

The Regulation of Video Games: Past, Present and Future

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The Digital Economy Act 2010, better known for its much-debated copyright provisions, also facilitates major changes to the statutory regulation of computer and video games in the United Kingdom. This article sets out the history of the regulation of game content by the BBFC and the video game industry, reviews the various reports and interventions that led to the 2010 provisions, and considers the implications of various new definitions. The possible separation of film and games is considered, as are developments in relation to tax relief and to the regulation of games in other jurisdictions.

Games and the Video Recordings Act

Although the main purpose of the Video Recordings Act 1984 (VRA) is to control the sale and supply of video works, it also affects video and computer games.¹ The Act established a statutory system for the classification of video recordings, with the British Board of Film Classification (BBFC) designated as the classification authority. Although video is defined in broad terms, the Act is framed in terms of physical supply alone. In its original form, the VRA refers to video games as a type of video work, but applies only to works on “disc or magnetic tape”.² In 1993, the BBFC proposed a number of amendments to the original VRA. One was to add “chip, cartridge, card” and “any other recording medium hitherto or yet to be invented” to s.2(a) of the Act.³ The eventual change was to replace “disc or magnetic tape” to “disc, magnetic tape, or any other device capable of storing data electronically”.⁴ However, it was widely noted that these amendments meant that games (or

indeed video works more generally) on a “memory chip, plug-in cartridge or board or similar”⁵ could now be the subject of regulation under the VRA.

Nonetheless, the majority of video games did not fall within the VRA, being exempted under s.2(1)(c). In turn, this exemption is lost if the game falls within a list of categories in ss.2(2) and 2(3). These include the depiction (“to any significant extent”) of human sexual activity, acts of gross violence towards humans or animals and criminal activity that is likely to encourage the commission of offences. Around 200 games per year are reviewed by the BBFC, although this is much less than the 1000+ games normally assessed by the voluntary self-regulation system managed by the Video Standards Council (VSC), known as Pan European Game Information (PEGI). This system is based on the original industry (ELSPA) ratings. In the case of consoles (but not the PC), manufacturers require the use of BBFC or PEGI, and retailers also require some form of rating.⁶ The distinction between PC and consoles is that the many manufacturers of PCs (or indeed Microsoft, as developer of the Windows operating system) do not have meaningful control over the software that users can install, while console manufacturers maintain tight control over software development through the control of intellectual property rights. To adopt Zittrain’s distinction between “generative” and “tethered” appliances,⁷ it is not possible to require PEGI compliance at the hardware level for the former, but it is trivial to do so in the case of the latter.

The level of activity at the BBFC has varied over the history of the VRA.⁸ BBFC annual reports usually contain a short section on “digital media”, with reports from the 2003 annual report onwards suggesting quite a number of high-profile games come through the BBFC system, with some ongoing discussion as to the definition of exempt.⁹ Nonetheless, concerns were expressed on a regular basis regarding the two systems and possible discrepancies, such as the idea that parents may assume that the PEGI ratings relate to ability rather than suitability.¹⁰ The games industry has long criticised the VRA, arguing that the system was slow and clumsy and that it would be better to enforce the PEGI system could be enforced against retailers selling games to “underage” customers.¹¹ Meanwhile, occasional issues such as the murder of teenager Stefan Pakeerah provoked criticism

¹ The term “video games” is used throughout, as it is found in the statute, although some distinguish between video games (consoles) and computer games (PCs), or substitute the term “digital games”.

² Video Recordings Act 1984 s.1.

³ James Ferman, *Computer pornography: Memorandum of Evidence to Home Affairs Committee* p.3. Reprinted in BBFC, “Annual Report 1993”.

⁴ Added by the Criminal Justice and Public Order Act 1994.

⁵ Norton, “Digital media works” (1995) 13 *International Media Law* 59.

⁶ Tanya Byron, *Safer children in a digital world* (2008). Available at: <http://www.dcsf.gov.uk/byronreview/> [Accessed August 30, 2010] [7.10].

⁷ Jonathan Zittrain, *The future of the Internet—and how to stop it* (New Haven (CT): Yale University Press, 2008).

⁸ e.g. just 21 “digital” works in 1999, the majority being CD-ROM erotica rather than true “games”, as compared with 252 in 2005, the first year of significant growth in classification: BBFC, “Annual Report 1999” p.22; BBFC, “Annual Report 2005” p.65.

⁹ BBFC, “Annual Report 2003” pp.90-93; BBFC, “Annual Report 2004” p.70.

¹⁰ Byron, *Safer children in a digital world* (2008) [7.25]; Slesenger Research, *Classifying games: qualitative research findings* (2008). Report for the BBFC. Available at [http://www.bbfc.co.uk/downloads/pub/Policy%20and%20Research/Classifying%20Games%20-%20Qualitative%20Research%20Findings%20\(January%202008\).pdf](http://www.bbfc.co.uk/downloads/pub/Policy%20and%20Research/Classifying%20Games%20-%20Qualitative%20Research%20Findings%20(January%202008).pdf) [Accessed August 30, 2010] pp.31-2.

¹¹ ELSPA, *Playing for success* (London, 1998) pp.4-5, 18-19.

of violent games accompanied by calls for greater regulation¹² including in Parliament, despite there being no relevant connection between the impugned game (Manhunt) and Pakeerah's murder.¹³

An influential report on the protection of children in the digital world, the "Byron Review",¹⁴ recommended changes to the system. The House of Commons Committee on Culture, Media and Sport issued a detailed report on "harmful content", including a discussion of video games and the implementation of Byron. The two reports differed, though, in their recommendations; Byron suggested a hybrid system,¹⁵ while the Culture, Media and Sport Committee¹⁶ preferred the use of the BBFC system for all games for those aged 12 and over. The BBFC itself pointed out that any reduction in regulation could create a loophole in DVD regulation, and supported the extension of the statutory scheme for DVDs.¹⁷ The subsequent Government consultation paper¹⁸ included four options, being hybrid (VRA powers for all +12 games), enhanced BBFC (VRA for all games), enhanced PEGI (statutory force to the PEGI system) and no change (with a voluntary code of practice). The European Commission favours the PEGI system and presents it as a desirable goal for member states to consider.¹⁹

The Digital Economy Act—a new approach

In June 2009, a version of the Enhanced PEGI system was chosen as the Government's preferred option, and ss.40 and 41 of the Digital Economy Act implement this decision. This Bill was first considered by the House of Lords, with comparatively short debates on these sections (the focus of the debate was on the copyright provisions also contained in it). Subsequently, it was the subject of the controversial "wash-up" procedure, with the House of Commons not even considering amendments to the sections on games in a radically truncated committee stage taken in the House.

Of course, just as the VRA itself is silent on many of the key factors of the classification system (such as the actual classifications), the amendments made through the DEB do not tell the full story. The new clauses, like the VRA before it, allows the designation of an authority to classify video games. At present, it is not possible to

designate more than one authority, but the amended VRA allows two such designations. The Government's intention is to continue the designation of the BBFC in respect of video works and to designate the VSC in respect of video games, and the council is currently preparing for this,²⁰ although it is now expected that the new system will not come into force until April 2011.²¹ New provisions on classification have also been introduced, most notably a much narrower "exemption" for video games (essentially meaning that games classifiable under PEGI at 12 or above would be non-exempt). However, without knowing the background to the legislation and the decision to move towards the PEGI system, it is impossible to make sense of the legislation.

The new provisions, though, do not address the question of games supplied in non-physical form. This is an older issue than is sometimes assumed. For example, the BBFC's consultative committee discussed the prospect of games delivered "in digitised form down a modem from outside national frontiers" in 1993,²² and the same body criticised the availability of the unclassified and controversial game *Schoolyard Slaughter* a through download a number of years later.²³ "Importing" of games without any BBFC or PEGI scrutiny is also a regularly cited issue.²⁴ The Byron Review deals with "online gaming" (defined as games using a live network connection), suggesting that the risks of such resemble those of the Internet more generally.²⁵ However, we find some unclear comments regarding legal status at a later stage. "Games provided online" are referred to at 8.14 as falling outside of the Video Recordings Act, but this is not synonymous with the review's own definition of online gaming, and it is unclear in other parts of the chapter dealing with online gaming which definition is being used. We can identify at least four types: games supplied in disc (or similar) form with an online component, games downloaded but played offline, games downloaded and played online, games played entirely online. Only the first falls within the VRA.

Although one of the key purposes of the new s.2A is to change the dividing line between exempt and non-exempt, the new section would also allow these conditions by which video games are considered to be exempt or non-exempt (and, separately, the definition of exempted supply) to be amended in future by

¹² BBC News, "Game blamed for hammer murder" (July 29, 2004). Available at <http://news.bbc.co.uk/1/hi/england/leicestershire/3934277.stm> [Accessed August 30, 2010].

¹³ James Newman & Iain Simons, *100 Videogames* (London: BFI, 2007) pp.112–5.

¹⁴ See also Iain Simons, "Byron Review—Safer Children in a Digital World" (2008) 19 Ent. L. R. 143.

¹⁵ Tanya Byron, *Safer children in a digital world* (2008) [7.47–7.49].

¹⁶ Culture, Media and Sport Committee, "Harmful content on the Internet and in video games" HC 353, July 31, 2008. Available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcomeds/353/353.pdf> [Accessed August 30, 2010] p.203.

¹⁷ BBFC, "Annual Report 2007" pp.4–5.

¹⁸ Iain Simons, "Byron Review on harmful content on the Internet and video games—an update" (2009) 20 Ent. L. R. 1.

¹⁹ European Commission, "Communication on the protection of consumers, in particular minors, in respect of the use of video games" COM(2008) 207; see in particular p.4–5 in respect of the BBFC "differing" from the PEGI system in the UK.

²⁰ Chris Remo, "UK Video Standards Council forms games classification panel" *GamaSutra*, January 15, 2010. Available at http://www.gamasutra.com/view/news/26844/UK_Video_Standards_Council_Forms_Game_Classification_Panel.php [Accessed August 30, 2010].

²¹ Ben Parfitt, "PEGI ratings delayed until 2011" *MCV*, July 15, 2010. Available at <http://www.mcvuk.com/news/40015/PEGI-ratings-delayed-until-2011> [Accessed August 30, 2010].

²² BBFC, "Annual Report 1993" p.21.

²³ BBFC, "Annual Report 1996/7" p.23.

²⁴ BBFC, "Annual Report 2001" p.66.

²⁵ Byron, *Safer children in a digital world* (2008) [8.1, 8.6].

statutory instrument (subject to the affirmative resolution procedure). The position of the DCMS is that this provision affords “flexibility to provide for any future developments and new games with different content”.²⁶ Surprisingly, the review of the delegated provisions of the Bill by the House of Lords Delegated Powers and Regulatory Reform Committee did not deal with this point. This is despite significant criticism of other aspects of the Bill, such as cl.17, which contained a much-debated power to amend the Copyright, Designs and Patents Act 1988. The Committee would have removed this clause,²⁷ and the Government ultimately agreed to an alternative clause. Ultimately, while embedding every technological definition in primary legislation may carry its own problems, relocating important issues into the domain of statutory instruments because they refer to technologies is questionable.

One important test for any regulatory system, but particularly a self-regulatory one, is how due process and fair procedures are provided for within the system. At present, the BBFC system (for video works, including non-exempt video games) includes both a BBFC procedure for reconsideration and also a Video Appeals Committee (VAC). The latter is required by s.4(3) of the VRA. Decisions of the VAC can also be challenged by way of judicial review (including by the BBFC itself!) and it is generally—and correctly—assumed that the Human Rights Act applies to decisions of both BBFC and VAC. The BBFC will also take into account what it calls “specific category requests”, where the person submitting the game can specify a desired classification and liaise with the BBFC (including a possible “second viewing” by senior staff or the making of cuts) before the final decision is made. The position in respect of PEGI is rather different. Although it is by no means clear whether the voluntary PEGI system could be amenable to judicial review, a non-statutory appeals procedure exists, with the “VSC Appeals Committee” including a range of members such as the general secretary of trade association ELSPA, a retailer, and even a nominee of the BBFC.²⁸ Furthermore, the PEGI system, at a European level, has a procedure that is not obviously applicable in the case of the BBFC, which is the right of individuals more generally to challenge the decision to award a PEGI rating through a complaints procedure. There is no apparent right of appeal to the VAC by anyone other

than the person that submits the game to the BBFC. The VAC procedures refer to “any person aggrieved” but subsequently refer to a video work submitted by said person.²⁹ As a possible alternative, the VAC procedures also allow it to consider written representations from any other person³⁰ once a case is before it, and an unsuccessful private members’ bill by Julian Brazier debated in 2008 would have allowed access to the VAC through a motion signed by 50 MPs.³¹

Separating film and games: what next?

A persistent theme in press coverage of the regulation of video games is how it may in future resemble that of film, or curiously and more precisely, “cinema-style”. This exact phrase (or the alternative film-style) is repeated in headlines and in text across a range of British newspapers in the period 2008–2009.³² It has also been used in the context of the discussion of Internet content more generally.³³ Others are more specific, referring to classification as “health warnings”³⁴ or dealing with the prominence of labeling.³⁵ At a broader level, it has been suggested that the response to video games resembles that observed in the case of the ‘video nasties’ around the time of the original VRA in respect of video works.³⁶ This accompanies separate discussion on the economic and cultural successes of film and games, with the latter sometimes said to be portrayed as be the “hip younger sibling” of the former.³⁷

There are a number of legal and conceptual issues associated with the relationship between games and film. Sometimes there can be “advantages”, from the point of view of the game developer. For example, in its review of video game regulation in California (discussed below), the 9th Circuit Court of Appeal noted that while the US Supreme Court has not yet addressed video games, ‘story-laden video games of the type potentially covered under the Act are similar to movies’,³⁸ which is significant as film is protected under the First Amendment as speech. On the other hand, Byron suggests that aligning classification systems for games and for film (i.e. extending the statutory regulation of the former) would reinforce her proposal that “games have to be taken as seriously as films”.³⁹

One feature that has been the subject of BBFC communication and advice is that of cutscenes, which are “non-interactive, linear cinematic” scenes included

²⁶ House of Lords Delegated Powers and Regulatory Reform Committee, “2nd report of session 2009–10” HL Paper 24, December 16, 2009 [72, 75].

²⁷ Delegated Powers and Regulatory Reform Committee, HL Paper 24 [19].

²⁸ Damien Tambini, Danielo Leonardi & Christopher Marsden, *Codifying cyberspace: communications self-regulation in the age of Internet convergence* (London, Routledge, 2007) p.194.

²⁹ Video Appeals Committee Provisions 1985 s.1.

³⁰ Video Appeals Committee Provisions 1985 s.4.

³¹ British Board of Film Classification (Accountability to Parliament and Appeals) Bill, Bill 16 of 2007–08; 2nd reading February 29, 2008, *Hansard HC Vol. 472 col.1352*.

³² Sean Poulter, “Call for cinema-style age ratings on games” *Daily Mail*, February 27, 2009 p.12; James Kirkup, “Film-style age classifications for online computer games” *Daily Telegraph*, August 1, 2008 p.12; James Chapman, “New cinema-style warnings for disturbing video games” *Daily Mail*, July 30, 2008 p.8.; Brian Brady, “Cinema-style rating for computer games” *Independent on Sunday*, March 23, 2008 p.6.

³³ Robert Winnett, “Internet sites could be given ‘cinema-style age ratings’”, Culture Secretary says” *Daily Telegraph*, December 26, 2008 p.1.

³⁴ Alexandra Freen, “Computer games to get health warnings” *Times*, March 27, 2008 p.1.

³⁵ Mark Milner, “Rules tightened on violent video games” *Guardian*, March 26, 2005 p.23.

³⁶ James Newman, *Videogames* (London, Routledge, 2004) p.65; Mark Kermode, “Should we avoid violent video games?” *Guardian*, December 11, 2009 p. 5 (G2).

³⁷ Screen International, Editorial, May 2, 2008 p.3.

³⁸ *Video Software Dealers Association v Schwarzenegger* (2009) 556 F 3d 950, 958 at fn.11.

³⁹ Byron, *Safer children in a digital world* (2008) [7.33].

in games. They can alternatively be divided into three categories: full-motion video (FMV), pre-rendered graphic animation, and the currently popular in-game cut scenes, generated “on the fly” using the same visual references as gameplay.⁴⁰ FMV was particularly popular in the mid-1990s as more powerful gaming hardware and larger storage media became available, such as in the various releases in the Final Fantasy series,⁴¹ with some use of what were termed “vactors” (videogame actors).⁴² Despite some predictions that this would mean the introduction of “soft” pornographic content in games,⁴³ this did not become a major feature, although apparently violent content did. Breaks between sections have been a staple for decades, despite criticism from some players that undermining the gaming experience.⁴⁴ They can be mere “tinsel” around the playing of the “real” game, but sometimes are designed to advance the “plot” of a game.⁴⁵ Cutscenes are familiar to users of the rich modern-day gaming experience, although the concept (albeit with slightly less rich display features) has always formed a part of the gaming experience as interstitial material between traditional “levels” in games like PacMan,⁴⁶ or as introductory material as in the once-radical 3D opening to King’s Quest VI.⁴⁷ A broad approach is taken by the BBFC, with for example the ability to modify the camera angle of a scene normally irrelevant to the status of a cutscene as such. The most important feature in relation to cutscenes is that the BBFC views all such scenes in full (although is not entirely clear to what extent this covers on-the-fly scenes), as opposed to the sampling used for the playable components of the game.⁴⁸

Even in the early days of the classification of computer games, the BBFC requested a video recording of the “look and feel” of games, along with a synopsis, flowchart and script.⁴⁹ It is not surprising that games are not played in full, taking for example a game like Grand Theft Auto IV which is designed to take over 100 hours to play⁵⁰ and contains significant opportunities for diversion from a prepared path and unpredictable actions.⁵¹ This is a

recurring issue regarding games in various genres,⁵² not just the obvious “sandbox” games. Cutscenes are the “most obvious links between games and cinema”⁵³ and it is likely that the BBFC has particular expertise in assessing them. Separately, the BBFC states, drawing on its own legal advice, that games including full-motion video clips “which are not an integral part of a game’s narrative action and development” or other promotional videos such as trailers and advertisements (unless, in the case of the latter, otherwise exempt) are considered non-exempt for the purposes of the VRA.⁵⁴ The BBFC’s advice in this regard regarding “DVD-style extras” was the reason for a major change in the number of games classified in 2005 and subsequent years.⁵⁵ Otherwise unproblematic games can contain scenes that affect the categorisation of a game at a particular age and can therefore be cut (e.g. the early example of Phantasmagoria 2).⁵⁶ The new provisions include a complex procedure for resolving disputes as to whether a particular work is a video work (BBFC) or a video game (the new authority), and the House of Lords did debate a number of issues on this point⁵⁷; one amendment that would have maintained aspects of the BBFC’s present role for mixed material was apparently described by the VSC (as putative designated authority for video games) as a “wrecking amendment”.⁵⁸ There are, however, some broader problems associated with a focus on the video material included in a game. Focus groups in a report for the BBFC had “particularly strong reactions” to videos within games, with parents expressing criticism of rating decisions based on these videos, but then reverting to agreement with the BBFC decision after playing the game as a whole.⁵⁹

Trade and tax relief

The economic significance of the video games sector and the parallel concern about violence and moral concerns may soon come into conflict. We have already seen some issues arising in relation to the much-copied practice of creating incentives for game development within a given

⁴⁰ Sacha Howells, “Watching a game, playing a movie: when media collide” in Geoff King & Tanya Krzywinska (eds), *ScreenPlay: Cinema/Videogames/Interfaces* (London, Wallflower, 2002) pp.114–6.

⁴¹ Bill Loguidice & Matt Barton, *Vintage Games* (London, Focal Press, 2009) p.83.

⁴² “Movies? How terribly 80s” *Empire*, January 1995 p.128.

⁴³ BBFC, “Annual report 1995/6” p.8.

⁴⁴ Newman, *Videogames* (2004) p.72.

⁴⁵ Steven Poole, *Trigger happy: the inner life of videogames* (London, Fourth Estate, 2000) pp.90, 108.

⁴⁶ Loguidice & Barton, *Vintage Games* (2009) p.184.

⁴⁷ Loguidice & Barton, *Vintage Games* (2009) p.155.

⁴⁸ BBFC, “BBFC Updates Games Submission Process”. Available at <http://www.bbfc.co.uk/news/stories/20060908.html> [Accessed August 30, 2010].

⁴⁹ Norton, “Digital media works” (1995) 13 *International Media Law* 59, 60.

⁵⁰ Tom Chatfield, *Fun inc: why games are the 21st century’s most serious business* (London, Virgin, 2010) p.29.

⁵¹ Irene Chien, “Moving violations” (2008) 62 *Film Quarterly* 80–1.

⁵² Poole, *Trigger Happy* (2000) p.71.

⁵³ Geoff King & Tanya Krzywinska, “Introduction: cinema/videogames/interfaces” in King & Krzywinska *ScreenPlay* (2002) p.11.

⁵⁴ BBFC, “Classification of video games”. Available at <http://www.bbfc.co.uk/downloads/pub/Submitting%20Companies/Video%20Games%20Submission%20Guide.pdf> [Accessed August 30, 2010].

⁵⁵ BBFC, “Annual report 2005” pp.63–6.

⁵⁶ BBFC, “Annual report 1997/8” p.11.

⁵⁷ *Hansard* HL Vol.717 cols 537–545 (committee stage), Vol.718 cols 28–30 (report stage). None of the amendments were accepted.

⁵⁸ Comment by Baroness Howe, Vol.717 col. 540.

⁵⁹ Slesenger Research, *Classifying Games* (2008) 67. A related question is that of the possible perception of in-game violence as a means to an in-game end rather than being related to real-life actions, as noted in Byron, *Safer children in a digital world* (2008) [6.29].

nation. The United Kingdom has initiated (unsuccessful) proceedings under international trade law against Canada in respect of tax incentives for game developers,⁶⁰ apparently with the support of the Industry Gaming Association (TIGA).⁶¹ Here we see the economic significance of the games industry and the application of free-trade principles, which does seem to contradict the national-based approach to classification more commonly found. Nation states do find themselves in a difficult position here, perhaps more familiar in the case of gambling than of media, as in Korea where there is an agency to promote the industry and also to deal with “addiction” and content issues.⁶² The approach of classifying a range of industries as “creative industries” groups together a number of different activities, with very different legal environments. Some pressure to harmonise can be found.⁶³ Eventually, it was announced in the first 2010 budget in the UK that tax relief for the games industry would be introduced,⁶⁴ along similar lines to that available in respect of film, but this decision was reversed in the emergency budget of June 2010, with the new Chancellor describing it as “poorly targeted”.⁶⁵ There have been some suggestions that other nations are now trying to “tempt” developers to leave the United Kingdom, in the absence of such relief.⁶⁶

New directions in the United States and in Australia

An attempt to regulate “violent video games” in California has given rise to ongoing, closely-observed court decisions. Pursuant to the new provision of the State’s civil code, such games cannot be sold to an under-18 and a labelling requirement is also included. At the 9th Circuit Court of Appeal, the constitutional doctrine of “strict scrutiny” was applied to the regulation of supposedly violent content, rather than the alternative and more State-friendly variable approach applied in *Ginsberg v New York*⁶⁷ in respect of non-obscene sexually explicit materials supplied to children. The court was also somewhat sceptical about the State’s interest of the “physical and psychological well-being of children” and

doubted much of the evidence supplied to it, most notably on the grounds that it was based on correlation rather than causation, therefore defeating the claim of a compelling State interest.⁶⁸ Finally, the labelling itself violated the First Amendment as compelled speech.⁶⁹ The application of the State to the US Supreme Court pays particular attention to the possible extension of *Ginsberg* to violent content supplied to children,⁷⁰ and the court has now granted certiorari,⁷¹ with the hearing expected in the 2010/11 term. As it remains much more likely that even the “mature” content within games is violent or includes swearing rather than depictions of sexual activity,⁷² this question is a hugely important one within US law, although this clear line between sex and violence is much less apparent in other legal systems.

In Australia, the current legislation is the Classification (Publications, Films and Computer Games) Act 1995. The Commonwealth government is currently consulting⁷³ on an R18+ category (which is similar to regular 18 in the United Kingdom; there is a separate X 18+ that resembles R18 in the United Kingdom). The 1995 Act does not include this category (although it does for DVDs), so if a game is not appropriate for categorisation at this level, then it cannot be sold in Australia. This means that the “top” category is therefore MA 15+. However, this remains a difficult task, as the Australian legal framework depends on multiple legislative provisions and ultimately, the unanimous consent of states and territories. Games available in the UK (e.g. *Left 4 Dead 2*, *Alien vs Predator*) have not been classified in Australia, due to the absence of a category above 15, although the latter decision was overturned on appeal.⁷⁴

Conclusion

The video game sections in the Digital Economy Act are rather detailed, and are part of a broader international move towards statutory regulation of the majority of games, but can only (at the present time) deal with what is increasingly just one part of a broad category of games. This places the policy-maker in a difficult position. There is no published reason as to why the harms purported

⁶⁰ Clive Thompson, “Violence and the political life of videogames” in Lucien King (ed), *Game on: the history and culture of videogames* (London, Laurence King, 2002).

⁶¹ Eric Krangel, “Rejected By WTO, UK Videogame Publishers Beg For Bailout” *Business Insider*, February 11, 2009. Available at <http://www.businessinsider.com/rejected-by-wto-uk-videogame-publishers-beg-for-bailout-2009-2> [Accessed August 30, 2010].

⁶² Neils Clark, “Video game regulation: where we are now?” *GamaSutra*. Available at http://www.gamasutra.com/view/feature/3907/video_game_regulation_where_we_are_now.php [Accessed August 30, 2010].

⁶³ A 2003 report for the European Commission points to easier distribution channels and the ability to move products from one territory to another based on consumer success or failure, thus supporting less popular products or smaller producers: Olsberg SPI, KEA European Affairs & KPMG, *Empirical study on the practice of the rating of films distributed in cinemas, television, DVD and videocassettes in the EU and EEA*. Available at http://ec.europa.eu/avpolicy/docs/library/studies/finalised/studpdf/rating_finalrep2.pdf [Accessed August 30, 2010].

⁶⁴ *Hansard* HC Vol.508 col.261 (March 24, 2010).

⁶⁵ *Hansard* HC Vol.512 co. 175 (June 22, 2010).

⁶⁶ “UK games developers lured to Canada” *BBC News* July 18, 2010. Available at <http://www.bbc.co.uk/news/technology-10677294> [Accessed August 30, 2010].

⁶⁷ *Ginsberg v New York* (1968) 390 U.S. 629.

⁶⁸ *Video Software Dealers Association v Schwarzenegger* (2009) 556 F 3d 950, 963.

⁶⁹ *Video Software Dealers Association v Schwarzenegger* (2009) 556 F 3d 950, 965–6.

⁷⁰ *Ginsberg v New York* 2009 WL 1430036.

⁷¹ *Video Software Dealers Association v Schwarzenegger* (2010) 559 S Ct 1448 (sub nom *Schwarzenegger v Entertainment Merchants Association*).

⁷² Newman & Simons, *100 Videogames* (2007) p.56.

⁷³ “Classification for computer games — public consultation”. Available at <http://www.ag.gov.au/gamesclassification> [Accessed August 30, 2010].

⁷⁴ Classification Review Board, “Decision: Left 4 Dead 2” October 22, 2009. Available at [http://www.oflc.gov.au/www/cob/rwpattach.nsf/IVAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)-DecisionReasons-Left4Dead2-Final-13November2009.pdf?file/DecisionReasons-Left4Dead2-Final-13November2009.pdf](http://www.oflc.gov.au/www/cob/rwpattach.nsf/IVAP/(3273BD3F76A7A5DEDAE36942A54D7D90)-DecisionReasons-Left4Dead2-Final-13November2009.pdf?file/DecisionReasons-Left4Dead2-Final-13November2009.pdf) [Accessed August 30, 2010]; Classification Review Board, “Decision: Aliens vs Predator” December 18, 2009. Available at [http://www.oflc.gov.au/www/cob/rwpattach.nsf/IVAP/\(C7C220BBE2D77410637AB17935C2BD2E\)-DecisionReasons-AliensvsPredator-Final-4January2010.pdf?file/DecisionReasons-AliensvsPredator-Final-4January2010.pdf](http://www.oflc.gov.au/www/cob/rwpattach.nsf/IVAP/(C7C220BBE2D77410637AB17935C2BD2E)-DecisionReasons-AliensvsPredator-Final-4January2010.pdf?file/DecisionReasons-AliensvsPredator-Final-4January2010.pdf) [Accessed August 30, 2010].

to be associated with the playing of games—particularly by those in the 12–18 category standing to be particularly affected by the legislative change—are any different in the case of online games, for example. Yet even if these changes come into force, this group that is apparently in need of such protection will still face these supposed dangers for non-physical supply. Does that then mean that Parliament has failed to protect young persons—or does it mean that the dangers of VRA-covered games are themselves overstated? Neither hypothesis reflects well on the legislative process. Similar arguments can be made with reference to arguments regarding “addictiveness”—there is no legal or technical reason to suggest that a game on an iPhone is any more or less addictive than one on a PlayStation.

The industry itself, though, should not be without scrutiny. It has supported the PEGI system and the legislation that leaves significant power in the hands of Ministers to reshape the entire regulatory system without proper democratic scrutiny. Console manufacturers are powerful, taking a 15 per cent “cut” of games,⁷⁵ influencing game development through licensing⁷⁶ in increasingly concentrated markets.⁷⁷ They play a key role in enforcing PEGI, not least for the online marketplaces for games, where the European Commission-funded PEGI Online system is enforced through the manufacturers. They may also function as online retailers,⁷⁸ with some taking an interventionist approach to quality control even for the most casual of games.⁷⁹ Although PC gaming has historically been a more open environment, and some aspects of Web-based gaming similarly situated, the emerging words of mobile and online gaming are perhaps even more constrained than

consoles. The worst of both worlds may be present: control by private authorities such as Apple in respect of applications for the iPhone (far beyond the VRA rules!), without judicial or legislative oversight. As this form of gaming becomes an important part of the playing experience, this serious issue must be dealt with.

The biggest “missed opportunity”, though, is the way in which all stages of the process—the Byron Review, the Government consultation, the legislative proposals and the House of Lords debate—have generally failed to engage with the diverse approaches to video games, which are widely discussed in academic literature and of particular relevance to a consideration of the appropriate legal approach. The First Amendment challenge to the California legislation has highlighted the diversity of research approaches to the playing of games. Gaming itself continues to undergo further changes, with motion-based controls along the lines of the Wii and 3D gaming emerging across the sector this year. The legislative system remains an awkward application of the Video Recordings Act, with the unknown dimension of how the new authority will apply the rules. The BBFC has played an important role (and indeed, a rather non-interventionist one, at least in the present day), although subject to some criticism in the approach it takes to gaming. There is little suggestion that these lessons are taken on board in the new system, and indeed without knowledge on the safeguards and procedures of the new system, it is too early to see what improvement will be present, other than the fact that the games industry is relatively pleased to see the curtailment of the BBFC’s role.

⁷⁵ Jon Dovey & Helen Kennedy, *Game cultures: computer games as new media* (Maidenhead, Open University Press, 2006) p.45.

⁷⁶ Gerard Kraus, “Digital games—video games” in Glen Creeber & Royston Martin (eds), *Digital culture: understanding new media* (Maidenhead, Open University Press, 2009) p.79; Nick Montfort & Ian Bogost, *Racing the beam* (Cambridge (MA), MIT Press, 2009) p.124.

⁷⁷ Aphra Kerr, *The business and culture of digital games* (London, Sage, 2006) p.79.

⁷⁸ Culture, Media and Sport Committee, “Harmful content on the Internet and in video games” (2008) [193].

⁷⁹ “Online console games market” (2010) 462 *Screen Digest* 81, 82.