Government sets out plans for a digital future

Following the recent publication of the Digital Britain Report, **Mark Owen** and **Tony Ballard** take a look at what's in store for media companies and the public

ON 29 JANUARY 2009 THE GOVERNMENT published a report by Lord Carter that described a plan to secure Britain's place at the forefront of the global economy, underlining the importance of the telecommunications and content sectors, their crucial impact on the economy and their role in building Britain's industrial future.

DIGITAL BRITAIN

What the government published is no doubt important but it is difficult to discern the full extent of the plan from its contents. Its title, 'Digital Britain: The Interim Report' (the Report), gives the game away. It is a work in progress, gathering together a range of issues for which government policy decisions need to be made, making recommendations as to actions to be taken and inviting feedback and comment from the public. A final report is promised for early summer, which probably means June or July at the earliest.

All businesses are affected to a greater or lesser extent by the transformational effects of broadband. It is absolutely right that the government should develop a strategic view that encompasses, so far as possible, all the consequences of the digital revolution that are taking place around us and that it should co-ordinate decision-making around that view. That is why this Report is important. It identifies the areas for action, gives some indications of government thinking so far and recommends the setting up of various bodies to facilitate implementation of government strategy or decision-making. Most of all, however, it is a consultation. All feedback and comments were due to be submitted by 12 March. There will be a Digital Britain Summit in April and other events will be held around the country in April and May designed for 'engagement and inspiration, as well as analysis'. Businesses affected by the actions proposed in the Report, or by the lack of them, will therefore still have an opportunity to influence the development of government thinking and the policies that will emerge from the process.

By Mark Owen (top) and Tony Ballard, partners at Harbottle & Lewis LLP

Faced with a wide range of issues, the Report organises them into four distinct layers:

- digital networks – the transport infrastructure;
- digital content – the material transported;
- universal connectivity – access for all; and
- equipping everyone to benefit – education and protection.

This grouping of the issues, while not revolutionary, is a useful and novel approach. It is these layers that are now discussed.

DIGITAL NETWORKS

The Report asks whether, as a nation, we can improve the capability and quality of our digital networks to meet growing consumer and business expectations, deliver what we need as a society and keep pace with international competitors. The focus is not on the core or backbone networks but on the networks in the last mile (or so) by which users get access to them. It looks in turn at fixed, mobile and broadcast networks.

Next generation (fixed) access networks

Broadband has developed principally through upgrading to digital the millions of copper wires between the home and the local BT telephone exchange, spurred by regulatory interventions that enable competing operators to take over the wires and use their own equipment to provide competitive services. Although the technology has been serially upgraded to faster speeds, there are limits and there are already signs of strain by consumer demand for real-time streamed access to video sites using technology such as iPlayer. The next generation of access networks (NGAs) is needed. In practice, these are likely to be in the form of fibre

from the digital exchange to the street cabinet (FTTC) rather than all the way to the home (FTTH) as the cost of FTTC is projected to be one-fifth of the cost of FTTH (£5bn instead of £25bn). BT, Virgin Media and others have investment plans for NGAs that the government welcomes. But to ensure that the UK has the necessary infrastructure in place when it needs it, a government-led strategy group is to be established to assess what measures are needed to underpin those plans.

What those measures might be is for the future, but it is clear that the government is thinking of relaxing its competition policy. It thinks that higher-risk infrastructure investment justifies higher rates of return, even where an operator is dominant and subject to regulatory controls. This is no doubt a signal to BT, whose investment in NGA is said to be contingent on what it is allowed by way of the rate of return on capital. It is part of a thread that runs through the Report. There are hints here and elsewhere that the government is looking again at the balance between promoting investment and competition. It speaks approvingly of successful Asian economies in which the regulatory framework balances the value of investment in the next generation of technologies against the benefits for the consumer of a competitive market place. It is tentative and understated but quite clearly suggests a stepping back in some degree from competition as the touchstone for efficient markets. This could be an alarming trend.

Other plans include:

- removing barriers to the development of a wider wholesale market in access to ducts and other primary infrastructure;
- resisting calls for net neutrality except for dominant operators on competition grounds;
- encouraging investment by clarifying the application of business rates to NGAs and extending the cable TV business rates regime to NGAs serving residential premises – where rates are assessed at a fixed amount per home passed (although current litigation in the UK and Europe may undermine this);
- considering the case for public incentives to enable NGA deployment to those households that the market may not reach; and
- assisting community and local groups with localised NGA projects.

Mobile wireless

The long-term goal is 'any content... over any network... on any handset... anywhere' and the key to unlocking it is access to and use of the radio frequency spectrum and, in particular, the re-farming of existing Global System for Mobile Communication (GSM) spectrum and the release of spectrum around the GSM/3G spectrum blocks. Unfortunately, the Report notes, the UK has hit a temporary road block here. There are disputes between the operators and Ofcom. The Report robustly indicates that if there is no agreement soon then a solution will be imposed. As operators have invested £22.4bn in 3G spectrum licence fees and similar sums in building out their networks, the government should perhaps take care not to discourage future investment by undue exercise of its powers to impose a solution.

Digital broadcasting networks

In television, the digital switchover programme is underway and will be completed by 2012. The government will consider helping the old and disabled to get connected to broadband and enlarging the publicly funded information programme on switchover to include digital opportunities beyond broadcast television. In radio, the government is prepared to make a commitment to digital audio broadcasting (DAB) as a primary distribution mechanism for radio and, if the industry designs a clear plan to drive migration to digital, the government will come up with its own plans to facilitate that plan, set up an industry group and assist in various other ways.

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DIGITAL CONTENT

The Report looks for a solution to the problem of rights-owners being less able to protect their content online, and the perceived growth in copying works online without permission or payment. This has now been an area of great debate for a decade, so does Lord Carter have anything new to add?

Business models

The Report's view is that the law should not support outdated business models. However, the proposals discussed here and in the Memorandum of Understanding between the BPI (formerly the British Phonographic Industry) and the internet service providers (ISPs), could be said to be aimed more at protecting the music industry's old business models based on the end user acquiring a permanent copy such as a CD or download. Partly this is because the music industry is so complex, with several different rights-owners having interests in the same piece of content and, as a result, change is difficult to agree upon. In part as well, it is because many consumers seem to like the old business model of buying a piece of content and being able to use it as often as they like. The challenge for the industry now is to ensure that the same business model can survive while new ones are embraced. That, in the main, is a question for technology and possibly ›

calls for some tweaks to the existing legal process.

The Report also touches on wider questions as to how digital content is to be funded. It sees advertising's support for content production as being in serious decline and appears open to permitting new ways to monetise consumer access to content. Keeping an open mind and crafting relevant regulatory frameworks to fit will be vital as it becomes more and more difficult for investors to understand the value chain for digital content.

Technology

Technology is likely to be at the heart of any solution to the problem of consumer infringement. There are two main reasons why people infringe copyright in music. First, it is because it is so easy to do – the files are small and are usually available in a non-digital rights management (DRM) or low-DRM protected medium – and music libraries on home PCs are often set with a default position allowing that music to be shared with anyone on the net when that PC is online. Secondly, if heavy DRM is placed on a downloaded digital file, consumers cannot transport that file for personal use on their own various music player devices.

However, these two issues conflict with each other. If you lock up content in very heavy DRM, users will feel that they are being exploited by having to purchase the content for several different devices. On the other hand, the lack of common standards for DRM and devices means that it is difficult to achieve portability without removing DRM altogether. There may well be technological solutions to these issues but getting so many different parties with different interests to agree on a solution is a challenge. It is perhaps here where the government may have its most important role. Carter acknowledges that the role of government is to 'smooth the path' and 'contribute constructively' to the transition to new business models.

Infringers and the law

Unlike in the analogue world, it is relatively easy to identify who is an infringer at least by reference to a user name. All ISPs have the ability to record what a user is doing and when, and indeed do record this information for billing purposes. However, data protection laws present a barrier to ISPs in disclosing this data to rights owners. Lord Carter indicates that legal processes will be changed to remove these hurdles.

Intellectual property law already creates suitable remedies for rights owners. The difficulty for rights-owners who have a large number of relatively small-scale infringers is that it is hard to identify who the infringers are and costly to bring proceedings against individuals who might not be able to afford to pay any damages. Of course, it would be possible to streamline this process, but, on the other hand, consumers must still have the right to defend themselves in some form, so there cannot be a completely automatic process where rights owners and ISPs determine that there has been an infringement.

Data protection legislation is often cited as a barrier to ISPs disclosing personal details without a court order. This is not necessarily the case. Section 35 of the Data Protection Act (DPA) 1998 provides an exception to the rules on non-disclosure of personal data where disclosure is necessary in connection with prospective legal proceedings. ISPs actually only require rights owners to obtain a court order so that they can maintain to consumers that they are not selling their customers out. If anything needs to change in DPA law, it may be to require ISPs to disclose personal data more readily. This may involve defining a fixed process by which rights owners can demonstrate that there are impending legal proceedings and could be as simple as requiring the rights holders to certify this and give an indemnity to the ISPs.

Privacy and data protection concerns are also raised by consumers and consumer organisations as a reason why personal data should not be disclosed to rights owners. This seems flawed. It is important to ensure that personal data is not misused, but data protection and privacy cannot be hidden behind to prevent a legitimate claim being brought as to infringement. Indeed, it should not be for the rights holder to demonstrate conclusively that they will win the case before the data is disclosed. The whole point of the trial process is to give the defendant the right to make representations, but the rights owner cannot even bring the case to trial if they cannot obtain the details of the apparent infringer.

The Report makes an interesting, but frustratingly vague, suggestion that a new, streamlined process to obtain judgment is required (perhaps a uniform domain-name dispute resolution policy (UDRP) -style procedure). This may well be useful but, arguably, the existing process is almost good enough anyway, particularly if the problem can be reduced by technology so that we are only talking about large-scale infringers (ie pirates). At present, rights owners need to compel ISPs to disclose personal data by obtaining a *Norwich Pharmacal*-type order and then issue proceedings against the infringer. While this was thought of as a complex procedure when first conceived, and legal bills were high because external lawyers were needed, the process is essentially the same every time. So, once you have the precedent application notices it actually costs very little to get the *Norwich Pharmacal* order and then issue proceedings and await a default judgment. It may take time, but so does all legal process and it does so in some cases to make sure that the rights of defendants are also protected. Whatever process is used must still retain this.

The Report was published on the same day as a report on the consultation as

FURTHER INFORMATION

The full text of the Report is available online at: www.culture.gov.uk/images/publications/digital_britain_interimreportjan09.pdf

Norwich Pharmacal Company & ors v Customs & Excise [1973] UKHL 6

to how to control file sharing. It appears that the favoured interim solution is now to get ISPs to send letters warning file-sharers. This is to be subject to a further consultation.

UNIVERSAL CONNECTIVITY

Affordable access to basic telephone services is mandated under the European Universal Service Directive (2002/22/EC) (the Directive). Should it be extended to broadband? This is a question that has been asked many times before but is answered positively in the Report, which points not only to the benefits that will flow from everyone having the opportunity to participate fully in the information society, but also to fairness. The broadband-enabled population gets access to BBC digital services funded by the licence fee to which all licence fee payers contribute and to public services, including health and schools, to which everyone contributes. Fairness therefore demands that everyone should be able to get reasonable access.

So the Report proposes a universal service commitment in broadband by 2012 with a data rate of 2MB/s. This might be regarded by some as very low, bearing in mind the development of NGAs. But it is partly a matter of cost and who is going to pay for it. There are no figures in the Report but there is some discussion about who should bear whatever the cost might be.

At present, the existing universal service obligation for basic telephone services is borne by BT. Nobody contributes to the cost of it because Ofcom has taken the view that the costs are broadly equivalent to the advantage conferred on BT by being the universal service provider. The Report suggests that the cost of the broadband commitment could be shared 'more widely... between a range of communications providers, and those who provide communication services over the network'; in other words, the operators, ISPs and others. It goes on to say that it is inviting views on the details, including how extensive it should be and who should contribute. Network operators, ISPs and other service providers are evidently legitimate targets for a demand for contributions and should consider making their views known in response to the Report, even though the main consultation period has ended.

Those who may be in the government's sights as a contributor might take the point that the Directive plainly envisages that universal service obligations are to be set at a community, not national, level and that market players are not to have financial contributions imposed upon them except for community-defined obligations. The Report says that the government will work with other member states to update the framework and to assess the options for provision and funding of the commitment but this central proposal of the Report appears to be contingent on getting the rest of Europe to agree to the universal service obligation being extended in this way.

But universal connectivity, as the Report recognises, is ultimately about demand. People must want to have the services that the technology delivers. They must want the programmes available on iPlayer, for example. They must be aware of the benefits of the technology. There is already a digital inclusion team under the Minister for Digital Inclusion that has proposed a 'Digital Inclusion Champion' to create synergies and provide expert advice across all sectors involved and, more generally, to ensure that all available expertise and resources are harnessed in pursuit of a shared understanding of digital inclusion. The Report proposes to encourage the development of more public service champions – champions of universal take-up – and also, more realistically perhaps, to invite the BBC to help and to develop a plan for delivery of public services online designed for ease of use by the widest range of citizens.

MEDIA LITERACY

'Media literacy' has been a feature of the UK government's approach to media regulation since the introduction of the Communications Act (CA) 2003. Under CA 2003, Ofcom was given a duty to foster media literacy in the UK, a term that it defined to mean 'the ability to access, understand and create communications in a variety of contexts'. The Report suggests that Ofcom's custodianship of this area needs to be reviewed in light of the now greater availability of digital services.

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Children and the media

An area of increasing focus over the past couple of years has been making children media literate as a means to protect them in the digital environments so many now spend time in. The Report picks up on this and draws various strands together, but it is hard-pressed to say anything new in a field now filled with policy initiatives.

The regulation of communications with children online has for several years been dominated by concerns about criminality and the activities of paedophiles. Increasingly, however, there has also been political pressure to look at the way children are using commercial digital services, such as social networks and user-generated content (UGC) sites, and to ensure that unfair advantage is not being taken. This pressure has found a voice in books such as Sue Palmer's *Toxic Childhood*, in campaigns by politicians from all the main parties, and most recently in The Byron Review: 'Safer Children in a Digital World'. Tania Byron, who was ›

tasked by the government with looking at the effect of computer games and the internet, came up with a quite limited series of recommendations on changes to be made, and the headline recommendations were around age ratings for computer games.

Perhaps more importantly in the long run, Byron also advocated the establishment of a UK Council for Child Internet Safety (UK CCIS). This duly arrived in September 2008, drawing its membership from over 100 public and private sector organisations. The UK CCIS aims to address problems such as online bullying, the availability of pornographic and violent imagery, and self-harm websites. It is also tasked with devising a child internet strategy that is to be published this spring. Some clues can be derived from the Report as to what this strategy will contain, though it is notable that specific overlaps between UK CCIS's stated aims and the Report's are quite few.

- The UK CCIS focuses quite strongly on the removal of inappropriate content, such as taking down illegal internet sites, establishing voluntary codes of practice for UGC sites, and making sites commit to take down inappropriate content within a given time. It also intends to promote responsible advertising to children online.
- While the Report similarly mentions the removal of illegal content, it also gives prominence to clear labelling. More radical suggestions are that 'walled gardens' of approved content should somehow be encouraged and that data-gathering practices should again be rebalanced in favour of the consumer, with clearer information on how personal data is collected, used and shared. This could appear to be an implicit admission that the existing data protection laws and the strenuous efforts of the Information Commissioner to enforce them have not been enough. It may also presage express laws on the circumstances in which the personal data of children may be used, if at all. Current UK and EU laws do not make specific reference to children, while the US and others have different rules depending on whether the child in question is younger than 13. This is an area where the desirable principles may be easy to state but the practicalities of implementation are challenging. Legislators have tended to focus on the importance of parents being able to give and withhold consent, and of age verification systems in order to prevent access by children of inappropriate ages (indeed there has been a recent private members bill along these lines[1]). As yet, however, there is no reliable and generally available technological mechanism for verifying ages online or of obtaining such consent.

CONCLUSION

This interim report may disappoint those hoping to find in it clear government policy decisions in relation to digital media and networks. Its strength, however, lies in it having brought together, in a little more than three months, a fairly comprehensive range of issues that need to be resolved across several converging industries and having organised them in a coherent way to facilitate public debate. There is a new perception in the report of the communications sector being as large as the financial sector and at least as deserving of political and investment attention. All businesses affected by the new digital technologies should, if they have not already done so, consider whether they have a contribution to make to the debate, notwithstanding that the main consultation closed on 12 March.

NOTE

1) The Online Purchasing of Goods and Services (Age Verification) Bill, introduced by Baroness Massey of Darwen.