



Submission to

**Department of Industry, Innovation  
and Science**

Subject

**Productivity Commission Inquiry into IP Arrangements  
Inquiry Report**

Date

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## Table of Contents

1. Introduction .....	3
2. Executive Summary .....	4
3. About IGEA .....	5
4. Overview of the Interactive Games Industry .....	6
5. Copyright Term and Scope .....	7
<b>Finding 4.1 – Optimal copyright term</b> .....	7
6. Copyright Use and Licensing .....	10
<b>Recommendation 5.1 – Agreements restricting use of copyright material permitted by an exception</b> .....	10
<b>Recommendation 5.1 – Circumvention of technological prevention measures</b> .....	13
<b>Recommendation 5.2 – Circumvention of geoblocking technology</b> .....	21
7. Conclusion .....	23
APPENDIX A – AUSTRALIAN MARKET DATA .....	24

# 1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the “Productivity Commission Inquiry into IP Arrangements” (the **Inquiry**) being undertaken by the Department of Industry, Innovation and Science (the **Department**). IGEA understands that the Department will have regard to all submissions previously provided to the inquiry, which would include IGEA’s initial submission<sup>1</sup> and post-draft submission.<sup>2</sup> IGEA would now like to provide a third submission, which specifically responds to the following recommendations and findings of the Productivity Commission’s inquiry report:

- **Finding 4.1**
  - “The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.”
- **Recommendation 5.1**
  - “The Australian Government should amend the Copyright Act 1968 (Cth) to:
    - make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
    - permit consumers to circumvent technological protection measures for legitimate uses of copyright material.”
- **Recommendation 5.2**
  - “The Australian Government should:
    - amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications’ report At What Cost? IT pricing and the Australia tax.”

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<sup>1</sup> Interactive Games & Entertainment Association, *Intellectual Property Arrangements* (30 November 2015) <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0007/194740/sub077-intellectual-property.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0007/194740/sub077-intellectual-property.pdf)>.

<sup>2</sup> Interactive Games & Entertainment Association, *Intellectual Property Arrangements – Draft Report* (3 June 2016) <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0013/201127/subdr437-intellectual-property.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0013/201127/subdr437-intellectual-property.pdf)>.

## 2. Executive Summary

By way of executive summary:

1. IGEA does not agree with **Finding 4.1** –
  - a. Any decrease to Australia’s term of copyright protection would be inappropriate, in breach of Australia’s international obligations and also counterproductive.
  - b. The commercial successes of many video games extend well beyond 15 to 25 years after creation. Consistency in global copyright terms is important to rights holders.
  - c. The Productivity Commission failed to recognise the importance of long-established, successful properties (especially video games) in being able to fund the development of newer works. Decreasing the current copyright term of life plus 70 years would compromise this, and therefore stifle innovation and the creation of new products.
2. IGEA does not support **Recommendation 5.1** –
  - a. Any provision that would make unenforceable agreements restricting or preventing a use of copyright material that is permitted by a copyright exception would compromise the freedom to contract. There exist many other provisions, pieces of legislation and sources of law that already act to potentially preclude contracts that attempt to exclude or limit copyright exceptions. Additionally, in an increasingly digital-based marketplace, the ability to contract out of copyright exceptions is even more important to protect against commercial exploitation, cheating in games, and unauthorised copying, distribution and use of software.
  - b. Technological protection measures (**TPMs**) are incredibly important to the video games industry, both in terms of providing beneficial features to consumers and deterring unauthorised uses of software and hardware. Permitting the circumvention of TPMs for “legitimate uses of copyright material” would severely reduce the effectiveness of TPMs in serving these purposes. Additionally, such a broad exception to the TPM prohibitions would be very unlikely to satisfy the required mechanism for introducing new TPM exceptions under section 249 of the Copyright Act.
3. IGEA does not support **Recommendation 5.2** –
  - a. Geoblocking technology allows game companies to tailor their products towards different market segments around the world, taking into account important factors such as consumer protection and classification or age rating requirements across territories. Permitting the circumvention of geoblocking would compromise this.

### 3. About IGEA

IGEA is the 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. This submission represents the views of the following IGEA members:

- 18point2
- Activision Blizzard
- All Interactive Distribution
- Big Ant Studios
- Disney Interactive Studios
- Electronic Arts
- Five Star Games
- Fiveight
- Gamewizz Digital Entertainment
- Mindscape Asia Pacific
- Namco Bandai Entertainment
- Microsoft
- Nintendo
- Sony Computer Entertainment
- Take 2 Interactive
- Total Interactive
- Ubisoft
- VR Distribution
- Well Placed Cactus
- ZeniMax Australia

## 4. Overview of the Interactive Games Industry

By way of overview, and in order to demonstrate the levels of engagement with interactive games by the Australian population, we would first like to highlight the results of IGEA's Digital Australia 2016 Report (**DA16 Report**) released on 28 July 2015.<sup>3</sup> In particular, the Report found that:

- 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 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 by Australians is 88 minutes
- 27 percent of players have tried making interactive games using software and 9 percent have studied or plan to study interactive games subjects

The DA16 Report also states that digital software sales in Australia's game market reached AU\$1.589 billion in 2015 (up by 27% compared to 2014), with physical software sales generating \$579 million in 2015. Accordingly, digital software sales of games made up 73% of total software sales in Australia in 2015. Consumers are increasingly turning to digital goods as their preferred medium of purchase, particularly due to the relative ease of purchasing, accessing and enjoying such content.

For further Australian video game market data in 2015, including additional data from IGEA's DA16 Report, please refer to **Appendix A** of this submission.

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<sup>3</sup> IGEA, *Digital Australia Report 2016* (28 July 2015) <<http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf>>.

## 5. Copyright Term and Scope

### Finding 4.1 – Optimal copyright term

#### **FINDING 4.1**

The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.

In our previous submission, IGEA strongly opposed any decrease to the term of copyright protection. IGEA notes that the Productivity Commission has slightly altered its draft finding, as it no longer concludes that an optimal copyright term would be closer to 15 to 25 years after creation.<sup>4</sup> Nevertheless, IGEA still does not support the finding that a single optimal copyright term is likely to be considerably less than 70 years after death. While finding 4.1 is, of course, not a formal recommendation, it still represents a dangerous conclusion for copyright holders. Because the Department has asked stakeholders not to resubmit information contained in previous submissions, IGEA will only now stress that our previous submission extensively outlines several reasons as to why the current term of copyright is appropriate for the interactive games industry and also why any decrease to the term would be harmful to copyright holders. The commercial successes of many video games extend well beyond 15 to 25 years after creation, especially with games that are “re-mastered” with upgraded graphics, “re-released” onto newer video game consoles or offered as part of online “game subscription” services. It should also be noted that the Minister for Communications and the Arts, Mitch Fifield, has made clear the Coalition Government’s view on this matter:

“Recently, it has been wrongly claimed that the Government is planning to reduce the life of copyright to 15 to 25 years after creation, rather than 70 years after the death of the author as it is currently. This is not something the Government has considered, proposed or intends to do.”<sup>5</sup>

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<sup>4</sup> Productivity Commission, *Intellectual Property Arrangements – Draft Report* (April 2016) draft finding 4.2 <<http://www.pc.gov.au/inquiries/completed/intellectual-property/draft/intellectual-property-draft.pdf>>.

<sup>5</sup> Senator the Honourable Mitch Fifield, *Conjecture on Copyright Changes Unfounded* (May 2016) <<http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>>.

IGEA believes there is still further scope to stress the importance of the current length of copyright protection, in terms of ensuring that Australia continues to meet its international obligations. Australia is signatory to several international agreements, namely the Berne Convention<sup>6</sup> and the Australia-United States Free Trade Agreement (**AUSFTA**),<sup>7</sup> which dictate the length of copyright protection that this country must implement. While the Berne Convention stipulates that the term of copyright protection shall be the life of an author plus 50 years after death, the AUSFTA increased this term to life plus 70 years. The Productivity Commission's finding goes against both of these international agreements to which Australia is a signatory and would undermine the years of negotiation underpinning their development. Even if Australia had the ability to unilaterally alter copyright terms, which of course it does not, it would be incredibly difficult for it to lower the term of protection. This would require renegotiation of the above agreements and it's highly unlikely that any other signatories would agree to this. Such a decision would also be incredibly counterproductive. Many Western and developed countries have increased (or committed to increase) their respective terms of copyright protection to life plus 70 years, with Japan, Canada and New Zealand being recent examples. Especially in an increasingly global market, consistency in copyright terms is absolutely crucial as it provides a necessary level of certainty to rights holders that, no matter the country, their works will be protected for an equal and appropriate length of time.

Additionally, in reaching its finding, we do not believe the Productivity Commission has recognised the importance of long-established works, and therefore a 70-year based term of copyright protection, in helping fund the development of newer works. In the interactive games industry, the cost of developing video games, not to mention advertising, marketing and distributing these games, can range in the tens if not hundreds of millions of dollars.<sup>8</sup> It is simply becoming very costly and difficult to publish "AAA" titles, and even existing and proven franchises can find it difficult to recoup development costs. But especially in the case of newly created works, based on new properties, characters and stories, the risk of incurring losses is even higher. Audiences are usually unfamiliar with new games and less likely to take chances and purchase them, so it is common for new and unproven titles to not perform well financially. However, publishers are much more willing to take chances on newer properties if the risk in doing so is lessened, such as by having long-established and successful games help fund the development of these titles. In economic terms, this is otherwise known as a "cash cow" – an asset or investment that produces a consistent cash flow over its lifespan, which can

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<sup>6</sup> *Berne Convention for the Protection of Literary and Artistic Works*, signed 9 September 1886, art 7.

<sup>7</sup> *Australia-United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005), art 17.4.4.

<sup>8</sup> Kotaku, How Much Does It Cost To Make A Big Video Game? (15 January 2014) <<http://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649>>.



then be used to fund new projects and innovations. And in the games industry, cash cows are usually those titles that have been around for many years, built a large and dedicated audience-base, and relied on a long term of copyright protection. If the copyright term were to be decreased, not only would this reduce the commercial lifespan of games generally, but it would also severely impact the ability of long-established, successful games to resource and fund newer properties. This change would stifle innovation and new investment.

**IGEA, therefore, does not support Finding 4.1.**

## 6. Copyright Use and Licensing

### Recommendation 5.1 – Agreements restricting use of copyright material permitted by an exception

#### RECOMMENDATION 5.1

The Australian Government should amend the Copyright Act 1968 (Cth) to:

- make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception

IGEA does not agree with this recommendation. Freedom of contract is incredibly important. Parties to a contract should be able to freely negotiate and agree to terms that are suitable in the circumstances. Statutory limitations on the ability to “contract out” of copyright exceptions would severely impact this and, therefore, the ability of businesses to distribute their copyrighted works. Any interference with the freedom to contract should only be allowed in serious circumstances, noting that the Australian Consumer Law already offers significant protections to consumers against contracts containing unfair terms<sup>9</sup> (in addition to prohibitions against misleading or deceptive conduct, unconscionable conduct and unfair practices). With regards to computer programs, such as video games, section 47H of the *Copyright Act 1968* (Cth) (the **Copyright Act**) also operates to nullify any agreement that attempts to exclude or limit the operation of certain copyright exceptions (i.e. for back-up, security testing, to correct errors and for study). Moreover, the Australian Law Reform Commission (**ALRC**), in its final report on “Copyright and the Digital Economy”,<sup>10</sup> lists many other sources that may affect the enforceability of contracts excluding or limiting copyright exceptions:

- *Competition and Consumer Act 2010* (Cth) prohibitions against the misuse of market power.
- Ordinary principles of contract law concerning the formation of contracts (i.e. insufficient notice of, and assent to, terms of online licenses).
- The equitable doctrine of unconscionable conduct (which is now statutorily entrenched by Part 2-2 of the Australian Consumer Law).
- The law relating to contracts that are contrary to public policy.

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<sup>9</sup> *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') part 2-3.

<sup>10</sup> Australian Law Reform Commission, *Copyright and the Digital Economy – Final Report*, Report no 122 (November 2013) <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf)> page 440.

In light of this, the ALRC states that, depending on the circumstances, the existence of these other laws may already render contractual terms that attempt to exclude or limit copyright exceptions as unenforceable. Thus, as there are already many protections in place, there is no need for a blanket prohibition on contracting out of copyright exceptions to be entrenched into the Copyright Act. All this would do is severely impact the ability for businesses to negotiate appropriate contractual terms, especially for licensing arrangements, and also create uncertainty in determining whether existing and future contracts are enforceable or not. In fact, the ALRC concludes that “...broader limitations on contracting out—for example, extending to all exceptions, or to all fair uses—would not be practical or beneficial. Generally, removing freedom to contract risks reducing the flexibility of the copyright regime, and the scope to develop new business models for distributing copyright materials.”<sup>11</sup>

IGEA agrees with the ALRC’s finding for several reasons. Consumers in the interactive games industry are increasingly turning towards digital goods as their preferred medium of purchasing games, particularly due to the relative ease of buying and accessing such content. Even in Australia, digital game software sales made up 73% of total software sales in 2015.<sup>12</sup> **Appendix A** has a helpful infographic which shows that, in 2015, physical software sales constituted \$579 million, whereas digital sales (including mobile, digital downloads and subscriptions) comprised \$1.589 billion in sales. This heavy reliance on digital products only increases the importance of contracts and licensing arrangements, and, importantly, the ability to freely negotiate those agreements. For instance, most video games are underpinned by robust End-User-License-Agreements (**EULAs**), containing conditions that are intended to protect copyrighted works. A prohibition against contracting out of copyright exceptions would take away an important tool that game rights holders have against practices such as commercial exploitation, cheating in games and unauthorised copying, distribution and use of software and hardware. Particularly because the Productivity Commission has recommended for a fair use exception to be introduced,<sup>13</sup> it is even more important for rights holders to be able to contract out in certain circumstances to protect their legitimate interests. Even in the United States, which has a fair use exception, courts generally uphold the freedom of contract and have not decisively used the US copyright misuse doctrine to nullify contracts that exclude the fair use of copyright works.<sup>14</sup>

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<sup>11</sup> Ibid page 436.

<sup>12</sup> IGEA, *Digital Australia Report 2016* (28 July 2015) <<http://www.igea.net/wp-content/uploads/2015/07/Digital-Australia-2016-DA16-Final.pdf>>.

<sup>13</sup> Recommendation 6.1.

<sup>14</sup> V Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking* (2007) 14(1) *University of California Davis Law Review* 45, 50. See also Australian Law Reform Commission, *Copyright and the Digital Economy – Final Report*, Report no 122 (November 2013) <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf)> page 443.

To exemplify the harm that recommendation 5.1 could bring to rights holders, IGEA asks the Department to consider the following. Video game EULAs typically contain prohibitions against reverse engineering. Reverse engineering could be encompassed within the fair use exception, but in the case of games, it can easily lead to other damaging practices like the creation of cheats or “hacks” (which give players an unfair advantage over others in online multiplayer games). Unauthorised copying, distribution and use of software and hardware are also major concerns. In the US case of *Davidson & Associates v Jung*,<sup>15</sup> several computer programmers reversed engineered an online video game service to allow people to play unauthorised versions of the publisher’s games. Both the trial and appellate courts found that, due to the publisher’s EULA and Terms of Service, the programmers waived away fair use and, therefore, their right to reverse engineer the games. If, as the Productivity Commission is proposing, the game publisher was restricted in their ability to negotiate licensing arrangements that involved the contracting out of copyright exceptions (such as fair use), then it would have been more difficult for the publisher to protect its copyrighted works against unauthorised copying, distribution and use. Furthermore, the games industry is continuously looking for ways to engage audiences. It is not unusual for such engagements to be subject to terms and conditions that would exclude the benefit of a copyright exception, such as fair use. For example, game publishers often send game art assets to users, encouraging them to create user generated content. These types of promotions would require the user to agree to certain terms and conditions, such as not using the game art assets in any way that would bring the publisher’s name or brand into disrepute. This condition must be enforceable, even if it would likely interfere with a fair use or other copyright exceptions.

If contracting out is to be considered at all, we strongly encourage the Department to limit it to exceptions for libraries and archives – a well-defined circumstance when the contracting out proposal can operate. The ALRC also agreed with this conclusion, when recommending that “the Copyright Act should be amended to provide that contractual terms restricting or preventing the doing of any act which would otherwise be permitted by the libraries and archives exceptions are unenforceable.”<sup>16</sup> Extending this recommendation to the overreaching operation of copyright exceptions as a whole is problematic and may have many unintended consequences.

**IGEA, therefore, does not support this aspect of recommendation 5.1.**

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<sup>15</sup> *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005).

<sup>16</sup> Australian Law Reform Commission, *Copyright and the Digital Economy – Final Report*, Report no 122 (November 2013) <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf)> page 18, recommendation 20-1.

## Recommendation 5.1 – Circumvention of technological prevention measures

### RECOMMENDATION 5.1

The Australian Government should amend the Copyright Act 1968 (Cth) to:

- permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

Before addressing this recommendation, IGEA would first like to explain the importance of technological protection measures (TPMs) to the interactive games industry.

### Consumer benefits of TPMs

TPMs are not simply used in the interactive games industry to help prevent against the unauthorised copying, distribution and use of video game software and hardware. TPMs are used for a wide variety of purposes and are absolutely central to the way game companies conduct business. The protections offered by TPMs have provided game publishers and developers with the confidence needed to take their traditionally “offline” businesses to the digital world. This has allowed brand new and innovative online business models and distribution methods to flourish, which provide many value-added features that actually benefit consumers. Importantly, the game industry’s ability to deliver these innovative models is inextricably linked and executed through TPMs. By way of example, by permitting 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 facilitate “trial” and “demo” versions of video game software that enable a “try before you buy” experience for the user. Some trial software is time-limited, some only permit a certain number of plays, and others permit play in limited areas of a game’s universe (e.g. limited to certain levels).

Additionally, video game TPMs also facilitate the digital distribution of products and thus are a critical enabler of electronic commerce. All major video game platforms (PlayStation 4, Wii U, Xbox One and the upcoming Nintendo Switch) offer services that allow users to download games and applications directly onto their consoles. Valve’s Steam and Electronic Arts’ Origin stores are just a few of the digital distribution services that have emerged specifically for PC games. Not only do these services rely on TPMs to operate, but many employ TPMs to offer value-added benefits to consumers. As an example, TPMs facilitate increased portability by permitting consumers to install and authenticate a single game on multiple computers or devices. Valve’s Steam service for instance not only allows a user to purchase

computer games online, but it also tethers any purchased video game software to the user's Steam account, rather than to one particular computer. This means that content can be downloaded to any number of internet-connected computers, allowing consumers access their games at convenient times and locations, such as when traveling or visiting a friend's house.

The games industry is also concerned about children obtaining access to games and content not suitable for their age. Accordingly, game companies employ TPMs to enable enhanced parental control features. Most major consoles contain parental controls that permit parents to restrict access to games according to their age rating, allowing parents to make decisions about what is appropriate for their families. The upcoming Nintendo Switch console also contains a timer that parents can use to determine how long their child may play, before the device prevents any more game playing until the next day.<sup>17</sup> Similarly, some "Massively-Multiplayer Online Games", such as Activision-Blizzard's World of Warcraft, include a scheduler so that parents can choose what time of day their children may play and for how long. TPMs make the implementation of features such as these possible.

### TPMs and unauthorised copying, distribution and use

Unauthorised copying, distribution and use of video game software and hardware continues to be a problem for the industry. Game companies invest a significant amount of money into technologies that prevent the unauthorised copying of games or the use of unauthorised versions. These technologies are otherwise known as "TPMs" and the games industry makes widespread use of a variety of TPMs to prevent the unauthorised access, use and transmission of copyrighted materials. Such TPMs come in a wide range of forms, including copy protection and access controls built into video game consoles and handheld devices that recognise unauthorised copied versions of games and refuse to play them. Online registration and authentication systems exist for PC games (i.e. product keys) that can verify whether a game is legitimate and has not been illegally copied. TPMs utilised within digital distribution services and online games can also tether games to online accounts rather than individual computers. Most major game consoles utilise these technologies to deter unauthorised copying and prevent the playing or exploitation of unauthorised games.

But, despite these efforts, it is frequently the case that new game titles are illegitimately copied or "cracked" within weeks or even days of release. For example, a common anti-tamper technology, "Denuvo", was once well known for preventing major game titles from being illegitimately copied and

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<sup>17</sup> Nintendo, *Nintendo Switch Parental Controls - Nintendo Switch Presentation 2017 Trailer* (13 January 2017) <<https://www.youtube.com/watch?v=03bAayBtcb0>>.

distributed, sometimes for many months or even not at all. However, people have slowly managed to work their way around Denuvo's once impenetrable protections, which has resulted in many large, AAA titles from being cracked soon after release. Major games such as Rise of the Tomb Raider, Doom, Far Cry: Primal, Mirror's Edge Catalyst, Deus Ex: Mankind Divided, and Watch Dogs 2, have all been cracked and now unauthorised copies of these games flood the internet.<sup>18</sup> In fact, the latest game, Resident Evil 7: Biohazard, was cracked just five days after its release date of 24 January 2017, even with the protections of Denuvo in place.<sup>19</sup>

Additionally, because of the demand for unauthorised copies, there is no shortage of people and organisations dedicated to developing "circumvention devices" – software and hardware applications that unscramble, decrypt, bypass or deactivate TPMs without the authority of the copyright holder. In fact, there are even businesses built up around this practice. Hackers devote extraordinary resources to the development of "mod chips," which can be installed into game consoles to bypass the TPM that prevents the playback of unauthorised copies of games, and also "game copiers," which are used to make and play unauthorised copies of games. Some of these devices enable the circumvention of both access and copy controls. For example, the "R4" enables both the copying of Nintendo DS games and their subsequent playback. These circumvention devices require considerable investment to design, manufacture, distribute and make available for sale. But the rewards for black-market entrepreneurs are great, as these devices can sell for as much as \$50 to \$100 each. Increases in unauthorised copying, distribution and use of games online have driven up demand for circumvention devices. This provides lucrative business opportunities for those who import, sell, and install these devices – some of whom may never be involved in the actual reproduction or distribution of infringing copies.

As can be seen, it is more important than ever for video game businesses to be able to develop new and innovative ways to deter the unauthorised copying, distribution and use of games. Of course, one important way this can occur is for publishers to release their games globally, on the same date, with equal content and at similar prices. Some people unlawfully download games because they feel that they are charged too much compared to other territories or even being treated worse by being offered lesser content. If players across the globe were sold games at the same times, for similar prices and containing the same content, this may very well push some players from unlawfully downloading to

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<sup>18</sup> Torrent Freak, *Denuvo Piracy Crisis as Resident Evil 7 Gets Cracked in Record Time* (30 January 2017) <<https://torrentfreak.com/denuvo-piracy-crisis-as-resident-evil-7-gets-cracked-in-record-time-170130/>>; Inquisitr, *Resident Evil 7' Cracked Already: Is Denuvo Broken For Good?* (1 February 2017) <<http://www.inquisitr.com/3940007/resident-evil-7-cracked-already/>>.

<sup>19</sup> Ars Technica, *Resident Evil 7's Denuvo protections cracked in under a week* (31 January 2017) <<https://arstechnica.com/gaming/2017/01/resident-evil-7s-denuvo-protections-cracked-in-under-a-week/>>.

legitimately buying those games. The Productivity Commission itself recognises this, when finding that timely and competitively-priced access to copyright-protected works is an efficient and effective way to reduce online copyright infringement.<sup>20</sup> But even given these considerations, it certainly does not mean that TPMs do not or should not play an important role in combatting unauthorised copying, distribution and use of games. The video games industry is required to use TPMs for these purposes as there are many people that simply unlawfully download games to avoid legitimately purchasing products and will very likely never change. Accordingly, TPMs are still an important tool to protect copyrighted works and typically are the only barrier standing in the way of games being cracked and unlawfully distributed online. In an era where unlawfully downloading software requires little more than the click of a mouse, providing adequate protection for copyright necessitates protection for TPMs. Even though traditional TPMs (i.e. Denuvo) are somewhat losing their effectiveness, just preventing a game from being cracked within the first week after launch can be incredibly important to publishers. The launch week for a game is typically the most profitable and can dictate the long-term success or failure of the title. If a game is cracked and unlawfully downloaded extensively within the first week, this can heavily damage sales and profitability.

### Recommendation 5.1

IGEA does not support recommendation 5.1, particularly in its application towards video game software and hardware (i.e. game consoles). As the above has shown, TPMs deliver many innovative features that benefit consumers while also helping to deter unauthorised copying, distribution and use of games and game devices. The ongoing support of such purposes is dependent on strong and effective TPM provisions. However, recommendation 5.1 would serve to reduce the effectiveness of the prohibitions against circumventing TPMs and, therefore, prevent the ability for TPMs to truly meet the above objectives. But IGEA reaches this conclusion not simply on the mere principle of wishing to protect the benefits that TPMs can offer consumers and game companies. As the following sections will show, there are also many other reasons as to why the Department, in conducting its review of the Productivity Commission's inquiry, should not adopt or agree to recommendation 5.1.

The Copyright Act contains a legislative mechanism that must be followed before any exception to the prohibitions against circumventing access control TPMs, such as recommendation 5.1, can be implemented. Specifically, under section 249(4) of the Copyright Act, the Minister has the power to

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<sup>20</sup> Finding 19.1.



recommend to the Governor-General that TPMs can be circumvented to allow for the doing of an act if the following conditions are satisfied:<sup>21</sup>

- (b) the doing of the act by the person will not infringe the copyright in a work or other subject-matter; and
- (c) the doing of the act by the person is in relation to a particular class of works or other subject-matter; and
- (d) an actual or likely adverse impact on the doing of the act by the person has been credibly demonstrated; and
- (e) the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V (*i.e. the prohibitions against circumventing access control TPMs*) would not be impaired if the doing of the act by the person were prescribed.

IGEA does not believe that the Productivity Commission has provided sufficient reasons as to why these conditions are met with regards to recommendation 5.1. Of course, the Commission has recommended for consumers to be able to circumvent TPMs for “legitimate uses of copyright material” and thus these would constitute the doing of acts that “will not infringe the copyright in a work”.<sup>22</sup> However, recommendation 5.1 does not relate to a particular class of works or other subject matter (*i.e.* DVDs, films, etc.). Rather, the exception is worded in such a way so as to apply to all works or other subject-matter generally. This simply does not meet the requirement of section 249(4)(c).

Furthermore, IGEA does not believe that the adequacy of the protections for access control TPMs and the effectiveness of the remedies for their circumvention would not be impaired if recommendation 5.1 was implemented. The exception is very broad, applying to any legitimate use of copyright material, rather than a defined, controlled and set list of legitimate uses. There is a real risk that, if the recommendation were to be introduced, the prohibitions against circumventing TPMs in the Copyright Act<sup>23</sup> would be rendered ineffective. This would especially be the case if, as the Productivity Commission is recommending, a fair use exception was also enacted. It is understood that the recommendation is theoretically designed to permit circumvention of TPMs to enable legitimate uses of copyright material. However, the issue is that any circumvention of a TPM, especially in the context of video games, game hardware and online game services, can very easily lead to acts that are in fact

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<sup>21</sup> Copyright Act 1968 (Cth) s 294(4).

<sup>22</sup> *Ibid* s 294(4)(a).

<sup>23</sup> *Ibid* ss 116AN-AP.

illegitimate uses of copyright material. In other words, allowing such a broad circumvention of TPMs on game software and hardware could easily result in the exploitation of products in many other ways that do infringe copyright in the work. Without any level of control on the kinds of acts that are permitted, there may be many unintended consequences for the industry.

By way of explanation, TPMs in the video games industry usually encompass technologies such as console and game security, encryption, authentication, anti-cheat systems, anti-piracy measures and many other tools. While these technologies are typically very difficult to crack, as soon as they are compromised, there is usually no way to turn back. TPMs are typically the first and last line of defence against unauthorised actions in breach of copyright law. When a TPM is circumvented and the knowledge for doing so is discovered and understood, the floodgates then open for a game to be unlawfully reproduced and downloaded, for online game cheats to be distributed, for game and console security to be compromised, and even for the knowledge of circumventing the TPMs themselves to be distributed (which may subsequently lead to further unlawful acts). Permitting the broad circumvention of TPMs tows a very fine line between legitimate and illegitimate uses of copyright material – the former could very easily lead to the latter. It would be incredibly difficult for rights holders to be able to determine whether actions or uses in question either do or do not infringe copyright in the work or are permitted under the Copyright Act.

Moreover, on a proper legal construction, IGEA does not believe that the broad TPM exception contained within recommendation 5.1 can ever be properly applied to the section 249(4)(d) criterion. This section requires the credible demonstration of an actual or likely impact on the doing of an “act”. Thankfully, the Government has provided guidance on how to address this determination. In response to the “Review of Technological Protection Measures Exceptions” Committee report, the then Government stated that the following question must be asked: “Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?”.<sup>24</sup> Reasonably believable evidence of such an impact also needs to be shown to justify an exception. However, when the proposed act or “non-infringing use” refers to “legitimate uses of copyright material” as a whole, as the Productivity Commission is requesting, IGEA does not believe that this question can be properly answered in the first place.

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<sup>24</sup> Government Response to the House of Representatives Standing Committee On Legal And Constitutional Affairs Report “Review Of Technological Protection Measures Exceptions” (19 October 2006) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=/laca/protection/govresp.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/laca/protection/govresp.pdf)> page 8.

To explain, when the Government has been presented with proposals to introduce TPM exceptions in the past, these proposals were in relation to very particularised and well-defined acts, which enabled the Government to properly answer the question of whether TPMs adversely impacted the performance of these specific acts. For example, the Government could agree that there should be an exception to liability for TPM circumvention for the reproduction and communication of copyright material by educational institutions,<sup>25</sup> as there was sufficient evidence that TPMs would have an adverse impact on these activities. Similarly, the Government could agree that there should be several exceptions for libraries and other institutions to reproduce copyright materials for research, study and preservation purposes, as valid examples were provided that showed TPMs adversely impacted these actions.<sup>26</sup> Lastly, the Government could disagree that there should be an exception to liability for TPM circumvention for making back-up copies of computer programs, as there was insufficient evidence to show that a TPM had ever been used to prevent owners or licensees from doing this.<sup>27</sup>

But when the question becomes whether the use of TPMs has an adverse impact or is likely to have an adverse impact on “legitimate uses of copyright material” as a whole, these kinds of analyses are almost impossible to perform adequately. The concept of “legitimate uses of copyright material” attempts to encompass every single legitimate use of copyright material. It is much too board. How could the Minister ever credibly demonstrate that TPMs adversely impact or are likely to adversely impact legitimate uses of copyright material as a whole? Would this not depend on what specific legitimate use of copyright material is at issue? As has been seen above, depending on the act in question and also the evidence that can be adduced, it may be the case that some legitimate uses of copyright material satisfy the adverse impact condition and justify an exception (i.e. interoperability with computer programs, assistance to persons with a print disability, educational institution use, etc.),<sup>28</sup> whereas other legitimate uses of copyright material may not (i.e. fair dealing, backing up computer programs, etc.).<sup>29</sup> The manner in which TPMs operate will always depend on the circumstances and the act attempted to be performed. It is therefore impossible to determine the level or likely level of adverse impact of a TPM without first identifying the specific act or legitimate

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<sup>25</sup> Ibid page 13.

<sup>26</sup> Ibid page 14-15.

<sup>27</sup> Ibid 11.

<sup>28</sup> See *Copyright Regulations 1969* (Cth) schedule 10A.

<sup>29</sup> Government Response to the House of Representatives Standing Committee On Legal And Constitutional Affairs Report “Review Of Technological Protection Measures Exceptions” (19 October 2006) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=/laca/protection/govresp.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/laca/protection/govresp.pdf)>.

use at issue. Accordingly, IGEA does not believe that recommendation 5.1 is defined in such a way that enables it to be properly applied to the section 249(4)(d) criterion.

Of course, it must now be asked whether the Copyright Act should be amended to avoid the above legal restrictions and explicitly enable the introduction of a TPM exception for “legitimate uses of copyright material”. IGEA believes the Department should not agree to this. As mentioned previously, Australia is a signatory to the AUSFTA and is bound to all obligations contained therein.<sup>30</sup> Importantly, this includes article 17.4.7(e) of the AUSFTA,<sup>31</sup> which stipulates that Australia must confine exceptions to prohibitions against the circumvention of TPMs to a specified list of activities, ranging from non-infringing reverse engineering, security testing and law enforcement activities. Article 17.4.7(e)(viii) then provides that any exceptions extending to non-infringing uses of copyright works, such as recommendation 5.1, can only be implemented:

“...[W]hen an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.”

Section 249 was specifically introduced into the Copyright Act to implement Article 17.4.7(e)(viii) of the AUSFTA.<sup>32</sup> This explains why the criteria under sub-section (4) must all be satisfied before the Minister can recommend the introduction of new TPM exceptions, including credibly demonstrating an actual or likely adverse impact on the doing of a non-infringing act. However, as has been explained extensively above, it would be very difficult for a broad exception to circumvent TPMs for “legitimate uses of copyright material” to satisfy these requirements. If the Department were to amend or even repeal section 249 simply to shoehorn recommendation 5.1 into the Copyright Act, Australia would very likely be in breach of its international obligations under Article 17.4.7(e)(viii) of the AUSFTA. IGEA does not believe that the Department should adopt this course of action.

**In conclusion, IGEA does not support recommendation 5.1.**

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<sup>30</sup> *Australia-United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005), art 17.4.4.

<sup>31</sup> *Ibid* art 17.4.7.

<sup>32</sup> Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) 12.61.

## Recommendation 5.2 – Circumvention of geoblocking technology

### RECOMMENDATION 5.2

The Australian Government should:

- amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications' report *At What Cost? IT pricing and the Australia tax*

In our previous submission, IGEA did not agree to a recommendation that would permit the circumvention of geoblocking technology. Geoblocking is not simply used as a tool, as the Productivity Commission has stated, to restrict consumer access to digital products, offer certain consumers a lower level of service and charge different prices to consumers depending on location. As is the case with TPMs, geoblocking plays a critical role in the business models of companies in the games industry. Some of the abovementioned consumer benefits with regards to TPMs are also facilitated via geoblocking. As the Department has asked stakeholders not to resubmit information contained in previous submissions, IGEA will only now note that our previous submission highlights the importance of geoblocking in enabling game companies to differentiate their products and meet varying consumer demands across the globe.<sup>33</sup> Geoblocking also allows publishers to meet classification and age rating requirements for video games within different territories. Permitting the circumvention of geoblocking would only render ineffective these important instruments that seek to protect children and young people from accessing material that is not appropriate for their age. Additionally, recommendation 5.2 seems to permit the circumvention of geoblocking technology in any circumstance, rather than confining circumvention to enable non-infringing uses of copyright material. While noting that IGEA would still not support an amendment to permit consumers to circumvent geoblocks for legitimate uses of copyright material, the absence of such a limitation would only further facilitate unauthorised uses of copyright material. IGEA does not believe that any provision should be introduced into the Copyright Act that would permit consumers to avoid geoblocks in all circumstances.

If after considering the above, the Department still wishes to introduce some sort of reform with regards to geoblocking technology, IGEA encourages the Department to consider geoblocking holistically in terms of its benefits to consumers and its ability to ensure companies can comply with

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<sup>33</sup> Interactive Games & Entertainment Association, *Intellectual Property Arrangements – Draft Report* (3 June 2016) <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0013/201127/subdr437-intellectual-property.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0013/201127/subdr437-intellectual-property.pdf)> pages 9-10.

laws (not just in Australia but also overseas territories). The many implications for permitting the circumvention of “geoblocks” in their entirety must properly and extensively be considered by the Department, otherwise there may be many unintended consequences.

By way of several examples, if reforms were to permit consumers to circumvent geoblocking technologies, those of which are being used by companies to satisfy Australian legal obligations, then where consumers do in fact circumvent geoblocks, those companies should be immune from any claim that they have breached Australian law. For instance, Australian businesses may be utilising geoblocking technology to ensure that they are complying with the Australian consumer law,<sup>34</sup> the National Classification Scheme,<sup>35</sup> and *possibly* the new digital GST scheme.<sup>36</sup> If consumers then go on to avoid these geoblocks to access a company’s goods or services in an overseas market, those businesses should not still be expected to somehow comply with the abovementioned pieces of legislation or considered to be in breach of their obligations. It would be incredibly difficult for businesses to comply with such laws when consumers are utilising virtual private networks (VPNs) to mask the fact that they are making purchases from within Australia. Moreover, reforms should not legislatively prevent businesses from supplying overseas-based goods or services to Australian consumers who are avoiding geoblocks to access foreign markets. For example, with regards to classification law, a business should not be prevented from selling Australian consumers a film or video game that has not been classified by the Classification Board and does not have an Australian age rating (which would otherwise be prohibited by the National Classification Scheme),<sup>37</sup> where those consumers are avoiding geoblocks.

Furthermore, the Department should strongly consider that a major reason behind the Productivity Commission’s recommendation is, in circumstances where consumers use a VPN to legitimately purchase content overseas, to remove the imposition of the heavy criminal and civil penalties that may otherwise apply (as the TPM circumvention prohibitions could potentially be in breach). Again, if the Department is still minded to introduce reforms around the circumvention of geoblocking technology, IGEA would welcome alternative reform from the Department that targets this specific issue, rather than merely adopting recommendation 5.2 which attempts to legislate too broadly and permit circumvention of geoblocks in all cases. For example, while not IGEA’s preferred option,

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<sup>34</sup> *Competition and Consumer Act 2010* (Cth) sch 2 (‘Australian Consumer Law’).

<sup>35</sup> Including the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) and complementary state/territory enforcement legislation.

<sup>36</sup> *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016* (Cth).

<sup>37</sup> For example, *Classification (Publications, Films And Computer Games) Enforcement Act 1995* (NSW) s 27. See generally *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

reforms could propose that, particularly for the concerns raised above, circumvention of geoblocks cannot ever permit the modification, hacking or reverse engineering of software, hardware or TPMs generally. The use of VPNs typically do not require any modification, hacking or reverse engineering, and IGEA has gone into significant detail above as to the serious harms these acts can cause. Permitting such circumvention would likely undermine the effectiveness of TPMs to protect against unauthorised use of and access to copyrighted material.

On a final note, IGEA asks the Department that, before any alternative reform with regards to geoblocking is introduced, feedback is first sought from stakeholders so that our views can be considered.

**In conclusion, IGEA does not support recommendation 5.2.**

## **7. Conclusion**

IGEA would like to thank the Department of Industry, Innovation and Science for the opportunity to respond to its consultation regarding the Productivity Commission inquiry into IP arrangements. We hope that this submission has been useful and look forward to all opportunities in the future to provide further comments on the regulation of intellectual property in Australia.

## APPENDIX A – AUSTRALIAN MARKET DATA

The IGEA's commissioned research from NPD Group Australia showed that, in 2015:<sup>38</sup>

- Video games industry growth has been led by the console sector, with current generation (Microsoft Xbox One, Nintendo Wii U and Sony PlayStation 4) consoles increasing in sales volume compared to 2014 by 9 per cent
- Console software was the best performing category, experiencing 13 per cent growth in revenue over last year
- Strong platform sales had a flow on effect to other areas, as the console accessories market grew in value by 12.2 per cent over 2014 data
- Over half (59 per cent) of game units sold were classified as G, PG or M

Further industry key highlights by independent research firm Telsyte evidenced:<sup>39</sup>

- Digital is now greater than half of the total games market, accounting for 56 per cent of sales
- Digital extras, which include season passes, map packs and game expansions, boomed with 53 per cent growth in 2015
- Games publishers are increasingly adopting the in-game purchase business model which is greatly contributing to the growth of digital extras market
- Physical products in the games market remain important with consumers indicating a preference for physical copies when purchasing as a gift or as a collectable or where there might be technical limitations such as download speeds or data caps

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<sup>38</sup> Research based on The NPD Group Australia, Time period 2014 and 2015 calendar year, and Telsyte, cited at IGEA, "Australian video game industry strides towards \$3 billion", *Media Release* (2 March 2016) <<http://www.igea.net/2016/03/australian-video-game-industry-strides-towards-3-billion/>>.

<sup>39</sup> Ibid.





AUSTRALIA  
TOTAL  
INDUSTRY  
VALUE

UP 15%  
\$2.832  
BILLION



Igea commissioned research from:  
\*The NPD Group Australia  
Time period: January 5 2015 - January 6 2016

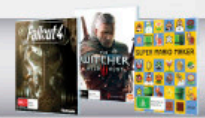
\*\*Telsyte - Igea Digital Market Monitor, Q1 - Q4 2015

TRADITIONAL  
RETAIL  
NPD DATA\*

UP 2%  
\$1.243  
BILLION

DIGITAL  
SALES  
TELSYTE DIGITAL  
MARKET MONITOR\*\*

UP 27%  
\$1.589  
BILLION



CONSOLE  
SOFTWARE

UP 13%  
\$579  
MILLION



CURRENT GEN  
HARDWARE

UP  
9%  
UNITS



CONSOLE  
ACCESSORIES

UP 12%  
\$166  
MILLION



MOBILE

UP 24%  
\$870  
MILLION



DIGITAL  
DOWNLOADS

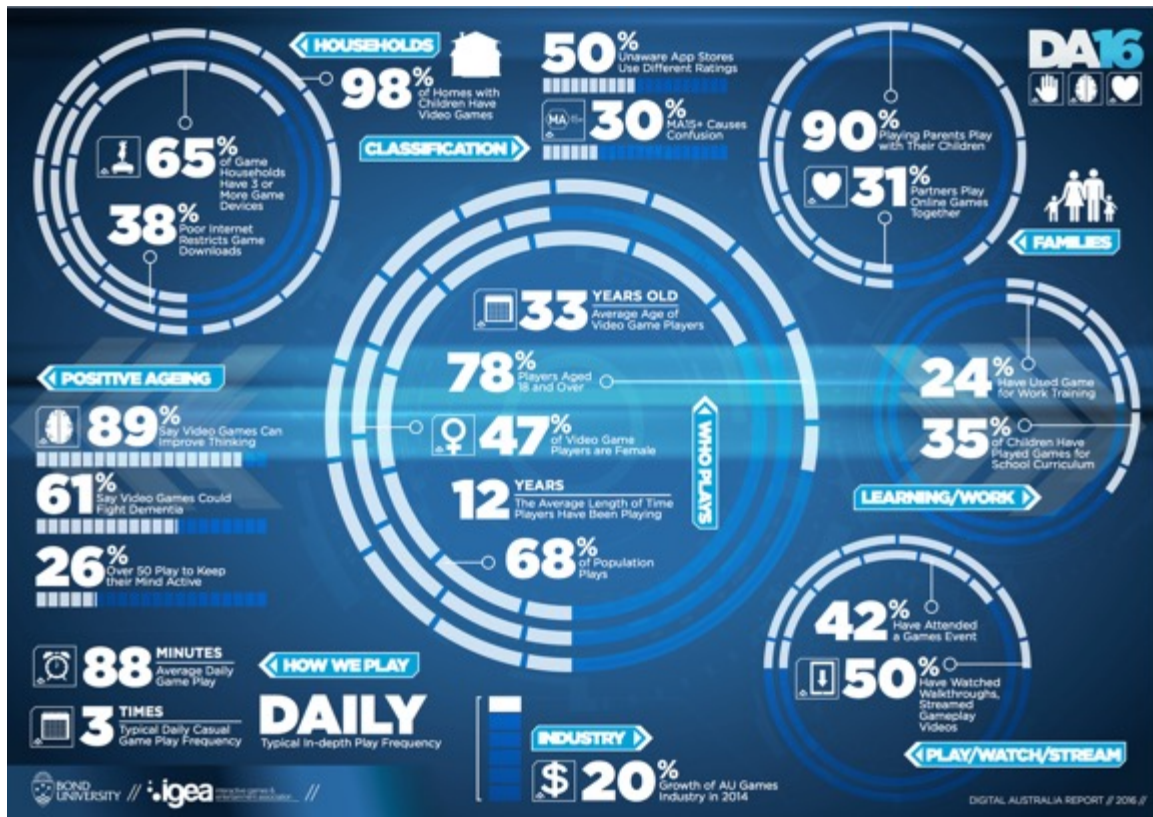
UP 33%  
\$603  
MILLION



SUBSCRIPTIONS

UP 29%  
\$116  
MILLION

## Key Findings: Digital Australia 2016



DIGITAL AUSTRALIA REPORT // 2016 // 5



### // 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%.