



Submission to

Australian Law Reform Commission

Subject

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

Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the Australian Law Reform Commission's (**ALRC's**) discussion paper on copyright and the digital economy (**Discussion 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.

Set out below is a brief description of IGEA followed by our detailed response to the Discussion Paper questions and proposals that are relevant to the games industry and IGEA.

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

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

4. The Case for Fair Use in Australia

Proposal 4–1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

IGEA’s stakeholders have varying perspectives on whether a broad, flexible fair use exception should be introduced. For this reason, IGEA will not be submitting on whether such an exception should be introduced.

While there are varying perspectives on whether such a broad fair use exception should be introduced, the industry holds consistent concerns about the ALRC’s proposal, including:

- (a) the proposed fair use exception will create a high level of uncertainty for rights holders and content users, with rights holders likely to suffer the burden and cost of resolving such uncertainty;
- (b) the threat of inconsistency and unpredictability of the exception’s operation and interpretation;
- (c) that in the United States, the most advanced jurisdiction in terms of fair use jurisprudence, there is little agreement as to the contours of fair use and attempts to provide guidance or agree on best practices have been met with limited success; and
- (d) that the scope of the fair use exception should be determined by the legislature, rather than the Courts.

We trust that the ALRC will consider and address these concerns in the final report for this inquiry.

Proposal 4–4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

As set out in our response to proposal 4-1, IGEA’s stakeholders have varying perspectives on whether the fair use exception should be introduced and consequently whether a non-exhaustive list of illustrative purposes should be used in the legislation for such an exception.

While there are different views on whether such a list should be included, IGEA’s stakeholders unanimously object to ‘private and domestic’ purpose being included as an illustrative purpose. Such a broad purpose category will, at the cost of content creators and rights holders, inevitably mislead content users about what is considered to be fair use. As set out in IGEA’s submission to the ALRC’s issues paper for this inquiry, there is little evidence to substantiate the introduction of a private and domestic use exception. Consistently, such a purpose should not be included in the list of illustrative purposes for the proposed fair use exception.

Should the ALRC determine that a list of illustrative purposes is necessary, IGEA suggests that the list be limited to those purposes that, as demonstrated by evidence submitted to this inquiry,

have a significant and indisputable public benefit such as those listed from (a) to (d) in proposal 4-4.

Question 4–1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

As set out in our response to proposal 4-4, IGEA considers the proposed list to be too expansive and therefore cautions the ALRC against including any further illustrative purposes without further public consultation.

5. Third party use

The ALRC states that a third party use might sometimes be considered fair when the third party appears merely to be facilitating an otherwise fair use, such as some types of private and domestic use. The ALRC goes on to state that other factors, however, such as whether the use is transformative, for a commercial purpose, or harms the rights holder’s market, may be more important².

As highlighted in IGEA’s response to the ALRC issues paper, there is a real risk that third party services could be used as a method of storing and distributing infringing content, including unauthorised copies of computer games. Accordingly, the proposed fair use exception must contain a clear and accessible mechanism to ensure that such third party platforms are not being used to facilitate copyright infringement, regardless of whether such platforms are operating for a commercial purpose.

7. Fair Dealing

Proposal 7–4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

IGEA refers to the concerns expressed above in connection with proposal 4-1, and in particular the concerns regarding the creation of uncertainty, inconsistency and unpredictability. Subjecting existing fair dealing exceptions to a broad and indeterminate set of considerations, as a departure from the existing legislative framework would not serve anyone’s interests. IGEA submits that this appears an attempt to shoehorn the concept of fair use into the existing fair dealing framework, and without expressing any views about the desirability of fair use per se, has concerns with this approach for the reasons expressed above.

9. Private and domestic use

Proposal 9–1 The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

As set out in our response to proposal 4-4, while there are different perspectives on the introduction of a fair use exception, IGEA’s stakeholders unanimously oppose having ‘private and domestic use’ as an illustrative purpose in the proposed fair use exception.

IGEA’s response to private and domestic use is more particularly set out in the response to proposal 9-2 below.

² Paragraph 5.3 of the Discussion Paper

Proposal 9–2 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

IGEA does not accept that there is sufficient evidence to support the introduction of a fair dealing exception for private and domestic use. As set out in our response to the ALRC issues paper, the interactive entertainment industry has answered the call for private and domestic uses through new technology driven licensing methods. The market is developing to accommodate user needs outside the existing exceptions and more time is needed to further develop these new business and licensing models.

The introduction of a fair dealing exception for private and domestic purposes would interfere with the development and continued operation of a number of technology driven licensing models that satisfy consumer demand for format shifting and backup as well as innovative business models for game content delivery (such as the free-to-play, freemium, subscription and ad-funded models as detailed in our response to the ALRC issues paper). The proposed exception risks interfering with the operation of such licensing models to the detriment of Australian consumers.

If this law is enacted now, and a standard of fairness is set, it would be very difficult to change in the future. It is important to note that the market has responded in a powerful way to address the needs of consumers to make broad uses of content, including through the offering of licensed cloud storage services, catch-up television and other innovative content delivery services, which have in some ways eclipsed the current private use exceptions. We therefore need to continue to ensure that industry is given sufficient time to adapt and accommodate the demands of the digital economy before a new and possibly perpetual standard of fair private and domestic use is introduced, which would disrupt these efforts, sow confusion amongst consumers and depress incentives to invest in and experiment with, emerging usage models.

10. Transformative Use and Quotation

Proposal 10–1 The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

IGEA supports the ALRC’s decision not to propose a separate exception for transformative use, even in the absence of a fair use exception.

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

As set out in our response to proposal 4-2, IGEA does not necessarily agree with ‘quotation’ being included as an illustrative purpose in the proposed fair use exception.

IGEA’s response to quotation is more particularly set out in the response to proposal 10-3 below.

Proposal 10-3 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

IGEA does not accept that there is sufficient evidence to support the introduction of a fair dealing exception for quotation. As explained in our response to the ALRC issues paper, the industry utilises a variety of licensing measures to encourage the widespread creation of user generated content therefore addressing the need for a 'quotation' exception.

The introduction of a separate fair dealing exception for quotation would also limit the development of markets that license such quotations. For example, clip licensing of video games is a developing market that would be eviscerated by the proposed quotation exception.

IGEA suggests that 'quotation' is better addressed through the concept of 'substantial part' as a test for infringement rather than through a specific quotation exception. Furthermore, quotation is likely to be accommodated through other exceptions, such as fair dealing for criticism or review.

17. Contracting Out

Proposal 17-1 The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

Consistent with our submission to the issues paper, IGEA rejects this proposal. Parties should be entitled to contract freely and the interference with such freedom should only be allowed in the most serious of circumstances.

Australia already has consumer laws that protect consumers against unfair contracts.

The ALRC has stated that it is concerned about the possibility of unintended effects of their proposal and it remains interested in further comment. The interactive entertainment industry is continuously looking for ways to engage their users and it is not unusual for such engagements to be subject to terms and conditions that would exclude the benefit of a fair use exception. For example, game publishers often send game art assets to users encouraging them to create user generated content. These types of promotions would require the user to agree to certain terms and conditions, such as having the user agree not to use the game art assets in any way that would bring the publisher's name or brand into disrepute. This condition must be enforceable, even if it would likely interfere with a fair use exception.

The ALRC notes that the proposal, if implemented, will not affect contracts governed by foreign law. If enacted, the proposal would therefore place Australian businesses at a competitive disadvantage to foreign businesses who aren't subject to this limitation.

IGEA rejects this proposal in its entirety. If contracting out is to be considered at all, we strongly encourage ALRC to limit it to exceptions for libraries and archives – a well defined circumstance when the contracting out proposal can operate. Extending this proposal to the overreaching operation of fair use or fair dealing, even for the purposes listed, is problematic.

ALRC's comments on TPMs

IGEA has submitted to the Attorney-General Department's Review of Technological Protection Measure (**TPM**) Exceptions Made Under the Copyright Act³. In our submission, we strongly opposed any expansion of the TPM exceptions, including for the fair dealing exceptions in the current Copyright Act or for backup purposes.

The terms of reference clearly state that the ALRC should not duplicate work being undertaken on a review of exceptions in relation to TPMs, yet throughout the Discussion Paper there are number of statements, opinions and proposals that directly relate to TPMs, including the following:

- Paragraphs 9.74 – 9.76
- Paragraphs 11.127 – 11.130
- Paragraphs 17.125 – 17.131

These comments are outside the scope of the ALRC's terms of reference and should not be included within the ALRC's final report. Enforcement is not within the ALRC's terms of reference and for this reason the ALRC has not provided any proposals or comments relating to enforcement. We would expect that the limitations in the terms of reference be similarly respected and applied with respect to comments aimed at TPMs.

³ <http://www.ag.gov.au/Consultations/Documents/InteractiveGamesandEntertainmentAssociationsubmission2.pdf>