

Ukie response to technical review of the copyright exception draft statutory instruments

About Ukie

UK Interactive Entertainment (Ukie) is the trade body 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. Ukie is the only trade body in the UK to represent all the major games console manufacturers (Nintendo, Microsoft and Sony).

Our response

Ukie believes that, because video games are primarily software, the exceptions under review will not apply to them. The protection of video games under the 2009 Computer Programs Directive, to be specific, is not affected by the Copyright Directive.

Ukie appreciates that the review undertaken by the UK's Intellectual Property Office (IPO) is restricted to the Copyright Directive and we believe it is crucial that this point is made clearly in any IPO policy statements, to avoid any potential confusion over the application of the exceptions to software and video games. Although we have been assured that these exceptions will not apply to video games in private conversations, public statements must be made to the same effect.

Although these exceptions will not apply to video games as such, the robustness of UK copyright law is absolutely vital for our industry's future success as it relates to other categories of copyrighted works that are also comprised in video games, such as images, text and sounds. As such, we wish to take this opportunity to submit comments outlining our concerns about the exceptions that have been published in draft statutory instrument form:

- **Scope of the exceptions.** It must be made clear that these exceptions can relate only to those categories of copyright works that are covered by the Copyright Directive. The exceptions to infringement set out in the 2009 Computer Programs Directive are distinct and different. Therefore, video games cannot be made subject to any of the proposed new exceptions by the IPO.
- **Lawful source.** As the IPO has recognized, no exceptions should be allowable with respect to any works obtained through illegal sources.
- **Validity of a number of the impact assessments.** A number of costs remain absent from the impact assessments, particularly those costs relating to the almost certain litigation and other legal action rights owners will be forced to take, and indeed is anticipated by the IPO, to seek the legal clarity currently missing from the SIs. In addition, the scope of the SIs has expanded beyond what was covered by the original IAs. For example, the parody SI now covers pastiche and caricature – neither of these uses was assessed in the IA. The text and data mining SI appears to include all forms of data as opposed to being restricted to only scientific data which formed the basis of the IA.

- **Lack of definition of 'fair dealing'**. The Government is proposing that a number of the exceptions be subject to 'fair dealing'. This is welcome but the lack of guidance as to what, for each exception, would constitute fair dealing will result in real burdens to business and users from increased legal costs for rights holders and creators as they are forced to seek clarification in the courts. These legal costs have also not been included in the IA.
- **Contract override provisions v licensing terms**. The regulations need to be much clearer as to how these two, potentially contradictory, concepts interact. Rights holders need to be able to work in a business environment that includes certainty and licensing is one important way a business has this certainty which leads to adequate confidence to engage in the work it is doing. The accompanying narratives refer to instances where rights holders will still be able to limit the exception, as well as, in some instances, making the exception 'subject to licence'. In addition, if the new permitted acts which may not be overridden remain undefined, the impact on creative industries which will increasingly rely upon contractual terms to support delivery options and market distinction within the digital world, is another issue that has not been addressed in the IAs.