Draft Consumer Rights Bill – Pre-Legislative Scrutiny
Ukie submission to BIS Select Committee

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).

General Comments

Ukie have engaged with BIS from the very beginning of the discussion leading up to this Bill. Our input has been focused on the Digital Content aspects of the Bill, and we will maintain that focus in this document.

Throughout the conversation we have highlighted the complexity of games in comparison to most other forms of digital content, both in their technological sophistication and their business models.

As such, we have suggested that games be taken as an important test case for the new rights being created for digital content. The level of complexity involved means that the risk of unintended consequences from regulatory changes is higher in games than for the majority of other forms of digital content.

There were three specific issues we raised in our initial submission based on this general warning. We are pleased to say that BIS have gone some way to recognising all of these. The three issues were:

1. Minor bugs are an unavoidable feature of all games, which consumers understand and expect. As such, there must be no "freedom from minor defects" right in relation to games and other technologically complex digital content.

2. As the majority of faults in games will be the result of flaws in the code itself, they will be universal. This means that repair attempts will usually involve universal patches or updates. Policy around repair attempts – the reasonable amount of time allowed, the number of opportunities to repair – must reflect this.

3. The right to reject, or the return of content in exchange for a refund, would make no sense for digital content in general and for games in particular. The trader or provider would have to be able to see clear proof that the content had been deleted by the consumer from all their devices. In closed platforms this may just be possible, but for open content, considering the ease of copying digital works, this is simply untenable.

These concerns have been listened to and reflected in the Draft Bill, as we will discuss further below.

However, there are other issues which have not yet been resolved. These mostly involve the grey area of interaction between digital content and services, and the uncertainty over which rights and remedies would apply.

There continues to be a high rate of experimentation and innovation in business models in this space – the concept of 'games as a service' is now a fundamental part of our industry - and we are not yet certain that the current proposals will accommodate such innovation without causing confusion for content creators, digital retailers and consumers.

We are also concerned about the decision to provide different rights to consumers where they buy the same digital content on a tangible disc rather than through a direct download. Although we appreciate that any decision on this problematic issue will create some uncertainty, we would like BIS to provide far more exploration of the possible consequences of what is being proposed.

Policy Decisions

The policy decisions taken by BIS in drafting the Bill have recognised much of the evidence we have put forward. We wish to state our support for these decisions, and stress the importance of their being kept in place.

- No right to reject

As stated above, this will simply not be feasible for digital content, where it will be almost impossible for the trader to be certain that the consumer has not retained a copy of the content. Such a right could potentially cause significant market disruption. A consumer's remedy should therefore be limited to repair/replacement or refund (or partial refund).

- No limit on repair/replace attempts

Defining when a repair attempt has been made will be complicated in a world of universal patches and updates. This would create difficulty for both traders and for consumers, with little benefit in return, as we believe that games companies already take a good-faith approach to repairing faulty games or offering consumers recompense.

- Acceptance of minor bugs in game code

The explanatory notes published alongside the Draft Bill have accepted the point that games and other forms of complex digital content cannot be made subject to the 'freedom from minor flaws' quality standard (paragraph 141). This is a vital point that must be retained. The drafting of this paragraph should be amended, however. Where currently it states "e.g. a reasonable person may expect bugs in a complex new game on release, but not a more simple piece of software", it is not helpful to point to other software, which by its nature will also be relatively complex. Instead it should refer to, for example, "a simpler piece of content such as a music file".

All three of these decisions are crucial, and must be kept in place if the new regime of digital content rights is to function.

Remaining Concerns

Services and Digital Content

Our greatest remaining concern about the Bill is a lack of certainty about the difference between digital content and services, and when the two different regimes will apply. There is no definition of "services" under the Bill to assist our understanding.

There is a certain amount of overlap between the two, particularly for more complex online offerings, and we feel that more discussion and explanation is required of how these will be treated.

Conversations with BIS so far suggest that they are not yet certain themselves how this overlap will be treated, and it does not appear to be fully tackled in the Bill itself.

Clause 41 touches on the area in which digital content is provided together with what we would traditionally see as a service, the ability to interact online with the game and other players via the trader's servers. It provides for server-based functionality of content to be maintained for a reasonable period of time; and states that the quality rights for the content have to be met every time it is transmitted back to the consumer.

Many games companies offer such services as part of the content offering, and although Clause 41 is helpful on the issues it tackles we are not yet certain that these companies would have the necessary clarity over whether the different elements of their offerings will be subject to the services regime or the digital content regime. We believe that other digital content industries are likely to face similar problems, as the innovative business models our industry has pioneered continue to spread.

Another area for potential confusion relates to the use of virtual currency. Many games now use a system of in-game currency which can be bought, in different amounts, with real money. This in-game currency is then used to purchase many different things, such as opening up new parts of the game world, aesthetic changes to the player avatar or game world, or new items which improve the player's statistics.

From our conversations so far with BIS it seems that they would interpret virtual currency to be a form of digital content. Yet the understanding of those companies currently offering it is that it is an "entitlement" added to a user's account on a server, which says the user is entitled to make transactions for a certain amount. Does such an entitlement constitute "data produced and *supplied* in digital form"? The same questions arise in respect an online retailer who gives the consumer the ability to top up a virtual wallet or to buy points to be used to acquire content from the trader's website.

There are other services offered around games – those which require a monthly subscription to play online, or 'cloud gaming' services which allow players to rent access to a game online for a certain

period, for example. Does the entitlement to play under these models constitute the supply of digital content or services?

The concept of 'related services' that was used in the consultation leading up to this Bill was helpful in framing this issue, making relatively clear when the services regime would apply. It may be useful to return to this language in conversations around the Bill.

In summary, we need to have a single regime that covers our consumer offerings as a whole. It does not benefit us - or consumers - if a single offering, such as a subscription that offers both content and services, is governed by different consumer law regimes, particularly where there is confusion over what part of that offering constitutes digital content and what constitutes the service element.

The legal status of these offerings will have far-reaching implications, such as in relation to the laws of VAT, duty, insolvency, retention of title and commercial agents. Online retailers also need clarity to draft enforceable terms and conditions with suppliers and consumers.

To clarify, we are not at this point proposing changes to the Bill itself; we are requesting that the occasions on which the services regime and the digital content regime will be applied are discussed in more detail. At that point, we would take the opportunity to comment on specific language.

We would also like to be clear that we are not requesting that games be treated differently on this issue than other forms of content, merely that further clarity about how the two regimes will work for all forms of content.

Digital Content on Tangible Media

Under s.15 of the draft Bill, where a consumer buys digital content on a disc, or other physical medium, they get both sets of rights – the rights for goods as well as the rights for digital content.

In effect, this means that a consumer buying a physical copy of a game will have slightly stronger rights – they will have 30 days to return the game and demand a full refund if it is faulty, and the trader will only have one opportunity to repair or replace a faulty game after that point before the consumer can demand a price reduction.

We are concerned that this will create just as much consumer confusion as the status quo, if not more, particularly where there is interaction with an online, service-like component of the game.

If a consumer has bought the game on a disc at a high street retailer and then finds they cannot access the online multiplayer, for example, they will be able to demand that the trader 'repairs' the game in just one attempt, even though they have no responsibility for or access to the online component, and thus no ability to offer such a repair.

In some instances, the purchase of a physical disc will also allow the player to download a separate game or piece of content. More explanation is needed from BIS of what rights the player would have for this separate download.

We appreciate that other contradictions are created if different approaches are taken to this problem. Our initial consultation response proposed that all digital content feature the same rights

for consumers, but recognised that this would mean they still had the rights for goods regarding the actual physical disc (eg it was scratched), but not the data on the disc.