



Digital Britain: the way ahead?

Some thoughts from the
digital specialists

June 23, 2009



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Introduction

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In fact, to have curated such a widely-inclusive discussion and emerged with a set of coherent proposals on each of 83 inter-leaved subject areas is remarkable."

Richard Eyre, former Chief Executive of ITV and Capital Radio, commenting to Osborne Clarke

The Digital Britain Report presented by Lord Carter on June 16 represents a significant step on the part of Government to position the UK as a true leader in the global digital economy. The Report is far reaching and has attracted much press attention. Inevitably, much of that attention has been focussed on a small number of key proposals such as the proposed broadband "tax" and the top slicing of the BBC licence fee, but behind these headlines lie a significant number of other key objectives and proposals which could dramatically influence the shape of the mobile, creative and digital industries in the UK for many years to come.

Following our [initial commentary](#) on the release of the Digital Britain Report on June 16, we set out here some further analysis and thoughts on those areas of the Report that are likely to be of most interest and relevance to our clients and contacts. The six areas we have chosen to focus on are:

- [access to broadband](#);
- [fighting online piracy](#);
- [interactive entertainment](#);
- [broadcast television](#);
- [data privacy](#);
- [media mergers](#).

We're delighted to be able to include comments that have been provided to us from a number of key players in the digital marketplace.

If you have any questions or would like any further information on the Report, please do not hesitate to contact me or any of the Osborne Clarke specialists whose details are contained below.

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1 Access to broadband

Lord Carter has set out a blueprint for broadband infrastructure investment in the UK on a technology neutral basis, i.e. broadband services provided over fixed, mobile, wireless and satellite networks. In this regard, the Report has two objectives:

- to ensure the availability of broadband services (of at least at 2Mbps) in regions (mostly rural) where the value of the potential business does not justify the capital cost of infrastructure ("Universal Service"); and
- to promote the development of next generation broadband services to at least 90% of the UK by 2017.

With this in mind, Ofcom will expressly be charged (as an amendment to the Communications Act 2003) with the objective of encouraging investment in communications infrastructure. This is consistent with its existing duty to promote competition in the telecoms sector for the benefit of consumers and potentially sets the scene for the focus of forthcoming regulatory policy.

Unsurprisingly the future of the UK's broadband networks relies upon market based investment by network operators. However, market driven investment cannot be expected to reach all parts of the country. In addition to £200m of public funds re-directed from the Digital Switchover budget (which is available for the deployment of all broadband services), Lord Carter plans to fund the roll-out of next generation broadband services through a levy of 50p per month against each fixed line phone. These additional charges (amounting to between £150-£175m per year) will be paid into a fund to be administered by Ofcom which will run tenders for contracts for the deployment of next generation broadband networks. Good news for alternative broadband service providers.

"Satellite broadband is the only technically proven and economically viable solution to the problem of the 10% of population identified by the Digital Britain report and we welcome the

announcement that the provision of service to these consumers will be accelerated by government intervention and funding, which we expect to benefit our HYLAS satellite."

David Williams, CEO of satellite broadband service provider Avanti Communications

On the mobile side, Lord Carter has stepped in with a plan to resolve some of the thorny issues which have delayed the release of the '3G expansion' spectrum (at 2.6GHz and 1800MHz) and the liberalisation of the 2G spectrum (i.e. allowing the spectrum allocated to mobile operators for 2G services to also be used for 3G services), both of which are key to the development of next generation mobile broadband services. An independent arbitration body will be established to resolve the issues so as to allow an auction of key spectrum by mid 2010. Numerous mobile operators have long since argued that, in order to allow them to make an informed decision of how much of the 3G expansion spectrum they should bid for, the question of the 2G spectrum liberalisation needs to be resolved before any new auction. In acknowledging the need to align these two issues, Lord Carter has certainly taken a step forward on this issue.

It's not all about regulation, though. Lord Carter also expects further competition in the broadband market to be facilitated by cable operators, such as Virgin Media, voluntarily providing other service providers with access to their networks on a commercial basis. Where operators are sitting on excess capacity, such wholesale models can be an attractive source of revenue. Partnering in this way with service providers with bespoke market propositions can also bring customers onto the network which would not otherwise be attracted to the mass market offering of the network operator. Mobile operators have already embraced the wholesale model through aggressive MVNO strategies. To the extent that regulatory intervention is involved, history has shown that we can't discount the possibility of a legal challenge from one quarter or another.

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2 Fighting online piracy

The Report acknowledges the "significant challenge" the content industry faces as a result of online piracy and particularly peer-to-peer file sharing, whilst also acknowledging the frustrations of consumers of online content who it believes would "prefer to behave lawfully" if the content can be made available online lawfully and affordably. The Report also acknowledges the confusion amongst some consumers as to what is lawfully available and what is unlawfully available. The Report therefore proposes a carrot and small stick approach to encourage consumers to access lawful content, with the option of introducing a bigger stick if the small stick does not have the desired effect.

The carrot puts the onus on the content industries to provide attractive content packages for consumers as well as education on what to do and what not to do to ensure lawful content is accessed. The small stick consists of legislation to give Ofcom a duty to take steps aimed at reducing copyright infringement which are to be fulfilled by Ofcom requiring ISPs to accept two specific conditions: (i) to notify account holders that their account has been used to infringe copyright - the belief being that most consumers will stop any illegal activity once notified; and (ii) an obligation to maintain and make data available (upon the production of a Court order) to enable the minority of serious infringers to be identified so that content providers can take action through the Courts against them. The aim is for these conditions to be implemented by way of an industry "Rights Agency" code of practice to be approved by Ofcom.

The report recommends that Ofcom conducts reviews at 6 months and 12 months after implementation of the Rights Agency code of practice so that if a target reduction in infringement of 70% of those notified under the code of practice is not achieved, then Ofcom should implement the bigger stick of legislating for other conditions being imposed on ISPs aimed at deterring, preventing or reducing online infringement such as blocking sites, bandwidth capping or shaping and content filtering for repeat infringers.

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3 Interactive entertainment

Introduction

If ever an example were needed of the benefits of the two stage approach that led to the publishing of the Report, few better could be found than that of the interactive entertainment industry. When the Interim Report was published in January this year, the interactive entertainment industry was shocked to see that it had been completely overlooked. However, to the credit of the industry trade associations, ELSPA and TIGA and also to Lord Carter and The Digital Britain Steering Board, the consultation period was used to good effect and the Report not only recognises the existence and significance of this industry, but also takes positive steps to encourage its future development.

Tax relief for game production

Although the UK has a long and successful track record in game development, it has faced increasing competition from jurisdictions that offer subsidies and tax relief. For several years, the industry has been trying to procure some form of tax relief in the UK and has therefore welcomed the Government's confirmation that it will consider the possibility of a production tax credit.

"Tiga is very pleased that the Government recognises the important place that the interactive entertainment industry has in the UK digital economy and we welcome the commitment to investigate a production tax credit for the industry. Tiga is making real progress on behalf of the industry in achieving this important goal."

Dr Richard Wilson, CEO of Tiga - The Games Developers' Association

Although this is a positive development for the industry, the onus is now on the industry to come up with a credible scheme that meets the needs of the

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industry and is likely to be acceptable both to the Government and the European Commission. This will be a challenging exercise, particularly since the form of relief being proposed will have to incorporate a cultural test. Nevertheless there are ways that this might be done and there are also alternative analogous approaches that the industry will wish to consider.

Skills and training

Another long standing and well known challenge faced by the UK industry is the need to improve the supply of people with the necessary qualifications and skills. The Report recognises this and in addition to the broad measures application to the digital industries generally contains a commitment to consider the possible development of "a video games centre of excellence".

Although the industry will welcome the Government's aspiration to address the current skills shortage, it is likely to be more interested in taking positive steps on a national basis, in particular to improve the teaching of maths and science in schools and the number of universities providing courses that have industry accreditation. This is therefore an area where considerably more work and thinking is likely to be needed.

Classification scheme

The Report finally brings to a conclusion the long-running debate about the future of the classification system in the UK. This decision had been expected in April and until then, it had appeared much more likely that the Government would decide to adopt the BBFC classification scheme, or at least to extend that scheme so that it applied to games suitable for those aged 12 and over. The Government's decision to adopt an enhanced version of the PEGI classification system as the sole classification system will therefore have come as a considerable surprise to many in the industry. However, it will undoubtedly be warmly welcomed by the industry which likes the fact that PEGI is used in many countries in Europe which also sees PEGI as being better suited for use with online games. This is a

remarkable turnaround and a real coup for ELSPA which has coordinated and executed a very successful campaign to communicate the advantages of the PEGI system.

Mike Rawlinson, Director General of ELSPA, the trade body which represents games publishers, said:

"The Government has made absolutely the right decision for child safety. By choosing PEGI as the single classification system in the UK, British children will now get the best possible protection when playing videogames either on a console or on the internet. Parents can be assured that they will have access to clear, uniform ratings on games and an accurate understanding of game content. The decision will ensure that games ratings stay relevant and adapt to the changing nature of videogames for many years to come. Retailers will now have clear, legal backing to help them prevent access to unsuitable content by children. We will work closely with the Government, the Video Standards Council and the BBFC to ensure a smooth and rapid transition to this new ratings system."

However, the process of implementing this decision will not be straightforward and will involve some significant and potentially complex legislative and procedural changes. Some commentators are already expressing concerns that this may not be possible to achieve so close to an election. However, this is probably a rather pessimistic view and having got to this point, the industry will no doubt energetically drive this forward.

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4 Television in Digital Britain

The BBC needs to have an evolving role as 'an enabler of Digital Britain', and C4 'needs a modernised remit'. The search for a solution to these goals is work in progress, however, with the Report identifying 'the prospect of purely commercial ventures between C4 and BBCW which are currently still under negotiation'.

For ITV and Channel 5, the Report talks about a 'strong case for progressive liberalisation' in public service obligations, but with Channel 3 Licensees remaining obliged to provide regional news through at least 2012.

On content production, the Report confirms the intention to ring fence the digital switchover underspend to fund content including material for older children and regional and local news. One 'priority' of the Report is the establishment of independently financed news consortia. The Report notes that the Quotas and Terms of Trade Framework 'are working well'.

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In fact, to have curated such a widely-inclusive discussion and emerged with a set of coherent proposals on each of 83 inter-leaved subject areas is remarkable.

The work does not bodyswerve the contentious, most notably the historic proposal to make a fixed share of the licence fee available outside the BBC.

Not unnaturally, the thoroughly decent Chairman of the BBC Trust, Sir Michael Lyons has rushed to protect the BBC's money. It's an argument he will lose, simply because it's not 'the BBC's money' but ours. If 'we' decide that redirecting a slice of our licence-fee payments is the best way to sustain things that are important to us, like

plurality of local news or new sources of inspiring ideas, then so be it.

As its commercial rivals grapple with double digit reductions in their income, the BBC can hardly plead poverty – though its argument is the more philosophical notion that this step impugns the BBC's independence. Frankly it's too abstract to carry public opinion.

For some years, despite remarkably resilient audiences and revenues, Andy Duncan, C4's CEO has been trying to convince us that C4 would need help to survive. He'll be pleased with the report, which rightly celebrates Channel 4's diversity and innovation and indeed recommends it expands its remit beyond TV. Its mooted merger with BBC Worldwide hits three targets, providing greater financial security for C4, increasing BBCW's distance from the Corporation, and snuffing the daft idea of a merger of 4 and Five.

Meanwhile ITV and Five have been granted the freedom further to wind down their public service contribution towards the barest minima – original productions and news. Anything else they contribute to the sum total of public service will be an offshoot from doing their thing for their shareholders. Let's not hold our breath, though both would be daft to rush down-market. Broad reach will remain a revenue winner.

The headline legislative framework under which TV in the UK is currently governed is the 2003 Communications Act, a work published before MySpace, Facebook and Twitter, when online culture was somewhere else and convergence of media were merely predicted.

Digital Britain will beget new legislation that for the first time comprehends the full media ecosystem. And Carter, the only member of the government to have mastered the inter-relating components of the UK's digital future will leave.

This is a shame as the discussion is far from over. The broad range of organisations affected by the report will continue arguing their own

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books, some of them desperately hoping the Tories can be persuaded to ditch it. They'd be out of their minds to do so.

Digital Britain may be a sketch, but in it we can make out the features of the first joined up media policy for the digital age."

Richard Eyre, former Chief Executive of ITV and Capital Radio

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5 Data privacy and exploitation

Supporting ICO proposals on a new code of practice for 'Personal Information Online'

The Report acknowledges that personal information will be 'the new currency of the digital world', supporting the Information Commissioner's Office (ICO) proposals to consult on a new code of practice for 'Personal Information Online'. A new Information Commissioner, Christopher Graham, takes charge of the ICO at the end of June. Given the fearsome reputation earned by the Advertising Standards Authority whilst it was run by Mr Graham, in particular on enforcement actions brought against digital marketing campaigns, it will be interesting to see how tough a stance these guidelines take. It is also interesting to note that the Report appears to seek to push the OFT and Ofcom forward to cover particular aspects of data regulation. It will be interesting to observe the interplay between these regulators, their contrasting powers to fine and the level of resources available to each of them to bring enforcement actions. All will determine who digital businesses need to pay most attention to.

Tackling concerns about behavioural advertising

The Report acknowledges that new online business models, such as behavioural advertising, are an area of concern for consumers and welcomes the Internet Advertising Bureau's (IAB) proposal to launch a consumer education portal about behavioural advertising. It also credits the role played by the IAB

in promoting online behavioural advertising principles that mirror US best practice but are adapted to EU data protection framework. This suggests a cautious endorsement of the IAB behavioural advertising principles, which broadly allow behavioural advertising on the basis of consumer opt-outs. This aspect of the Report is therefore likely to be welcomed by behavioural advertisers.

A single online point of access for all public UK datasets

The Report notes that the Prime Minister has tasked a panel of experts, led by Sir Tim Berners-Lee, to investigate how to implement a single online point of access for all public UK datasets with a view to encouraging re-use of and innovation. This is likely to be modelled on the successful approach taken in the US and will replace the current Crown licensing arrangements for access to public UK public data, often criticised as too restrictive. Quite how 'public data' is to be defined remains to be seen. Two issues arise:

- Firstly, given the large number of quasi private and fully private companies which provide key public services or infrastructure, how far does the Government propose to go in freeing up availability of what it calls 'public UK datasets'? Could private sector companies be forced to share their valuable IPRs?
- Secondly, although the Report seeks to differentiate between public data (which it wants to see made freely available) and personal data (which it wants to assure us will be protected) it fails to recognise the extent to which the two overlap. 'Geographic data' is given as an example of public data which should be made more available to facilitate digital services. But some geographic information held by and on behalf of the public sector can disclose a lot about where and how we all live. It will be interesting to see how this conundrum is dealt with.

Finally, it will be interesting to see what, if any, future revenue generation models public authorities are

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permitted to operate in respect of data currently "owned" by them. At a time when public authorities face the deepest round of Government spending cuts in a generation, the prospect of data revenue generation being reduced will not be welcomed with open arms.

"Whilst there has been something of a mixed reaction to the report amongst the wider advertising community, the response from marketing agencies in the digital sector has been far more positive. In particular, the proposals to deliver universal broadband access to households across the country by 2012 will be welcomed, as will the planned fund for investment in the next generation of broadband networks. Both these initiatives will help to further increase internet penetration in the UK, which can only be a good thing for digital marketers. The report also notes the increasing importance of behavioural targeting in online advertising and acknowledges the IAB's (Internet Advertising Bureau) role in promoting best practice in this area."

Mark Collier, founder of interactive marketing agency Dare Digital

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6 Merger regime

On the same day as the publication of the Digital Britain report the OFT published its Final Report on The Review of the local and regional media merger regime it had undertaken following the Digital Britain Interim Report. The OFT has stated that no changes need to be made to the existing regime and is confident that the existing framework as it applies to media mergers is sufficiently robust and flexible to take account of the changing considerations that are being brought to bear on the media industry. That being said the OFT have argued any further research should be done in the context of a specific media merger.

The involvement of Ofcom in the process must be seen as a positive given its deep knowledge and understanding of the media markets and it will be interesting to see the guidance that should be published towards the end of the summer. This is clearly a step in the right direction that should encourage media owners however it will be interesting to see the extent to which this is tried and tested before the OFT reports back later in the year on the cross-media ownership rules and whether the OFT will be as flexible as it says it can be.

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And finally, a closing thought...

"The report is just like embarking upon a diet. Its intentions and aims are worthy but if it is not strictly observed the same old bad habits return and ultimately failure will ensue.

It acknowledges that greater protection for rights in a digital world is a fundamental tenet of growth. Without a robust enforcement regime one cannot reward the world class creative community which has developed over decades in this country. Piracy is theft and should be treated as such. On this point, the report is direct and clear, with government intervention clearly in the national interest. It must also be of benefit to us all (except the BBC) to see "top slicing" being used in the best interest of the viewer and valuable public service programming – whoever makes it. There is however something which does strike me as somewhat ironic. As the report aims to stimulate growth we appear to have a self destruct button in this country. When ITV/BBCW/C4 recently attempted a large dose of digital "self help" the Competition Commission deemed "Project Kangaroo" unacceptable. Presumably they believed it would have a negative impact on private sector development and the market. Indeed all they have done is force weakened British companies into the arms of US players who will welcome them with open wallets.

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Digital Britain blindly supports C4 and the initiative to join with BBCW. C4 has already over one third of its staff working on non PSB channels and yet it apparently contemplates splashing out another £100m+ of public money on more commercial channels from Virgin Media. Confused? Why does the extension of the existing establishment at the cost of genuine commercial players create a sustainable digital market and not destroy it?

At the heart of the report is the importance of Innovation. I chair the Royal Television Society Innovation Awards which this year will celebrate great UK digital talent. We have much to be proud of but a word of warning. The Digital Britain report used a memory stick as a logo. If used properly these devices can provide fantastic information and enhance existing knowledge but we all know how easily they are lost down the side of the sofa and destined to do little but collect dust."

Jeff Henry, former MD ITV Consumer division

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