



Address: Suite 145,
National Innovation Centre,
Australian Technology Park,
Eveleigh, NSW 1430
Tel: +61 2 9209 4325
Fax: +61 2 9310 7232
Email: info@ieaa.com.au
Web: www.ieaa.com.au

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Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

Dear Ms Daniels,

Review of sections 47J and 110AA of the Copyright Act 1968 - Copying photographs and films in a different format for private use

The Interactive Entertainment Association of Australia ("IEAA") welcomes the opportunity to contribute to the review by the Attorney-General's Department of sections 47J and 110AA of the Copyright Act 1968 (Cth) (the "Review").

Issue 7(a) of the Review is of particular interest to IEAA and its members. In essence, that issue asks whether the making of a reproduction of a computer program embodied in a computer game should be permitted in the event that the existing format-shifting exception for cinematograph films in section 110AA of the Copyright Act is extended to permit digital-to-digital copying of cinematograph films embodied in computer games.

IEAA's core submission is that no private use exception that permits any form of digital-to-digital copying of computer games (or any of the separate copyright-protected elements thereof) should be introduced into Australia's Copyright Act.

Having regard to reasonable consumer expectations and practices, as well as common business models in the interactive entertainment industry, IEAA considers that there is no need for any private use exception that permits digital-to-digital copying of computer games. Furthermore, IEAA is of the view that any such exception would fail to satisfy the 'three-step test' in the Berne Convention and TRIPS, with the result that its inclusion in Australia's Copyright Act would be in contravention of Australia's obligations under those instruments.

1 Introduction to the IEAA

IEAA is a national industry association proactively representing companies in the interactive entertainment industry. IEAA's members develop and market computer and video games software, hardware and accessories in Australia. IEAA's members comprise:

Activision	SEGA
Atari Australia	Sony Computer Entertainment
Electronic Arts	Take 2 Interactive
Microsoft Australia	THQ Asia Pacific
Mindscape Asia Pacific	Ubisoft Entertainment
Nintendo Australia	Vivendi Universal Games Australia
QV Software	Warner Bros Interactive Entertainment

2 The interactive entertainment industry in Australia

The interactive entertainment industry in Australia offers four main types of product:

- games designed to be played on consoles (such as Sony's PlayStation 3, Microsoft's Xbox 360 or Nintendo's Wii);
- games designed to be played on hand-held devices (such as Nintendo's GameBoy) and network capable devices such as Nintendo's DS and Sony's PlayStation Portable device, as well as wireless telephone handsets;
- games designed to be played on PC or Macintosh; and
- games designed for networked gaming over computer networks.

There is a current trend towards the popularity of online games. An online game can be played over the internet, either through a console, wireless hand-held device or PC. Most, if not all, new games are released with some online network capabilities.

The traditional business model based on selling console based games is evolving with the proliferation of broadband and wireless Internet access, which supports online and networked gaming. New online business models include allowing consumers to make retail purchases online, subscription fee models which allow game play on certain sites, 'pay-per-play' which allows consumers to enjoy a 'one-off' experience, and interactive advertising. New technology and high speed Internet access create new markets and support games development. They also make unauthorised copying of material much easier.

Although interactive gaming is a relatively new phenomenon it is growing fast. The latest statistics show that sales figures exceeded \$1.3 billion for the year ending 31 December 2008. There was an overall market increase of 46 percent during the period 1 January 2007 to 31 December 2008, with over 15.4 million games and almost half a million gaming consoles sold during that period.¹

¹ See further <http://ieaa.com.au/7.news/pdf/Sales%20figures%202007%20Release.pdf>

3 There is no need for a private use exception that permits digital-to-digital copying of computer games

The Department will recall that one of the key rationales for the introduction of the limited format-shifting and space-shifting exceptions in the Copyright Act was to address the disconnect between acts permitted by Australia's Copyright Act, and common, reasonable consumer practices.²

IEAA submits that in the case of computer games, there is no such disconnect between acts permitted by the Copyright Act, and common, reasonable consumer practices. The consumption of computer games in Australia is very different to the consumption of music, TV programs and films, not least because of the different business models adopted by the interactive entertainment industry.

In the first instance, there is no reasonable expectation among computer game users that they are permitted to make identical digital copies of legitimately purchased computers games for their private and domestic use, let alone any common practice of doing so. This is partly because users are typically prevented from making identical digital copies of legitimately purchased computer games by the operation of TPMs applied to those games by copyright owners.

Similarly, consumers do not expect to be able to engage in format-shifting of computer games so as to permit a game developed for a particular platform to be played on one or more other platforms.³ Game developers develop software specifically for the proprietary technology of each gaming platform. So while the content or game play of a particular game across platforms may be the same or similar in some cases, the underlying code is entirely different. Each system has its own firmware, operating system and library programs to enable the game to be played on the particular platform for which it is developed. Moreover, each gaming platform has its own particular strengths and weaknesses that users not only expect, but demand, game developers to utilise. In fact, users are so aware of these differences between platforms that they often discuss them and chide developers who do not develop specifically to a platform.

Given the differences in the underlying code between computer games developed for different platforms, it is not possible for a typical user to format-shift a computer game. Computer games cannot be format-shifted without extensive reworking of the source code for the game, which is not made available to users due to its highly confidential nature. Gamers are aware of these technical constraints on using the same game on multiple platforms and do not expect to be able to do so.

It is also relevant to note that the interactive entertainment industry is currently experimenting with online networks that allow for "cross-platform" game play. "Cross platform" game play allows gamers to compete against one another despite their use of different platforms to play the same title (eg the game "*Final Fantasy XI*" allows console

² *Explanatory Memorandum to the Copyright Amendment Bill 2006* (Cth) pg 6.

³ By way of background, the Department may be aware that most popular computer games are available in a variety of formats that correspond to the different platforms on which the games can be played. For example, the popular computer game known as "*Guitar Hero*" is available in different formats for the Nintendo Wii, PlayStation 3, and Xbox 360 platforms.

gamers to play against PC gamers). Innovations such as “cross-platform” game play illustrate the commitment of the interactive entertainment industry to meeting user expectations and demand for new product offerings.

4 A private use exception that permits digital-to-digital copying of computer games would likely contravene the ‘three-step test’ in the Berne Convention and TRIPS

IEAA is sceptical that any private use exception that permits any form of digital-to-digital copying of computer games (or any of the separate copyright-protected elements thereof) would satisfy the ‘three-step test’ in the Berne Convention and TRIPS. Specifically, IEAA considers that any such exception would contravene the second and third limbs of the ‘three-step test’ by conflicting with the normal exploitation of computer games and unreasonably prejudicing the legitimate interests of the rights holders.

Given that the primary business model of the interactive entertainment industry is to sell computer games on a per copy basis, it is axiomatic that the introduction of a private use exception that permits digital-to-digital copying of computer games conflicts with the normal exploitation of computer games by reducing the market for copies of those games.

Furthermore, IEAA considers it inevitable that the introduction of a private use exception that permits digital-to-digital copying of computer games would invite some users, as well as illegitimate dealers in TPM circumvention devices, to rely on any such exception as a pretext for pirating (or encouraging the piracy of) computer games. Consequently, the introduction of such an exception would unreasonably prejudice the legitimate interests of computer publishers and thereby contravene the third limb of the ‘three-step test’ in the Berne Convention and TRIPS.

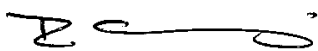
5 A private use exception that permits digital-to-digital copying of computer games would be without precedent in other jurisdictions

So far as the IEAA is aware, the introduction of a private use exception that permits digital-to-digital copying of computer games (or any of the separate copyright-protected elements thereof) would be without precedent in any other jurisdiction. IEAA submits that the Attorney-General’s Department should therefore treat any suggestion that such an exception is necessary with caution.

6 Further consultation

Thank you for considering our views on Issue 7(a) in the Review. IEAA would welcome the opportunity to further discuss the matters raised in this letter. To do so, please contact me on (02) 9209 4325 or email ron@ieaa.com.au.

Yours sincerely,



Ron Curry
Chief Executive Officer
Interactive Entertainment Association of Australia