

18 August 2023

IP Australia
Policy and International Affairs

Email: consultation@ipaustalia.gov.au

Dear Mr Gardner and Ms Bailey,

Enhancing Australian Design Protection

The Interactive Games & Entertainment Association (IGEA) welcomes the opportunity to provide a submission to IP Australia's Enhancing Australian Design Protection public consultation. We thank IP Australia for drawing our attention to and discussing with us the proposed changes to provide protections for virtual designs under the Australian designs system. We are pleased to provide a submission on how these proposed changes may impact the Australian video games industry. Our submission will provide a brief background on the intersection of intellectual property and video games and will then comment on the proposed changes to protect virtual designs.

IGEA is the industry association representing and advocating 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 emerging independent studios to some of the largest technology companies in the world.

Video Games & Intellectual Property

Design protections do not currently apply to virtual video game design elements, and therefore are not utilised by the industry. Instead, the video games industry primarily relies on automatic copyright protections under the *Copyright Act 1968* (Cth) ('Copyright Act'). 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.

Like other forms of software, video games developers, publishers and distributors heavily rely on technological protection measures (TPM) 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. For this reason, strong copyright enforcement frameworks remain a critical need to the video games industry. Outside of copyright, other forms of intellectual property such as trademarks and patents are also important for our industry.

Protection for Virtual Designs

The proposed reforms will allow the protection of virtual designs, such as a digital user interface, that is only visible when a display-generating device is in use, such as a video game console. Many two dimensional or virtual designs, particularly those with artistic or aesthetic purposes are already protected by copyright law. We understand that the purpose of these reforms, however, is to accommodate functional aspects of virtual designs, which may not always be protected by copyright. We understand that in theory, expanding design protections to virtual designs could fill gaps in the protection of virtual functional interfaces and tools. While in principle we support the expansion of options for protecting intellectual property in video games, there are some possible issues that may arise in the implementation of the proposed reforms.

Firstly, we are concerned that any possible additional protections available for virtual designs will interfere with the established industry practice of using copyright to protect intellectual property within video games. As outlined in the discussion paper, some virtual designs may have both functional and aesthetic purposes. For example, many digital games include "health bars" which is a two-dimensional representation of how much "health" a player's character has left. This may be considered a functional design that under the overlap provisions of the Copyright Act loses its copyright protection and instead would require registration under the Design framework. However, if a design is registered under the Design Protection framework for its functional purposes, we understand that the design will generally not be entitled to ongoing protection under the Copyright Act. Given the importance of copyright reliance in the video games industry, it is critical that any reform in the design framework must not interfere with or replace copyright protections.

Secondly, given the significant reliance on copyright protection for two dimensional or virtual designs in the video games industry, we are concerned about the possibly unintended consequences of protecting virtual designs under the Design Registry framework. Theoretically, the only way for other persons to use a registered design would be for the original right holder to licence or sell it. If this were to extend to every functional part of a video game, it would be very difficult for smaller studios to pay for the use of specific designs, stifling creativity and innovation. There are further concerns about the ability of smaller studios to conduct due diligence searches as required by the Design Protection framework. As such, the definition and scope of virtual design requires much more conversation about how it could be implemented in a nuanced and carefully considered way.

We note some international approaches may be useful to consider, should virtual designs be incorporated into the current Design Protection framework. For example, the Intellectual Property Office of Singapore defines design to mean features applied to any article or non-physical



product that give the article or non-physical product its appearance.¹ A non-physical product must have an intrinsic utilitarian function that is not merely to portray the appearance of the thing or to convey information. For example, a projection of a computer keyboard has an intrinsic utilitarian function to type characters in the same manner as a physical computer keyboard. Theoretically, this means that something like a “health bar” in a video game would not be considered a design, as it does not have an intrinsic utilitarian function and rather conveys information. This arguably provides a more nuanced approach to determining whether virtual features are considered designs.

Further, the Japan Patent Office has implemented policy allowing standalone graphic images to be protected under Japan’s *Design Act*.² However, the Act recognises that it may be inappropriate to treat all kinds of graphic images as designs. Therefore, they are limited to those provided for use in the ‘operation of the device or displayed as a result of the device performing its function’.³ This includes, for example, the graphic image of a clock displayed onto a wall. This approach allows for the protection of functional virtual designs, without unnecessarily categorising virtual features with ancillary functionality as designs. Of particular interest, this means the content of a movie or game should not be determined as a design under the Act.⁴

Finally, we reiterate that should the proposed changes to include virtual designs be made, the Design framework should not interfere with or replace copyright protection, an established and reliable form of intellectual property protection for the video games industry. It would also be critical that legislation enshrine a review after two years to ensure the efficacy of the proposed changes and that any issues can be identified and resolved.

Conclusion

The proposed policy has potentially significant implications for virtual designs and therefore the intellectual property protections utilised by the video games industry. As such, we welcome further dialogue around the practical implementation of the proposed changes, prior to any progression of the reforms. We welcome further discussion on these reforms and invite IP Australia to further consult with IGEA to determine how the proposed policy can be put into practice.

Thank you again for inviting us to contribute to IP Australia’s discussion paper on virtual design protections. If there are any questions about this submission, please do not hesitate to discuss this matter further with us.

Regards,

Ron Curry
CEO

¹ [registered-designs---guidelines-for-non-physical-products.pdf \(ipos.gov.sg\)](#)

² [0401.pdf \(jpo.go.jp\)](#)

³ [0401.pdf \(jpo.go.jp\)](#)

⁴ [0401.pdf \(jpo.go.jp\)](#) Page 5, 27; See *Design Act (Japan)* Art 2, Art 3(1).

