



Submission to
**Parliament of Australia
Senate Legal & Constitutional Committee**

Subject
**Inquiry into the
Australian film and literature classification
scheme**

Date
March 4, 2011

EXECUTIVE SUMMARY

The Senate Legal and Constitutional Committee is reviewing Australia's National Classification Scheme following several terms of reference, including:

- (a) the effectiveness of the National Classification Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults; and
- (b) the interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority in supervising broadcast standards for television and Internet content.

There are a number of issues which undermine the National Classification Scheme's ability to properly deal with new technologies and new media, including:

- (a) legislative and regulatory uncertainty;
- (b) regulatory overlap;
- (c) the massive scale of content being created and delivered through new technologies and new media; and
- (d) rapid technological change.

The interaction between the National Classification Scheme and the role of the Australian Communications and Media Authority has also experienced several issues, namely jurisdictional conflict and uncertainties as well as an inconsistent approach to the treatment of internet content.

There are significant issues with Australia's current classification system and its application to computer game content that is distributed over the internet. While it is clear that reform in this area is required, it is important that any future classification system is carefully considered to address community interests and concerns and to ensure effectiveness with future technological developments.

INTRODUCTION

This paper has been prepared to assist the Senate Legal and Constitution Committee (the **Committee**) in its inquiry into the Australian Film and Literature Classification Scheme. This paper will focus on the following two terms of reference that have been provided by the Committee:

- (a) the effectiveness of the Scheme in dealing with new technologies and new media, including mobile phone applications, which have the capacity to deliver content to children, young people and adults; and

- (b) the interaction between the National Classification Scheme (the **Scheme**) and the role of the Australian Communications and Media Authority (**ACMA**) in supervising broadcast standards for television and Internet content.

The growth of the internet has provided the entertainment industry with an opportunity to develop innovative ways to distribute content to consumers. The increased consumer use of broadband internet and, more recently, the prospect of the National Broadband Network, have prompted the entertainment industry to develop innovative models for digital content distribution. The computer game industry understands and complies with the application of the Scheme for traditional content distribution methods, however, the Scheme's application to digitally distributed content is unclear and has created a number of challenges to the creation of effective models for digital distribution.

The purpose of this paper is to explore some of the legal and practical challenges that the computer game industry has encountered with the Scheme and its application to digitally distributed games and online games. These challenges are detailed to assist the Committee with their understanding of the issues faced by the computer game industry in its attempts to comply with the Scheme.

This paper will focus on computer games and content that are sold exclusively over the internet (**Digitally Distributed Games**) and server-based computer games that are played entirely over the internet (**Online Games**) as these formats are emerging as key products within interactive games industry.

ABOUT US

The Interactive Games and Entertainment Association (**iGEA**) is an industry association representing Australian and New Zealand companies in the computer and video game industry. iGEA's members publish, market and/or distribute interactive games and entertainment content and related hardware. The following list represents iGEA's current members:

- Activision Blizzard
- Disney Interactive Studios
- Electronic Arts
- Findlay Marketing
- Fiveight
- Gamewizz Digital Entertainment
- Microsoft (Xbox)
- Mindscape
- Monaco
- Namco-Bandai Partners
- Nintendo
- QVS International
- SEGA
- Sony Computer Entertainment (PlayStation)
- Take 2 Interactive
- THQ Asia Pacific
- Total Interactive
- Ubisoft
- Warner Bros. Interactive Entertainment

BACKGROUND

Classification requirements for computer games are set out under the Scheme which was designed for the purpose of enabling the Commonwealth, States and Territories to take a uniform approach to classification. In 1995, the Commonwealth passed the *Classification (Publications, Films and Computer Genres) Act 1995 (Cth)* (the **Classifications Act**) which set out the procedures that must be followed when making classification decisions for publications, films and computer games in Australia. The Classification Act is complimented by various legislative instruments, including the *National Classification Code 2005*, the *Guidelines for the Classification of Films and Computer Games 2005* and the *Classification (Markings for Films and Computer Games) Determination 2007*. The Classification Act and the various legislative instruments are enforced in each State and Territory through various State and Territory enforcement laws (the **Enforcement Laws**).

To date, the classification procedure has largely been applied to computer games distributed in Australia and sold through retail outlets in formats such as game cartridges, CDs, DVDs, UMDs and Blu-ray. Such computer games are generally played on computers, hand held devices (including Nintendo DS, PlayStation PSP) and game consoles (including Nintendo Wii, PlayStation 3 and the Xbox 360). The Scheme sets out the responsibilities of the publishers when distributing computer games in this manner.

Several years ago, game publishers began experimenting with Digitally Distributed Games. Initially, the types of games being distributed online were usually already released as physical products (CDs etc) within Australia. Accordingly, these products were usually already classified under the Scheme and publishers generally applied the same classification to the digitally distributed games when making the game available for sale online. As technology and the variety of platforms that consumers use to access games have evolved, consumer practices and expectations have changed. Consumers have become more aware of digital distribution and online gaming and the range of Digitally Distributed Games and Online Games has increased significantly.

The following are some examples of content types that have developed as a result of the internet and new technologies, including some examples of such content:

Content Type	Examples
Add On Content: Any content that is additional to the core game such as expansion packs and in-game micro-transactions.	<i>Medal of Honour / Halo</i> map packs <i>LittleBigPlanet</i> costume packs

Mobile Games: Games able to be played on a mobile device and tablets. This includes full downloadable games and in-game content offered through micro-transactions.	<i>Angry Birds, Fruit Ninja, Need for Speed, Rockband.</i> Micro-transaction examples include <i>Need for Speed</i> where players can purchase bounties and on <i>Rockband</i> where players can purchase songs.
Small downloadable casual games	<i>Bejeweled</i>
Small casual server based online games such as games available on POGO, ninemsn, Yahoo7, Facebook etc.	<i>MafiaWars, Farmville, Words With Friends, Bejeweled Blitz.</i>
Server-based online games such as mid-session gaming (MSGs)	<i>FIFA Online and Need For Speed World.</i>
Client based games that are playable online	Most traditional PC and console games now have offline and online play using client-server architecture (<i>Medal of Honor, FIFA 11</i> ; some are client-server games that can be played only online (MMOGs such as <i>Warhammer</i> , or <i>World of Warcraft</i>).
User Generated Content	User Generated Content includes any content that is created and shared by a user with other users of a particular computer game. This may include customised characters and environments (for example, the content creation features of the <i>Sims 3</i> and <i>Spore</i>) and even includes any text written by users such as contributions within any 'chat' feature of Online Games.

The following are some examples of the models that have developed and how publishers are using the internet to deliver computer games to their customers:

- (a) **Standard Digital Purchase** - Customers are able to purchase and download entire computer games and Add On Content (as explained below) through a web site (e.g., EA Store, AppStore for Mac) or an online user interface (PlayStation Network, Xbox Live, AppStore for iPhone/iPad, Steam client). For example, a customer is able to purchase and download the PlayStation game titled *Flower* through the PlayStation Store (an online shop accessible through the PlayStation 3 console via the PlayStation Network. The PlayStation Network is an online gaming and digital media delivery service operated by Sony Computer Entertainment Europe). Currently, *Flower* is \$12.95 RRP (as of the

date of this submission, current pricing subject to change) and is only available through the PlayStation Store. Another example includes the computer games that are being distributed to customers via Apple's App Store for use on Apple's iPhone, iPod Touch and iPad devices. These games are usually very small and are only distributed via the App Store.

- (b) **Code Purchases** – Customers are able to purchase products at retail stores which give the customer access codes that enable the customer to download games or even Add On Content. Such codes can also be used to provide the user with access to Online Games and in-game currency. For example, Zynga Game Cards can be purchased with real money in certain retail outlets throughout Australia. These cards provide the customer with a code which can be used to redeem in-game currency for Zynga's computer games. Such in-game currency is then used by the customer to purchase and unlock certain content within Zynga's computer game.
- (c) **Subscription Services** – Online Games are often made available to customers in return for a subscription fee. Customers are also able to subscribe to services which allow the customer to download, at no additional cost, certain computer games. For example, PlayStation's '*Plus*' service allows customers to pay \$20.95 for a 90 day subscription, or \$69.95 for a 12 month subscription (as of the date of this submission, current pricing subject to change). In exchange for the subscription fee, the customer is allowed to download a full game trial from a range of PlayStation titles from the PlayStation Store for a period of time at no additional cost (trial games may also be purchased). Subscribers are also offered discounts and free content. Another example would be computer games that are made available through IPTV services such as FetchTV, Foxtel and TiVo. Such computer games are offered over the internet as part of a wider subscription service which bundles movies, television shows, music and computer games.
- (d) **Ad Supported or Free Games** – Customers are able to download entire computer games or play Online Games without exchanging any money. These computer games are accessible to customers for free, and may be funded by advertisements placed in or around the computer game. For example, the computer game *Scrabble* is made available to iPhone and iPod Touch users for free through the iTunes App Store. While the computer game is free, the publisher of the computer game earns revenue from the placement of advertisements throughout the computer game .
- (e) **Micro Transaction Funded Games** – More recently, publishers are providing games to users for free, and relying on subsequent Add On Content download purchases to receive revenue. For example, Electronic Arts has released a soccer game to users for free in Asia. Users subsequently have to pay \$1 to download each new team or stadium for use within the game.

- (f) **Independent Games Distribution** - Publishers are beginning to promote user innovation by providing accessible and cheap online distribution channels for programmers to use to sell their computer games. In markets outside of Australia, Microsoft has made available an 'Independent Games Channel' where student game programmers can create their own games. These developers undertake a peer review for the consideration and disclosure of classification elements. The programmers then release their games for a price directly through the Xbox Live service. These programmers do not have the commercial or regulatory understanding to apply for Australian classification when it is not a requirement in other markets. There were over 1500 titles made available through this channel within the channel's first 12 months.

These online distribution channels and new business models have offered consumers amazing choice on when, where and how to access games and how to pay (or not) for those games. They have also resulted in the volume of games and game content in the market to grow exponentially. Low barriers to entry have made it possible for even 1-man developers to enter the market, including through the AppStore and Xbox Live's Independent Games Channel. As a result, there is more game content than ever available to Australian consumers.

THE EFFECTIVENESS OF THE NATIONAL CLASSIFICATION SCHEME IN DEALING WITH NEW TECHNOLOGIES AND NEW MEDIA, INCLUDING MOBILE PHONE APPLICATIONS, WHICH HAVE THE CAPACITY TO DELIVER CONTENT TO CHILDREN, YOUNG PEOPLE AND ADULTS

The current Scheme has not been effective in dealing with new technologies and new media, such as Digitally Distributed Games and Online Games. There are several reasons the current Scheme has not been effective, including:

- (a) legislative and regulatory uncertainty;
- (b) regulatory overlap;
- (c) the massive scale of content being created and delivered through new technologies and new media; and
- (d) rapid technological change.

The above issues (apart from regulatory overlap which is discussed later in this paper) are discussed below.

Legislative and Regulatory Uncertainty

Due to the broad language used within the Classification Act, it is not clear whether the definition of 'computer game' under the Classification Act encompasses the new forms of computer game content, such as:

- (a) Digitally Distributed Games;
- (b) Online Games;

- (c) User Generated Content, including user content created within server based Online Games ; and
- (d) Add On Content.

The definition of ‘computer game’ under Section 5A of the *Classification Act* is as follows:

- ‘(a) A computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game; and
- (b) A computer program, data associated with a computer program or a computer program and any associated data that is capable of generating new elements or additional levels into a game (the original game) and is contained in a device separate from that containing the original game.’

The *Classification Act* goes on to define ‘interactive game’ as follows:

‘Interactive game means a game in which the way the game proceeds and the result achieved at various stages of the game is determined in response to the decisions, input and direct involvement of the player.’

The definition of computer game is broad and is not limited to computer programs stored in a particular medium or form. The *Classification Act* does not make a distinction between computer games that are distributed as physical products or as digital files. At the time this legislation was being considered, the internet was in its infancy and both Digitally Distributed Games and Online Games could not have been properly considered. While it is arguable that the definition of computer games is broad enough to include Digitally Distributed Games and Online Games, there are no provisions within the Enforcement Laws that clearly specify that Digitally Distributed Games and Online Games should be subject to the Scheme.

It is also not clear whether the Enforcement Laws apply or can be applied to the following types of transactions:

- (a) the sale of digital computer game content over the internet from a local host;
- (b) the sale of digital computer game content over the internet from an overseas host;
- (c) digital computer game content that is downloaded or accessed as part of a subscription service or bundled service;
- (d) digital computer game content that is downloaded or accessed using a download code which has been purchased, gifted or distributed for free;
- (e) digital computer game content that is downloaded or accessed for free and not subject to any prohibitions; or
- (f) digital computer game content that is downloaded or accessed using in-game currency.

The Enforcement Laws generally prohibit a person from selling or publicly demonstrating an unclassified computer game. Accordingly, any computer game that is sold would be subject to the relevant enforcement laws. As noted above, at the time these enforcement laws were passed the internet was in its infancy and the business models using digital distribution had not been developed. It is difficult to ascertain whether or not it was the legislator's intention to regulate the digital distribution of computer games. The legislation does not provide any guidance on this matter as the definition of 'sale' or 'sell' in the various enforcement laws is broad in nature and does not specifically identify the medium in which the sale is to take place. It is therefore uncertain whether the concept of 'sale' or 'sell' would apply to Digitally Distributed Games.

These uncertainties have significantly undermined the effectiveness of the Scheme when dealing with new technologies. These uncertainties have led to an inconsistent approach to classification in the various outlets for Digitally Distributed Games and Online Games.

Massive Scale of Content Creation and Delivery

Technological developments have allowed the development of an online international computer game market, which has provided international developers with direct and relatively cheap access to Australian consumers. The current Scheme is not suitable for the provision of consistent, meaningful and timely content advice for the massive amount of Digitally Distributed Games and Online Games being made available to Australian consumers.

Due to the increased use of 'smart phones' and other hand held devices there has been an increase in consumer demand for Mobile Games. Additionally, the internet has allowed for the frequent release of relatively small Add On Content which is made available exclusively over the internet. If it was determined that all Mobile Games and Add On Content required classification under the Scheme, the cost of classification fees would be prohibitive to most of the developers and distributors of such games and Add On Content. Accordingly, any attempt to apply the Scheme to such games would inevitably reduce the availability of product to Australian consumers.

Currently, there are over 50,000 game applications available on the AppStore with approximately 1,500 to 2,000 games being added each month. It is unlikely that the current resources of the Scheme would be able to effectively manage the massive increase in workload required to classify each of these games.

Rapid technological change

As indicated in the background section of this paper, the computer game industry has witnessed and will continue to witness rapid technological change. It is therefore critical that Australia's classification scheme is capable of adapting to the rapidly changing ways in which consumers enjoy and interact with their entertainment.

The Scheme's legislative and regulatory uncertainties, coupled with the practical limitations of applying the Scheme to Digitally Distributed Games and Online Games, demonstrate that the current Scheme is not capable of dealing with rapid technological change. The Scheme's rigidity may be due to the legislative framework in which the Scheme has been developed whereby any amendment to the Scheme requires the consideration and acceptance of each State and Territory Government. Australia's future classification scheme must be future-proofed or re-crafted in a way that is easily adaptable to both emerging products and rapidly changing consumer use patterns.

THE INTERACTION BETWEEN THE NATIONAL CLASSIFICATION SCHEME AND THE AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY IN SUPERVISING BROADCAST STANDARDS FOR INTERNET CONTENT

ACMA is given responsibility under the *Broadcasting Services Act 1992* (Cth) (**BSA**) to monitor online content, including internet and mobile phone content, and enforce Australia's content services provisions. The following two issues have emerged throughout the interaction between the Scheme and ACMA when dealing with internet content:

- (a) jurisdictional conflicts and uncertainties; and
- (b) inconsistent approach to the treatment of internet content.

The above issues are discussed below.

Jurisdictional Conflicts and Uncertainties

ACMA has the responsibility to monitor online content and enforce Australia's content services provisions as set out in the BSA. The Scheme sets out the requirements for the classification of materials, including computer games, and generally prohibits the sale of unclassified computer games. The obvious jurisdictional conflict emerged when computer games began being distributed over the internet. Such conflict has been avoided in other mediums through the use of a specific exclusion of 'Broadcasting Services' from the scope of the Scheme. However, since internet and content services are not included within the definition of 'Broadcasting Service' in the BSA, the Scheme potentially continues to regulate Digitally Distributed Games and Online Games. Both regulators and the computer game industry have experienced difficulties when dealing with this regulatory overlap between the BSA and the Scheme.

Inconsistent Approach to the Treatment of Internet Content

The online services and content services provisions of the BSA were introduced to regulate online content in a way that balances the need to protect children from being exposed to content suited only for adults while providing industry with the flexibility to explore the potential of providing entertainment and other services over new technologies. The content services provisions allow for both classified and unclassified content to be communicated over the internet

provided that MA15+ or R18+ content (or content that would, if classified, be classified MA15+ or R18+) is subject to a restrictive access system. ACMA enforces a take down regime which successfully provides a balance between protection of children and the promotion of industry innovation.

Under the BSA, publishers are able to internally assess unclassified computer games, such as unclassified Add On Content, and release such computer games in accordance with the provisions of the BSA. Due to the reactive nature of the BSA's enforcement provisions, the publishers have the ability to explore innovative and alternative business models such as Ad Supported Games and Micro Transaction Funded Games. Furthermore, smaller game developers are able to develop, sell and demonstrate games without the prohibitive compliance costs of the Scheme. The BSA has allowed such innovation to prosper, while minimising the chances of inappropriate content being accessed by children.

If the Scheme was to apply to content distributed over the internet, the publishers of such content would be subject to two regulators (the Classification Board and ACMA) and two regulatory regimes (the Scheme and the BSA). Publishers and game developers would be unable to benefit from the reactive enforcement provisions of the BSA; instead they would be subject to the compliance burdens of the Scheme. Such regulation undermines the purpose of the BSA as has the potential to stifle innovation and industry progression within the online environment.

RECOMMENDATIONS FOR A FUTURE CLASSIFICATION SYSTEM

The above points on the effectiveness of the current Scheme and the interaction between the Scheme and ACMA clearly demonstrate that Australia's classification system needs to be amended. The iGEA recommends that the following key points be addressed in any reform of Australia classification system:

- a) Any classification system must be structured to ensure that the community, to the extent possible, is well informed regarding the suitability of entertainment content for themselves and those in their care.
- b) Any overlap with the Scheme and the BSA must be clarified to provide ongoing certainty for the industry.
- c) Australia's classification system must be future proofed, or re-crafted in a way that is easily adaptable to emerging products or consumer use patterns.
- d) Content classification guidelines must be sufficiently broad to respond to changing community standards and must also be technology and delivery channel neutral.

- e) Australia's classification system must avoid any cumbersome or onerous requirements for Digitally Distributed Games and Online Games in order to ensure consistent and proper compliance from content providers.
- f) Any final policy must offer certainty to the industry in terms of expectations and obligations.



www.igea.net

Suite 145 National Innovation Centre
Australian Technology Park
Garden St, Eveleigh, NSW 1430

