

THE HUNGER (FOR) GAMES

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Outline

- Act 1: Tax
- Act 2: Consumer protection
- Act 3: Intellectual property
- Dramatic Conclusion

Preface

- Project questions:
 - Where, when and how do legal perspectives affect the process of game creation and development?
 - To what extent are game players aware of legal issues (i.e. their rights and obligations, with regard to developers, manufacturers / platform operators other players, and the criminal law)
 - What is the significance of video games within transmedia planning and branding?
 - What are the barriers and opportunities, in legal and business terms, associated with existing and emerging business models in the games sector?
- Review of (mostly industry) literature; developer workshop; gamer survey

Act 1, Scene 1: Calls for tax relief

- Film tax credit 2006 (replaced discredited write-off / sale & leaseback schemes for film & TV)
- Promises in run up to 2010 election
- Not implemented by Chancellor (“poorly targeted”)
- Criticism from industry representative bodies (especially in context of relief available elsewhere)
- And the regional dimension...

Act 1, Scene 2: Finance Act

- Announced December 2012 (along with animation and high-end TV), along same lines as film scheme (additional deduction for expenditure, possibly payable as credit)
- Two components: Finance Act (actual tax impact), and “cultural test” points (BFI) - setting, characters, subject matter, language, cultural contribution, “hubs”, people
- “Video games” not further defined (after consultation), but explicit exclusion of “*anything produced for advertising or promotional purposes*” and gambling

Act 1, Scene 3: review and decision

- Review by European Commission as art 107 TFEU state aid (hardly surprising) - doubts letter sent 2013 (necessity, subsidy race, etc)
- Finally cleared in 2014: “focusing on a small number of distinctive, culturally British games which have increasing difficulties to find private financing” (full decision awaited)
- Chancellor: “This is a key industry of the future and I want Britain to be one of its biggest centres. 95% of UK video games companies in the UK are SMEs. This relief is one of the most generous in the world and will help them to grow, creating new jobs for hardworking people”.
- Vaizey: “This is tremendous news for the supremely talented and creative UK games sector. The government recognizes the important contribution the industry makes to the economy and is committed to supporting the industry’s continued growth through a range of measures like these new tax reliefs”.

Act 2, Scene 1: Digital content

- Consumer Rights Bill three-category system (goods, services, digital content)
- “data which are produced and supplied in digital form”
- Already an EU law requirement but for limited purposes (2011 Directive)
- In broad terms, existing ‘goods’ requirements applied to paid-for digital content (reserve power to extend to other forms)
- Concerns from games sector about ‘fit’ of proposed consumer rights regime

Act 2, Scene 1: Digital content

- “This means that, as with goods, this quality standard is **flexible** to allow for the many different types of digital content. For example, the **reasonable expectations** of quality for a 69p app would not be as high as for one worth £5.99. The clause also sets out other matters that can be taken into account when accessing the quality of the digital content, such as its **state and condition, fitness for purpose and durability**. This is not, however a comprehensive list. Other relevant circumstances may include the **type** of digital content (e.g. a reasonable person may expect bugs in a complex new game on release, but not a more simple piece of software) or the way in which it is **accessed** (e.g. on a disk or downloaded from the Internet)” (BIS post-consultation statement for Draft Consumer Rights Bill)

Act 2, Scene 2: always-on

- "From a player perspective, always-online is another in a long line of business models disguised as features" (*Edge* May 2013 p. 97)
- Impact of Prism on Xbox One strategy
- CRB may have a role here
- Link with IP questions (DRM and resale)

Act 2, Scene 3: IAP vs OFT

- Chasing the whale and the questions of ethics
- The impact of psychology - or even now a loss of power?
- “F2P” and even “Paymium”
- Significance of OFT (but note structural changes in competition and consumer law)

Act 2, Scene 3: IAP vs OFT

- “The freemium model led to children spending money without parental approval, and in a market with many developers and a few key industry players, notably the platforms, there has been widespread ignorance of how consumer protection law applies ... This is a model of how we want to work in stamping out online consumer detriment and making online markets work well for consumers, businesses and the economy.” (David Currie, chair of CMA, 1 April 2014)

Act 3, Scene 1: TPM

- Group of English ‘modchip’ cases - applying both Software Directive & InfoSoc Directive provisions (including criminal for the latter) - including playing-is-copying logic
- *Nintendo v PC Box* CJEU 2014
 - Requirement for breach of (C) law
 - Availability of other means
 - Relative costs, effectiveness, evidence of use
- “Console Manufacturers Right” (Boaton & MacCulloch) - what now?
- A correction to the (mis)use of copyright? See e.g. *MDY v Blizzard*, Copyright Review Committee (Ireland)

Act 3, Scene 2: Scope

- Multiple forms of protection (code as literary work, artistic, film, dramatic, literary)...
- ...or a need for something else, like gameplay? (Lee 2012)
- Important decisions on exhaustion (UsedSoft) and protection of functionality (SAS)
- The tactical use of different forms (not just games; see FAPL cases)
- “The protection offered by Directive 2009/24 is limited to computer programs. [Videogames] constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29” (*PC Box*)

Act 3, Scene 3: Attack of the Clones

- Appears to be a particular problem in app stores
- Limits to existing law (*Nova Productions*)
- Other remedies e.g. trademark
- But would the cure be worse than the poison?

Dramatic Conclusion

- Serious law for serious times, or the only way is ethics?
- Evaluating the three issues
 - How ‘united’ is the industry?
 - What can law ‘do’?
 - Future-proofing and convergence?