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Commercial and Copyright Law Branch
Attorney-General's Department
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Dear Commercial and Copyright Law Branch

IGEA response to copyright enforcement review issues paper

The Interactive Games & Entertainment Association (IGEA) is pleased to respond to the Attorney-General's Department's (AGD) copyright enforcement review issues paper.

IGEA represents and advocates for the video games industry in Australia, including the developers, publishers and distributors of video games, as well as the makers of the most popular gaming platforms, consoles and devices. IGEA also organises the annual Games Connect Asia Pacific (GCAP) conference for Australian game developers and the Australian Game Developer Awards (AGDAs) that celebrate the best Australian-made games each year. IGEA has over a hundred members, from local studios to some of the largest technology companies in the world.

Critical importance of copyright protection in video games

This review is of great interest to us because video games have become a core component of Australian society and culture and an important and growing segment of Australia's future-looking economy.

Australian video game businesses can broadly be placed into three categories, all of which are relevant to this consultation:

- Developers create their own games which they bring to market themselves or through a third party publisher or distributor.
- 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 Australia.

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



Video games are among the most expensive and valuable copyright-protected works. Many 'AAA' games cost tens of millions of dollars to make, while for smaller scale locally made games, significant personal sacrifices are often made and the success of a game can make or break a studio. Publishers and distributors often incur significant costs and take high risks to bring games to Australia or to obtain and exercise the right to distribute games throughout the country.

Copyright infringement of video games

Given their popularity - with two out of every three Australians being game players - it is no surprise that the infringement of video game copyright is widespread. In fact, video games are arguably the most unlawfully consumed online content in Australia, coming out as the most (or equal most) commonly infringed category of online content in four out of the last five annual consumer surveys on online copyright infringement conducted by the Australian Government. In 2022, according to AGD's own research, 26% of survey respondents stated that they had recently consumed video game content unlawfully.

The copyright infringement of video games can occur in many ways, with some of the most typical examples set out in the table below:

Video game copyright infringement	Example
Copies of video games unlawfully distributed online.	Unlawful copies of a video game (or unlawful means to access a game) downloadable by Australians through a third-party website or file sharing service.
Copies of video games unlawfully distributed via physical media.	Unlawful copies of video games circulated between friends and family in Australia via storage drives or sold through 'plug and play' gaming devices loaded with copyright-infringing copies of games.
Video game copyright is infringed in other online media.	Video game IP unlawfully used online in Australia, such as in videos, social media and other user-generated content.
Video game copyright is infringed in physical items and merchandise.	Video game IP is used on products and merchandise (like t-shirts) in Australia without the copyright owner's license or permission and sold, often online.
Video game copyright is infringed in another video game.	Video games, typically made overseas, that copy or 'clone' parts or all of an Australian-made game.
Theft of pre-release video game material.	An Australian person or network steals copyright-protected material related to a game that has not yet been released, such as images or source code.

Copyright-infringing consumption of video games

The unlawful online consumption of video games is the most prevalent and economically damaging form of video game copyright infringement and will be the focus of the rest of this submission, including our responses to the discussion questions.

AGD's consumer survey on online copyright infringement 2022 lists and tracks many of the most popular ways that Australian game players may unlawfully consume video games online. These are listed below, with some additional commentary from an industry perspective.



Unlawful method of consumer video games online (AGD survey)	Comment
Paying a small fee to access subscription services through a shared / unknown account.	As the popularity of video game subscription services rises, the practice of account sharing is also expected to rise. Video game accounts, especially those containing rare characters or items, are sometimes also sold on third party websites in breach of the terms of use of the account. This practice is unique to games and does not occur with video streaming.
A file hosting web site or cyberlocker.	A very common method of facilitating online copyright infringement, where players download unlawfully copied games, cracks for bypassing the Technological Protection Measures (TPMs) of games, or 'repackaged' games with TPMs bypassed. These sites may use piracy-friendly hosting providers and content delivery networks (CDNs) based in lenient jurisdictions to avoid enforcement activity.
BitTorrent or another file-sharing or peer to peer service (e.g. uTorrent).	Please see above. However, instead of a website, players utilise peer-to-peer file sharing. Players may use 'linking sites' (see below) to find torrent links.
Receiving a link to download video games made available by someone else.	These are most commonly 'linking sites' that aggregate, categorise and index links to infringing copies of complete versions of video games stored on third-party hosting websites and cyberlockers. Like file hosting websites, cyberlockers and file-sharing or peer-to-peer services, linking sites generally generate revenue through advertising.
Downloading a crack for a game to bypass Digital Rights Management (DRM).	Cracks may take the form of either a small file or batch of files that interact with an installed game, or a full game that has been 'repackaged' with the crack. Please see above for how players find cracks.
Downloading emulator versions of typically older games for free.	This form of online copyright infringement is widespread and common. Unlawful physical devices are also sold online or in store loaded with hundreds or thousands of emulator versions of older games.
Downloading mod versions of mobile games for free.	While the copyright infringement of mobile games is less common due to their (generally) lower cost, they can be unlawfully copied and modified so that players can 'sideload' them onto their phones for free.
Receiving the file(s) directly from someone else (e.g. Dropbox, Google Drive, USB stick).	The sharing of unlawfully copied video games generally occurs between friends and family as it does with films and TV shows. This means that the economic harm of online copyright infringement can extend beyond infringing persons to their networks.



Technological Protection Measures (TPMs)

Like other forms of software, video games developers, publishers and distributors heavily rely on TPMs (also called DRM) to protect their copyright. TPMs typically take the form of copy control TPMs that prevent the duplication of games, and access control TPMs that prevent or restrict unauthorised access to games. Both are vital tools in our industry's efforts to combat copyright infringement. Examples include the requirement for a game to be always connected to the internet so that it can be constantly verified as being a lawful version.

However, while TPMs provide video game copyright-holders with critical tools that helps our members to combat copyright infringement in a way that the film, TV, live sport and music industries may not always have, they are not infallible. As covered above, modern forms of video game copyright infringement often revolve around TPM circumvention, including the copying and distribution of 'repackaged' games with TPMs disabled, as well as the distribution of tools, guides or 'cracks' that enable end-users to disable TPMs in online games. For example, a game with a DRM tool that requires that it be always connected to the internet could be repackaged with that tool removed, even though that game may never be able to be played online.

Further, gaming consoles may be modified (sometimes called 'chipped') or connected to a TPM circumvention device to disable device-level TPMs and to enable them to play TPM-disabled copies of games. Chipping services and TPM circumvention device are easily available online.

For this reason, strong copyright enforcement frameworks remain a critical need for us.

Response to issues paper questions

As previously mentioned, our brief responses to the issues paper questions below mainly focus on the unlawful consumption of video game content online.

1. What challenges have you been facing in relation to copyright infringement in recent years? Are you seeing any changes or trends (including any forms or methods of infringement that are emerging or particularly concerning, or conversely, are becoming less prevalent or concerning)?

As the Australian Government's annual consumer survey of online copyright infringement shows, the unlawful consumption of video games in Australia remains high and persistent. There is a continual arms race between the video games industry and the people and networks responsible for facilitating video game copyright infringement, who often possess significant resources and sophistication. Trends that we have observed over the past few years are addressed above but include in particular the distribution of 'repackaged' games on websites, often via websites hosted from Eastern Europe, and the sale of gaming devices loaded with hundreds of thousands of unlawfully copied vintage games, generally online but observed by the author at least once in a physical store.

2. Can you provide any data on the scale of current copyright infringement, or the estimated economic impact of such copyright infringement on you, your organisation or your industry more broadly

This information is not currently available. However, given the prevalence of video game copyright infringement in Australia and the significant size of the video games market, the economic damage is significant and in our estimate is likely to be as high or higher than the cost of copyright infringement in any other creative, entertainment or software sector.

3. Are there any particular drivers of copyright infringement that you see as noteworthy or significant? Have these drivers changed in recent years?

We believe that the biggest driver of the copyright infringement of video games is the explosive growth of the popularity of games, with two out of every three Australians being a game player. The quality and quantity of video games available also continues to rise, meaning that there are many more games that people want to play. While it is possible that copyright infringement may also be partly driven by the perception among some game players that video games have increased in cost over the years, the reality is that the price of video games has remained steady in real terms and has fallen significantly after adjusting for inflation, despite the rising costs of game development.

4. Are the currently available industry-led mechanisms appropriate, and/or being appropriately used, to address or prevent actual or potential copyright infringement? Which mechanism(s) are most frequently and/or effectively used, and why?

The video games industry already relies heavily on industry-led mechanisms to address and prevent actual or potential copyright infringement, as discussed above. In addition, the business models of video games have diversified significantly over the past decades, often at least partly in response to piracy concerns, with the freemium (free games with optional in-game purchases) and subscription model of games reducing the economic incentive for copyright infringement.

5. What factors influence your decisions on what action(s), if any, to take through industry-led mechanisms in response to actual or potential copyright infringement?

As a members-led industry association, any actions that we take on behalf of our industry are driven by our members' guidance. Factors influencing what industry-led actions our members take will vary from company to company, but the size and importance of the Australian market, the prevalence of copyright infringement activity relating to specific titles, whether specific mechanisms are best undertaken at a local or global level, and the amount of resourcing available to track and respond to copyright infringement by Australians are all key factors in any decision.

6. Are the costs (including financial and time costs), benefits and risks of industry-driven mechanisms appropriately shared between different parties?

Video games companies already invest significant amounts of resources into industry-driven mechanisms to combat copyright infringement, particularly through the development and maintenance of TPMs and active enforcement.

7. Are there ways in which industry participants could work together more effectively or efficiently to address or prevent copyright infringement (for example, barriers to utilisation that could be removed; new or emerging mechanisms that could be adopted)?

Please see our response to question 6 above. Individual video game companies invest heavily into anti-infringement activities and technologies. While some companies may already be working together to more effectively address copyright infringement, commercial confidentiality considerations as well as concerns about competition laws may prevent deeper cooperation.



8. How effective and efficient is the current website blocking scheme as a way of combating copyright infringement and steering online consumers towards legitimate sources of content? For example, is the application process working well for parties, and are injunctions operating well, once granted?

We are not aware of the current website blocking scheme being used at the present time to address the copyright infringement of video games specifically and so we have no comment on its efficiency. To the extent that the framework has been utilised by other industries such as the screen, live sport and music sectors, it is likely that at least some of the websites that have been blocked would have also facilitated the copyright infringement of video games. We are therefore highly supportive of the scheme overall and our industry is continually assessing whether and when to leverage use the framework in future. As a part of these considerations, our industry notes that the scheme is not a silver bullet and can be circumvented, including through the use of VPNs.

9. Could the way the website blocking scheme operates be improved in any way (for example to address the use of new and emerging technologies to navigate around or through website blocks), including through changes to how the current scheme is practically implemented, or potential amendments to legislation?

(a) What impact would any such changes have on you or your organisation?

(b) Are there any potential broader or unintended consequences (for example, on other aspects of internet traffic management) that should be taken into account when considering changes that may be suggested through this consultation process?

One of the reasons that the website blocking scheme has to date been underutilised by the video games industry is the relative ease by which it can be circumvented through - as phrased it in the question - the use of new and emerging technologies to navigate around or through website blocks. The use of such technologies is not a major hindrance to the relatively sophisticated cohort of game players that engages in copyright infringement.

Given our sector's focus on the continual improvement of TPMs to address infringement, we have not been in a position during the short duration of the review so far to identify specific ways in which the website blocking scheme should be improved. We acknowledge that other media sectors in Australia such as the screen, live sport and music industries are more advanced in their consideration of this topic than us, and to the extent that they may present considered and evidence-based suggestions for strengthening the effectiveness of the scheme, we would seek to participate in dialogue.

10. How effectively and efficiently are the authorisation liability provisions and/or safe harbour scheme (and associated notice and take-down process) currently operating as mechanisms for addressing copyright infringement? For example:

(a) How clear are the circumstances in which a party may be considered to have authorised another person's copyright infringement, given the courts' interpretation of the authorisation liability to date?

(b) How effective and efficient is the safe harbour scheme (and associated statutory notice and take-down process) in striking the right balance between combatting copyright infringement and protecting the legitimate interests of service providers?



The authorisation liability provisions and safe harbour scheme in Australia have to date been of more peripheral relevance to video games and their creators. One of the reasons for this is that unlike films, TV shows and music, video game footage uploaded by third parties is commonly found on third party platforms and much of this is lawfully done. For example, many video game companies not only allow their players to upload or live-stream an essentially unlimited amount of gameplay footage onto services like YouTube or Twitch and to monetise such content, but they are encouraged to do so. Any proposed changes to the authorisation liability provisions and safe harbour scheme that might harm this collectively beneficial relationship between the games industry, video streaming services, game players and their viewers would be troubling to us.

11. Are there ways in which these provisions could be amended to improve their effectiveness or efficiency?

(a) How would such changes affect you or your sector?

(b) Are there any potential broader or unintended consequences that should be taken into account when considering changes that may be suggested through this consultation process?

Please see above. We have no further views at the present time, but we would ask to be closely involved in any future policy reform discussions on this topic.

12. What factors influence your decisions on what action(s), if any, to take through the legal system and/or law enforcement in relation to suspected or alleged copyright infringement?

(a) For example, have you found mechanisms such as mediation, alternative dispute resolution and other non-court remedies to be preferable as ways to resolve disputes?

Many factors influence the consideration by our members to take action through the legal system and/or law enforcement, including the jurisdiction of the alleged infringement, the likelihood of success of the action, whether the action is focused on a facilitator of copyright infringement (eg. the person hosting the infringing material rather than an end-user) and whether it will have a wider deterrence or longer-term effect. Other considerations include the cost of action and whether legal action would be more effectively undertaken from another jurisdiction.

13. Are the various avenues available through the legal system and law enforcement to address copyright infringement suitable and effective? For example:

(a) Have you sought to engage with the courts or law enforcement in relation to suspected or alleged copyright infringements? If so, please provide (if possible) any data or examples in relation to your experiences.

(c) Are the current civil and criminal remedies under the Copyright Act appropriate?

(d) What barriers (if any) do you face in engaging with the legal system? Could any models introduced in other international jurisdictions to streamline consideration of copyright matters be potentially relevant in an Australian context?

(e) Were you previously aware of the ABF's Notice of Objection border enforcement application process?

We have no information to share from our members for this question at the present time.

14. Are there any ways in which the current system could be improved? How would such changes affect you or your sector?



Nil response at the present time, although we would be pleased to continue our engagement with the Department and fellow stakeholders on thoughtful and meaningful ways in which existing copyright enforcement frameworks can be improved.

Should AGD wish to further discuss this submission, please contact me at ben@igea.net.

With regards

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