

Online Infringement of Copyright and the Digital Economy Act 2010

Ukie response to notice of
OFCOM's proposal to make
by order a code for regulating
the initial obligations

July 2012



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).

The video games industry provides a myriad of successful and sustainable business models many of them digital, which deliver consumers easy access to the products that they want – from £40 boxed products and cloud-based offerings to free to play apps, casual, and social games.

This all equates to one of the biggest, most agile, and most diverse creative industries in the UK. The UK has the biggest consumer market for video games in Europe, valued at close to £3 billion in 2011.

£30 billion

The global revenue from software sales

Our successful UK industry sits within a strong global video games and interactive entertainment market. Global revenues from software sales are reportedly \$50 billion per annum (over £30 billion) and are expected to rise to \$87 billion (£54 billion) by 2014. PricewaterhouseCoopers projects that the sector will grow at an average annual rate of 8% between 2010 and 2014 - faster than film, music and TV.

Ukie welcomes Ofcom's publication of the Initial Obligations Code, which takes the UK an important step closer to having a robust notice-sending framework in place, as envisioned in the Digital Economy Act.

Games are a vital, global growth industry, in which the UK is perfectly placed to be a world leader. Having a balanced and proportionate system to protect and value rights and content in the digital age is an important step in making the UK an attractive place

for games companies to do business.

As such, Ukie supports the draft Initial Obligations Code published in June. We believe it is a practical and proportionate system that will allow online copyright infringement to be tackled chiefly through educating and helping consumers to find legal content, with court action as a final backstop only where necessary.

We recognise that Ofcom have incorporated several of our comments on the previous draft code, and has taken a mostly pragmatic approach to aligning these with suggestions from other stakeholders.

In concert with the Alliance Against IP Theft (the Alliance), we would like to highlight and dispel several myths that continue to arise around the notice-sending process.

- This is NOT a 'three strikes and you're out' process

Elements of the media continue to use this phrase when talking about the DEA, despite its inaccuracy. As such we urge Ofcom to encourage all parties to use accurate language when communicating and discussing the Act and the Code.

- Letters to subscribers will NOT be 'threatening'

Rights holders have no interest in pursuing potential customers through the courts. There is a clear commitment from all rights holders to ensure that the letters are as educational as possible and assist consumers in finding legal content and securing their internet connections.

- Notifications will NOT be sent to the wrong individuals

The letters will make it clear that we appreciate the internet subscriber may not be the person who committed the infringement. Given the refundable appeal fee of £20, it will ultimately be costly to rights holders to target the wrong individuals, which is why our members that take part will be strongly focused on having robust evidence-gathering procedures.

- DEA costs will NOT be passed on to consumers.

The overwhelming costs of the DEA fall on rights holders but should ISPs pass their element of the costs onto consumers it is estimated this would be only 49p a year per subscriber.

Ofcom's Questions

1. Application of the Code

1.1 Ukie appreciates the reasons for limiting participation in the notification scheme to fixed-line ISPs with more than 400,000 subscribers; this will cover the majority of the market at the most reasonable balance of cost.

1.2 However, the long-term status of this majority market share is far from certain: as Ofcom's own research has shown, the proportion of people accessing the internet through smartphones, and therefore also through public wi-fi, is growing rapidly. Technological change continues to accelerate, driving this process faster, with the coming advent of 4G certain to be a milestone in this regard.

1.3 This is particularly important for the games industry: mobile and social games are an ever-growing proportion of the games market, and in some sectors are beginning to see their own mounting issues with piracy.

1.4 There has been discussion amongst Alliance members of the need to ensure the definition of the Code's scope does not make it overly difficult to include other internet access providers, including those providing mobile and public broadband services, in the scope of this system.

1.5 Ukie welcomes Ofcom's commitment to review the application of the Code to ISPs. We urge that this be completed as quickly as possible; preferably within 6 months of the system becoming operational rather than 12 as suggested.

1.6 We also feel that drafting the Code to make it 'future-proof' would be beneficial. An ability to broaden the type of ISP included without having to introduce further secondary legislation, and the consultation process that this would require, would make the system more robust in the face of long-term technological change.

2. Evidence Gathering and CIRs

2.1 The decision to establish a Publicly Available Standard (PAS) for the evidence-gathering process by rights holders is welcomed by Ukie.

2.2 This will provide certainty and clarity for rights holders, and crucially should lower the entry costs for smaller rights holders. The government have, through the introduction of games production tax breaks in the 2012 Budget, made it clear that they want to encourage a flowering of start-ups in our industry, as well as increasing inward investment. The more likely it is that this growing number of smaller companies can benefit from the protection of this Code, the more legitimacy it will have in all parts of our industry.

3. Notifications

3.1 Although the Code specifies the content that must be contained within each type of notification, and requires each ISP to have its own standard form for each type of notification, it is unfortunate that Ofcom does not have the power under the DEA to specify the form of the notification.

3.2 As in our previous submission on the draft code (as ELSPA), we underline how important it is that notifications must not undermine the initial obligations process through either their tone or content. It is vital for the success of this system as a whole that consumers respect and understand it. We would still recommend a provision in the code stating that nothing in the tone or content of the notification should undermine the initial obligations process, and would suggest that Ofcom make it clear they would use their enforcement powers should it be found that ISPs are sending letters which do not abide by the letter and spirit of the law.

Notifications must not undermine the initial obligations process through either their tone or content

3.3 It should also be made clear that this provision on the tone and content of the letter would be breached if general marketing material were included in the notification letter by ISPs. This would detract from the important and legally impactful message of the letter. It would also be inappropriate for such material to be sent in postal deliveries for which rights holders would be sharing the costs.

4. CIR Procedure

4.1 Ukie welcomes the decision that ISPs will not be allowed to reject CIRs based on their 'reasonable opinion'. As we said in our previous submission, this gave far too broad discretion for CIRs to be rejected; the decision to rely on the grounds stated in the DEA itself is a good one.

5. Appeals

5.1 Ukie supports Ofcom's decision to limit the grounds for appeal to those contained in the DEA and to include a small appeals fee, refundable on success. It is important that the refundable nature of the fee is made clear in all communications on the system, as this protects the rights of subscribers to defend themselves whilst being an important protection against mass, vexatious appeals, which could quickly render the system unworkable and illegitimate in the eyes of business.

6. Notification Period

6.1 Ukie will of course also be responding to the separate consultation on the sharing of costs. However we wanted to raise now the suggested system for estimating CIR volumes and costs in advance of the first notification period. It is important that clarity be provided on this as soon as possible. It could prove difficult for games companies to anticipate in advance the volume of CIRs they might send over an entire 12 month period. Everything must therefore be done to allow them to estimate this as close to the beginning of the period as possible. This is particularly salient, of course, with regard to the first period and the set-up process being established.

The cost of being involved in the notification system must be made clear as early as possible

6.2 Whilst the games industry has constant underlying levels of IP theft, it can sometimes see unpredictable jumps in piracy, for example when a console is initially hacked (this makes it possible to play illegal copies of games on that platform for the first time). This occasional unpredictability has the potential to make advance predictions of CIR levels difficult.

6.3 Whilst the first notification period will require estimates from rights-holders so that ISPs can set up the necessary infrastructure, it would be helpful for the games industry to have a more flexible line regarding the numbers of CIRs in further notification periods after the first.

7. Costs

7.1 Similarly, the cost of being involved in the notification system must be made clear as early as possible, so that the full breadth of the games industry can assess what level of involvement they wish to take.

List of UKIE Members

Full Members

1C UK Ltd
3MRT Ltd
505 Games Ltd
Activision Blizzard UK Ltd
Atari UK Publishing
Avanquest Software Publishing Ltd
Bigpoint Marketing Ltd.
Blue Graphics Ltd
Born Ready Games Ltd
CE Europe Ltd
ChangYou.com (UK) Company Ltd
Codemasters Ltd
Disney Interactive Studios UK
Easy Interactive
EJW Creative Ltd
Electronic Arts Ltd
FatBob Games Ltd
Focus Innovation
Focus Multimedia Ltd
Hardlight
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 GmbH
One Thumb Mobile Ltd
Piggyback Interactive Ltd
Playdom Inc.
PlayMob
PQube Ltd
Railsimulator.com
Reloaded Productions
Revolution Software Ltd
RIE Studios Ltd
Rising Star Games Ltd
SEGA Europe Ltd
Six to Start Ltd.
Soccer Manager Ltd
Somethin Else
Sony Computer Entertainment Europe Ltd
Sports Interactive 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 Publishing
Ubisoft Ltd
Warner Bros Interactive Entertainment
White Room Games Ltd
Xiotex Studios
YoYo 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
Centresoft Ltd
Channel Four Television Company Ltd
DNA
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
K7 Media Ltd.
Kantar Worldpanel
KPMG
Ludus Magnus
NESTA
OK Media Ltd
OnLive Ltd
OPM Response Ltd
Osborne Clark LLP
Replay Events Ltd
Scottish Enterprise
Sony DADC UK Ltd
SpecialEffect Ltd
Spotless Interactive
Tandem Events Ltd
Target Media Ltd
The Games Tribe Ltd
Unity Software 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 Centre Grimsby, Grimsby Institute of Further & Higher Education
University of Abertay Dundee
University of Bournemouth
University of Glamorgan; Cardiff Sch of Creative & Cultural Industries
University of Hull
University of the West of Scotland
University of Wales, Newport (Skillset Media Academy Wales)