



interactive games & entertainment association

**Submission to the New Zealand Ministry
of Business, Innovation & Employment
Review of the Copyright Act 1994**

April 2019

Interactive Games & Entertainment Association

Table of Contents

Introduction	2
The New Zealand video games industry	4
<i>Socio-economic significance of video games</i>	4
<i>The New Zealand video games industry</i>	4
<i>Importance of copyright</i>	5
Comments on Part 4 of the Issues Paper: Rights	7
<i>Protected works</i>	7
<i>Data</i>	7
<i>Ownership of rights</i>	8
<i>Artificial intelligence and copyright</i>	9
<i>Reversion of rights</i>	10
<i>Copyright term</i>	11
<i>Communication works</i>	12
<i>Use of the term ‘object’ in the Copyright Act</i>	12
<i>User-generated content</i>	13
<i>Technological protection measures</i>	14
Comments on Part 5 of the Issues Paper: Exceptions and Limitations	17
<i>Fair use</i>	17
<i>Exceptions for criticism, review, news reporting and research or study</i>	17
<i>Technical processes: cloud computing</i>	18
<i>Non-expressive use of copyright works (data mining and the creation of artificial intelligence)</i>	18
<i>Use of quotation</i>	18
<i>Format shifting of sound recordings</i>	19
<i>Exceptions relating to computer programs</i>	20
<i>Contracting out</i>	21
Comments on Part 7 of the Issues Paper: Enforcement of Copyright	22
<i>Proving copyright exists in a work and who owns that copyright</i>	22
<i>Cost of taking legal action</i>	22
<i>Infringing file sharing regime</i>	23
<i>Additional enforcement measures</i>	24

Introduction

The Interactive Games & Entertainment Association (IGEA) is the peak industry association representing the business and public policy interests of New Zealand and Australian companies in the interactive games industry. Our members publish, market, develop and distribute interactive games and entertainment content and related hardware. See [here](#) for information on our members who we represent.

IGEA recognises that there is a need to review and modernise the Copyright Act 1994 (the Copyright Act) in light of the significant changes that have occurred in the content, media and digital landscape in New Zealand and around the world over the past two decades. We appreciate the opportunity to provide a submission to the Ministry of Business, Innovation & Employment (MBIE) and congratulate MBIE for preparing a considered and balanced Issues Paper. In line with the purpose of this first consultation process, this submission focusses on providing MBIE with a better understanding of the New Zealand video games industry and the copyright issues that are most important to the businesses that we represent.

This submission will address the key topics and questions relevant to our industry that are raised in the Issues Paper in chronological order. Where we have not addressed a specific topic or question in this submission, it should not be taken that we have no views, but rather than we considered it to be more constructive to provide our views in response to any specific proposals outlined in the subsequent Options Paper. Many of the views outlined in our submission were also raised on the 1 March 2019 workshop in Wellington that we attended. IGEA is also a member of WeCreate, which represents New Zealand's diverse creative sectors, and while our views as articulated in this submission should take precedence, we are pleased to be able to contribute to its submission.

We hope this submission is valuable to MBIE. We look forward to further consultations and discussions and providing a response to the Options Paper in due course.

The New Zealand video games industry

Socio-economic significance of video games

Video games have increasingly become a core component of New Zealand's society and culture as well as an important and growing segment of New Zealand's future-looking economy.

New Zealanders love to play video games. Research conducted by IGEA in 2018 found that two out of every three New Zealanders played games and that 98 per cent of homes with children had video games. Video games are not just played by children, with the average age of a Kiwi gamer being 34 years old and 44 per cent of those aged 65 and over also game players. In fact, older people are amongst the faster growing demographic of the game playing community. IGEA's full research on the people who play games in New Zealand and why they love to game is available [here](#).

Economic research commissioned by IGEA found that New Zealanders spent \$452.3 million on video games and games hardware in 2017. Digital sales of games rose 12 per cent to \$334 million and between 2013 and 2016 grew almost 20 per cent year on year. Physical retail sales (boxed game) continue to be important and came in at \$118.3 million in 2017. Spending on consoles and accessories also grew, rising 10 per cent and six per cent respectively. IGEA's full research can be found [here](#).

The New Zealand video games industry

The video games industry in New Zealand, which includes all the businesses involved in the video games supply chain, is one of the country's most important creative and technology sectors.

Video games businesses in New Zealand can broadly be placed into three categories: publishers, distributors and developers. Publishers generally market and distribute games that they or other parts of their broader organisation develop. Distributors market and distribute third party games, after having acquired the legal rights to sell those games in New Zealand. Developers create their own games which they bring to market themselves or through a publisher or distributor. Our members include most of the major game publishers and distributors, both digital and physical, that represent the New Zealand market and many have a strong presence in the community, including local staff, offices and warehouses.

We also support New Zealand's game development industry and work closely with the New Zealand Game Developers Association (NZGDA) which

represents local developers. Research conducted by the NZGDA found that New Zealand game developers earned \$143 million in the year to 31 March 2018, up 43 per cent from the previous year. Crucially, 93 per cent of that revenue came from overseas, highlighting the vital importance of video games as a creative, high-technology export that is part of New Zealand “new economy”. Local studios also employed 550 full-time staff, an increase of 10 per cent, and the game development labour force is expected to continue to grow as existing studios expand and new entrants arrive. The NZGDA’s research can be found [here](#).

Importance of copyright

Just like books, music, film, TV and other creative sectors, copyright-protected content underpins New Zealand’s video games industry.

A strong intellectual property framework that supports investment in creation is vital to the success of the industry globally and in New Zealand. Video games rely on copyright protections for both software and non-software elements, such as the underlying code, gameplay visuals, musical score and the speech and likeness of characters. In recognising and supporting the Government’s work in modernising New Zealand’s copyright law, our priority is to ensure that the copyright protections that have worked effectively to grow our industry and protect the content that businesses own are retained, while engaging in constructive dialogue on what reforms may be appropriate and needed in the public interest.

Publishers and distributors are vital to New Zealand as they ensure that the video games that New Zealanders most love to play are available to them. They also help to ensure that New Zealand-made games are funded, developed and made available in physical and digital forms to consumers, not only in New Zealand but markets all around the world. Publishers and distributors often incur significant costs and accept high risks to bring games to New Zealand or to obtain and exercise the right to distribute games throughout the country. Strong copyright laws help ensure that New Zealand remains an attractive place for publishers, distributors and developers to invest and do business in.

Video games are becoming increasingly expensive to develop, publish and distribute, both financially and in terms of time and effort. Many games cost tens of millions of dollars or more to make, with these costs usually borne by both the developer and the publisher and, indirectly, the distributor. In addition to marketing, publishers and distributors are often responsible for

manufacturing (for physical product) and localisation. The video games market has also become highly competitive, particularly since the rise of mobile gaming, which can often increase marketing costs and elevate the risk of commercial losses.

A modern and effective copyright scheme is therefore vital for ensuring that developers, publishers and distributors can protect the fruits of their labour and generate commercial returns for their businesses. In particular, the industry continues to face threats from piracy, which unfortunately continues to occur and threaten the billions of dollars the industry invests in new intellectual property each year. While we do not have specific New Zealand statistics, the Australian Government conducts an annual survey of piracy in that country. The research found that around a quarter of Australian gamers continue to pirate games, a proportion that has remained relatively steady over the past four years but appeared to increase in 2018 to a third. The full research for 2018 can be found [here](#). In addition, legal parallel importation and the increased ease of New Zealanders to “grey import” copies of video games from overseas also provide for an increasingly challenging environment for many local owners of video game copyright.

The complexity of video games compared to other forms of content can make their copyright particularly difficult to protect. Video games can be worked on by many hundreds or thousands of different people and are essentially complicated bundles of copyright. As video games as a medium continues to evolve, so too do the implications from a copyright perspective. New Zealand’s existing copyright laws were written before video games achieved both the complexity and popularity that they have now. It is therefore essential that any reforms that are undertaken properly recognise games as an important form of content and do not, as an unintended consequence, erode the ability of video game rights holders to protect their copyright.

Comments on Part 4 of the Issues Paper: Rights

Protected works

As previously mentioned, video games are amongst the most complex of artistic works in terms of their copyright, which extends to both the software and non-software components of games. Under the Copyright Act, video games are not currently a specific category of works that are protected. Rather, a game's underlying code and use of written or spoken words are protected as literary works while screenshots, visual footage, sound and music of a game might variously be protected separately as artistic, film, sound recording and musical works.

The Copyright Act does not specifically address video games more broadly, except under the categories of computer programs or computer-generated works. But video games are unique from most other kinds of computer programs due to the presence of so many creative elements, with some games containing hundreds of hours of cinematic-like visuals, dialogue and music. Furthermore, while the Copyright Act recognises and highlights the different elements of copyright in a film (specifying, for example, that "a scenario or script for a film" is a dramatic work) no such recognition is provided around video games.

While we are not aware of any issues that have arisen because of the fragmented nature of how the various elements of video games are treated under the Copyright Act, there is potential for complexity and confusion. This risk may increase as video games continue to evolve through technological change faster than most other types of protected works. While we would welcome further discussions around new or amended categories of protected works, we would as a minimum support clarifying the definitions of the existing categories of protected works to more clearly address the various types of copyright within video games.

Data

Q7. Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?

Many video games contain millions of lines of code comprising many tens or hundreds of gigabytes of data. As part of their code, video games may rely on a range of databases and datasets. These data sets may be 'fictional', such

as the unique characteristics of playable characters, or may be ‘real’ such as player statistics in a sporting video games. While we are unaware of any problems that have arisen in relation to data sets contained in video games, it is important that they remain protected by copyright like any other piece of a game’s code. Further, if data sets are replicated outside the game, such as published on a game’s website for guidance, it should also remain protected.

More generally, we also note the discussion in the Issues Paper around the relatively strong protections afforded to data compilations in New Zealand compared to many other countries and do consider there are valid questions around the risk of inadvertently locking up or preventing access to some kinds of underlying data that one would reasonably expect to be open. As also noted in the paper, data is becoming increasingly important for identifying, acting on and being improved for commercial opportunities. This includes the development of video games, where independent game developers in New Zealand may find innovative uses of available data sources.

Further, larger development studios are also starting to use machine learning for game development. For example, many “AAA” video games rely on large open worlds to provide new spaces for players to explore. However, creating such large levels and worlds is resource-intensive when crafted completely manually. As a result, developers are starting to leverage existing data, such as large maps of real-world terrain to help artificial intelligence (AI) learn how to create realistic and interesting terrain automatically. In another example, the video game company Ubisoft is currently collaborating with Google and The British Museum through the [Hieroglyphics Initiative](#) to identify whether machine learning can be used to translate the hieroglyphics of ancient Egypt. These kinds of innovation are only possible if the underlying data is readily available and accessible.

For these reasons, we would support consideration of a more sensible approach to the protection of data compilations including, if needed, a more nuanced ‘skill, effort and judgement’ test.

Ownership of rights

Q8. What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

We have not identified major issues with the way the default rules for copyright ownership work in the context of video games. The video games industry relies on complex software works, the development and creation of which can

involve hundreds if not thousands of individual creators. Video games are therefore not like most other kinds of creative works, such as publishing, music and, to an extent, film where there are a smaller number of people involved in creating a piece of content. Currently, the copyright of the underlying game by default belongs to the author – the person who ‘created’ the work. This often means the developer, publisher or both, depending on the specific arrangements of individual projects.

Artificial intelligence and copyright

Q9. What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?

There is a rich history between AI and the video games industry, with some of even the earliest video games ever created containing elements of AI. The use of AI in video games is becoming more sophisticated and innovative and we have already given an example of how video game development studios have been using machine learning to help develop new levels and worlds. Looking ahead, while we consider that developing entire games through AI may be further off than, say, writing simple stories or songs with AI, it is likely that more and more elements of games may be developed with AI assistance in future. We are also aware of [research](#) where AI and machine learning has been used to build primitive games, with much more likely to be possible in the coming years.

The Issues Paper notes that the definition of ‘author’ in the Act requires the author of a work to be a natural person (a human) or a body corporate (such as a company). It also notes that in the case of computer-generated works, the author is the person who made the arrangements necessary for the creation of the work (generally the computer programmer or the programmer’s employer). Content created by AI raises novel questions and some [commentators have argued](#) that copyright that would otherwise be granted to the AI should be granted to the person who built or made the operation of the AI possible (or, in the context of a work-for-hire arrangement, the person who hired that person). As AI technology will continue to evolve and raise ongoing questions around authorship, we recommend that MBIE continue to liaise closely with industry on any policy considerations and hold dialogue with other countries who are similarly considering whether or what reforms are needed.

Another important question that has been raised in policy discussions around AI and data relates to where a game is designed with the aid of machine learning that ‘copies’ a style learned from data or data compilations. Any copyright restrictions on that data may raise uncertainty or at least a lack of clarity surrounding the copyright over works created through adaptation of that data. As a practical example, a game developer may build an AI to analyse surrealist art (some of which may be subject to copyright) to create a game that exhibits a similar art style. An AI may similarly use data mining to compile music and moving images from the internet to create a new work.

Given the uncertainty around the future scale and precise uses of AI, we are still considering our position on this issue surrounding copyright, data mining and machine learning. Some of our members favour a copyright framework that is broadly supportive of and provides clarity around the use of data by AI, arguing that the use of data for training AI is a positive example of non-consumptive and non-expressive adaptation of that data. However, some other members consider that further exploration is needed and it is still too early to form a fully informed view one way or another.

Similar to our views above, we would recommend that MBIE further investigate approaches that are being considered overseas to inform options for the New Zealand context. For example, the proposed Singaporean model (which would create a general data mining exception for both commercial and non-commercial purposes subject to lawful access to copyright-protected works) is already identified in the Issues Paper and provides a useful starting point for further discussion. We would be happy to continue discussions with MBIE on this topic in the following months and hope to be in a position to further articulate our views in our response to any specific proposals in the Options Paper.

Reversion of rights

Q11. What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?

Reversion of rights is not currently a live issue for the New Zealand video games industry. We are not aware of any cases in New Zealand of any game developers who have transferred the copyright of their games to a publisher and have subsequently sought to have their copyright assigned back to them.

Published video games, particularly those distributed digitally, generally do not fall “out of print” like physical books might. They will generally remain available for as long as there is a market for them and often even when their player bases become very niche. When a publisher invests in the copyright for a game, it is making a bet that the game is not only popular in the short term, but could see a resurgence years or even decades after its initial release. We have already seen this kind of resurgence occur as a result of an upswing in retro games as well as re-releases on new consoles and subscription services. For an article exploring the links between retro games, nostalgia and wellbeing, please see [here](#).

We also note that unlike traditional literary works, video games comprise complex software that can involve hundreds if not thousands of individual creators. This raises real questions about how reversion of rights could practically apply to video games, particularly given the fluidity of development studios. Similarly, we note that in the United States, where a form of reversionary rights exists, conflicts between members of the estates of deceased authors have prevented publishers from being able to deal with them effectively.

Speaking on behalf of video game publishers, we are not aware of any need in the games industry for a mechanism of reversion of rights and we would have concerns with its introduction as it has the potential to interfere with their ability to earn revenue from their long-term investments. We believe that any potential objectives of reversion of rights relate to matters that should be best left to the parties involved in a commercial relationship and the arrangements they have determined to be most appropriate. However, should reversion of rights be considered, it should only vest after a very long period of time and in limited circumstances where a publisher is not exploiting and has no plans to exploit the copyright.

Copyright term

We note that the length of copyright for the different categories of protected game content varies, but that the code that underpins games are literary works which expire 50 years after the ‘author’ dies. As previously discussed, the economic rewards from video games can often extend decades after their release, particularly given the success of retro games, inclusion of games in streaming services, re-mastering of games and re-releasing of games on newer consoles. In this environment, the current length of copyright for games should not be reduced and we note the analysis in the Issues Paper that this could not be done without breaching New Zealand’s international obligations.

If anything, there is an argument for raising the length of copyright to 70 years for consistency with global standards, noting that 70 years is the norm across the European Union and in the United States.

Communication works

Q19 What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

While it is unlikely that video games would traditionally fall within the copyright category of communication works, defined as the transmission of content, it is possible that newer methods of playing games may do so in the future. For example, some gaming platforms are experimenting with new and innovative ways to deliver games to consumers, such as streaming games, enabling games to be played from the cloud and virtual/augmented/mixed reality gaming. An example is Sony’s PlayStation Now, which allows the player to stream a library of games directly to their device, and Google’s newly-announced video game streaming platform Stadia. Should New Zealand’s laws continue to provide rights to transmissions in general as a category of protected work in their own regard, this right should logically extend to streamed video games.

On the other hand, the modern practices of traditional streaming of video game footage raises some interesting questions for the concept of ‘communication works’. Currently, gameplay is live-streamed on services like Twitch or uploaded and broadcast on demand on platforms like YouTube, including esports competition and “streamers” who play and talk about games to their viewers. First, the concept of ‘communication works’ is fairly unique to New Zealand, so it creates a scenario where a streamer may be given copyright to their content in this country but nowhere else. Second, the copyright for gameplay footage that is broadcast in this way is generally owned by the game’s publisher, who may not have necessarily given express permission for use of the footage. While neither of these have raised major issues for us to date, they may be relevant for considering the role of ‘communication works’ in a modernised copyright framework, if kept at all.

Use of the term ‘object’ in the Copyright Act

Q20. What are the problems (or benefits) with using ‘object’ in the Copyright Act? What changes (if any) should be considered?

Copyright-infringing video games often, if not mostly, exist as digital rather than physical copies (although we often see pirated games sold in physical emulator consoles too). They can also exist in multiple digital formats, given the different platforms and consoles on which games are played. We support changing the definition of ‘object’ so that content can infringe copyright irrespective of its format or medium in which they exist or the way they are distributed and accessed.

User-generated content

Q22. What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

We are not aware of any problems with how the Copyright Act applies to user-generated content.

While we agree that much user-generated content is still created by non-professionals who do not expect to make money from them, there has been a blurring of lines in recent years between non-professional and professional user-generated content. A significant volume of the most popular kinds of user-generated content created around the world is games-related, such as game streams, reviews and discussions. There are likely thousands of people who are either professionally or semi-professionally creating game-related content, including on YouTube (many of the most popular YouTube channels in the world are games-related) and on live streaming platforms like Twitch which are dedicated to gaming communities and esports. Many video game streamers and influencers do what they do as their careers and some can make hundreds of thousands of dollars or more a year.

The video games industry has an important but flexible and often informal relationship with user-generated content creators. Many game publishers appreciate passionate communities that are built around their products and actively encourage the inclusion of gaming footage in user-generated content. They may provide permission to do so in a game’s end user license agreement (EULA) and some even provide a built-in functionality to make it easy to share gaming content online. For many other publishers, even if they do not grant express permission, they may choose not to take action to enforce their copyright.

In addition to streamed or broadcast user-generated content, many games also enable the community to participate in the activity of ‘game modding’ – or the modification of games. These kinds of content rely heavily on copyright-

protected gaming content, such as game footage and other artwork. Some kinds of community-driven modding is supported by industry, with some publishers utilising a variety of licensing measures to encourage the widespread creation of user-generated content.

In addition to the express or implied permission of copyright holders, user-generated content creators can rely on existing copyright exceptions, such as for criticism or review, to use game content. However, while copyright exceptions may apply to some kinds of user-generated content, some users may not be savvy about or be able to practically navigate the boundaries of such exceptions and could mistakenly rely on them to 'legitimise' infringing activities. This is an issue to be considered in the review's consideration of copyright exceptions.

There must also be limits to the ability of user-generated content creators to use game content. Publishers have a prerogative to be able to protect their copyright and there are many reasons they may need to do so. For example, footage from a child-friendly game may be used in an adult, offensive, inappropriate or illegal piece of user-generated content that could cause significant harm to the copyright owner. Furthermore, some kinds of game modding has been commercialised to the detriment of copyright holders, such as through various 'retro consoles' that come preloaded with unlicensed and infringing games. While moral rights issues may also arise with the former, they are complex and uncertain (the Issues Paper notes that moral rights have not been enforced in the courts), and general copyright enforcement may be the most flexible, effective and appropriate way to deal with these challenges.

Technological protection measures

Q28. What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

Q29. Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

We generally do not support copyright exceptions for circumventing TPMs.

The video games industry continues to suffer from copyright infringement including piracy. Copy control TPMs (TPMs that prevent the duplication of games) are imperative to the video games industry and it is vital that the Copyright Act continue to prohibit people from facilitating TPM circumvention. Copy control TPMs are arguably the most important mechanism available to

protect copyright owners in our industry against infringement and have arguably given video games an advantage over the film, TV and music industries in our collective battles against piracy. Copy control TPMs are becoming increasingly sophisticated and rather than simply not allowing a copyright-infringing copy of a game to be played, some use the opportunity to educate or at least send a message to copyright infringers. Please see [this article](#) for some examples from Australian game developers.

Access control TPMs (TPMs that prevent or restrict access to games) also help to prevent copyright infringement and by using different mechanisms to copy control TPMs, they provide a second layer of protection against increasingly-sophisticated copyright infringers. In addition, access control TPMs underpin the fundamental security of games, including protecting personal information and enabling real-time software updates, and facilitate a range of safety features on games such as parental locks, time-based controls (eg. time limits) and region-specific ratings and content warnings. Game publishers already implement access control TPMs in as least intrusively a way as possible and, just from a safety perspective, we believe the benefits significantly outweigh any possible disadvantages for consumers.

Access control TPMs are also important to the innovation of video game business models. They help to enable more innovative ways of delivering games like streaming to occur. They also help to encourage the availability of different and more varied product options, including lower cost 'standard' versions of games for players on a budget, in addition to full or premium versions of the game. In addition, access control TPMs benefit consumers by encouraging publishers to safely release free, trial or 'beta' versions of games knowing that they can still protect their copyright after the trial period has ended. Finally, access control TPMs encourage localisation and enable games to be tailored for different geographical regions.

We argue that the exclusion of access controls from the definition of TPMs needs to be reconsidered. The currently wide exclusion (ie. not just limited to libraries and museums etc.) encourages TPM circumvention more broadly. There is a range of risks to TPM circumvention, including to families who may be endangered by the disabling of safety features and parental controls made possible by access control TPMs. TPM circumvention might also lead to hacking into the servers and networks of game companies and platforms. This poses significant security risks not only to these businesses but to the data of their game players whom they protect, including New Zealand businesses and businesses that hold data on New Zealanders. For example, in 2018 the Federal Bureau of Investigation (FBI) in the United States [arrested](#) a Serbian-

Italian hacker who obtained unauthorised access to Electronic Art's servers, gaining access to sensitive commercial data.

Comments on Part 5 of the Issues Paper: Exceptions and Limitations

Fair use

The question of fair use is complex and, if it is to be considered in New Zealand, significant and thorough further consultation with stakeholders will need to be carried out. The complexity is reflected in IGEA's position on this issue. While some of our members consider that fair use is not necessary and will increase uncertainty around the permitted uses of copyrighted content, other members support fair use and acknowledge that in the United States the application of fair use principles has supported content creation.

Rather than covering fair use in detail in this submission, we will instead respond to any of MBIE's specific proposals on the question of fair use that are outlined in the subsequent Options Paper.

Exceptions for criticism, review, news reporting and research or study

Q31 What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

As previously discussed, there are many professional and semi-professional user-generated content creators who draw heavily from game content, such as for game streaming, review and discussion. Many games also enable the community to participate in the activity of 'game modding'. As covered in our response to Q22, we believe that user-generated content creators can already rely on existing exceptions to use copyrighted material, such as for criticism or review. The video games industry also utilises a variety of licensing measures to encourage the widespread creation of user-generated content.

We are not aware of problems that user-generated content creators have encountered to legally use video game content, including to make content that provides them with commercial gain. Specifically, we are not aware of any problems with how the existing exceptions for criticism, review, news reporting and research or study are operating, or that they are too narrow or limited in scope.

Technical processes: cloud computing

Q36. What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

As previously discussed, the games industry is increasingly utilising cloud computing for game storage and game streaming purposes. There has been significant media speculation about new cloud-based gaming services being developed as the games industry continues to innovate better and faster ways of delivering games to the public.

While we are not aware of practical roadblocks in New Zealand's existing copyright framework that have impeded the use and adoption of cloud technology, we acknowledge that it also provides limited certainty about whether and to what extent cloud computing services can lawfully operate within the country. We note that some copyright frameworks overseas, such as in Singapore and Japan, have specifically introduced copyright exceptions for cloud computing to address this uncertainty. Should the Government consider a specific exception for cloud computing as part of modernising its copyright framework, it should be carefully defined and make clear that the exception should not legitimise illegally-copied content that is stored on the cloud.

Non-expressive use of copyright works (data mining and the creation of artificial intelligence)

Q38. What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

Please see our responses to questions 7 and 9 above for a discussion of our views on copyright issues related to data mining, machine learning and AI in the context of the video games industry.

Use of quotation

Q40. What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?

We note the discussion in the Issues Paper highlighting the fact that section 42 of the Copyright Act permits the use of quotations or extracts but only for the purpose of criticism and review. While we understand that section 42 is useful for user-generated content creators who, for example, review video games, even if its scope was broadened we do not anticipate that it would be useful for esports or streamers who generally rely on extended gameplay footage. However, we note there are arguments for broadening section 42 to include some other limited uses where there may be sufficient public benefit, like education.

More generally, we note that commercial licensing arrangements have been established across many industries, including music, publishing, sport and, to a growing extent, video games. While the commercial markets for ‘clip licensing’ of video games is still emerging, it could become a vital revenue source for the industry in future. A broad-based exception for quotation could potentially eviscerate this market.

Format shifting of sound recordings

Q52. What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?

The games industry has responded to the demand for format flexibility and has adapted its business models accordingly, with many games now being developed and distributed in formats that can be enjoyed on a number of devices. For example, the New Zealand-created game *Path of Exile* is currently already available on PC, Xbox One X and PlayStation 4. We believe that the unique business models of games means that the objective of format-shifting is already being met.

The general availability of games across platforms notwithstanding, the industry has developed in a way where some games are only available on certain devices. For example, most gaming consoles have ‘marquee’ titles that are exclusively available on their consoles in order to increase their marketability and underpin the hundreds of millions, if not billions, of dollars that are needed to develop them. It also encourages console manufacturers (often called first party developers) to also contribute to the game development industry and to invest in game studios and development projects.

We are not aware of any problem or need for the current exception for format shifting of sound recordings to be extended to video games. If a broadened

exception for format shifting of video games existed, we would be concerned about the risks of known and unknown misuse of this exception for copyright infringement, as demonstrated by the example previously raised of various ‘retro consoles’ that come preloaded with unlicensed and infringing games. Given the complexity of format shifting games, the exception would most likely be misused by professional copyright infringers and the infringing copies they sell for illicit commercial gain could have serious integrity issues including malware and data security vulnerabilities.

Our broader views notwithstanding, if museums or galleries argue for a limited format shifting exception for legitimate and necessary archiving purposes, we would not oppose it.

Exceptions relating to computer programs

Q56. Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?

We are not aware of any issues arising from the existing exceptions relating to computer programs, nor any evidence that these exceptions should be changed or expanded. The ongoing innovation and popularity of digitally-distributed games has allowed platforms and retailers to address users’ desire to back-up content. For example, in many if not most cases, users already have the ability to re-download games multiple times if, for any reason, they accidentally or intentionally remove a game from their device, primarily due to the industry’s use of TPMs. Often this is achieved by linking purchases to a game player’s account, giving them ongoing access to that game across any compatible device.

The proprietary nature of the formats used in the games industry, as well as the use of TPMs, will often prevent the backing up of games through other means. This is to protect against copyright infringement and, as discussed in the previous response, the risk of infringing copies being sold with serious integrity issues including malware and data security vulnerabilities. If a broader back-up exception were to be considered, it should always be subject to there being no circumvention of a TPM and no breach of any EULA.

Contracting out

Q58 What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?

As a general principle, most of our members see benefit in the flexibility currently available to video game copyright owners to limit or modify copyright exception. In its report [Copyright and the Digital Economy](#), the Australian Law Reform Commission (ALRC) acknowledged the argument that freedom of contract helps to protect the integrity of work and the economic interests of copyright owners. The ALRC noted concerns that limitations on contracting out threaten freedom of contract, the role of contractual terms to provide clarity and certainty for copyright users, and that limiting this freedom may have unintended consequences.

Like many other kinds of software, the video games industry has moved increasingly to the licensing of games to players and the use of EULAs is a crucial part of this. Video game copyright holders may rely on their freedom to contract out through specific terms of licensing agreements to help protect their interest, including against the misuse of copyright material. For example, the publisher of an educational video game aimed at children and their parents and guardians may have legitimate concerns with the use of the content of that game for use in certain inappropriate contexts, even though it would arguably fall within the scope of an existing copyright exception. Specific terms of licensing agreements may also be needed to apply geographical or platform restrictions to reflect digital business and distribution models.

Reducing the enforceability of EULAs may also have a negative impact on the gaming community and its ability to interact with games and each other. EULAs increase the willingness of games companies to allow gameplay screenshots or footage to be used in user-created content and to allow gamers to participate in 'modding', game testing or other collaborative activities that the gaming community appreciates and enjoys. Currently, of the creative industries, the video games sector arguably has the most 'open' stance towards the use and adaptation of their content, and EULAs are central to this. An unintended and counterproductive consequence of limiting the freedom to contract out could be a reduction in the willingness of the creators and owners of games to innovate and experiment with new business models and ways of sharing their content.

Comments on Part 7 of the Issues Paper: Enforcement of Copyright

Proving copyright exists in a work and who owns that copyright

Q76. How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?

We consider that there could be merits in introducing a voluntary registration regime to assist copyright owners to enforce their copyright, as long as registration is not mandatory and the absence of registration is not prejudicial to copyright owners.

The cost of registration should be reasonable and affordable and, apart from any applicable fees, the administration of any copyright register should not be subject to cost-sharing with industry. Registration should also be easy to use and we note that the United States Copyright Office is currently undergoing a major [modernisation process](#) of its copyright registration system.

Cost of taking legal action

Q79 Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?

Despite the prevalence of copyright infringement, copyright owners may choose not to take legal action against copyright infringement for many reasons. These include the costs of identifying piracy, cost of legal action, limited potential for damages (particularly against end users) and the limited likelihood of success (particularly against overseas websites and services). Legal action by video game copyright owners, where it does occur, often takes the form of 'cease and desist' letters.

A radically improved infringing file sharing regime, as discussed below, would theoretically reduce one of the cost barriers for copyright owners wishing to take action against copyright infringement. However, TPMs are a more important mechanism for fighting copyright infringement than enforcement action for video games and, as previously discussed, it is vital that the Copyright Act not be changed in any way that undermine their practical effectiveness.

Infringing file sharing regime

Q82. Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?

Q83. Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?

Q84. What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?

The infringing file sharing regime provides a potential option for copyright owners and we are not arguing for its removal. However, in reality, the regime is less useful and important than other tools against piracy such as TPMs. As a matter of practicality, we would argue that ISP-driven copyright take down notice schemes that are underpinned by New Zealand’s copyright safe harbours are inherently faster, more effective and cheaper than utilising the infringing file sharing regime.

Peer-to-peer file sharing and other online technologies are still being used to infringe the copyright of games. As we’ve previously outlined, a 2018 survey conducted by the Australian Government found that around a third of Australian gamers pirated games. This is consistent with another [survey](#) conducted in 2016 where around a third of PC gamers admitted that they pirate games. The European Commission maintains a watch list of the different kinds of online and physical marketplaces that are reported to engage in counterfeiting and piracy, which can be found [here](#).

As discussed, there are a range of barriers to games publishers taking legal action against copyright infringement, including the cost of legal action and limited likelihood of success. For the infringing file sharing regime, there is a cost of \$275 (\$25 per notice plus a cost of \$200 for a claim) excluding the significant costs that need to be incurred to identify and monitor copyright-infringing behaviour in the first place. It is also no large secret that technological protections that help to mask the identity of online actors such as Virtual Private Networks (VPNs) undermine the effectiveness of the regime.

These costs and limitations make claims against individual consumers uneconomical, while claims against piracy websites and platforms are challenging to progress given that they are mostly hosted overseas. Any

decision taken by video game publishers operating in New Zealand not to use the regime is simply a reflection of these realities, rather than any implied acquiescence to piracy.

Additional enforcement measures

Q85. What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?

We note that site blocking order schemes have been implemented in several countries across the world, including in Australia since 2015. While no video game publishers have chosen to use the Australian scheme to date, we did not oppose it and acknowledge that site blocking order schemes that are thoughtfully designed and carefully implemented can play a role to help protect copyright holders against piracy.

Should a site blocking order scheme be considered for New Zealand, we suggest that MBIE investigate the scheme operating in the United Kingdom which we understand has been effective for rightsholders. If a scheme were introduced in New Zealand, we would primarily be concerned with websites that flagrantly facilitate or host copyright-infringing material. There should also not be any positive requirement to use the scheme, given the volume of copyright infringement that occurs, and failure to seek an order should not be regarded as a rightsholder implicitly allowing copyright infringement to occur.