

DIGITAL ECONOMY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Topic 9: Video recordings

Background

178. The Video Recordings Act 1984 (“the 1984 Act”) makes it an offence to supply a video recording, such as a DVD, containing a video work, such as a film or video game, unless the video work has been submitted to an authority designated by the Secretary of State for classification as to its suitability to be viewed by persons of particular ages and the DVD is supplied in accordance with the classification certificate. The Secretary of State has designated principal office holders in the British Board of Film Classification (BBFC) for this purpose.
179. Certain types of video works are exempted (see section 2 of the 1984 Act). They include video works that, taken as a whole, are designed to inform, educate or instruct, or that are concerned with sport, religion or music, provided that they do not contain the particularly objectionable content described in section 2(2) and (3), which includes sexual activity and gross violence. For example, a music video is not exempted from the classification requirement if it contains depictions of gross violence, human sexual activity or if it is likely, to any significant extent, to stimulate or encourage human sexual activity.
180. Most video games are currently exempted from the 1984 Act, unless they contain content such as sexual activity, gross violence or other matters of concern listed in section 2(2) and (3) of the Act. The BBFC classify video games which contain any film material, because the film material is not usually exempt from the requirements of the 1984 Act, even when it is contained in an exempt game. Additionally, on a voluntary basis, the video games industry submits to the BBFC games which they believe are likely to be classified as 18+.
181. Video games which are currently exempted under the 1984 Act are usually classified on a voluntary basis by the Pan-European Games Information (PEGI) system. PEGI classifications of 12 and over are administered throughout Europe by a UK body, the Video Standards Council (VSC).
182. The provisions that make changes to the Video Recordings Act 1984 concerning the classification of video games were notified in draft to the European Commission under the provisions of the Technical Standards Directive.¹

Section 40: Classification of video games etc

183. The Act extends the statutory classification requirement to video games that are only suitable for viewing by persons aged 12 years and above (see new subsection (1A) of

¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L24, 21.7.1998, p37) (as amended by Directives 98/48/EC and 2006/96/EC).

section 2 of the 1984 Act). This extension of the classification requirement to a wider age bracket for video games implements Professor Tanya Byron's recommendation set out in her independent review entitled *Safer Children in a Digital World*² and it follows in the wake of a UK-wide public consultation on the future structure of the video game classification system.

184. **Section 40** sets out the conditions that must be satisfied for the game to be an exempted work under the 1984 Act. The existing statutory exemptions for video games will continue to apply. So those games that, taken as a whole, are designed to inform, educate or instruct, and those concerned with sport, religion or music, will not be required to be classified, provided that they do not depict human sexual activity, gross violence or any of the other matters set out in section 2(2) and (3) of the 1984 Act.
185. A video game will also be exempted if it satisfies one or more the conditions set out in new section 2A. The first condition is that the game does not contain anything listed in section 2A(2)(a) to (h). The second condition is that the designated authority (or a person nominated by it) has confirmed in writing that the game is suitable for viewing by persons under the age of 12. The criteria listed in section 2A(2)(a) to (h) are based on the criteria used by the PEGI³ system to determine whether a video game is only suitable for those aged 12 years and above. They include depictions of violence against human or animal characters, depictions of activity involving illegal drugs, swearing and offensive language. Depictions of violence against human or animal characters would not meet the criteria if the character was of a rudimentary form, such as a simple stick character.
186. The Secretary of State will have power to amend the criteria set out in section 2A(2)(a) to (h) by regulations, which must be approved by both Houses of Parliament. This will enable the criteria to be updated, if necessary, in the future, subject to Parliamentary scrutiny. The Secretary of State will also have power, by regulations subject to approval by Parliament, to add or remove further criteria for exempted video games.
187. **Section 40** confers a new power on the Secretary of State to amend section 2 of the 1984 Act by adding, amending or removing cases in which video works are not exempted works for the purposes of the Act (see new subsection (4) of section 2 of the 1984 Act).
The power is exercisable by regulations, which must be approved by both Houses of Parliament.
188. Section 3 of the 1984 Act sets out the circumstances in which a supply of a video recording is an exempted supply, even if the film or game contained in the video recording is not exempted. The Act amends that section to secure that the supply of video games by means of amusement arcade machines is exempted (see new subsections (8A) and (8B)), unless the game includes any of the matters mentioned in section 2(2) and (3) of the 1984 Act. It also confers on the Secretary of State a new power to amend section 3 of the 1984 Act, by regulations subject to parliamentary approval, by adding, varying or removing exempted supplies under the Act.

Section 41: Designated authority for video games

189. This section inserts a new section 4ZA into the 1984 Act and allows the Secretary of State to designate two different authorities under section 4 of the Act. So, a person (or persons) may be designated to make arrangements with respect to video games ("the video games authority") and a different person or persons may be designated for making arrangements in respect of other video works ("the video works authority").
190. Some mechanism is thought to be necessary to enable the designated authorities, where appropriate, to transfer work between them. New section 4ZB provides that where two authorities are designated under section 4, responsibility for classifying a class of video

² <http://www.dcsf.gov.uk/byronreview>

³ PEGI age related logos, content descriptors and the guidelines for completing the ratings questionnaire can be downloaded from the opening page of VSC website <http://www.videostandards.org.uk>.

games may be allocated by the video games authority to the video works authority. This will allow the video games authority to allocate to the other authority responsibility for video games that are considered to be suitable only for supply in licensed sex shops. It also provides that the video games authority may allocate responsibility in relation to video games when they are supplied in a particular type of video recording – for example, responsibility might be transferred for video games that are supplied on the same disc as a film or within the same boxed set as a film. An example would be the basic games found on Blu-Ray discs. Once an allocation is made, the video works authority has responsibility for making arrangements in respect to the allocated works.

191. An allocation must be made by notice and may only be made with the consent of the video works authority. It may only be withdrawn by notice and with consent. When making or withdrawing an allocation, the video games authority must have regard to any guidance issued by the Secretary of State.
192. Any question as to which authority is responsible for making arrangements with respect to a class of video games may be determined conclusively by the video games authority. New section 4ZA(2) provides that references in the 1984 Act to the designated authority in relation to a particular video work will be to the authority designated to be responsible for making arrangements in relation to the video work, taking account of any allocation made by the video works authority under new section 4ZB.
193. New section 4ZC relates to video works that are found within video games, for example, a film which can be viewed as part of the process of playing a game. Where the video work already has a classification certificate issued by the video works authority, it enables the video games authority to take account of that certificate. For video works that have not already received a classification certificate, it enables the video games authority to make arrangements to obtain and have regard to any subsequent determination made by the video works authority as to the suitability of all or part of the video work included in a video game. The video games authority must consult the video works authority with respect to the appropriateness of the arrangements that it makes for taking account of such matters. It must also have regard to any guidance issued by the Secretary of State.

Schedule 1: Classification of video games etc – supplementary provision

194. **Schedule 1** makes further amendments of the 1984 Act.
195. Section 4 of the 1984 Act makes provision about the arrangements to be made by the designated authority. Sections 4(1)(b)(i) and (ii) and 7 are to be amended to clarify that the arrangements may include provision for the revocation of classification certificates.
196. A new subsection (1C) is inserted into section 4 so that arrangements made under this section may require a person seeking a classification certificate for a video work to agree to comply with a code of practice, such as the PEGI⁴ code of practice. That code includes provision relating to the labelling of video recordings.
197. A new subsection (3A) is inserted into section 4 to ensure that, prior to making any designation under section 4, the Secretary of State must satisfy himself that adequate arrangements will be made for taking account of public opinion in the United Kingdom. This means that the designated authority must have an effective system to gauge public opinion and take account of it.
198. **Section 4(5)** currently requires the Secretary of State to approve tariffs for fees to be charged by the designated authority in connection with the classification of video works. The Act amends this so that the designated authority simply has to consult the Secretary of State about the fees that it proposes to charge.

⁴ <http://www.videostandards.org.uk>

*These notes refer to the Digital Economy Act 2010
(c.24) which received Royal Assent on 8 April 2010*

199. A new subsection (6A) is inserted into section 4 to ensure that the designated authority complies with any guidance issued by the Secretary of State relating to arrangements made under that section. For example, the Secretary of State may provide guidance on administrative matters such as how records of classification certificates are to be kept and how appeal arrangements may be set up. New subsection (6B) makes it clear that the Secretary of State's guidance is not to extend to the criteria to be taken into account in making individual classification decisions. Section 4A of the 1984 Act sets out the criteria to which special regard is to be given by the designated authority when making such decisions.
200. New section 7A of the 1984 Act provides that classification certificates may be issued so as to have effect only for the purposes of a particular video recording. This enables video works to be classified by reference to the recording in which they are to be published. For example, a video game may be classified for the purposes only of its supply for use on a particular platform, such as Nintendo or Xbox. Section 7A(2) provides that, in such a case, the classification certificate can only be relied on for the supply of the video work for use on that platform and not for its supply more generally.
201. The offences set out in the 1984 Act at sections 11 (supplying a video recording of classified work in breach of classification), 13 (supplying a video recording not complying with requirements as to labels, etc) and 14 (supplying a video recording containing false information as to classification) are amended to provide that an offence is not committed where the video work concerned is an exempted work or the defendant believed on reasonable grounds that the video work was an exempted work. For example, the defendant might believe, on reasonable grounds, that a video game has not been classified because it is suitable for viewing by persons aged under 12, having regard to the criteria set out in new section 2A(2)(a) to (h).
202. The offences under the 1984 Act relate to the supply, or possession for the purpose of supply, of a video recording that contains a video work. Section 22(2) of the 1984 Act provides that a video recording contains a video work if it contains information by means of which all or part of the video work can be produced. There is an exception to this: if a video work contains an extract of another video work (for example, a film that includes an extract from another film), the extract is not part of the work of which it is an extract but a part of the video work which contains the extract; and hence the video recording contains that video work including the extract. An increasing variety of video recordings are available, some of which contain a mixture of films and video games. New subsection (2A) of section 22 provides a power for the Secretary of State to make provision about the circumstances in which a video recording does or does not contain a video work for the purposes of the 1984 Act. This allows provision to be made to take account of new formats, such as where a video game contains a whole film within it or a film contains a game within it.