



Submission to

**Senate Standing Committees on Environment and
Communications**

Subject

**Copyright Legislation Amendment
(Fair Go for Fair Use) Bill 2013**

Date

30 August 2013

Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to assist the Senate Standing Committees on Environment and Communications (the **Committee**) with its inquiry on the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013* (the **Bill**).

Set out below is a brief description of IGEA, a summary of our response to the Bill followed by more detailed response to a number of issues raised in the Bill.

IGEA is also a member of the Australian Content Industry Group (**ACIG**) and IGEA supports the ACIG's submission to the Committee on the Bill.

About IGEA

IGEA is an industry association representing the business and public policy interests of Australian and New Zealand companies in the computer and video game 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:

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

Summary

The proposed amendments to the *Copyright Act 1968* (Cth) (**Copyright Act**) will have a serious impact on the well established and emerging business models in creative industries, including Australia's interactive games and entertainment industry.

The issues addressed in the Bill are currently being considered throughout a number of significant and ongoing Government inquiries and IGEA considers the proposed amendments to be premature ahead of the completion of such reviews.

IGEA does not support the Bill.

Extension of Safe Harbour Protection in the Copyright Act

The Attorney-General's Department is currently considering the expansion of the safe harbour scheme in the Copyright Act¹. IGEA has made a submission to the Attorney-General's Department's inquiry on this issue² that generally supports such an expansion. IGEA trusts that the Attorney-General's Department will carefully consider the many complicated and often conflicting factors when considering this issue and formulating the recommendations of its inquiry.

¹ <http://www.ag.gov.au/Consultations/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx>

² <http://www.ag.gov.au/Consultations/Documents/InteractiveGamesandEntertainmentAssociation.pdf>

IGEA considers the proposed amendments in the Bill on this issue to be premature and accordingly IGEA does not support this part of the Bill.

Technological Protection Measures and the Interactive Games Industry

Technological Protection Measures (TPMs) employed by rights holders in video games and video game systems are used to prevent unauthorised copying of and access to video 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 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 video game software.

Video game TPMs also facilitate digital distribution of products and thus are a critical enabler of electronic commerce. Generally, all game platforms (including PlayStation 3, Wii U and XBOX 360) offer services that allow users to download games and applications directly onto their consoles/devices, while Valve's *Steam*³, and Electronic Arts' *Origin Store*⁴, are just a few of the digital distribution services that have emerged for PC games. Not only do these services rely on TPMs to operate, many employ TPMs to offer value-added benefits to consumers. For instance, the *Steam* service not only allows a user to purchase computer games online, but tethers any purchased video game software to the user's *Steam* 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 makes a tool available to Xbox 360 users that allows users to "migrate" licenses and associated content to a new console in the event of hardware malfunction or failure or the purchase of a new console.

Importantly, the entertainment software industry is also concerned about children gaining access to video 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 video games according to their classification, allowing parents to make decisions about what is appropriate for their family. The Xbox 360 also contains a timer so parents can determine how long their child may play. Similarly, some Massively Multiplayer Online Games 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 how long.

While providing the above benefits to consumers through the use of TPMs, the video game 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.

³ <http://store.steampowered.com>

⁴ <http://store.origin.com>

The above is a brief summary of how TPMs are delivering a number of innovative features that benefit the consumer while also deterring piracy. The ongoing support of such benefits, as well as the deterrence of piracy, is dependent on strong and effective TPM provisions provided under law.

Proposed Amendments to Technological Protection Measure Exceptions

The Australia-United States Free Trade Agreement sets out the requirements and expectations for introducing exceptions to the TPM provisions in the Copyright Act. These requirements are reflected in the regulation making power to create further exceptions as set out in section 249(4) of the Copyright Act.

The Attorney-General's Department is currently considering the exceptions to the TPM provisions of the Copyright Act in a manner consistent with the expectations of the Australian-United States Free Trade Agreement and section 249(4) of the Copyright Act⁵. We understand that, throughout the Attorney-General's inquiry, there have been submissions concerning the exceptions proposed in the Bill. We understand that the Attorney-General's Department will seriously consider these submissions to determine whether the proposed exceptions satisfy the requirements of the Copyright Act and in particular whether any proposed exception will have an adverse impact on the effectiveness of the protections afforded by the TPM provisions.

IGEA has made a submission to the Attorney-General's Department's inquiry on this issue⁶.

IGEA considers the proposed amendments on the new exceptions to the TPM provisions to be premature ahead of the completion of the Attorney-General's Department inquiry and accordingly IGEA does not support this part of the Bill.

Geocode Mechanisms

The second reading speech for the Bill states that the intention of the Bill is to address the claimed problem of price discrimination that apparently exists due to the use of geographic market segmentation technologies. IGEA does not support the proposed amendments for the following reasons.

(a) *This issue is the subject of a recently concluded Government inquiry*

Price discrimination and geographic market segmentation were core issues addressed in the recommendations contained in the Standing Committee on Infrastructure and Communications' report for the IT Pricing Inquiry⁷. Throughout this inquiry, a number of Government departments and agencies, including the Australian Competition and Consumer Commission, the Attorney-General's Department and the Treasury have cautioned against the legislative interference with geographic market segmentation technologies⁸. Any laws that may follow the recommendations from this report will undoubtedly require careful consideration and, due to the far reaching implications of the recommendations, are likely to require further public and industry consultation.

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<http://www.ag.gov.au/Consultations/Pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx>

⁶ <http://www.ag.gov.au/Consultations/Documents/InteractiveGamesandEntertainmentAssociationssubmission2.pdf>

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http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ic/itpricing/index.htm

⁸ Standing Committee on Infrastructure and Communications' report entitled 'At what cost? IT pricing and the Australia tax', pages 113 and 114

- (b) *The Copyright Act already contains provisions to address issues of geographic market segmentation*

The definitions of ‘technological protection measures’ and ‘access control technological protection measures’ both specifically state the following are not TPMs and therefore are not subject to the provisions of the Copyright Act:

“a device, product, technology or component to the extent that it... if the work or other subject-matter is a cinematograph film or computer program (including a computer game)--controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia”

This issue of geographic market segmentation was carefully considered throughout the drafting of the TPM provisions to provide the most effective outcome that balances a copyright owners’ right to protect their copyright material and a consumer’s ability to access such material.

- (c) *Geocodes serve a number of purposes, including the satisfaction of legal obligations*

The interactive entertainment industry often use geocodes to localise their products and services to ensure they reflect Australian standards, such as Australia’s National Classification Scheme.

For example, the upcoming game Saints Row IV has recently been refused classification by the Classification Board and the Classification Review Board. Consequently, this version of Saints Row IV is banned from sale in Australia. An edited version of Saints Row IV was subsequently classified MA15+ by the Classification Board. Geocodes will undoubtedly be used to ensure that only the edited and legal version of Saints Row IV will be sold in Australia. The circumvention of geocodes in this instance would be problematic and potentially lead to banned content being allowed in Australia.

There are a number of other laws and regulations that depend on effective use of geocodes, such as the *Broadcasting Services Act 1992* (Cth) and possibly even the Australian Consumer Law. The support of geocode circumvention technologies ultimately raises serious questions about how Australian law, including laws on censorship and content standards, can realistically regulate the Internet and Internet transactions.

- (d) *The perceived problems concerning geographic market segmentation are being addressed by the market and do not require legislative intervention.*

In a time of rapid technological development and increasingly fast Internet speeds, the interactive games industry continues to adapt with the evolving needs of the market, including demands for less intrusive digital rights management technologies. For this reason, both Sony and Microsoft have recently announced that the game discs for their next generation of game consoles, the PlayStation 4 and the Xbox One, will not be region coded and will not contain overly restrictive digital rights management technologies.

Industry, business models, products and services will continue to evolve to meet consumer demands and the amendments proposed in the Bill are simply not appropriate or necessary at this time.

Fair Use

The Bill would introduce a fair use exception in the Copyright Act. The Australian Law Reform Commission (**ALRC**) is currently conducting an inquiry on copyright exceptions with its final report due by 30 November 2013⁹. IGEA has recently responded to the ALRC's discussion paper on this issue with its view on the fair use exception.

The introduction of a fair use exception requires serious consideration and public consultation. The ALRC's review has uncovered a range of views about the need and feasibility of a fair use exception. Accordingly, we strongly suggest that any legislative drafting of the exception only be considered after the ALRC has had the opportunity to report on the matter.

Conclusion

The issues addressed in the Bill are currently being considered throughout a number of significant and ongoing Government inquiries and IGEA considers the proposed amendments to be premature ahead of the completion of such reviews.

IGEA does not support the Bill.

⁹ <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>