



Submission to

Productivity Commission

Subject

Intellectual Property Arrangements – Draft Report

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the Productivity Commission's (the **Commission**) Draft Report on Intellectual Property Arrangements (the **Commission's Draft Report**).

At the outset, we refer to IGEA's previous submission of November 2015 in which we set out a brief description of IGEA and an overview of the interactive game industry in Australia, together with a general submission on the importance of intellectual property (**IP**) to this industry. That submission particularly focused on copyright given its importance in our industry, and also provided a more detailed response on Technological Protection Mechanisms (**TPMs**) and the proposed "fair use" vs. "fair dealing" provisions.

We do not intend to repeat the content of our previous submission again, except to the extent that it is relevant for our response to the Commission's Draft Report.

For the purposes of this further submission, IGEA has continued to focus its comments on copyright as a fundamental IP protection, given that copyright remains critical to encouraging, protecting and rewarding innovation in the interactive games industry. It is also noted at the outset that trademarks also play an important role as a form of IP protection for this industry.

2. Executive Summary

In response to the Commission's Draft Report, IGEA's position can be summarised as follows:

1. IP covers a wide range of protections, from copyright to patents to geographical indicators. IGEA is strongly of the view that each of these forms of IP protection should be considered separately rather than the Commission simply considering IP as a whole in terms of their effectiveness, efficiency, adaptability and accountability. The nature of the respective creators, the engagement of consumers and the industries involved in each form of IP protection are incredibly diverse and varied.
2. Copyright is essential to encourage innovation and creativity in the interactive games industry and to provide rewards to creators. IGEA is concerned that the Commission has given too much weight to the fact that Australia is a significant "net importer" of IP and may have also underestimated the fact that Australian interactive games developers and companies are creators of innovative works which are enjoyed by consumers globally.
3. It is important for the Commission to consider that geo-blocking can allow interactive game companies and developers to ensure that they can tailor their products to different markets around the world, taking into account important factors such as consumer protection requirements based on how each individual game is classified in different markets.
4. IGEA's members have varying perspectives on whether a US style fair use exception should be introduced in Australia as recommended by the Commission. If the Government is minded to act on this recommendation, then IGEA considers that the Commission's proposed introduction of a new style "fair use" exception should be further explored to ensure that they map to the existing legitimate expectations of interactive game creators and consumers.

While IGEA's members have varying perspectives on whether Australia's IP laws, and copyright laws in particular, are well balanced, for the reasons set out in this further submission IGEA does not generally agree with the Commission's statement (page 91) that:

Australia's stance on IP rights is not well balanced and is out of keeping with its position as a net importer of IP intensive goods and services.

In IGEA's view, while there may be further room for greater flexibility on exceptions, a strong and robust copyright regime is critical to ensuring 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 consumer population.

3. Response to the Commission's Draft Report

3.1 The Commission's approach to the review of IP

To reinforce our previous submission, IGEA reiterates that robust and effective IP protection, especially copyright, is essential to encourage innovation and creativity in the interactive games industry for the benefit of both Australian creators and Australian consumers.

While IGEA agrees with the Commission's statement that "IP policy should seek to balance the interests of rights holders and users" (page 6), as we stated previously, it is critical that, in assessing this balance, the Commission consider different types of IP protection separately and flexibly.¹ For example, copyright and its effectiveness, efficiency, adaptively and accountability must be considered separately from other forms of IP such as patents, given their different history, purpose, application and outputs.

IGEA is concerned that the Commission's holistic assessment of IP broadly in the Draft Report has not engendered an approach that truly appreciates the unique nature of the different forms of IP protection, the respective creators and industries which rely on such protections, and also the consumers that enjoy their creative outputs. Chapter 2 of the Commission's Draft Report is pitched in terms of the "IP system" broadly, which covers all types of IP from copyright to patents to designs to geographical indicators. While there are naturally some commonalities between IP, an overall "broad brush" approach is not helpful particularly given the starkly different creators and industries in which the specific forms of IP protection apply, such as pharmaceuticals and interactive games. Furthermore, Australian consumers enjoy interactive games in a very different manner to that in which they may engage with patented products and those that solely rely on trade mark protection.

The Commission goes on to state (page 5) that:

For countries that are net importers of IP, such as Australia (figure 2), costs to consumers and follow-on innovators from higher prices and restricted availability are not offset by increases in Australian producer profits.

In IGEA's view, it is somewhat one dimensional to consider Australia simply as a "net importer of IP". Indeed, the Chief Economist of the World Trade Commission has openly criticised the Commission's stance on this issue, stating: "It's important for Australia not to view itself as an island of IP - a net importer - rather than thinking about it in a more global context and how its position might evolve."²

¹ Issues Paper, page 15.

² Greber, J, "WTO chief economist challenges Productivity Commission view on IP", *The Financial Review*, 19 May 2016 at <http://www.afr.com/news/economy/wto-chief-economist-challenges-productivity-commission-view-on-ip-20160518-goxyf#ixzz49APs7Kgg>.

In the case of the Australian interactive games industry, it has embraced, and will continue to embrace, the opportunities presented by the *global* digital economy which includes strong export potential. The industry continues to lead the way in innovative business models based largely on copyright to access new revenue streams and address consumer demands. Australian game developers are creators of some of the world's most innovative products that are exported internationally, such as *Crossy Road*, *Fruit Ninja*, *Borderlands: The Pre-Sequel*, *L.A. Noire*, *BioShock 2*, the *Real Racing* franchise, and many others.

Furthermore, IGEA does not believe that it is accurate to broadly assert that, in the case of interactive games, Australian consumers have restricted availability. Indeed, the nature of interactive games and their customers means that the marketplace is global and Australian consumers continue to benefit from this global approach. This point is discussed further below.

3.2 Copyright protection

While IGEA notes the Commission's depiction of copyright as "an important IP right", some of IGEA's members are concerned about the characterisation of copyright as "copy(not)right" (page 16), together with statements such as:

However, Australia's copyright arrangements are weighed too heavily in favour of copyright owners, to the detriment of the long term interests of both consumers and intermediate users. Unlike other IP rights, copyright makes no attempt to target those works where 'free riding' by users would undermine the incentives to create. Instead, copyright is overly broad; provides the same levels of protection to commercial and non-commercial works; and protects works with very low levels of creative input, works that are no longer being supplied to the market, and works where ownership can no longer be identified.

In IGEA's view, copyright allows those in the chain of interactive games creation (including Australian games developers, publishers, distributors, narrative game writers, game composers and music performers) to protect the fruits of their labour in order to generate appropriate commercial rewards. To provide a few specific examples, game developers consist of the artists and animators that design how characters, environments, items and levels will look; the designers that develop game concepts, genres and experiences; and the programmers who write the source code that pulls all of these elements together and enables the game to function.

Copyright protection is particularly important in the creative industries where it is difficult to "pick a winner" and it can be challenging to attract traditional financial investment upfront. Moreover, any financial rewards obtained through the exploitation of interactive games will typically be reinvested into the creation of more innovative content for the benefit of Australian consumers.

The issue of investment in the interactive games development industry has recently and comprehensively been reviewed by the Senate Environment and Communications References Committee's Report entitled, "Game On: More Than Playing Around".³ In short, this report recommends the introduction of a number of funding and support mechanisms for Australia's video game development industry. Copyright protection is a fundamental and implicit element of these recommendations, in that it provides Australian game developers with an ongoing commercial ownership stake in their interactive games to enable return on investment (e.g. to repay and/or justify such funding and support mechanisms).

³ A copy of the report of 29 April 2016 can be accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Video_game_industry/Report.

Australian 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. Game developers depend on strong copyright laws to maintain these revenue streams and provide return on investment.

IGEA agrees with the Commission’s assessment that “the digital age has probably helped more than hindered access to copyright material for consumers” (page 93). As stated previously, the introduction of low-cost, global digital distribution platforms have empowered Australian developers and caused significant growth in the independent interactive games development industry.⁴ The interactive games industry has thrived under the current copyright regime, offering large numbers of highly creative and entertaining interactive games via a multiplicity of business models with huge opportunities for Australian consumers to engage and, indeed, be creative themselves.

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 also 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 App Store. Increasingly, Australian games developers are retaining copyright in their works to allow for global exploitation. A number of examples here include *Fruit Ninja*, *Crossy Road*, *Shooty Skies* and *Jetpack Joyride*.

Furthermore, for consumers, there is a growing availability of affordable and properly licensed software and other digital assets that can be used to build interactive games. For example, the digital environment allows professional, high-end game engines to be distributed for no, or very little, upfront cost (examples of this include Unity, Unreal Engine and GameMaker Studio). These have made interactive game development more accessible through the use of flexible and affordable licenses, all within the current copyright regime in Australia.

3.3 Copyright term

In the Draft Report, the Commission states that (page 17):

The evidence (and indeed logic) suggests that the duration of copyright protection is far more than is needed. Few, if any, creators are motivated by the promise of financial returns long after death, particularly when the commercial life of most works is less than 5 years.

In IGEA’s view, the current term of copyright provides a sufficient period for rights holders to commercialise their creative content and receive a return on investment in the interactive games industry. With all due respect, it is not quite clear how the Commission has concluded that the commercial life of most copyright works is “less than 5 years” (page 114).

Indeed, the Commission’s only reference to an interactive game example in relation to copyright term is in Box 4.5 entitled, “Multiplayer mode”, in which it refers to an example of alleged “copyright challenges in videogames” (page 116). In our view, this example is neither illustrative of challenges to the term of copyright, as such issues could have arisen at any time during the lifetime of the game in

⁴ For more information on business models see the IGEA Submission to the Australian Law Reform Commission at http://www.alrc.gov.au/sites/default/files/subs/192_ org_igea.pdf page 6.

question, nor supportive of the argument that the term of copyright is a widespread problem. It is simply one isolated and worst-case scenario.

Indeed, in the case of interactive games, the development, release and, in fact, commercial success of a title generally continues well beyond five years. This is particularly so in the case of games that, many years after their initial creation and launch, are “re-mastered” with upgraded graphics, “re-released” onto newer video game consoles with a “backwards compatibility” feature, and also offered as part of online “game subscription” services. The number of games that adopt such business models is almost impossible to list, but a few popular examples include:

- *Call of Duty* (Activision)
- *Minecraft* and *Halo* (Microsoft)
- *Legend of Zelda* and *Pokémon* (Nintendo)
- *NBA* and *FIFA* (Electronic Arts)
- *Fallout* (Bethesda)

There are also a number of highly successful interactive games series that have grown over time, including *Mario Brothers*, which was first released in 1985 for the Super Nintendo and, over 30 years later, appeared in the game *Mario & Sonic at the Rio 2016 Olympic Games* on multiple Nintendo consoles. Other examples of similar interactive games’ franchises and characters include *Sonic*, *Tomb Raider* and *Zelda*. Furthermore, interactive game characters and storylines are often licensed for adaptation in other media, including film. High-profile films that were licensed and adapted from interactive games include *Tomb Raider*, *Resident Evil*, *Hitman*, *Prince of Persia* and *Mortal Kombat*. As a final example, *Resident Evil* was first released in 1996 on the Sony PlayStation. In the 20 years since its first release, there have been 23 different interactive games released in the series and five different films made.

As such, the notion that copyright could be reduced to 15-25 years *after creation* as suggested by the Commission is out of sync with commercial realities and the international marketplace for the interactive games industry.⁵ A number of IGEA’s members have a vast back-catalogue of interactive games, together with games of other third-party publishers, which can and do continue to generate returns on initial investment well after 15-25 years. This is helped made possible through many services such as Nintendo’s Virtual Console, Electronic Art’s “EA Access” program, Microsoft’s backwards compatible Xbox One console, and Sony’s “PlayStation Now” game streaming service. In addition, many publishers release games onto the PC platform, where an incredibly large number of older video game titles are purchasable via digital distribution platforms (including Steam, Origin and Good Old Games).

Accordingly, the ability of such back-catalogue interactive games to provide ongoing returns is critical to the continuous investment in the creation of new and innovative games for the benefit of Australia consumers.

Furthermore, given that interactive games have a global market, there is a clear need for consistency of applicable copyright terms in the international environment. The Commission’s states that (page 87):

Many aspects of Australia’s IP arrangements are embodied in international agreements that set out minimum IP protections and contain obligations relating to key policy levers such as

⁵ Draft Finding 4.2 at page 29 of the Commission’s Draft Report.

the duration and scope of protection (box 3.4; appendix B). These obligations limit Australia's capacity to tailor rights to suit local circumstances and to accommodate change.

Unfortunately, in IGEA's respectful opinion, this view is too simplistic. The reality is that the parity of international protections in relation to copyright term allows our members to offer their interactive games to consumers throughout the world and overcomes the potential for vastly different business models to be employed in different territories if they are unwarranted. To take a hypothetical example, if Australian games developers were only able to offer interactive games to Australian consumers for a shorter commercialization period when compared to the rest of the world, it may become necessary for them to change the nature of that commercial offering in Australia to justify the initial investment and ensure an appropriate return on that investment.

IGEA notes that one of the reasons that New Zealand is currently taking steps to increase its term of copyright for certain works, to life of the creator plus 70 years, is due to the expressed need for international consistency in the protection for creators of copyright material.

IGEA, therefore, does not agree with the Commission's conclusion that "the current duration of copyright imposes costs on the community and access to works is restricted" (page 93). Nor does IGEA think it appropriate or practical that (ibid):

scope exists to collaborate with other countries to seek mutual amendment to institute more consumer favourable copyright laws, including shorter protection terms of between 15-25 years after creation of new works.

As the Commission itself notes (page 117), Australia has no unilateral way to alter copyright terms, particularly recognising that the current terms are a direct result of the Australia-United States Free Trade Agreement.

Therefore, IGEA welcomes the recent statement by the Minister for Communications and the Arts, Mitch Fifield:⁶

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.

3.4 Fair use

IGEA notes the recommendation of the Commission to replace Australia's current exception for fair dealing with a broader US style fair use exception.⁷

As stated in our previous submission, while IGEA's members have varying perspectives on whether a broad and flexible fair use exception should be introduced, it noted that the interactive games industry had been able to develop and introduce new and innovative business models in Australia without the benefit a broad fair use exception. There is currently a robust community of gamers legitimately

⁶ Minister for Communications and the Arts "CONJECTURE ON COPYRIGHT CHANGES UNFOUNDED" *Media release*, May 2016 at <http://www.mitchfifield.com/Media/MediaReleases/tabid/70/articleType/ArticleView/articleId/1179/Conjecture-on-copyright-changes-unfounded.aspx>.

⁷ Draft Recommendation 5.2 at page 31 of the Commission's Draft Report and discussed at pages 159-161.

sharing content online, via platforms such as YouTube and Twitch, within the framework of existing exceptions under the Australian copyright regime, enabled by copyright owners.

It is acknowledged that some of IGEA's US members do rely on fair use as part of their creation of new content. However, amongst those who do not oppose the introduction of “fair use” exceptions, there is a consistent view that additional consultation is required on this topic, particularly given the complexity of the issues, in order to ensure that they map to the existing legitimate expectations of interactive game creators and also consumers.

If the Australian Government is minded to accept this recommendation, IGEA urges the Government to conduct a separate and dedicated review of this complex and contentious topic as part of any implementation process.

3.5 Geo-blocking

IGEA notes the comments of the Commission in respect of geo-blocking (page 19):

Geoblocking restricts a consumer’s access to digital products, enabling rights holders and intermediaries to segment the Internet into different markets and charge different prices (or offer different services) to consumers based on their location.

The use of geoblocking technology is pervasive, and frequently results in Australian consumers being offered a lower level of digital service (such as a more limited music or TV streaming catalogue) at a higher price than in overseas markets. Studies show Australian consumers systematically pay higher prices for professional software, music, games and e books than consumers in comparable overseas markets. While some digital savvy consumers are able to avoid these costs (such as through the use of proxy servers and virtual private networks), many are relegated to paying inflated prices for lower standard services.

We also note that there has been ongoing conjecture on whether a consumer’s circumvention of geo-blocking would in fact constitute an infringement of a TPM.⁸ Without commenting on this issue, in IGEA’s view geo-blocking can often be an essential tool in enabling interactive games companies to differentiate their products to meet varying consumer demands and offer a greater range of options and flexibility to consumers in different markets (e.g. rental vs. purchase, etc.), rather than simply something that “limits” access to consumers.

Moreover, while interactive games are typically offered to consumers globally, there are many different consumer requirements and protections in each marketplace, especially those concerning classification and consumer advice. For example, in the case of the popular interactive game, *Call of Duty: Black Ops*, it received the following ratings across different markets:

- United States and Canada – Mature 17+ (ESRB rating)
- Europe – 18 (PEGI rating)
- Australia – MA 15+
- New Zealand – Restricted 16

⁸ House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT pricing and the Australia tax*, 2013, page 108 referred to at the Draft Report at 128.

Call of Duty: Black Ops was developed by Treyarch and published by Activision. Geo-blocking enables Activision to offer the interactive game to all of the territories set out above (and others) with the correct rating for different consumer markets. An excellent article on a comparative analysis of ratings, classification and censorship in selected countries around the world reinforces the practical need for geo-blocking to ensure interactive games' consumers are appropriately protected in their respective territories.⁹

Therefore, IGEA is of the respectful view that geo-blocking should be considered holistically by the Commission also in terms of its potential benefits to consumers to offer interactive games that meet consumer protection requirements in different territories.

4. Conclusion

In conclusion, IGEA and its members support IP and copyright as essential to providing essential incentives 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* with respect to copyright protection, the term of that protection and TPMs. It has actively developed new and innovative games and business models to address the growing demands of global consumers in the digital environment and engage the 68 percent of Australian consumers that play interactive games.

IGEA appreciates the opportunity to provide a further submission to the Commission on Intellectual Property Arrangements and looks forward to the opportunity to discuss this in more detail at the Commission's proposed Public Hearings.

⁹ Brand, J, "A comparative analysis of ratings, classification and censorship in selected countries around the world", *Bond University e-publications*, 2002, available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1886&context=hss_pubs.