

UKIE Response to Intellectual Property Office Consultation on proposals to change the UK's copyright system

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THE ASSOCIATION FOR UK INTERACTIVE ENTERTAINMENT

Executive Summary

The Association for UK Interactive Entertainment (UKIE) is the trade association that represents a wide range of businesses and organisations involved in the games and interactive entertainment industry in the UK.

UKIE exists to make the UK the best place in the world to develop and publish games and interactive entertainment. UKIE's membership includes games publishers, developers and the academic institutions that support the industry. We represent the majority of the UK video games industry; in 2011 UKIE members were responsible for 97% of the games sold as physical products in the UK and UKIE is the only trade body in the UK to represent all the major console manufacturers (Nintendo, Microsoft and Sony).

Below we outline the key points we would like to make to the IPO consultation:

- Current IP framework promotes growth - the current intellectual property framework has fostered investment, growth and innovation in the video games industry, which itself is a source of UK international competitive advantage. The games industry has a track record on new and innovative business models, dynamically responding to customer need. UKIE questions the economic assumptions behind the consultation, namely that the current framework hinders growth.
- Private copying - we question the practical application of any proposed private copying exception to games. Since the essential ingredient in a video game is the computer source code, games are primarily "software" by definition and as such are protected in the EU by the 2009 Directive on the Legal Protection of Computer Programs ("The Software Directive"). Under this Directive no private copying of computer software (and therefore games) is permitted under EU or UK law.
- Removal of rights through contract - UKIE supports the fundamental principle of freedom to contract, as such the consultation should not be seeking to extinguish the kind of certainty that rights-holders need to do business in the UK.

Background

Our successful UK industry sits within a strong global video games and interactive entertainment market. Today, some 70 per cent of the UK population enjoys playing games. Indeed, hundreds of millions of people are enjoying playing games the world over. Global revenues from software sales are reportedly \$50 billion per annum and are expected to rise to \$87 billion by 2014¹. It is the largest entertainment industry in the world and continues to grow. The sector is projected to grow at an average annual rate of 10.6% between 2010 and 2014². Ours is clearly a burgeoning and increasingly popular industry, with the potential to continue generating billions of pounds for the UK economy.

The video games industry thrives on the development of original IP

Today the total value of the British games market - ranging from online and mobile gaming through to merchandising - is worth in excess of £3.266 billion across a variety of formats³. In the UK alone online games (Xbox live subscriptions, casual and social gaming, download-to-own and streaming on-demand games) revenues stand at £520m; mobile gaming (download-to-own and in-game purchases) £158m with traditional 'boxed' software at £1.42bn. Spin-off toys, music and products on video games properties such as Sonic, Moshi Monsters and Mario are an increasing source of revenue, bringing in £70m last year.

The video games industry epitomises technological innovation and thrives on the development of original intellectual property. UKIE believes that the UK's intellectual property (IP) regime has been the foundation of the UK's innovative, growing and dynamic video game industry. We seriously question

1 - Next Gen. 'Transforming the UK into the world's leading talent hub for the video games and visual effects industries: A Review by Ian Livingstone and Alex Hope' (NESTA, February 2011).

2 - PwC(2010)'Global Media and Entertainment Outlook 2010-2014.' London: PricewaterhouseCoopers; Orland, K. (2011) 'EA CEO: Digital Game Sales To Outpace Retail In 2011.'

3 - Market for Computer and Video games (MCV) industry data February 2012.

the need for change which could weaken, or be perceived to weaken, that essential foundation and put this industry at a competitive disadvantage both at home and abroad. In common with the submission of other creative industries – and the Alliance Against IP Theft⁴ - if anything, respect for the UK's existing IP regime needs to be strengthened through education and more effective enforcement of IP rights, otherwise the UK industry risks permanently losing its home grown innovators, those who invest in their innovations and the related IP.

Intellectual property regime changes must bring clear benefits not endanger growth

UKIE's work with government in recent years has focused on current and forward looking challenges to incentivise our members to innovate and grow. Member priorities are primarily access to finance for games businesses, current and future skills deficits, having appropriate legal tools to respond to Internet piracy and the effective enforcement of existing Intellectual Property laws. The industry's support for the European PEGI content rating system, now about to be recognised within UK law, facilitates distribution of UK content both on and off line on numerous distribution platforms on an EU-wide basis.

While we welcome the opportunity to respond to the IPO's consultation arising from last year's Hargreaves Review, we again question the subjective premise on which much of Hargreaves was based; namely that the main policy intervention needed for the creative industries in order to promote further growth and innovation is to change the Intellectual Property system. UKIE believes that it is clear that the existing UK IP framework has supported the successful development of the UK's creative industries, an area in which the UK enjoys a strong competitive advantage internationally. As we noted in our response to Hargreaves⁵, strong evidence of any need for change is necessary before any adjustments are made to the UK IP framework. As such we concur with the assessments made by the Alliance Against IP Theft and the conclusion reached by their Oxford Economics study in response to this consultation.

The Government believes that copyright "should not over-regulate individuals and businesses." The suggestion that the widening of exceptions is fundamentally a deregulatory measure (and therefore that the removal of regulation will necessarily boost economic activity) is misconceived when used in reference to this sector. Copyright forms an important basis of confidence in investment decisions in content industries, providing greater certainty to investors in content and supporting innovation and growth in its distribution. Any weakening of copyright, however

well-intended, carries the clear and obvious risk of undermining confidence in investment in this sector, which cannot be the intended consequence of government policy.

Public policy interventions seeking to provide a boost to growth over the medium term need to take a wider view - there are many cultural, economic, social, and legal factors which affect levels of innovation including: domestic infrastructure support for innovation finance; levels of relevant skills and education; labour productivity; the current state of "entrepreneurial culture"; levels of direct or indirect public-sector support for innovation; access to venture capital; taxation and the collaborative character of the research culture. These factors vary significantly from country to country and even by region.

The existing UK IP framework has supported the successful development of the UK's creative industries

New business models

The games industry has a very positive story to tell with regard to innovative business models. Indeed few industries demonstrate the level of innovation, creativity and development of original content and of getting products to market. From the introduction of motion control technology across all three major video game consoles, including the Wii Remote Controller, the Microsoft Kinect and PlayStation Move, to the many new ways consumers can experience and acquire games online, the video game industry has had a tremendous and on-going impact on both cultural and technological innovation.

As it should, the current IP framework supports creators by providing a protection and enforcement regime no matter how the creative work is exploited. The range of formats and business models employed by the game industry include traditional boxed products, online games, those played on mobile devices, accessed from 'the cloud'. Many of these games are playable online so that users connected to the internet through their interactive services can compete against one another online. The UK video games and interactive entertainment market has evolved in recent years, responding to the challenges and opportunities of innovation, and giving consumers increasing choice in the range of products available through multiple channels.

4 - <http://www.allianceagainstiptheft.co.uk/>

5 - UKIE Response to Review of Intellectual Property and Growth: Call for Evidence (March 2011) <http://www.ipreview-c4e-sub-ukie.pdf>

The advent of digital distribution has transformed the video games value chain, enabling developers to reach their audiences directly, or through online stores such as Apple's AppStore, Valve's STEAM, Microsoft's Xbox Live and the UK's Get Games, which allows consumers to buy and download PC games. It has also made it possible to produce new kinds of video game that are played on the Internet or in social networks, with new business models that generate revenues through subscriptions, online advertising, and the sale of virtual goods and premium content. The online segment of the video games market is expected to grow at an annual rate of 21.3 per cent between 2010 and 2014, twice the average for the sector cited above⁶.

Online segment of video games market expected to grow at an annual rate of 21.3 per cent between 2010 and 2014

One other area where the video games industry has shown particular innovation is in offering its consumers a variety of channels and new business models through which to play games online and access game content. Two popular and growing models are the use of in-game micro-transactions and ad-supported versions of games. Micro-transaction models give consumers the option to make small, in-game purchases of additional content or enhancements to a game they purchased or one offered as a "play for free" product. Publishers more often are also offering consumers ad-supported versions of game, which give consumers the opportunity to enjoy a basic gaming experience for free. Both models give consumers more flexibility in accessing and paying for game content, but ensure revenue streams to games publishers and developers for their creative works.

Consultation questions

UKIE appreciates the government's review of the effectiveness of its copyright regime whilst at the same time it greatly values the UK's current Intellectual Property regime which is the foundation of the many diverse and growing business models which make up today's games industry. Below we identify the key issues arising from the consultation and outline our industry response to them.

6 - PwC (2010) 'Global Media and Entertainment Outlook 2010-2014.' London: PricewaterhouseCoopers; Orland, K. (2011) 'EA CEO: DigitalGame Sales To Outpace Retail In 2011.'

Introduction of a personal private copying exception to games

As the essential ingredient in a video game is the computer source code, games must be considered primarily "software" by definition and as such are protected in the EU by the 2009 Directive on the Legal Protection of Computer Programs ("The Software Directive"). This Directive does not provide for any private copying exception for games, and nor indeed does the UK's Copyright Designs and Patents Act 1988. Thus, no private copying of computer software (and therefore games) as such is permitted under EU or UK law. Although constituent elements of games, for example music and audio-visual content, could be independently copied and thus theoretically made subject to a private copy exception, that content could not of itself constitute a copy of the game as a copy of the underlying software would also be needed to enable the game to function and gameplay to take place.

Widening Exceptions

UK copyright law provides an extensive list of exceptions to copyright allowing the use of copyright works without the need to seek permission from the copyright holder. It is well established that all exceptions must comply with the so-called 'three step test' set out in the Berne Convention (to which the UK is a signatory) in that they (i) must only be permitted in certain special circumstances (ii) do not conflict with normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the rights holder. This test was reproduced in the World Trade Organisation's 1994 TRIPS agreement, as well as the EU's Information Society Directive. It is therefore clear that any new exceptions cannot be introduced if contrary to the three step test.

Removal of rights through contract

UKIE's position supports the fundamental principle of freedom to contract, as such the consultation should not be seeking to extinguish the kind of certainty that rights-holders need to do business in the UK. Any attempt to strip away this fundamental principle would create chaos. Moreover, with carefully crafted, narrow exceptions in the law which fully meet the international three step test standards, there should be no reason why such a decision cannot be considered on a case by case basis.

Orphan works

As a relatively new industry, the issue of orphan works is less relevant. UKIE would nevertheless argue that the steps taken for "diligent search" are proportionate to the centrality of the use of the work in the product concerned.

Copyright Notices

The introduction of a new statutory role for the IPO by the issuance of general 'notices' could potentially be beneficial to resolving disputed matters of fact between parties but would need to be clearly and closely regulated to ensure consistency and remove any potential conflict with accepted jurisprudence.

Extended Collective Licensing

Video games, being software, are not subject to collective management or compulsory licensing anywhere in the EU. Where UKIE members have encountered collective licensing issues in the online games sector, they arise within the context of territorial collective rights management structures which impede clearance, usually of music rights, at a national level.

List of UKIE Members

Full Members

3MRT Ltd
505 Games Ltd
Activision Blizzard UK Ltd
Atari UK Publishing
Avanquest Software Publishing Ltd
Blue Graphics Ltd
CE Europe Ltd
ChangYou.com (UK) Company Ltd
Codemasters Ltd
Disney Interactive Studios UK
Easy Interactive
Electronic Arts Ltd
FatBob Games Ltd
Focus Innovation
Focus Multimedia Ltd
Kalypso Media UK Ltd
Koch Media Ltd
Konami
Licensed 4 U Ltd
Majesco Europe Ltd
Mastertronic Group Ltd
Mediatonic Ltd
Microsoft Ltd
Mind Candy Ltd
Namco Bandai Partners UK Ltd
NCsoft Ltd
Nintendo UK Ltd
Nordic Games Publishing AB
Piggyback Interactive Ltd
Playdom Inc.
PlayMob
PQube Ltd
Rising Star Games Ltd
SEGA Europe Ltd
Soccer Manager Ltd
Somethin' Else
Sony Computer Entertainment Europe Ltd
Square Enix Ltd
Take2 Interactive Software Europe Ltd
Tecmo Koei Europe Ltd
The Creative Assembly
The Stationery Office Ltd
THQ International Ltd
Trion Worlds Europe Ltd
TT Games
Ubisoft Ltd
Warner Bros Interactive Entertainment
White Room Games Ltd
Zenimax Europe Ltd / Bethesda Softworks Europe Ltd

Associate Members

AGI World Ltd
AIME Ltd
ASP Solutions Ltd
Awillys Ltd
Birmingham Science Park Aston
Brand Culture Sport and Entertainment Ltd
Casual Games Association
CCS Media Packaging
CD Team Ltd
Centresoft Ltd
Channel Four Television Company Ltd
DNA
EJW Creative Ltd
Eurogamer Network Ltd
European Console League
Future Publishing Ltd
Game Central
GAME Stores Group Ltd
GameHorizon
Games Aid
Games Britannia
Gem Distribution Ltd
Get Games Online Ltd
Google UK Ltd
Green Man Gaming
Harbottle & Lewis LLP
Hasbro Europe
Indigo Pearl Ltd
Intent Media Ltd
Interactive Opportunities Ltd
Internet Advertising Bureau
Jumpstart UK Ltd
KPMG
Ludus Magnus
NESTA
OK Media Ltd
OnLive Ltd
OPM Response Ltd
Replay Events Ltd
Scottish Enterprise
Sony DADC UK Ltd
SpecialEffect Ltd
Target Media Ltd
The Games Tribe Ltd
VGM
Virgin Media Ltd
World Gaming Executives

Academic Members

Birmingham City University – Gamer Camp
De Montfort University
Middlesex University
National Film & Television School
Norwich University College of the Arts
Ravensbourne College
Sheffield Hallam University
Teeside University - School of Computing
University of Abertay Dundee
University of Bournemouth
University of Glamorgan; Cardiff Sch of Creative & Cultural Industries
University Centre Grimsby, Grimsby Institute of Further & Higher Education
University of Hull
University of the West of Scotland
University of Wales, Newport (Skillset Media Academy Wales)