁸ Issues Paper, page 21.

¹⁹ http://www.alrc.gov.au/sites/default/files/subs/741_0rg_igea_discussion_paper_submission.pdf at page 3.

Indeed, the complex issues around a fair use exception may ultimately be better addressed in a specific Issues Paper on this topic, if required at some stage in the future.

8. Conclusion

In conclusion, IGEA and its members supports IP, particularly copyright, as essential to innovation and creativity in the interactive games industry in Australia. The Australian interactive games industry continues to grow, innovate and evolve with the support of the underlying framework of the Copyright Act. It has actively developed new and innovative business models to address the growing demands of users in the digital environment and engage its 68 percent of Australian consumers that play interactive games.

IGEA appreciates the opportunity to provide a submission the Productivity Commission on Intellectual Property Arrangements. It looks forward to the opportunity to discuss this in more detail at the Productivity Commission's Public Hearings on the Issues Paper.

APPENDIX A – AUSTRALIAN MARKET DATA

The IGEA's commissioned research from NPD Group Australia showed that in 2014:²⁰

- Growth was driven by console hardware, which had increased by 47 percent. New consoles, the PS4 and Xbox One, had the best sales within the first 12 months of launch of any console hardware
- Software sales were \$614.5 million in 2014, down 5.3 percent from the previous year, however PS4, Xbox One, Wii U and 3DS had experienced growth in software
- Two new franchises, Watch Dogs and Destiny entered the Top 10 games titles sold in 2014
- The PS3 and Xbox 360 continued to contribute a significant amount to the overall software sales
- Originally a digital only game, Minecraft increased in value by 114 percent in 2014
- Action was the number one genre in terms of the volume of sales in Australia
- 61 percent of all games sold (based on volume) received an unrestricted Classification

Further industry key highlights by independent research firm Telsyte evidenced:²¹

- The Australian mobile gaming market, incorporating smartphones & tablets exceeded \$700M in 2014, growing by 56 percent from 2013
- The majority of mobile games revenues was generated through in-app purchases
- 20 percent of new games sales in 2014 were digital downloads
- The fastest growing segment is the online, in-game purchase market driven by adventure games, which have extra levels, missions' campaigns and map packs

²⁰ Research based on The NPD Group Australia, Time period December 31 2012 – Dec 29 2013, December 30 2013 – Dec 28 2014 cited at IGEA, "Australian game sales surge in 2014", *Media Release*, 4 March 2015, at <http://www.igea.net/2015/03/australian-game-sales-surge-2014/> (accessed 3 August 2015).

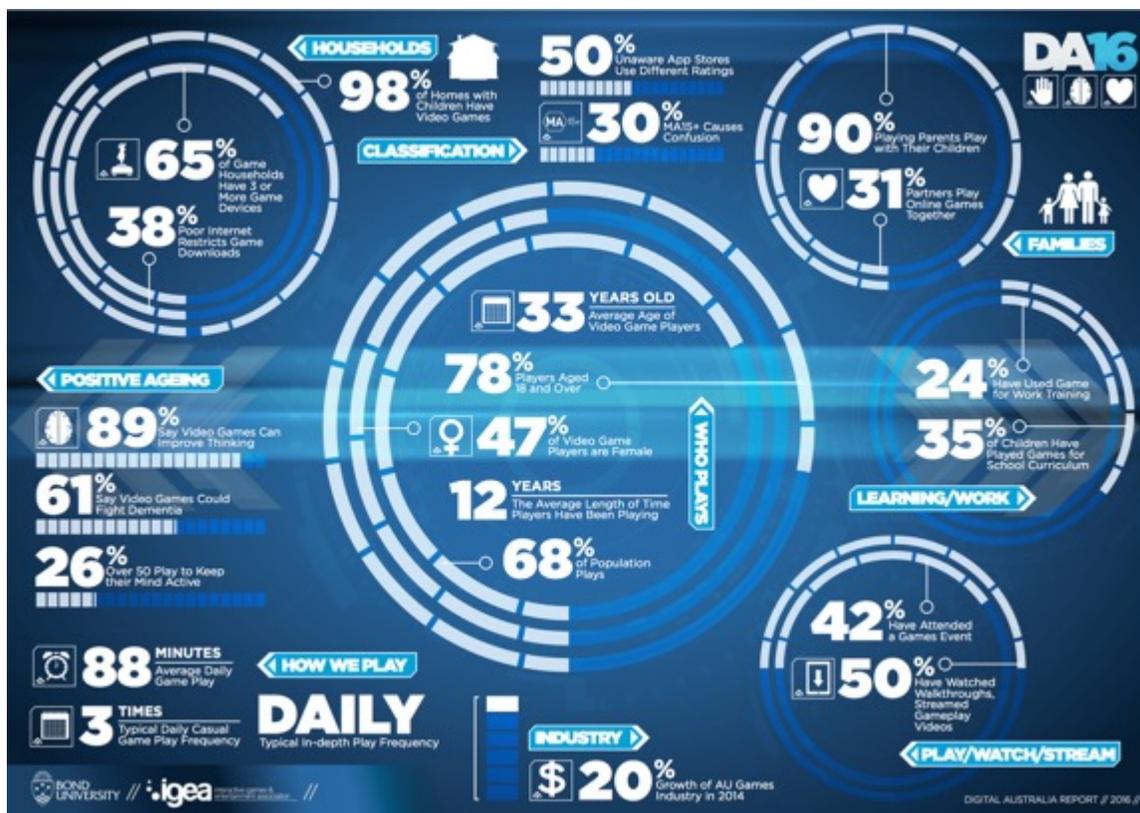
²¹ Telsyte, *IGEA Digital Market Monitor*, 2014 cited *ibid*.



IGEA commissioned research from:
 *The NPD Group Australia.
 Time period December 31 2012 – Dec 29 2013, December 30 2013 – Dec 28 2014.
 **Telsyte – IGEA Digital Market Monitor, Q1-Q4 2014
 ***Revised 2013 estimate



Key Findings: Digital Australia 2016



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// Key Findings //

Games Households

- 98% of homes with children have computer games.
- 65% of game households have three or more game devices.
- 38% choose not to download games due to data limits.

Who Plays

- 68% of Australians play video games.
- 47% of video game players are female.
- 33 years old is the average age of video game players.
- 78% of players are aged 18 years or older.
- 39% of those aged 65 and over play video games.
- 12 years is the average length of time adult players have been playing.

How We Play

- 88 Minutes is the average daily total of all game play.
- 10 Minutes, three times a day is typical for casual game play.
- 1 Hour, daily is typical for in-depth game play.

Why We Play

- To keep the mind active is the main reason older adults play.
- To have fun is the primary reason PC and console players play.
- To pass time is the main reason mobile players play.

Families and Play

- 90% of playing parents play with their children.
- 31% play online games with partners.
- 57% of adults are 'Always present' for purchase of games for children.
- 66% are familiar with parental controls on game systems.

Classification and Media Concerns

- 30% indicate MA 15+ causes most confusion.
- 28% indicate M causes most confusion.
- 50% are unaware that app stores have different rating systems.
- 41% say ratings have "a lot of influence" on games purchased for children.

Game Play Culture

- 50% have watched walkthroughs or streamed gameplay videos.
- 42% have attended a games event.

Games and Benefits

- 89% say video games can improve thinking skills - health.
- 79% say video games can improve coordination and dexterity - health.
- 76% say video games increase mental stimulation - positive ageing.
- 61% say video games could fight dementia - positive ageing.

Learning and Work

- 24% have used video games at work for training.
- 35% say their children have used video games for school curriculum.

Game Business

- 20% is the amount of growth in the Australian game industry in 2014.

Methodology

Digital Australia 2016 (DA16) is a study of 1274 Australian households and 3398 individuals of all ages in those households. Participants were drawn randomly from the Nielsen Your Voice Panel in May 2015; research was designed and conducted at Bond University. The margin of error is ±2.7%.