

Thursday 12 March 2009

Lord Stephen Carter
Department for Business, Enterprise and Regulatory Reform
1 Victoria Street
London
SW1H 0ET



A handwritten signature in black ink that reads "Dear Stephen,".

Thank you for your recent letter and may I congratulate you again on your Interim Digital Britain report and what we at Intellect think is a vital first step in raising the awareness of the issues that are facing the UK around the current and future capability of its digital infrastructure.

As you say in your interim report much of the debate around next generation networks confuses 'two separate issues': that of the exciting maximum speeds that act as 'national or corporate headline symbols', and the less exciting but no less important average speeds that consumers experience. In this letter we will aim to set out our position on these two separate but inter-connected issues and make some recommendations on mechanisms that will help drive the market forward.

Universal service commitment in broadband by 2012

We applaud the commitment to a Universal Service Commitment of 2Mbit/s to 100% of homes by 2012 and understand the 'patchwork quilt' approach which will mean broadband services are delivered by a mixture of fixed and mobile, wired and wireless means. This is a laudable aim but we retain concerns that it doesn't help move the UK forward in generating wealth in new and innovative ways. We also have concerns that it could be seen as diverting effort away from delivering fibre and other wireless technological solutions which we believe will help drive growth at this difficult time and should remain your priority. We believe that the technologies to provide a base level of service are available now and what remains is for government to provide some clarity on the following three issues in order for the market to best deliver them:

- what level of service will be defined in the USC? Will it be defined solely by headline speed, or does it require a stable link, low latency, a lack of restrictive download limits?
- what other steps will be taken to drive take up of services? There is little purpose in deploying high speed networks across the country if they are not then utilised. With take up rates of broadband at around 60% of homes, compared to its current availability in 99% of homes, it is important that the government focuses also on measures to ensure and enable take up of broadband services.
- 2Mbit/s appears to be the right base level. A specified level of 2Mbit/s is already broadly available in the UK but may be expensive to and difficult to deliver to those who don't already receive it.

Our vision for a base line broadband service is as follows -

In addition to the fixed network deployments we expect Satellite to play an important role, in accessing unserved, underserved and rural areas of the UK for universal broadband services today and for NGA tomorrow. In the UK, US and France satellite has already been demonstrated to be an affordable service for broadband provision. Mobile broadband will also have an important role to play, both as a complement to and as a substitute for high-speed fixed line broadband, but action is needed now to ensure the necessary spectrum is available to the market. Whilst provision will be market-led for the majority of the fibre rollout in mainly urban areas, public sector intervention is likely to be required for next generation broadband service provision in rural and remote areas, using a variety of technologies based on a technology neutral basis.

What will the balance between these technologies be? We believe that to focus solely on fixed broadband solutions is misplaced. Satellite and mobile broadband provide a cost effective route to deliver the USC to the parts of the UK that remain unserved and will be able to deliver a capability well before 2012.

Superfast broadband

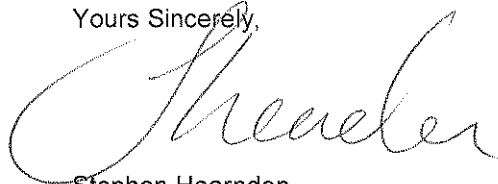
The role of government in the broadband market has to be to optimise the market deployment of NGA in as timely and efficient fashion as possible. We recognise the progress that is being made on the issue, particularly in light of the recent announcement from Ofcom confirming its policy towards regulation of future superfast broadband networks, which said that providers will have freedom to price wholesale superfast broadband products "without any regulatory intervention". Such clarity is essential to building business cases and is likely to encourage investment in our digital networks. In line with our support for a minimum 2 Mbit/s today we believe the government needs to go further and faster and set out a vision for superfast broadband. 5 years out we would like the UK to be well on the way to having a superfast broadband network capability covering over 50% of homes, and a commitment to deliver the right policy environment to enable virtually 100% of homes within 7 years. However, we recognize that achieving this would be dependent upon adequate incentives for private sector investment or public sector investment incentives.

The cost of delivering a 50MBit/s service to a significant number of homes in the UK has been modelled by the Broadband Stakeholder Group in a recent report as between £5Bn-£30Bn depending on whether it is FTTC or FTTH solution that is deployed, the take up and the percentage of the country that is to be covered. To finance an investment of this scale the following four items are significant:

- the cost and availability of capital becomes a significant issue even in these days of low interest rates, and there needs to be ready source of capital for one of the major players to access to fund such a major capital expenditure investment. It is in this context that there have been calls for the government to change immediately first year capital allowances to 100% for the next 12 months thereby encouraging the acceleration of investment without long-term cost to the exchequer.
- the barriers for alternative operators to enter the market should be reduced through the ready availability of wayleaves, spectrum or anything required to help the creation of a mixed ecology of broadband provisions.
- clarity is needed around the steps the government is willing to take to incentivise NGA deployment in the parts of the country the market will not service.
- a mixed ecology of broadband provision means that the delivery of NGA Superfast Broadband access to areas of the UK unlikely to be covered by fibre or cable would need to served by a combination of terrestrial wireless solutions and satellite wireless solutions.

We know you understand the central importance of the digital infrastructure to the current and future prosperity of the UK. We are keen to support you in this work in any way we can and would be happy to come and discuss it with you.

Yours Sincerely,



Stephen Hearnden
Director - Telecommunications and Technology

UK-IPO Paper: © the Future – developing a copyright agenda for the 21st century

Response from Intellect

10 February 2009

Intellect is the UK trade association for the IT, telecoms and electronics industries. Its members account for over 80% of these markets and include blue-chip multinationals as well as early stage technology companies. These industries together generate around 10% of UK GDP and 15% of UK trade.

General Points

As the significance of copyright is central to the creative economy, with ever-new and evolving business models, methods of content delivery, and innovative new product offerings, it imperative that copyright policy seeks carefully to balance the interests of the whole spectrum of stakeholders, in order to promote a pro-competitive climate conducive to creativity and innovation for the ultimate benefit of the consumer particularly in the digital domain. Technology plays a vital role in bringing the digital experience to consumers, and it is industry, through substantial investment in innovation, that develops and supplies enabling technology. As such industry is a key stakeholder in the whole copyright debate. We are pleased to see some mention of industry in the UK-IPO Paper but urge that the industry community remains centrally engaged in copyright policy discussions.

Intellect understands that whereas Gowers looked at what changes were thought necessary to the existing copyright legislation, this UK-IPO Paper is intended to stimulate some thinking at a higher level as to what would be ideal copyright legislation without being overly concerned at the moment as to how one might get there.

Notwithstanding the above, Intellect notes that it is now some two years after the UK government accepted Gowers' recommendations and several of the recommendations have yet to be implemented. In particular the uncertainty over format shifting is not helpful and a statement on how and when, if at all, these recommendations might be taken forward would be welcome.

Russell Square House
10-12 Russell Square
London WC1B 5EE

T 020 7331 2000
F 020 7331 2040
www.intellectuk.org

Information Technology Telecommunications & Electronics Association

Contact: Jennifer Carlton
T 020 7331 2003
E jennifer.carlton@intellectuk.org

As the Paper rightly points out, much copyright legislation is controlled by International and European Institutions i.e. WIPO and the European Union. Intellect encourages the UK Government to take a lead in the work of these Institutions. Intellect specifically asks UK Government to ensure that these Institutions fully consider the Industry perspective which is so important to economic growth.

Overall, education & awareness regarding digital content and the key online issues of safety and privacy as well as respect for intellectual property must be a priority for Government. Given the broad consensus that a successful creative economy is in the UK's national interest, and that much of the innovation, consumption and distribution of creative content will take place online, IT education in schools and colleges must focus on the opportunities and advantages offered by intellectual property (as well as the dangers associated with inappropriate behaviour online). Today's students are tomorrow's creators and consumers of online content, and an understanding of online safety principles, the importance of privacy and security, and "IP literacy" are essential to ensure that the creative economy develops and thrives in the 21st Century.

Copyright Levies

Intellect should like to take the opportunity once again to urge the Government to maintain its stated aim of not introducing equipment levies in the UK. As the UK-IPO itself argued in last year's consultation the UK's narrow private copy exception (even if extended to include format shifting) does not – and would not - give rise to more than minimal harm that would qualify for fair compensation under the European Copyright Directive 2001/29/EC. In countries that have much broader private copy exceptions and do have copyright levies systems these are regarded as a very blunt instrument unfair to consumers and giving rise to significant distortive effects in the internal market.

There are currently over 25 separate cases underway in courts across Europe, disputing copyright levies in one way or another. Some have been brought by industry and others by rightholders and they range from local courts to IP courts to the European Court of Justice.

This highly dysfunctional and widely contested system requires reform on many levels and should certainly not be considered as a model ready for expansion or in any way reflecting the modern use of copyright. Indeed there is currently a Stakeholder Forum initiative being facilitated by the European Commission (jointly by DG EAC and DG MARKT) exploring a number of facets of the serious problems caused by the disparate national Levies systems in Europe.

The ICT industry is deeply committed to copyright and ensuring that artists are fairly compensated for the use of their work, but we must be absolutely clear that the copyright levies regimes that exist in Europe today distort the single market, create massive legal and financial uncertainty, and have directly resulted in many companies either not selling products in certain markets or even deciding not to develop products

in certain segments as the business case is just too complex to make in the face of entirely unpredictable levy application.

Consumers are the victims. They pay the levy in product prices and bear the increased costs of doing business that its administration requires. The small section of the market that even realises that they are paying a copyright levy on their purchases also often assume it is a licence to make private copies or worse, a licence to pirate copyrighted material.

The questions below are important to the debate but we see them as just a subset of those that need to be considered. Intellect is however pleased to contribute and our answers are below:

Response to the specific questions

Recognising creative input

Q1. Does the current system provide the right balance between commercial certainty and the rights of creators and creative artist? Are creative artists sufficiently rewarded/protected through their existing rights?

As the IPO has pointed out, the creative industry already supports 1.9 million UK jobs and constitutes 8.2% of UK GDP. The legislative foundation of the creative industries – the copyright system – is therefore clearly working. Rather than adopt an introspective view of the UK's copyright system, the IPO can and should showcase it to the world as a best practice for encouraging, rewarding and managing innovation and creativity. It has produced one of the most dynamic and successful markets world-wide for developing original copyright material.

The UK system is based on a balance of exclusive rights for those who develop copyright material and freedom of contract for those creators as to how their work is transferred, licensed and used. There is no reason to second-guess or undermine this system, and in particular no need for government intervention in what is essentially healthy, market-based commercial negotiations.

As the management of intellectual property moves from the physical to the digital domain, copyright must certainly stay abreast of developments in technology, but our focus should be less on the legal framework which underpins copyright, but more on the tools and infrastructure that are needed to manage and implement it. The consumption modes and patterns of copyright material have changed substantially in the past decade, becoming highly economically efficient as costs have been stripped out of distribution and consumption by the introduction of digital content and wide access to broadband networks.

In the analogue world, the business of licensing content could realistically and effectively be managed by the communication of documents between people and, in cases of failure of compliance, through the courts. In the digital world, where the tools for the creation and reuse of content have become democratised, we need matching tools for the management of the rights in that content – tools that take advantage of the technology infrastructure, not try vainly to fight against it.

This should not be seen to imply that the internet does not set new challenges to existing ways of doing things for the content industries – far from it. The internet provides extraordinary opportunities for innovation both in content development and in business models. But the real potential, including the flow of talent to the creative sector, will only be realised when those who create and invest in content have the confidence that their investments – whether of time, expertise or money – will be able to earn a reasonable return.

Access to works

Q2. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?

Whilst there is an inevitable degree of complexity in a system that protects a number of right holders, and safeguards a number of user interests, the system is in fact extremely flexible, as demonstrated by the fact that it does allow for a co-existence of often competing interests. The system allows rights holders to make material available under almost whatever terms they wish, and for users to adopt – or reject – these terms as they wish. It is this very flexibility that encourages the development of such a variety of business models which are essential to economic growth.

Intellect believes there is still a need for improvements around multi-territory licensing of rights, e.g. in musical works, where the level of complexity can be said to be prohibitive.

With no clear, consistent or central availability of information identifying ownership of rights, digital businesses endure legal uncertainty on a scale never previously experienced. They are faced with the task of piecing together a jigsaw of rights from multiple sources, in an attempt to ensure that all rights required have been licensed. This is a virtually insurmountable task, and any shortfall of acquired rights equates to legal risk for the distributor. This situation arises largely as a result of changes in European policy over the past few years, namely the Recommendation on multi-territorial licensing. The recent CISAC competition decision has not improved matters. These measures have created layers of complexity and increased divisions between different national collecting societies, making the process of completing the jigsaw of rights in musical compositions in Europe even more difficult.

This situation is also framed in the context of current legislative efforts at the EU level to extend the term of copyright. The debate on term extension at the European Parliament has now expanded to include proposals on the creation of new types of rights for which collective management would be mandatory, further entrenching national systems. Industry has raised concerns over these proposals which would add yet further complexity to the system.

The dissonances and complexities in licensing regimes for musical works across Europe described above are contrary to the interests of both rightholders and potential users. It serves no-one other than those who would promote illicit distribution of copyrighted material without authorisation from rightholders. A key factor in the fight against piracy is the creation of an efficient licensing regime that will encourage and facilitate the development of legitimate content distribution businesses.

Intellect would also support the introduction of some clarity around how to make payments to an author. It is often unclear as to who you pay for author's rights.

The UK-IPO might like to consider taking a role as a facilitator and guide in rights clearance. Such a role would include bringing potential rights holders and users together and helping users get permission to use copyright material and pay for this right.

Intellect would support regularising the reality of the situation we have today, where it is commonplace for consumers to copy digital content for playback on different devices, such as from a CD to a MP3 player or from a PC to a portable payer or CD. In February 2008 Intellect responded to the UK-IPO consultation on format shifting supporting the introduction of an express, limited private copying exception for format shifting. We believe this will help provide clarity and restore credibility and confidence in the copyright regime in the UK, not only among consumers, but also among stakeholders including rightholders and technology providers. In parallel with this Intellect supports a programme of work to educate consumers on their rights. These measures should allow enforcers to concentrate on piracy and illegal copying for financial benefit.

Incentivising investment and creativity

Q3. Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

It is an unfortunate fact that piracy, both physical and digital, remains the most substantial drain on investment, creativity and innovation in the software and other creative sectors. Whilst robust copyright protection is a key driver of the UK's creativity, technological progress and competitiveness as a whole, it is important to keep in mind that copyright piracy and inadequate copyright enforcement have

precisely the opposite effect—they allow unauthorised, unpaid copying and distribution to compete unfairly with and undermine the business models for legitimate content distribution. Counterfeiting and piracy, whether involving physical goods or on-line activities, damage legitimate sales, lower governments' tax revenues, hurt jobs in upstream and downstream industries and damage innovation and competitiveness.

Although the Gowers Review recommended that the Department of Constitutional Affairs needed to “ensure that an effective and dissuasive system of damages exists for civil IP cases and that it is operating effectively”, and should “bring forward any proposals for change by the end of 2007,” this recommendation is still languishing, unfulfilled. The current system of civil damages in copyright cases leaves large gaps in the legal enforcement framework, in that they can actually encourage, rather than deter piracy.

Civil damages reform is vital to the anti-piracy enforcement framework that helps to maintain the creativity and innovation benefits of the UK copyright system. This should be the IPO's number one priority for law reform. However, in framing enforcement policy and remedies it is imperative for the policy maker to reflect the careful balance between blatant unauthorised copying on a commercial scale (piracy) on the one hand, and – on the other hand - private use, and the legitimate access to third party rights.

Authenticating and protecting works

Q4. What action, if any, is needed to address issues related to authentication? In considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

The protection granted to authors and right holders by copyright legislation should not be conditioned to the eventual commercial value of their work, because that is contrary to the concept of copyright and only the market would determine such value at each given time.