

Digital Britain Interim Report

Response of the Open Rights Group

Detail of Respondents

Prepared by: Jim Killock
Responding on behalf of: The Open Rights Group
Date: 21 March 2009
Address: Open Rights Group
7th Floor
100 Grays Inn Road
London WC1X 8TY
United Kingdom
Telephone: +44 (0)20 7096 1079
Email: info@openrightsgroup.org
Website: <http://www.openrightsgroup.org>

Response

ACTION 10

In the final report we will examine measures needed to address the challenges for digital content in more detail, including opportunities for providing further support to foster UK creative ambition and alternative funding mechanisms to advertising revenues.

We would like to emphasise the need for the digital environment to support creativity and experiment. Digital creatives, particularly in their early years, learn and deploy their skills building on the work of others. Support for the 'creative commons' in terms of legally reusable works needs to be built upon. Instead the commons threaten to be eroded, for instance by copyright term extension.

Further support for open content and use of open licensing would aid non-commercial and commercial production.

We have emphasised in previous submissions the need to look at voluntary collective licensing agreements, based on Von Lohmann's 'Seven principles' (1). We note that the music industry itself has helped fund a report *Let's Sell Recorded Music*, (2) that surveys some of the steps in this direction, including efforts for collective licensing on the Isle of Man, and the Harvard legal P2P start up Noank Media.

While incumbent rights holders may prefer services and agreements that emphasise the control they can exert over their content, such as Spotify, many users and our next generation creatives value the ability to contribute, remix and reuse content.

Let's Sell Recorded Music also emphasises the experience that these services offer as a key part of how they have dominated the downloaded music market, including in some cases by offering better quality and otherwise unavailable music.

A free market in alternatives, and preferably methods of monetising and legalising P2P

through voluntary collective licensing, should be explored.

Longer term, services that offer on demand access to music may prove to be very attractive to many consumers, especially as access to wireless bandwidth improves. But whichever services work in the end, the market should lead, while licensing should play a background role, making sure content provides revenue. Unfortunately the debate between industry players has tended to put licensing in the foreground, trying and failing to dictate market structure.

ACTION 11

By the time the final Digital Britain Report is published the Government will have explored with interested parties the potential for a Rights Agency to bring industry together to agree how to provide incentives for legal use of copyright material; work together to prevent unlawful use by consumers which infringes civil copyright law; and enable technical copyright-support solutions that work for both consumers and content creators. The Government also welcomes other suggestions on how these objectives should be achieved.

This action has the potential for much harm. We call on the final Digital Britain report to reject the idea of a 'rights agency'.

The proposal seems to be at heart a way of extending the MoU process without a clear idea of how to resolve the underlying problems.

We are concerned by the model that a rights agency might adopt, and feel it is somewhat unfortunate to float an idea without a clear idea of what is being proposed.

Overall, we doubt that a rights agency would be able to adequately reflect users and citizen's rights, have a tight remit and offer value for money.

We have emphasised that any agency would have to include representatives of consumer interests, so that concerns such as protection of the innocent, and preservation of privacy are given proper weight. We would not wish the role of defending customers to be filled by ISPs alone, especially as many of them are also rights holders, with conflicting business interests.

There are other key stake holders who would need to be represented, including at least Consumer Focus, UK Online Centres and the Information Commissioner's Office.

However, because of the nature of such an agency's work, we are equally sure that non-statutory groups would likely be very cautious about engaging in its work.

A rights agency we assume would be in effect a semi judicial process, with a duty to co-ordinate enforcement of sanctions below the level of court action. While there may be merit in, for instance, overseeing the nature of letters sent to consumers, there are also potential problems. A 'rights agency' could quickly be involved in inappropriate attempts define a range of sanctions below the level of court action.

A 'rights agency' could easily be a body whose functions quickly sprawl, especially under pressure from rights holders if their business models continue to change too slowly to meet market demands.

From a public perception point of view, innocent consumers would be paying through their broadband bills for the enforcement of third party rights. This doesn't seem like a wise option for a government looking for public consent.

We are sceptical about the ability to fix copyright enforcement through technical means. Music DRM technologies are rapidly being abandoned because of the difficulties they create for consumers. In video, they are widely circumvented.

Other technical means of detecting copyright infringement on ISP's networks would be in our view a step too far, removing privacy rights in favour of copyright enforcement. As well as being easily circumvented, by encryption, they are also simply disproportionate. We have detailed the potential problems with these technologies in our previous response to the BERR P2P consultation (3).

The report offers some welcome changes of emphasis, towards promoting the development of business models that work. The recording industry itself has shown some willingness to change, but appears to continue to be hampered by market uncertainty and the short term commercial interests of companies and collecting societies in licensing negotiations.

Video and TV services, if they are not to suffer the same problems as the music industry, need to be helped to move quickly to internet platforms. In the light of this, the demise of the public service broadcaster's Kangaroo project at the hands of the Competition Commissioner seems an unfortunate step.

ACTION 12

Before the final Digital Britain Report is published we will explore with both distributors and rights-holders their willingness to fund, through a modest and proportionate contribution, such a new approach to civil enforcement of copyright (within the legal frameworks applying to electronic commerce, copyright, data protection and privacy) to facilitate and co-ordinate an industry response to this challenge. It will be important to ensure that this approach covers the need for innovative legitimate services to meet consumer demand, and education and information activity to educate consumers in fair and appropriate uses of copyrighted material as well as enforcement and prevention work.

Consumer education and innovative approaches to meeting consumer demand are important and we would welcome them. However, we would also welcome an understanding from government and rights holders that a 'new deal' on copyright is needed if education and enforcement are to be legitimate and take hold.

Users are not copyright experts, and yet are suddenly being expected to obey the letter of a rather strict copyright regime. Users are therefore likely to act on their own ideas of what constitutes fair use of works. Many of these 'fair use' instincts, such as: format shifting; personal educational use; caricature, parody and pastiche; and transformative use are not reflected in copyright law, as the Gowers report recognised.

Copyright law should aim to reflect what society perceives as 'fair and appropriate uses of copyrighted material' through some clear rights, as suggested in the Gowers Report. Giving these perceived rights a legal basis, and then educating users in their positive rights would make acceptance of the rights retained by creators much easier to learn and accept.

Digital Britain should therefore take this opportunity to support the UK IPO in promoting these aspects of the post-Gowers process which are currently proceeding at a snail's pace.

Civil enforcement of copyright threatens to be weakened by the proposal at EU level for a 95 year copyright term in sound recordings. In our view, lengthening copyright terms

reinforces the perception that the recording industry is looking after its own interests to the exclusion of any meaningful sense of a fair deal for consumers. Digital Britain should recognise that excessively long copyright terms will undermine efforts to legitimise and enforce copyright.

ACTION 13

Our response to the consultation on peer-to-peer file sharing sets out our intention to legislate, requiring ISPs to notify alleged infringers of rights (subject to reasonable levels of proof from rights-holders) that their conduct is unlawful.

We also intend to require ISPs to collect anonymised information on serious repeat infringers (derived from their notification activities), to be made available to rights-holders together with personal details on receipt of a court order. We intend to consult on this approach shortly, setting out our proposals in detail.

Without seeing the full detail, we would not wish to endorse any proposal. We welcome the need for evidence to come from rights holders, rather than, we presume, packet examination on ISP networks.

We also welcome the need for courts rather than other bodies to be involved in final action, but note that scope for abuse has already been demonstrated. Consumers need to retain confidence in the system, so this needs to be tackled.

A number of potentially abusive cases have been highlighted in the press, leading to complaints against one firm, Davenport Lyons, by the consumer watchdog Which? to the Solicitors Regulatory Authority.

We would therefore welcome examination of the legal system for small time infringers. A system for low level infringers that guaranteed that fines and costs imposed could only be in rough proportion to the infringement made could go a long way to solving this problem.

In relation to the provision of Original UK Content (Actions 14-16):

We think an additional action is needed to address the changes in use of public service content in the digital age.

Public service broadcasters, particularly the BBC, are holders and producers of very large amounts of content, much of which is currently inaccessible through BBC services. We understand that work is being done to allow access to much of this material, but is progressing slowly. We would welcome public discussion of the terms and conditions of reuse of this publicly-funded material.

Re-use of public service content is widespread, and currently illicit. A quick scan of Youtube will find, for instance, large volumes of short famous BBC TV clips, news interviews that viewers have found interesting and provocative, and documentary material that is not locatable elsewhere.

A 21st century public service broadcaster could continue to capture the hearts and minds of the nation by making much more of this content legally and easily redeployable. It could enhance democratic debate, help education and give citizens access to popular cultural memories. By providing the means of access, the BBC would also be able to better control their brand's products on the web.

There are appreciable problems in terms of rights clearance, but the easiest elements to tackle are likely to be documentary and news coverage, which might also make the

greatest democratic and educational contributions.

An action is needed to make sure that public service broadcasters commit to making their material as available as practicable on the web to enhance the social and economic value of their output.

In relation to Network Universal Connectivity on Digital Networks:

ACTION 17

We will develop plans for a digital Universal Service Commitment to be effective by 2012, delivered by a mixture of fixed and mobile, wired and wireless means. Subject to further study of the costs and benefits, we will set out our plans for the level of service which we believe should be universal. We anticipate this consideration will include options up to 2Mb/s.

ACTION 18

We will develop detailed proposals for the design and operation of a new, more broadly-based scheme to fund the Universal Service Commitment for the fully digital age – including who should contribute and its governance and accountability structures.

Access to internet-based tools and services are fast becoming a fundamental right as the web embeds further into our culture, politics and private lives. We strongly agree that everyone should be able to be part of the digital economy and digital society and, in general terms, welcome the policy case for a Universal Service Commitment (USC). Yet the obligation outlined in the interim report lacks a detailed business case and proper concern for network discrimination. The final report must then, as noted by Action 18, provide a detailed analysis of the economics of connecting and maintaining networks for even the most rural, distant homes.

A USC is also meaningless if services are made unobtainable by the service provider. Network discrimination must therefore be addressed in detailed universal service. There are many potentials for such anti-competitive practices, as the market increasingly involves businesses who provide multiple services from different sectors. Examples have already occurred of mobile operators preventing use of VOIP software (4).

Clear motivations for discrimination also exist where network operators are also rights holders and content distributors. Many network operators are, for instance, also cable TV operators.

The risk is that a USC would be rendered meaningless if users are restricted to services 'approved' by a monopolist provider, rather than guaranteed access to the growing range of web-enabled content and services. In this context we ask for further consultation, particularly engaging users and SMEs, on appropriate principles for protecting network neutrality.

Notes:

- (1) Fred Von Lohmann's 7 principles. See "Monetizing File-Sharing: Collective Licensing Good, ISP Tax Bad", available at <http://www.eff.org/deeplinks/2008/03/monetizing-file-sharing-collective-licensing-good-isp-tax-bad>
- (2) *Let's Sell Recorded Music*, MusicTank, March 2009
- (3) Open Rights Group submission to BERR P2P consultation
- (4) <http://www.trustedreviews.com/mobile-devices/news/2009/03/02/Nokia-N97-Vetoed-By-O2---Orange-Over-Skype-Integration/p1>

About the Open Rights Group

The Open Rights Group is a grassroots digital rights advocacy group based in the UK. It aims to increase awareness of digital rights issues, help foster grassroots activity and preserve civil liberties in the digital age. It is funded by individual donations and small grants.