Consumer vs. gamer
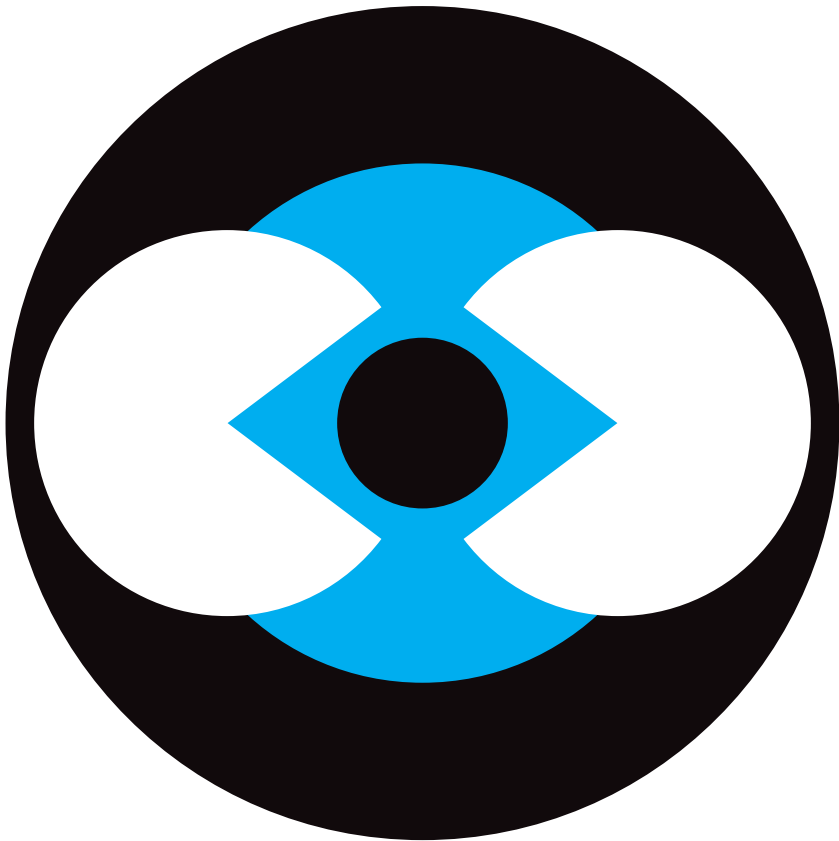
Rights at play

The Norwegian Consumer Council (NCC) is an independent, government-funded interest group working for a consumer-friendly society. The digital market is one of the NCC's top priorities for the coming years.

The Consumer Council is a supporter of games, gamer culture and gaming innovations. Thus, it is long overdue to ask the question: Is there a need for consumer rights for gamers?

NCC's digital charter consists of eight mandatory consumer rights for digital products legally available to consumers. The charter is the foundation of the Consumer Council's work on digital services.[1]

This document highlights challenges related to core games and the platforms they are played on. As this is meant to serve as a starting point for our work on games, we do not go in depth with regards to casual games or games/apps for handheld devices such as phones or tablets.

[1] http://forbrukerportalen.no/Artikler/2007/consumers_digital_rights

Introduction

The market for pc- and console games has grown substantially the last years. In fact, the market has continuously grown over the last three or four decades. From being a quirky way for scientists to put their room filling super-computers to use, games are now household, or even handheld, entertainment.

Although games have become commonplace, gaming still has a tint of social non-acceptance. The main emphasis whenever gamers or gaming is debated publicly is seemingly addiction, violence, adolescence or gender differences. There seems to be a bias towards viewing gamers as male, socially inept teenagers with an inherent
addiction problem.

Over the last decades the gaming industry has grown from being a fringe market to being main-stream as well as big business. The best-selling game to date is Call of Duty: Black Ops (2010, Activision/Treyarch) grossed $650 million during its first five days of sales. The top-grossing box office movie after five days, The Dark Knight, brought in $200 million, proving that games should be considered a mass market product, rather than a fringe market.

More and more games are adding social dimensions. You can cooperate or compete with friends or other gamers, transfer information about gaming achievements to other platforms or social media. This trend has exploded with Xbox Live, Facebook gaming and mobile games/apps for various platforms. Games are no longer tied to the household's TV or PC. Games are intrinsically intertwined with the social fabric that holds entire generations together.

Connectivity has allowed game publishers to repair glitches, patch flaws and add content after the game is taken off the shelves. In many cases this is a clear benefit for the gamer. But at the same time it opens up possibilities to target consumer groups for advertising, tap personal data and harvest metadata about all online gamers:

Who owns the user data? Under what conditions is it fair to pay with attention and personal data? What is the real value of data? What is private? And who is responsible safeguarding the information generated by the user?

Why work on digital services

The Norwegian Consumer Council has worked on digital services for several years. In general, our efforts can be summarized in three key areas:

- privacy issues
- network neutrality
- right to fair use

Simply said, our work has primarily focused on ensuring consumers equal rights regardless of whether or not a good or a service is of traditional, physical nature or has more intangible, digital qualities.

The reason for us to be working on digital services in the first place, is two-fold: Traditional consumer legislation is expressly limited to goods (not services) and digital products and services tend to be sold cross-border, thus presenting a significant problem when trying to decide which country's law applies.

A good example of how these issues are being treated is the exemption of digital content from the scope of the proposed consumer rights directive. Digital products seemed to be explicitly kept out of the scope of the directive simply because it was a difficult issue.

We fully agree with the notion of these being difficult issues, but we believe they deserve attention, not ignorance.

During the last five years, there are four specific cases that exemplify our work on the digital products field.

- **Apple iTunes DRM**
  In 2006, NCC filed a complaint on Apple iTunes' use of DRM and the terms of service. We deemed them to be in violation of the Norwegian Marketing control act. Before the proceedings were concluded, Apple changed their policy.

- **Network neutrality**
  In 2009 guidelines for network neutrality was established and signed by Norwegian network service providers. NCC took part in this work in order to ensure equal and fair access to infrastructure for all consumers. The guidelines have recieved international attention in many occasions.

- **Privacy and Facebook**
  On the basis of a large-scale research project NCC filed a complaint to the Norwegian Data Inspectorate regarding Facebook and game provider Zynga's breaches of the Personal Data Act. The case is currently pending consideration by the Data Inspectorate.

- **Predictability with regards to updates/ upgrades**
  Sony's unilateral removal of OtherOS from Sony PlayStation 3 caused NCC to file a complaint in January 2011 to the Consumer Ombudsman on the basis of unfair terms.

NCC has also worked internationaly on other issues such as cloud computing and online storage services, interoperability, open standards and copyright legislation.

Games – a new product category?
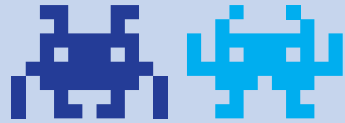
Building on our experience, gaming is an intriguing example of how difficult it can be to differentiate between goods and services. In particular if we take into account the increasing role of downloadable online content and/or online gaming modes.

While games in the past were sold as finished products that came out of the box in a final, unchangeable version, games nowadays tend to be sold with additional content, expansion packs or in chapters. In many cases, there is no need to buy a physical product at all.

It can generally be said that this is good for the consumer, as the online connectivity also allows the game-distributor company to correct errors, fix flaws and patch coding faults. And in general it seems like the gamers do not perceive problems with games or game content as consumer goods.

In 2010 NCC received a handful of complaints regarding any gaming or game related goods or services. As a consequence we started our work with the games industry with a hypothesis that went as follows: Given that the NCC hardly receive any inquiries regarding games, there are a) no one who experience problems related to games, b) problems that are solved outside the traditional consumer scope or c) gamers do not perceive themselves as consumers.

In our opinion, gamers seem to be a consumer group that is grateful that new games and additional content is being provided in the first place. There are more gamers affectionate about their games, than there are refrigerator-owners passionate about their fridges.

It seems appropriate to point out the efforts done by game industry actors to combat the flaws that are in their games. Gamers seem to be a demanding and very audible group of customers. They will definitely make it heard if they are not happy with the products.

When the gaming community discovers something they do not approve of, it is instantly broadcast online. Examples of this can be found from both the outcry relating to the infamous Call of Duty: Black Ops update, Blizzards introduction of Real ID and several other cases where the gaming forums are set on fire by outraged gamers forcing the companies to change policy or fix "the problem".

From console to cloud

Although computer games appeared in the 1950s and video game consoles emerged in the 1970s, it took several decades before games could be played over networks. First-person shooters (FPS) such as Doom popularized local area-network as well as speed up the development of Internet gaming over TCP/IP. The first video game console that included an ethernet port and online gaming was the Microsoft Xbox.

Over the last decade, popularization of broad-band Internet access, as well as innovations in online services made it possible to play full games online without purchasing any physical product. All you need is a computer or a console connected to the web. Microsoft, Sony and Nintendo all offer downloadable content through their console online services. Several sites sell games as downloadable content, while emerging services such as OnLive makes it possible to play games entirely "in the cloud".

The development into online services accentuates the challenges relating to jurisdiction and which set of rules apply to digital products. Today the product might not primarily be physical, but entirely digital, making traditional consumer legislation obsolete.

Given the rapid advances in cloud computing technology, we expect this trend to only become more present in the years to come. In particular this development will be enhanced with the increase in cross-platform games made available through the use of smartphones or tablets with on-the-move communication abilities.

All the while this development is expanding the potential for gaming, it also obliterates the problems of being sold a malfunctioning product. If the game as well as the gaming is in the cloud, correcting errors and patching flaws should be more efficient. At the same time, given the immeasurable number of different set-ups that would access the cloud game, there are infinite things that can go wrong.

Another issue that has to be addressed is the need for safeguarding personal data. Online connectivity is by default a massive collection of personal data; name, date of birth, address, credit card or payment details, preferences and links to other social media or online services.

The ever-present paradox with great online, social media services is that for it to become really valuable to the users, they need to, at some extent, give away the control over their personal data. And the more information people give away, the more powerful the company providing the service becomes. In this situation it is paramount that cloud gaming services prove themselves as conscious actors.

Consumer vs. gamer

For our work to have meaning for gamers, industry and academics alike, it needed to take into account what all groups thought were the main challenges – if any.

Albeit a growing understanding of games as a topic that interest many, most public debate regarding games seem to circle three topics; game addiction, gender differences and violence. Neither of which are related to gaming as a past-time activity, cultural product or experience. As a consequence, there are few arenas where gaming can be debated as a consumer product.

As there are few events that bring together the entire Norwegian "gaming community", NCC organized a gaming conference titled "Consumer vs. gamer" in November 2010.

There were two goals for the conference: Primarily we wanted to increase our own understanding of games as a consumer issue.

Secondly, we wanted our event to be a small effort to raise the understanding and appreciation of games on a general level.

Consequently, we also wanted to get some feedback on whether or not this was a topic a publicly funded consumer interest group should deal with at all.

Leading up to the conference we did two research projects. The first involved reading and summarizing the end user license agreements for all the three gaming consoles as well as the online game store Steam. The result was a matrix summarizing the terms of all platform EULAs and their contractual, privacy and copyright aspects:

	XBOX 360	PlayStation 3	Wii	STEAM
Length of terms (EULA "console" + EULA online service + Privacy statement)	13050	11760	7890	7955
Terms unchangeable without gamers explicit consent	❌	❌	❌	❌
National law applies	✅	❌	❌	❓
Age limit: 18 years or older to sign	✅	✅	✅	❓
Gamer may voluntarily accept updates	❌	❌	❌	❌
Backup copies allowed	✅	❌	❌	❌
Terms guarantee a fully functional product	❌	❌	❓	❌
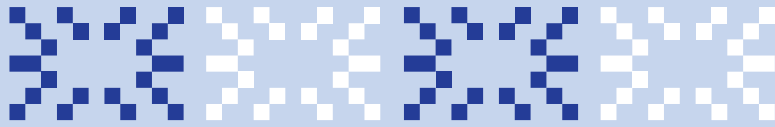
The second project was a large-scale, compre-hensive study of Norwegian gaming habits. The survey was based on a representative selection of the adult (15+ years) population.

Not surprisingly, Norwegian young adults (15-29 years) play more and spend more money on games. PC is the favored gaming platform for the population as a whole, while console games seem more popular in the youngest age group. There seems to be a positive correlation between the amount of time and money spent on games.

Online gaming is less common amongst the older age groups, but all age groups do play online. Roughly four in ten gamers have experienced a loss of connection during online gaming, and 24 percent of the selection has experienced a game crashing during single-player games. However, almost 80 percent do not report the problems that occur. It did not give any answer as to why people complain to neither game producer the seller or the consumer authorities.

A recurring topic throughout the conference was how to balance the benefit that comes with receiving automatic upgrades and patches with the potential of losing either functionality or privacy to the game companies.

On one hand it is obviously in the gamers' best interest to receive updates with minimal hassle, but at the same time connectivity grants companies access "directly into your living room". And often change to software or firm-ware is done without any chance to opt out.

From a traditional, consumer-centered, point of view, it seems unfair that a company can alter the product after the consumer has purchased it. But digital services, and gaming in particular, seem to challenge that notion.

Another issue that was thoroughly addressed was privacy. What information is aggregated, preserved, analyzed and shared through the use of a gaming console? In the case of linking your Xbox LIVE-account to Facebook, who has access to what information about you?

There is little transparency regarding such questions, but it will inevitably become more important in the years to come. It seems only fair that a user at least can see what information is being generated while using a product and understand who has access to that data.

PlayStation 3 and Other OS

During 2010, the Consumer Council received several complaints from consumers regarding Sony's update to the PlayStation 3 in April of that year. The 3.21-update disables the OtherOS feature, effectively removing the possibility to run other operating system such as Linux.

The key element here is whether or not the terms of service a consumer accepts when he signs up for a PlayStation Network (PSN) account are fair, and consequently if it is ok for Sony to remove a functionality that the console was sold with. In our opinion an update that effectively removes functionality could be in violation of the Norwegian marketing control act.

Sony has made the argument that they can do this according to the terms of service. PSN being a service which you sign up for after you have actually purchased the console makes it hard to deal with this issue in light of other consumer legislation. Further complicating the matter, the contract you enter through accepting the terms of service is with Sony Computer Entertainment Europe Ltd (SCEE), located in the United Kingdom.

In the terms of service, Sony state that they can and will update the software and/or firmware if they see it necessary. A main point for us in filing the complaint is trying to define what constitutes an update/upgrade. In a digital realm where the consumer has little or no protection from consumer legislation, it should at least be a degree of predictability involved about what you can expect your product to be and for how long.

We acknowledge that consumer electronics companies need some leeway in developing their products, adding and subtracting bits and pieces to ensure a well-functioning product. But how far does this right to unilaterally change the functioning go?

Is it fair to remove online connectivity for users of a particular age group? In a specific country? Gamers with or without a Facebook account? Following the wording of the EULAs we researched before our gaming conference, it's all up to the company to define for themselves.

We want the buyer of a digital goods and accompanying services to have a relative certainty of a functioning product and access to the marketed functions for the expected lifespan of the product. Furthermore, we want a legal statement on what should be expected and accepted as an upgrade or update.
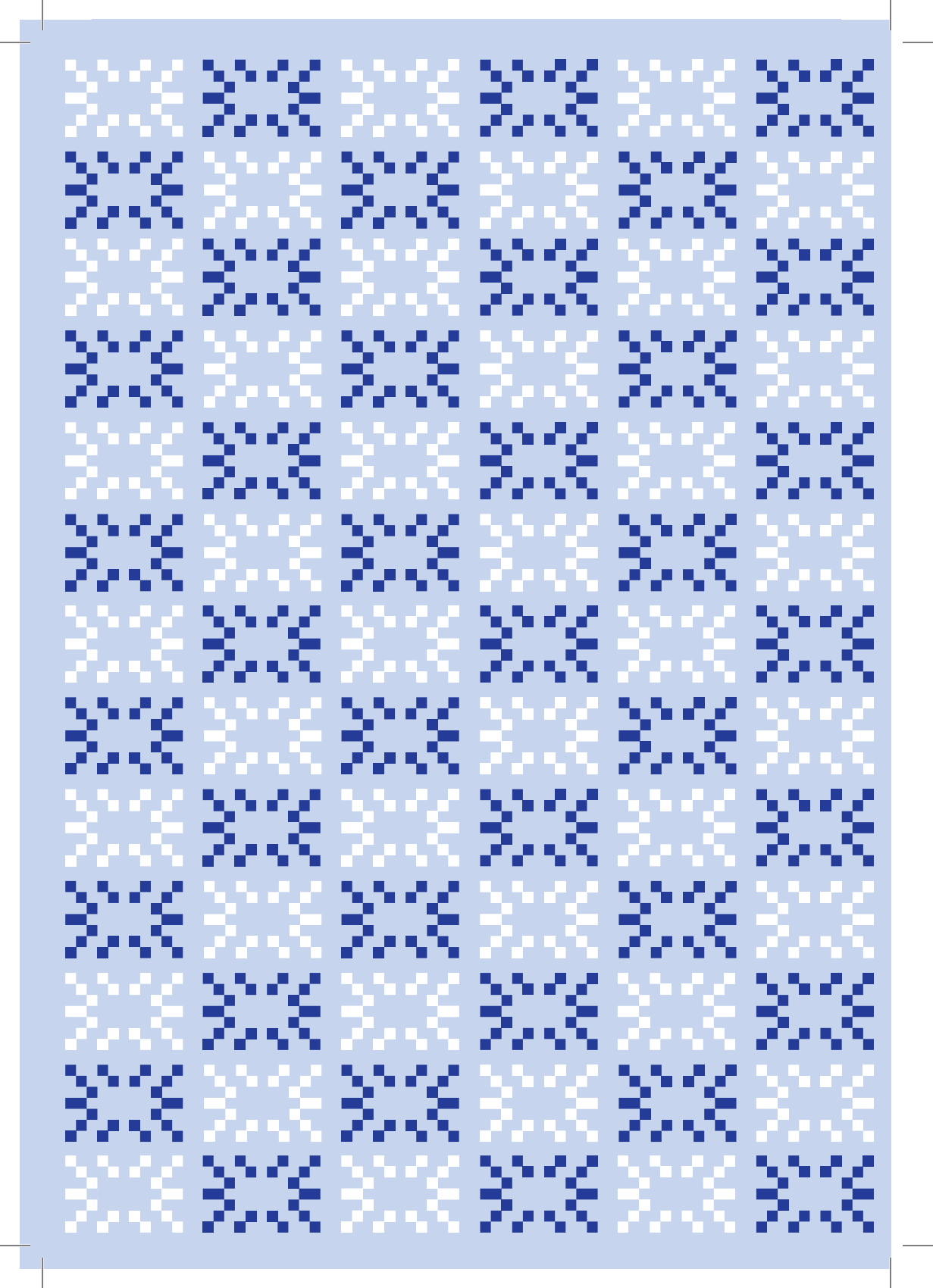
In short…

The Norwegian Consumer Council asks for the following to strengthen the consumer's digital rights:

- Proposed consumer legislation must secure consumer rights in digital products
- Legal definitions of terms and concepts pertaining to digital markets
- Secure and trustworthy handling of personal information
- The discontinuation of any terms or conditions that are potentially unfair and to detriment of consumers
- Information requirements on inter-operability and the application of technical protection measures

More information about NCC´s work will be given upon request, or can be found online:
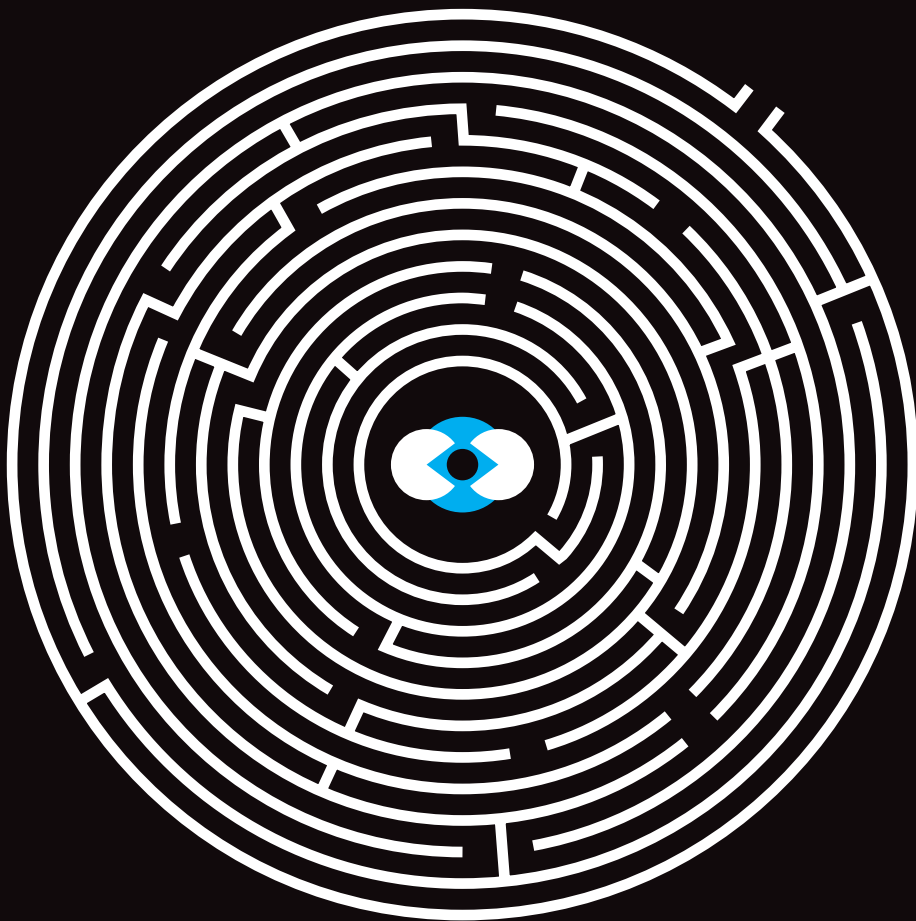
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