



## **Digital Britain: The Interim Report**

MPA<sup>1</sup> and its members wish to express their appreciation for the opportunity to comment on the interim Digital Britain Report.

We applaud the overall initiative and the aim of the report – to build an effective infrastructure that will bring broadband to every home in Great Britain. We recognise that the provision of content, in compelling ways and at affordable price points, is a key part of what drives consumers to take up broadband. We also recognise that in the next year, the Government has an opportunity to deliver a comprehensive strategy that provides a solution for all parties concerned; consumers, rights holders, service providers and Government itself. This is the big prize for Digital Britain and we are unambiguously committed to helping Government achieve it.

The experience of consumers in this process is essential – it is this that drives investment in our business, just as it does for ISPs. Our very purpose in seeking solutions to digital theft online is so that we can make our content available online legitimately to as many of them as possible.

MPA member companies have been leaders in licensing content for, and launching, new and innovative business models. We are wholeheartedly committed to improving and expanding the range of these legitimate online services. However, those new and innovative business models cannot be viable and survive if the content they commercialise is simultaneously stolen and redistributed in vast quantity.

We salute Government's forward-leaning efforts to address illegal online activities and encouraging the emergence of innovative new online commercial offers. As the interim DBR rightly recognized: *"we should look at the environment within which [rights owners] operate, and for rights holders that means the sea of unlawful activity within which they have to swim"*. Effective enforcement must first create the environment within which new opportunities for accessing content online through secure digital delivery can survive. The gating factors are two: (1) rapid progress toward the government's goal of reducing illegal file-sharing by 70-80%, and (2) creation of secure delivery pathways that ensure that new digital services do not themselves accelerate the traffic in stolen content. In such an environment the success of new and innovative business models would be defined by consumer demand rather than unfair competition from pirate sites. Without question, creating such commercial offerings will inevitably be up to individual transactions between content companies and digital distributors.

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<sup>1</sup> MPA is a trade association that represents 6 major international producers and distributors of films, home entertainment and TV programmes. Our members comprise: Buena Vista International, Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

*MPA also believes that marketplace competition is the most effective means of providing consumers with a dynamic, content-rich broadband experience. Regulating in this area would be extremely complicated and would likely produce many unintended consequences that would stifle new investments, inhibit future innovation and limit consumer choices.*

*In a competitive ISP/operator environment, these players must be able to manage their networks efficiently to decrease internet congestion and protect legitimate offerings. Indeed, through its regulatory policy, Government could provide encouragement to ISPs to support the endeavour to create innovative, vibrant and strong commercial offerings and to create conditions that support deployment of Next Generation Networks.*

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Inherent in the interim DBR, and indeed in the Government's approach to the MoU, is the very relevant notion that bringing about a responsible internet environment is beyond simple, single ingredient prescriptions. A more holistic approach is called for. In this sense, creating a "rights agency" could well be a constructive step. We will come back with more specific advice on this matter in the related consultation process expected to be launched very shortly.

There follows a discussion of our six core suggestions and requests respectfully submitted for action in the final DBR planned for May. We believe that Ofcom has an established track record on these core issues and should be asked to take on the challenge of making sure they are addressed.

We are prepared to follow-up as needed.

**1. The principles and objectives underlying the July 2008 Memorandum of Understanding signed by Government, the ISPs, and the content sector should be re-affirmed.**

The benchmark of achieving a 70%-80% reduction in file-sharing within 2-3 years was the right goal last summer and remains the right goal now, but it cannot be achieved without implementing a sensible, proportionate and credible repeat infringer policy. The Digital Britain Report and the Government's response to the consultation on legislative options to address illicit file-sharing contain partial potential solutions to meet the goals set by the MoU.

**2. A comprehensive approach is needed. An obligation to forward educational warning messages as proposed in the interim DBR is a start. We support Government's recommendation on notice sending as long as it is carried out comprehensively and based on automated processes.**

Necessary development and testing of an automated message delivery system should be started now in light of the pilot tests carried out pursuant to the MoU, as intended at the start of the pilot. This should not wait for legislation mandating deployment or we will lose many months of precious time that we do not have to spare. By October 2010, the envisaged effective date for the legislation, the system must be ready for full-scale deployment if there is to be any chance at all of achieving the piracy reduction goals underlying the MoU. Ofcom should be asked to resume the work it coordinated pursuant to Principle 4 of the MoU in this perspective.

- 3. Government's interim response needs to be completed, in particular by obliging ISPs to extend largely extant network management technologies to all illicit content. If there are deemed to be legal uncertainties, which we doubt, these should be removed in the forthcoming legislation announced in the interim DBR.**

We are attaching a recently-completed report by Informa Telecoms and Media prepared at the request of MovieLabs (a technology consortium created by the studios) and the MPA. It is an independent confirmation of what we all know: network management technologies exist and are being used by the ISPs as a tool to address other forms of illicit behavior. These same technologies could be adapted readily to the needs of the creative community. It is noteworthy in this regard that, in the interim DBR, Government wisely refused to intervene to prevent traffic management by ISPs absent evidence of abusive practices. Taking that to its logical conclusion, we believe that traffic management solutions can and should be used where educational warning messages have been ignored in pursuit of responsible behavior. The solutions are there, and in use. Indeed, this point came through quite clearly in the work hosted by Ofcom on so-called Principle 5 of the MoU, which is also attached. To the extent that there are any legitimate legal uncertainties, which we doubt, Government should remove these in the legislative package it puts forward. In this regard, reference is made to the important work undertaken pursuant to the MoU's P5-Legal group overseen by Ofcom.

- 4. Suspension of browser service for limited time periods would be a credible, proportionate and, in our view, effective deterrent. For serious offenders such as so-called "first seeders", the option Government seem to favor, i.e. legal actions by rights holders, could be envisaged.**

We understand that there are legitimate sensitivities about account termination. We believe that a browser suspension, limited in time and scope, addresses these concerns. The suspension could be itself be scaled, starting out for a short duration and lengthening if the behavior resumes. Other services do not need to be disturbed. We note that, according to a November 2008 Ipsos survey, there is a surprising degree of acceptance of technology based actions such as access termination, traffic management and site blocking even amongst those who engage in unauthorized activities with over half of those surveyed finding such measures acceptable or somewhat acceptable.

There may well be those for whom legal remedies may be the most meaningful deterrent. We do not reject this approach where it is appropriate and could be expected to be effective, so long as it is not the first and only method available for dealing with repeat infringers. For the film industry, for example, those who upload films just as they are being released to the public in cinemas for the first time – so called "first seeders"—do particularly serious economic harm and legal options may provide an effective and proportionate cause of action as suggested by Government.

- 5. We urge Government to work with us and ISPs to facilitate site-blocking for rogue sites and sites which facilitate online piracy.**

Certain sites ensconce themselves in mobile safe havens to profit from illegal activity that clearly undermine the rule of law, authority and concepts of property protection. They avoid taxes and compliance with laws other than intellectual property protection, such as youth protection and relevant media regulation. Other sites clearly facilitate such behavior. Principles can be agreed that establish parameters for a presumption for action to block such sites, with due safeguards.

- 6. We believe that the considerable learnings from the MoU work to date should be consolidated. It should be carried forward with the continued able support of Ofcom, indeed under its aegis. This relates both to the notice sending as well as repeat offender actions. The innovative idea of a holistic approach under the aegis of an agency with the requisite authority to drive all of the necessary work should be pursued. We believe Ofcom is best suited to handle this challenge. Alternatively, a co-regulatory approach via a newly created agency, not per se a part of any existing agency, backstopped by the authority of Ofcom, could be envisaged.**

In order to add value any such agency, whether under the aegis of Ofcom or as an independent co-regulatory body back-stopped by Ofcom, would in our view need to:

Have a clear structure, remit & focus, including meeting the MoU target of reducing P2P piracy by 70-80% in 2-3 years, and broadened to cover all internet piracy

There should be no division between the body responsible for implementing the notice sending code and a more refined, proportionate new approach to repeat offenders as suggested above. We believe Ofcom is most suited to this task. It would make most sense for the RA to sit within Ofcom given its current activities and the work it has driven as part of the MoU process. However, if it is nonetheless deemed necessary to create a separate new body, it should be back-up by the authority of Ofcom.

The remit to Ofcom should include a clear responsibility to build on the notice sending proposal and to look at technical measures which ISPs can implement to prevent repeat infringers from continuing to infringe.

We can see the value of an RA having a coordinating role in terms of consumer awareness campaigns, ensuring that rights holders and ISPs make the best use of available resources to educate consumers about the value of IP and about the possible consequences under a graduated response system.

The RA could have a role, duly circumscribed, in terms of looking at new business models, providing a forum for discussions about those models (ie. the barriers to new services becoming available) and perhaps commissioning consumer research. It should not be a licensing agency.

Have the powers to take and implement decisions, it should not be a mere a 'talking shop'

Having the power to take and implement decisions means a regulatory framework which we understand Government may not favour, but without this one cannot see how the RA structure, and in particular Ofcom, would be effective regarding notices/repeat offender oversight. There are simply too many structural impediments to effective self-regulation, a fact already partly recognized by Government in deciding that it will be necessary to promulgate legislation to address notice-sending.

Be nimble & staffed by experts

Whilst representation will understandably need to be wide, steps must be taken to channel representation through trade bodies etc to minimise the number of voices at the table. In that sense, the agency's coordination function, managed by government, bringing together the various competent bodies, is particularly relevant.

Chris Marcich  
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Attachments

- Informa Telecoms & Media Report to MPA
- P2P and Copyright Infringement Online – Report of MOU Working Group Debate – 12 Feb 2009
- Indicative list of Digital Services