



Submission to

Australian Law Reform Commission

Subject

**Copyright and the Digital Economy
Issues Paper Response**

Date

November 29, 2012

Introduction

The Interactive Games and Entertainment Association (**iGEA**) welcomes the opportunity to respond to the Australian Law Reform Commission's (**ALRC's**) issues paper on copyright and the digital economy (**Issues Paper**).

In 2012 the Australian interactive games industry was estimated to be worth \$1.7 billion and is expected to be one of the fastest growing media and entertainment markets, second only to the Internet¹. The games industry relies on strong intellectual property laws, including strong copyright laws, to maintain this level of growth in, and contribution to, the digital economy. While there continues to be challenges with online copyright infringement which need to be addressed, Australia's copyright laws have provided the games industry with a secure framework to develop and use new and innovative business models and, most importantly, to develop and distribute new game content.

The iGEA is also a member of the Australian Content Industry Group (**ACIG**) and the iGEA supports the ACIG's submission to the Issues Paper.

Set out below is a brief description of iGEA, an executive summary of our response and our detailed response to each of the Issues Paper questions that are relevant to the games industry and the iGEA.

About the iGEA

The 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 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
- Findlay Marketing
- Fiveight
- Gamewizz Digital Entertainment
- Microsoft
- Mindscape Asia Pacific
- Namco-Bandai Partners
- Nintendo
- QVS International
- Sony Computer Entertainment
- Take 2 Interactive
- THQ Asia Pacific
- Total Interactive
- Ubisoft
- Warner Bros. Interactive Entertainment

¹ PriceWaterhouseCoopers, Outlook: Australian Entertainment and Media 2012-2016

Executive Summary

The games industry continues to grow, innovate and evolve with little limitation imposed by the relevant provisions of Australia's *Copyright Act 1968 (Cth)* (the **Copyright Act**) which are the focus of this inquiry. The games industry has actively developed new and innovative business models to address the growing demands of users in the digital environment. Consequently, many of the exceptions being contemplated by this Issues Paper are simply not necessary, as many of the intended outcomes of such exceptions are currently being achieved through the use of new and innovative business models. For example, the introduction of legitimate cloud computing services has mitigated the need for consumers to create backup copies; games are being developed to work on a number of different formats removing the need for format shifting; and games are being offered with express licences that allow users to create and share user generated content for social, private or domestic purposes. There continues to be scope for the games industry to respond to user demands that would obviate the need for the introduction of the exceptions raised in the Issues Paper, therefore we do not consider the exceptions to be necessary. Furthermore, there is a significant risk that the introduction of further copyright exceptions would introduce a layer of uncertainty and undermine the feasibility of such new and innovative business models.

A number of the exceptions posed in the Issues Paper would raise questions regarding the continued integrity of technological protection measures as tools to incentivise the games industry to innovate across digital platforms within a secure legal and technological environment. It is important that the protections offered by technological protection measures are preserved. Accordingly, it is critical that any exception considered throughout this review is subject to there being no circumvention of technological protection measures.

iGEA sees no reason for the Copyright Act to be amended to introduce a broad 'fair use' exception. The Issues Paper sets out a number of the concerns about this issue that are shared by the games industry, including the lack of jurisprudence; the need for litigation to determine the scope of permitted uses; the likelihood of higher transaction costs; and the uncertainty of any broad exception's application. It is clear that the games industry has been able to develop and introduce new and innovative business models without the benefit a broad fair use exception. Accordingly, the highlighted risks involved simply do not justify the introduction of such a provision.

The Issues Paper specifically asks for input on the enforceability of contracts that conflict with copyright exceptions. The games industry relies on end user licence agreements to set out the terms upon which games are provided to users. These licence agreements provide a certain and flexible environment by which the games industry can develop and introduce new and innovative business models to the global market. Many new and innovative business models would not exist if copyright exceptions were able to prevail over end user licence agreements. Accordingly, to provide the certain and flexible environment that is necessary for the continued development and introduction of such new and innovative business models, it is critical that the Copyright Act is not amended to prevent contracting out of copyright exceptions.

When considering the copyright exceptions raised throughout the issues paper, it is essential for such exceptions to comply with Australia's international obligations, including the three step test² for copyright exceptions. Each of the proposed exceptions should only be considered to the extent that such exceptions comply with the three step test.

² as set out in the TRIPS Agreement and the Berne Convention: Berne Convention for the Protection of Literary and Artistic Works (Paris Act), 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 9(2).

ALRC Issues Paper Questions and iGEA Response

The Inquiry

Question 1. The ALRC is interested in evidence of how Australia’s copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

Copyright protection provides an essential basis for innovation and investment in the games industry, as well as the industries which compliment and support the development, distribution and exploitation of interactive entertainment products. In particular, copyright protection in the digital environment has enabled the games industry to embrace, and continue to embrace, the opportunities presented by the global digital economy. The games industry continues to lead the way in innovative business models to access new revenue streams and address consumer demands. However, the ability for creators and content owners to earn a living is being seriously compromised by the level of copyright infringement that is occurring in the digital environment. While we understand that the ALRC’s review is limited to considering whether exceptions and statutory licences in the Copyright Act are adequate and appropriate in the digital economy, we respectfully suggest the ALRC also considers how to address copyright infringement in the digital economy to better protect the rights of creators to earn a living and to make a positive contribution to Australia’s digital economy.

How copyright law affects the ability of creators to earn a living

The ‘creators’ of the games industry primarily consist of game developers, publishers and distributors and combinations of each. Game developers consist of the artists and animators that design how the game characters and the game environment will look; the game designers that will develop the game concept and the user’s game experience; and the programmers who write the source code that pulls all of these elements together. As with all creators in the content industries, game developers rely heavily on copyright and other intellectual property rights to secure their business models. While copyright protection for the intellectual effort of creators is the centrifugal force of the games business, this protection also exists to sustain a larger group of employees, businesses and stakeholders that are part of the distribution pipeline, and who are dependent on the continued viability of the games industry.

Game developers have traditionally earned a living through a number of sources, including entering into publishing agreements or alternatively through work-for-hire agreements. These arrangements continue to operate today, with many Australian development studios working on blockbuster games alongside prominent international publishers. Furthermore, game publishers often own and manage their own game development studios, such as the Australian Firemonkey game development company that is owned by international publisher Electronic Arts. These

developers depend on strong intellectual property laws, including copyright laws, to maintain these traditional revenue streams. Furthermore, a number of these arrangements involve international parties and therefore benefit from intellectual property laws that compliment intellectual property laws in an international environment.

While the games industry continues 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 games industry with direct access to a variety of new revenue streams and new digital goods and services on a global scale. For example, it is relatively inexpensive for game developers to distribute their iPhone mobile games to a global market through the iPhone's AppStore. The introduction of these new, low-cost, global digital distribution platforms have empowered game developers and caused significant growth in the independent game development industry.

The games industry continues to embrace the opportunities provided by the digital economy, however the rewards presented by these opportunities are undermined by the lack of protection from copyright infringement in the digital environment. The continuing significance of online infringement prevents the games industry from competing on a level playing field, which impedes the growth of legitimate services. Even though games are now more accessible than ever before, selling for as little as \$1, these infringement rates continue to persist³. While new business models and technology have assisted to combat such infringement levels, the problem continues unabated. Without adequate protections against copyright infringement, the risk that is involved in creating and disseminating original content can be prohibitive.

While there is no evidence that indicates game developers are unable to access such new revenue streams and new digital goods and services because of Australia's copyright law, the persistence of online copyright infringement does demonstrate that the games industry is currently unable to effectively protect their intellectual property rights in the digital environment. Such protections would allow game developers to earn the appropriate and well deserved income that will enhance their ability to contribute to the wider Australian digital economy and generally reap the mutual benefits of their creative endeavors.

How copyright law affects the introduction of new or innovative business models

The games industry continues to develop and introduce new and innovative business models and have not been limited by the current copyright laws. The following list sets out the key innovative business models that have recently been introduced and widely utilised by the games industry.

Free-to-play - These types of games allow users to play the game for free. While users can enjoy the game experience without the need to make any form of payments, users are also able to enhance their game experience by purchasing certain in-game content or features. For example, the mobile game '*Jetpack Joyride*' by Australian developer Halfbrick is distributed for free on the Apple's AppStore. Throughout *Jetpack Joyride*, the user will collect coins that can be used to unlock upgrades within the game. While the user could wait to save up enough coins to unlock the upgrade they desire, the user also has the ability to use real money to purchase the in-game coins. In this example, while Halfbrick does not earn revenue when the user downloads the game, they are able to generate revenue through the use of in-game purchases. This new and innovative business model is particularly popular with mobile and web applications.

³ <http://www.businessweek.com/articles/2012-11-01/piracy-cuts-into-paid-app-sales>

Freemium - Similar to free-to-play games, users are able to play freemium games for free however the user's game experience is somehow limited. These limits may include preventing the user from playing beyond a certain amount of time, preventing the user from progressing past a certain level or only providing the user with a basic set of game features. Once the user has experienced the freemium version of the game, they can decide to purchase and unlock the full version. While this business model has been regularly used to provide game demonstrations of console and computer games, the model is now also being used for mobile games.

Subscription - Games that require ongoing support, such as massive multiplayer online games, often require the user to commit to a monthly subscription. For example, the popular computer game *'World of Warcraft'* requires users to pay a monthly subscription fee to access the game. In addition to these types of games, platforms are also providing subscription services to their users. These subscription services often provide users with a variety of benefits, including access to multiplayer features, free games and other content. For example, Sony's *PlayStation Plus* subscription service provides its users with a number of free games, discounts and other content in exchange for a subscription fee.

Advertising - Internet enabled game devices are being used to provide games that are funded through advertising. The games industry is now able to easily integrate tools that serve advertising throughout the game experience. For example, users are able to download a free version of the mobile game *Angry Birds* that contains dynamic advertisements throughout the game experience. Computer games are also using advertising to generate revenue. For example, Square Enix has launched the new service *CoreOnline*⁴ that allows users to earn gameplay time by watching advertisements. This business model is likely to grow as technology improves and Internet speeds increase.

Crowdfunding - Game developers are using social networks and crowdfunding platforms such as *'Kickstarter'* or Australia's *'Pozible'* to help fund their games. These crowdfunding platforms allow users to pledge money towards the development of creative projects, including games. Games continue to be a popular category on these crowdfunding platforms, with some of the more popular developers collecting millions of dollars before the game is even developed⁵. Game developers have also started to sell the opportunity for users to have early access to a game that is still in development. Through platforms such as *'Desura'*, users are able to pre-order and play an incomplete version of a game that is in development and provide feedback to the developer⁶. This approach provides developers with early funding for their game and an opportunity to receive invaluable feedback from core fans that will ultimately help improve the completed game.

The above lists several key examples of the new and innovative business models that have emerged in the games industry. Australia's copyright law has not affected the development and introduction of these new and innovative business models. While the development of these business models has not been affected by Australia's copyright laws, the persistence of online copyright infringement has affected the types of business models that can effectively be used by the games industry. For example, the advertising model is often relied on to avoid the negative consequences of online copyright infringement. We believe that the growth of innovative business models would increase at a faster rate if the games industry was able to rely on effective protections against online copyright infringement.

⁴ <http://beta.coreonline.com>

⁵ <http://www.kickstarter.com/projects/doublefine/double-fine-adventure>

⁶ <http://www.desura.com>

In addition to these new and innovative business models, the games industry has also developed and introduced a range of new and innovative features to meet the demands of the games market. These new features include those that address the consumer demands concerning back-up copying, format flexibility and transformative use (which will be addressed in detail throughout our response to the relevant questions raised in the Issues Paper). It is important to recognise that these features have been developed and introduced in response to user demand and have not been limited by Australia's copyright law.

How copyright law imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material

We submit that it is not the existence of copyright law that has imposed unnecessary costs of inefficiencies on creators, but rather that the lack of sufficient protection and enforcement of Australia's copyright law that has failed to shield creators and content owners from unnecessary costs and inefficiencies in the digital economy. As previously stated, game developers are being exposed to significant levels of copyright infringement which are likely to increase with broadband Internet speeds which are being realised with the rollout of the NBN. The games industry has been unable to rely on the remedies that are currently available in the Copyright Act to effectively address this issue. This problem is particularly difficult to address when copyright infringement occurs through the use of websites or 'rogue sites' that host, facilitate and benefit from providing infringing content to Australian users.

Australia competing internationally

The games industry develops and distributes games for an international market. While other issues, such as tax and funding, have affected the Australian games industry's competitiveness, the local industry continues to develop and distribute games that are internationally successful. There is simply no evidence that supports the notion that Australia's copyright law is placing the Australian games industry at a competitive disadvantage internationally. On the contrary, Australia's membership of international treaties and trade agreements which uphold minimum standards for intellectual property protection support the ability of the local games industry to compete in foreign markets. We are concerned that such benefits are under threat of being eroded by efforts to roll back copyright protections.

Guiding principles for reform

<p>Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the <i>Copyright Act 1968</i> (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?</p>
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A number of the guiding principles suggested in the Issues Paper are unclear and/or seem to be couched in a way that suggests that the ALRC has already taken a view on a negative correlation between strong and effective copyright protection on the one hand, and promotion of innovation and access to content on the other. This is very concerning. In particular:

Principle 1 states that reform should promote the development of the digital economy by providing incentives for 'access to content'. We must ensure that this principle refers to promotion of the development of new content, not the erosion of protections that allow for protection of content in the digital environment. Also, the ALRC must recognise that there are circumstances where the incentives for innovation in technologies are increased and the digital economy is developed through restrictions on access to content, for example through the use of technological protection measures.

Principle 4 refers to ‘fair access to and wide dissemination of content’. There may be instances where content creators make commercial decisions not to have their content disseminated widely or make their content simultaneously accessible to the global market. This may not always be considered ‘fair’ to users, however these decisions are being made in a commercial context for the purposes of ensuring a maximum return on investment, a competitive advantage or other commercial imperatives for creating such content.

While we appreciate that the principle asks to ‘promote’ fair access, it is important that such fair access isn’t mandated at the risk of undermining the creation of content and the digital economy. While we may not need to change the language used in the principle, it is important that we have a clear understanding and appreciation for what is ‘fair’ in a commercial context and that ‘fairness’ is framed for both creators and users.

Principle 5 states that reform should ensure copyright law responds to changes in technology, consumer demand and markets. The business models used by the games industry have continued to develop with the introduction of new legitimate technologies, platforms and services and as a result of consumer demand. This development has been achieved within, or in spite of, the current copyright framework.

There has also been the introduction of new technologies, platforms and services that are used for the purposes of conducting or facilitating copyright infringement. It is critical that copyright law is able to respond to the infringing use of such new technologies, platforms and services – something that is lacking from the current copyright framework. It is important the ALRC considers this issue when considering its recommendations throughout the Inquiry.

Principle 6 states that reform should take place in the context of the ‘real world’ range of consumer and user behavior in the digital environment. While copyright law should respond to ways in which content is being used, it should also acknowledge where the marketplace is sufficiently dynamic to address consumer needs without government intervention.

Content distributors and developers are in the business of addressing consumer demand and responding to changes in consumer behaviour in a way that supports and does not erode existing incentives to invest in high quality content and technology. On the other hand, it should also be acknowledged that certain consumer behaviour can and should be regarded as unlawful, and there should be sufficient protections that discourage and deter such behaviour.

Principle 7 states that reform should promote clarity and certainty for creators, rights holders and users. While we acknowledge the importance of certainty and education for consumers, we also need to ensure that consumer perceptions about the benefits, use and requirements of copyright law are not affected by any inaccurate or misleading information that may be propagated by certain stakeholders.

Caching, indexing and other internet functions

Question 3. What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia’s copyright law?

At this stage, we are not aware of any issues that have been encountered by the games industry (or its customers) concerning caching, indexing or other uses related to the functioning of the Internet.

We look forward to considering this issue in more detail once we have reviewed the other

submissions on this matter and the proposals that will be set out in the ALRC's discussion paper.

Question 4. Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

As set out in our response to question 3, we are not aware of any issues that have been encountered by the games industry or users concerning caching, indexing or other uses related to the functioning of the Internet. In the absence of demonstrable adverse real-world impacts on such activities, we believe that any exceptions are unwarranted. To the extent that the ALRC recommends that exceptions are in fact needed, they should be narrowly tailored, and should not exist to legitimise the activity of those who perpetrate or facilitate infringement, or provide additional hurdles to enforcement of existing rights.

Furthermore, any such exceptions must be subject to there being no circumvention of any technological protection measures and the terms of any end user licence agreement.

We look forward to considering this issue in more detail once we have reviewed the submissions on this issue and the proposals that will be set out in the ALRC's discussion paper.

Cloud computing

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

The games industry is approaching cloud computing services in a multitude of ways. The best examples of cloud computing services for the games industry include cloud services for game storage and, while not widely available in Australia at the moment, game streaming services.

There are a number of cloud computing services that offer game storage in Australia. The cloud services being offered are growing with the demand for cloud game storage. Since many of the available games are only available in a proprietary format, the availability of such formats on cloud computing services will depend on the services being made available by the owner of such proprietary format. For example, if a user purchases a game from the Sony's '*PlayStation Store*', the user is able to download that game again on the same or another authorised device multiple times. The same approach is used on many online computer game retail platforms, such as Electronic Arts' '*Origin*' store⁷, and will continue to be provided to satisfy user demands. While these types of features are usually subject to certain contractual terms to avoid any exploitation of the service, the feature achieves its objective of providing a flexible digital environment where users are able to download previously purchased games when they have the urge to play them.

There are a number of computer game streaming services available overseas that are likely to be introduced in Australia as broadband Internet speeds increase. These services use remote computers to continuously receive inputs from the user, process the computer game and then stream the audio-visual output to the user. These game streaming services remove the need for users to have the expensive hardware that is often necessary to process and play computer games. While these services have emerged with varying degrees of success, they provide a real example of how computer games can be delivered over the cloud.

Australian copyright law is not impeding the development or delivery of these cloud computing services. The only limitations to the further development and delivery of cloud computer game

⁷ <http://store.origin.com>

services in Australia are the Internet speeds and Internet plans that are currently available. Games vary in size, from less than one megabyte to over 8 gigabytes with the larger games often being the more popular ones. In the current Internet environment, it is not convenient for users to continuously download larger games from the cloud as such users would need to wait through a lengthy download process and frequent downloading of larger games would likely consume a significant portion of the user's monthly download limit. Also, game streaming services require instant feedback from the user's interaction and input, therefore fast upload and download speeds are critical to the success of game streaming services. We anticipate that these cloud computing services will continue to grow as broadband Internet speeds, reliability and affordability increase and will not be limited by the current copyright laws.

Question 6. Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

As set out in our response to question 5, we do not consider that the Copyright Act has impeded the development or delivery of cloud computing services for the games industry in Australia, therefore we do not consider that any amendments or new exceptions are necessary. Whilst our experience does not indicate the current law has impeded the development of cloud computing services, we anticipate that the broader adoption of and availability of such technology in Australia will present both risks and opportunities for our industry. In many countries, including Australia, the activities of certain cloud services have raised legal issues, such as whether the scope of certain exceptions established for the benefit of end users may also be relied upon by such services.⁸ We anticipate that such services will advocate strongly for the introduction of broader exceptions as a means to reduce their risk of liability. We caution against such views, which do not take into account the broader benefits of and investment in cloud computing technology which is occurring in Australia and around the world, which are not predicated on the weakening of copyright protection.

If an exception were to be considered for cloud computing services, it is critical that consideration is given to the implications and responsibilities of any intermediaries that are providing such cloud computing services. There is a real risk that cloud computing services could be used as a method of storing and distributing infringing content, including unauthorised copies of computer games. We have serious concerns that a broad exception that promotes such cloud computing services will further undermine the games industry's ability to protect against online copyright infringement. Accordingly, we strongly recommend that any new exception that is being considered to account for cloud computing services contains a mechanism to ensure that such platforms are not being used to facilitate copyright infringement.

Further, if any such exception is introduced it is imperative that it be subject to there being no circumvention of a technological protection measure or breach of any end user licence agreement.

The ALRC may also consider the alternatives for introducing an exception for cloud computing services. For example, the ALRC may consider broadening the safe harbor regime in the Copyright Act to include such cloud computing services on the basis that such services be required to satisfy certain requirements, or participate in a scheme, to address occurrences of copyright infringement.

We look forward to considering this issue in more detail once we have reviewed the other submissions on this matter and the proposals that will be set out in the ALRC's discussion paper.

⁸ For example, *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147 and *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

Copying for private use

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

For the games market, an exception for private and domestic use could potentially be used to allow games to be played on multiple devices. Copying a game so that it plays on multiple devices raises a number of significant issues, many of which are currently being addressed through the use of innovative business models.

The games industry continues to develop and use new and innovative business models to deliver game content. As business models continue to evolve from traditional transactions, towards more innovative approaches such as subscription, free-to-play, or freemium (all of which are described in our response to question 1), it is critical that the terms relied upon by these new business models are not undermined by broad copyright exceptions. For example, subscribers of the Sony's *PlayStation Plus* service can download a number of free games every month and those games will continue to be available to the user for the duration of their subscription to the *PlayStation Plus* service. Allowing any private copying of these games for any reason outside the scope of the *PlayStation Plus* subscription agreement would seriously undermine the feasibility of the subscription service. This example demonstrates how a more freely permitted right to copy legally acquired copyright material would undermine new and innovative business models.

Games are often provided to users on the basis that the user only has the right to use one copy of the game at one time. For example, while many platforms allow users to re-download a copy of their previously purchased game on another device, it is unlikely that the platform would allow two copies of the game to be played simultaneously. If two users in the household wanted to play a game at the same time on separate devices, the game's owner may require the household to purchase a separate copy of the game. The introduction of a broad private use exception could potentially remove this requirement and challenge this approach.

Copying for private and domestic use also raises serious concerns for effective use of technological protection measures. The use of technological protection measures in the majority of all major proprietary game devices would simply not allow the effective use of privately copied games. Notwithstanding this, the games industry is mindful of the reasons why users are demanding the ability to copy legally acquired copyright material and are adapting their business models accordingly.

There continues to be scope for the games industry to develop innovative solutions to address the reasons why users would demand a more freely permitted right to copy legally acquired games for private or domestic purposes. Furthermore, there would be significant impracticalities for the actual operation of such a right, including conflict with technological protection measures. For these reasons, we do not consider the introduction of a more freely permitted right to copy legally acquired games for private or domestic purposes to be necessary or practically achievable.

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Games and Formats

Games are currently being provided in a number of digital formats. Most games for consoles and handheld devices are provided in a proprietary format that can only be used on the respective console or handheld device. For example, a PlayStation 3 game provided on a blu-ray disc can only be used on the PlayStation 3. Conversely, computer games designed for the Windows operating system can be enjoyed on any computer running Windows (provided that the computer meets the minimum system requirements to play the game) and is not limited by the computer's manufacturer. The variety of formats used by the games industry is critical to provide a competitive environment that drives investment in game development, hardware, new business models and innovation.

Exclusive Formats

The games industry uses proprietary formats to drive the development of new and innovative exclusive games. While many games are released on a variety of game platforms, platforms often distinguish themselves by heavily investing in the development of games that will be exclusively available on their platform. For example, the innovative title *'Halo 3'* was developed by Bungie exclusively for the XBOX360 console. These exclusive arrangements often benefit both the platform manufacturer and the developer since a popular exclusive title will often increase the appeal and sales of the platform and the developer will often receive increased funding and rewards as a consequence of the exclusive arrangement. These exclusive arrangements depend on the proprietary nature of the formats used and would be significantly undermined if format shifting was allowed for games. For example, if the fans of Mario and Luigi were able to change the format of Nintendo Wii's exclusive title *'Super Mario Galaxy'* so that it would be playable on an XBOX360, it is possible that the appeal and success of the Nintendo Wii would have been undermined. We need to ensure that the proprietary nature of game formats are preserved so that manufacturers and developers can continue to reinvest and benefit from these exclusive arrangements.

Meeting the demand of format flexibility

The games industry has noticed the demand for format flexibility and has adapted its business models accordingly. Games are now being developed and distributed in formats that can be enjoyed on a number of devices. For example, games that are purchased on the iPhone can often also be played on the iPad and iPod devices. Computer games can also be provided in a format that is playable on both Windows and OSX operating systems. For example, Electronic Arts' *'The Sims 3'* can be played on the latest iMac as well as a Windows PC. Similarly, with the release of Sony's new handheld device, the *'PlayStation Vita'*, games are being developed and distributed with the 'cross-play' feature that enables the user to enjoy the cross-play game on both the PlayStation 3 and the PlayStation Vita at the user's convenience. These business models will continue to lead the way and adapt to any growing demand for format flexibility. Since there continues to be scope for the market to address consumer demand for format flexibility, and strong evidence that creators and manufacturers are actively serving that demand, it is simply too early to determine whether a broader format shifting exception is actually necessary. Furthermore, introducing a broad exception for format shifting may risk the motivation to continue development of such innovative business models.

Technological Protection Measures

The games industry significantly relies on technological protection measures for a number of reasons, including for protection against copyright infringement and the delivery of many consumer benefits⁹. Any attempt to change the format of a game developed and distributed for a proprietary game device or platform is likely to necessitate the circumvention of such technological protection measures. Furthermore, any attempt to play a format-shifted game on a proprietary game device is likely to necessitate the circumvention of technological protection measures. Accordingly, the introduction of a general format shifting exception is likely to create a number of significant issues with the understanding and operation of the technological protection measures of the Copyright Act.

Should a broader format shifting exception be introduced?

As set out above, the games industry understands the demand for format flexibility and continues to adapt their business models to address this demand. These new business models are able to balance these demands while continuing to work with the proprietary nature of the major game formats and technological protection measures. The introduction of a broader format shifting exception would conflict with the proprietary nature of the major game formats and challenge the effectiveness of technological protection measures. For these reasons, we do not consider that a broader format shifting exception should be introduced.

If there is a consideration that a broader format shifting exception is introduced, it should always be subject to there being no circumvention of a technological protection measure and there being no breach of any end user licence agreement.

Question 9. The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
- (b) should the exception apply to content made available using the internet or internet protocol television?

Time-shifting is not an issue that is currently relevant to the games industry. We look forward to reviewing the submissions on this issue and, if necessary, providing further input in our response to the ALRC's discussion paper.

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Section 47C of the Copyright Act sets out when a user can create a backup copy of a computer program. The proprietary nature of the formats used in the games industry, as well as the use of technological protection measures, prevent this provision from being used in certain circumstances. Notwithstanding this, the objectives of section 47C are being achieved through the ongoing development of new and innovative business models.

⁹ Interactive Games and Entertainment Association's submission to the Attorney-General's Department Review of Technological Protection Measures, 12 October 2012

The growing feasibility and popularity of digital distribution business models have allowed platforms and digital retailers to address the users' desire to back-up content. For example, if a user purchases a PlayStation Vita game through the online PlayStation Store, that user has the ability to re-download that game multiple times if for any reason they accidentally, or intentionally, remove the game from their device. This approach is being shared on other online platforms, including the online computer game distribution platforms 'Steam' and 'Origin'. This approach addresses the issues raised by proprietary platforms and technological protection measures and is an ideal approach to address the user's desire to back-up their computer game content. Since the games industry is actively providing and promoting authorised methods to back-up computer game content, we do not consider it necessary to provide any broader back-up rights in the Copyright Act.

If a broader back-up exception were to be considered as part of the Copyright Act, it should always be subject to there being no circumvention of a technological protection measure and there being no breach of any end user licence agreement.

Online use for social, private or domestic purposes

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

While there are limited examples of how games are being used online for social, private or domestic purposes, there is a growing trend for the creation and distribution of audio-visual content that is derived from a user's gameplay experiences. The best examples of these types of uses include user 'walkthrough' videos and 'machinima' videos.

'Walkthrough' videos are instructional videos designed to guide viewers through a game. In this example, users will use screen-capture software to record themselves playing through a game and then synchronise the recorded video with their own audio commentary. These videos are often shared through platforms such as YouTube and Vimeo and attract a significant number of viewers.

'Machinima' videos are animated films that can be created with the use of a video game. These films use the 3D graphics of games to cinematic effect to create animated films, mini-series, parodies etc. These films have grown in popularity and continue to be distributed online through platforms such as YouTube and Vimeo.

Other than walkthrough and machinima videos, users are also known to simply share videos of their own gameplay sequences online to be viewed for a number of reasons, including by those wanting to research a possible game purchase.

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968 (Cth)* be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

The Copyright Act should not be amended to introduce an exception for the online use of copyright materials for social, private or domestic purposes.

Like many content industries, the games industry recognises the commercial benefits of users sharing their experiences online with others in their social networks. For this reason, certain content creators will actively encourage the creation and sharing of such content by providing a user friendly licence that covers such content. For example, Microsoft has published an express

licence for the creation and distribution of such content¹⁰. While creators may actively encourage the use of their material for social, private and domestic purposes, it is important that such conduct does not interfere with the content owners' interests.

It is therefore essential that content owners are able to maintain control over how their content is being used and shared, including over the Internet for social, private or domestic purposes. The introduction of Google's 'Content ID' program responds to this requirement and recognises the need for content owners to maintain control over how their content is shared over the Internet. Such innovations, and natural market response to such conduct, removes the need to introduce this exception.

The games industry is also concerned about the broad nature of this exception. The exception would cause a significant amount of uncertainty with content owners and users likely to have vastly different perceptions about what types of uses would benefit from this exception. It is important that copyright exceptions are unambiguous to avoid the need test the scope of the exception through costly litigation.

If an exception is introduced for online, social, private or domestic purposes, it should always be subject to there being no circumvention of a technological protection measure and there being no breach of any end user licence agreement. Furthermore, the benefit of this exception must be limited to those users that are sharing such content and should not be available to the intermediaries that benefit, albeit indirectly, from the distribution of such content.

We look forward to considering this issue in more detail once we have reviewed the other submissions on this matter and the proposals that will be set out in the ALRC's discussion paper.

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Since Australia is a party to a number of international agreements which restrain it from introducing exceptions that do not meet the requirements set out in (b), we regard these principles as the starting point for any discussion regarding exceptions. Also, the ALRC must recognise that even 'non-commercial' uses could potentially conflict with the legitimate interests of copyright owners and should therefore be approached cautiously.

In addition to the above, as set out in our response to question 12, any such exception should always be subject to there being no circumvention of a technological protection measure; there being no breach of any end user licence agreement; and the benefit of this exception must be limited to those users that are sharing such content and should not be available to the intermediaries that benefit from the distribution of such content.

Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

The games industry understands that users want to interact and engage with games at a higher level that often demands the use of user generated content. Consequently, games are being developed to incorporate user-generated content in a range of innovative ways. For example, users are able to design and share their own wallpaper patterns in the *Sims 3*, users are able to

¹⁰ <http://www.xbox.com/en-US/Community/Developer/Rules>

design and share game levels in PlayStation's *'LittleBigPlanet'*, and users are able to place a photograph of themselves on the face of an athlete in *FIFA 13*. This approach has developed within the limits of the current copyright laws in a manner that does not undermine the protections afforded by technological protection measures or end user licence agreements. The games industry will continue to develop new and innovative ways to respond to the growing demand for such user generated content features.

The games industry also benefits from a thriving community of game 'modders' who actively develop game mods that enhance the original game's experience. These mods range in size and effect, from smaller mods that may merely introduce new tools or clothes for a game avatar to use, to larger mods that create whole new game experiences. Once developed, these mods are often shared for free with other users who have purchased the original game. There are growing online communities of game modders, particularly for computer games, who create and share game modifications.

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

While game mods may not always fall within the scope of what could be considered a 'transformative use', they provide a useful example of how game content can be created and modified by end users and how the games industry has responded to the issue.

Mods and Games

It is important that the original game's creator or owner maintains the right to control what mods are developed and how they are used, exploited and distributed. Creators and owners invest a significant amount of funds and effort into the development of new game technologies that are often used in future game releases. For example, Electronic Arts' game engine *'Frostbite'* has been developed and used in a number of Electronic Arts' games including *'Battlefield 3'*, *'Need For Speed: The Run'* and *'Medal of Honor: Warfighter'*. It is therefore important that game developers and publishers are able to prevent the distribution of mods that may undermine the business models that have allowed the funding of such new game technologies. Furthermore, publishers must be able to protect themselves from mods that bring the publisher's brand into disrepute. The current copyright law allows developers and publishers to maintain an appropriate level of control over the development of mods.

There is a growing number of developers and publishers who actively encourage the development of mods. Since users will always require the original game to enjoy the game's mods, certain publishers/creators actively encourage modding in order to increase the sales of the original game. For example, the computer game *'ArMA 2'* experienced a significant rise in sales with the release of the game modification *'DayZ'*¹¹. As a consequence of the growing popularity of mods, many computer games are now being released with programs that allow users to easily modify game files. For example, the developers of the critically acclaimed computer game *'Skyrim'* also released the *'Skyrim Creation Kit'* program to encourage user mods. Within the first few months of *Skyrim's* release there were thousands of mods being shared throughout modding communities¹², from mods that simply enhanced the original game's graphics to those that introduce whole new game environments and game mechanics.

¹¹ <http://www.kotaku.com.au/2012/05/pc-zombie-darling-causes-sale-explosion-arma-devs-happy-to-help/>

¹² <http://www.pcgamer.com/2012/10/28/the-25-best-skyrim-mods-2/>

Microsoft also allows for the creation and use of mods by providing a balanced and broadly available licence permission as set out in Microsoft Xbox “Game Content Usage Rules”¹³. While there are many developers and publishers who provide users with express licences or the required tools to create mods, other developers may simply encourage modification through promotions and online communications.

While many publishers and developers may want to encourage the development of mods, there are circumstances where mods simply can not be allowed because such mods would risk undermining the quality of the original game. In particular, mods in multiplayer games could potentially give players an unfair advantage and undermine the carefully designed balance that is critical for an enjoyable multiplayer experience. For example, players in the massive multiplayer online game ‘*World of Warcraft*’ spend a significant amount of time, effort and money to build their game characters, therefore mods of this game are prohibited to avoid the risk of people ‘cheating’ and negatively affecting the game experience for other users. Game mods may also be prohibited if the game depends on a secure environment to create a digital economy or marketplace. For example, the computer game ‘*Diablo 3*’ allows users to trade digital items collected throughout the game for real world currency. Mods for *Diablo 3* have therefore been prohibited in order to ensure that the digital economy and market can not be exploited.

Should transformative use be more freely permitted?

As set out above, game mods may, at one end, be actively encouraged or, conversely, totally prohibited in the games industry; the approach largely dependent on the specific game itself and the business model being adopted by the publisher or developer. In response to market demand, and where actually feasible from a business and technical perspective, the games industry has continually shown their ability to actively encourage game mods and user generated content without the need for an exception. For this reason, and since there are legitimate circumstances where such uses can not be permitted, the Copyright Act should not be amended to provide that game mods do not constitute a copyright infringement. We recommend that content owners and creators should be free to permit or restrict mods and transformative uses in its express licenses and general permissions.

If introduced, how should such an exception be framed?

The evidence does not justify the introduction of this exception. However, we reiterate our general position that any exceptions should be subject to a number of requirements, including that:

- (a) there must not be any circumvention of a technological protection measure;
- (b) there must not be any breach of the end user licence agreement.

In particular, if an exception is considered, the following needs to be taken into account:

- (c) the transformative use must not be distributed, including by any intermediary, for any commercial purposes; and
- (d) the transformative use must not affect the market, including any future market, for the original work.

¹³ <http://www.xbox.com/en-US/Community/Developer/Rules>

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

As set out in our response to question 15, the Copyright Act should not be amended to provide that transformative use does not constitute a copyright infringement.

Question 17. Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Since Australia is a party to a number of international agreements which restrain it from introducing exceptions which do not meet the requirements laid out in (b), we regard these principles as the starting point for any discussion regarding exceptions. Furthermore, as set out in our response to question 15, if the exception is introduced it should be subject to a number of requirements, including that:

- a) there must not be any circumvention of a technological protection measure; and
- b) there must not be any breach of the end user licence agreement.

Question 18. The *Copyright Act 1968* (Cth) provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

Question 20. Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

Question 21. Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Games are created and distributed in digital form and therefore the games industry is generally supportive of enlarging the universe of digital products. However, we do not expect that such digitisation should be allowed if it would undermine the incentives for the creation of new products.

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

Orphan works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Question 24. Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Data and text mining

Question 25. Are uses of data and text mining tools being impeded by the *Copyright Act 1968* (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

Question 26. Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

Question 27. Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

Educational institutions

Question 28. Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

Question 29. Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 30. Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Question 31. Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Crown use of copyright material

Question 32. Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

Question 33. How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

Question 34. Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

Retransmission of free-to-air broadcasts

Question 35. Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

Question 36. Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

Question 39. What implications for copyright law reform arise from recommendations of the Convergence Review?

Statutory licences in the digital environment

Question 40. What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

Question 41. How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Question 42. Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Question 43. Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

Question 44. Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Fair dealing exceptions

Question 45. The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Question 46. How could the fair dealing exceptions be usefully simplified?

While we do not have any comments on this question at this stage, we look forward to reviewing the other submissions on this issue and, if necessary, provide a response within our submission to ALRC's discussion paper.

Question 47. Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

While we do not have any comments on this question at this stage, we look forward to reviewing the other submissions on this issue and, if necessary, provide a response within our submission to ALRC's discussion paper.

Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?

Question 50. Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?

While we do not have any comments on this question at this stage, we look forward to reviewing the other submissions on this issue and, if necessary, provide a response within our submission to ALRC's discussion paper.

Question 51. How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?

While we do not have any comments on this question at this stage, we look forward to reviewing the other submissions on this issue and, if necessary, provide a response within our submission to ALRC's discussion paper.

Fair use

Question 52. Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

The Copyright Act should not be amended to include a broad, flexible exception. The games industry shares a number of the concerns that are set out in the Issues Paper, including the lack of jurisprudence; the need for litigation to determine the scope of permitted uses; the likelihood of higher transaction costs; and the uncertainty of any broad exception's application (which would conflict with Guiding Principle 7 of the ALRC's review).

Throughout our response to the questions raised in the Issues Paper, we have demonstrated that consumers are receiving many of the benefits that would flow from a broad exception through the games industry's development and introduction new and innovative business models. Accordingly, we strongly recommend that the ALRC consider whether there is sufficient evidence to substantiate the introduction of such an exception considering the many problems that such an exception is likely to cause.

Question 53. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Contracting out

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

End user licence agreements are widely used throughout the games industry. These agreements set out the terms upon which game creators or owners are willing to provide users with copies or licences of their games. These terms vary depending on the business model used by the creators or owners and play a critical role with the development and introduction of new and innovative business models.

Agreements that purport to exclude or limit existing or any proposed new copyright exceptions should be enforceable. In an international market, it is critical that international creators or owners, which includes Australian creators, are able to develop new and innovative business models without the risk of such business models being undermined by local copyright exceptions. There are clear examples of business models that would simply not exist if copyright exceptions were able to prevail over end user licence agreements, including those discussed for

the exceptions dealing with back-up copies (see our response to question 10), format shifting (see our response to question 8) and transformative use (see our response to question 15). Any attempt to reduce the enforceability of these end user licence agreements is likely to have a detrimental affect on the development of new and innovative business models and Australia's ability to compete internationally and enjoy the benefits within our own local digital economy.

<p>Question 55. Should the <i>Copyright Act 1968</i> (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?</p>

As set out in our response to question 54, the Copyright Act should not prevent contracting out of copyright exceptions. Freedom to contract is a cornerstone of business and any incursions to such a freedom should be resisted and only contemplated in the most serious of circumstances. If the ALRC proposes to recommend an amendment which would prohibit contracting out of a copyright exception, we request that such prohibition should only apply in limited circumstances and for a limited range of exceptions. When considering the limitations of the prohibition, the ALRC should limit its focus to areas that are attracting significant public concern and avoid any prohibitions that would undermine the development of new and innovative business models.