



Digital Britain

Interim Report

TalkTalk Group response

12 March 2008

Introduction

This is TalkTalk Group's (TTG) response to DBERR/DCMS's Digital Britain Interim Report.

TalkTalk Group provides broadband and voice services to over 3 million customers – both residential customers (under the TalkTalk and AOL brands) and business customers (under Opal brand). We operate the UK's largest NGN network which uses MPF. TalkTalk Group is owned by the Carphone Warehouse plc.

This issues addressed in the Digital Britain Report (DBR) will have a profound effect on our customers and our business.

If there are any questions regarding this submission please contact Andrew Heaney (HeaneyA@cpwplc.com)

Summary

Overall we welcome the report and its proposals. It is the right time to be considering these issues and the proposals are, in the main, sensible.

We have commented in our response on three main issues that are particularly relevant to our customers and business. In particular:

- Proposals for addressing illegal P2P filesharing (actions 11, 12 and 13)
- Proposals for a (so-called) Universal Service Commitment (actions 17 and 18)
- Proposals for NGA networks (actions 1, 2, 3, 4 and 5)

Illegal filesharing

A successful and dynamic content industry is critical to the UK's social and economic development whether in the digital/online world or elsewhere. Illegal P2P filesharing can harm the success of these industries.

The music and video industries have been pushing to reduce illegal filesharing by demanding ISPs disconnect alleged infringers and ISPs filter 'illegal' traffic on their network. However, we think these approaches would be unfair, illegal, impractical and would not be cost effective.

- The measures would breach fundamental human rights to privacy, data protection and freedom from intrusion/monitoring
- The disconnection approach they are suggesting (which circumvents the proper judicial procedures) would mean the rightsholders could decide who to disconnect with no protections for citizens against false allegations and penalties. This is particularly concerning given the unreliability of the evidence in identifying individual infringers due to the prevalence of multi-users per account, wifi hijacking and botnets (which hijack computers).
- It is easy to circumvent controls or avoid detection (e.g. spoofing IP address/anonymisation, encryption or simply moving to other ISP) which may make these measures ineffective

We are therefore pleased that the DBR has rejected the content industry's call for these type of obligations to be imposed on ISPs and instead put the focus elsewhere. We think the final DBR report should make clear that these measures are 'off the table' (at least for now).

We think that the right focus should be on better education (both 'broadcast' and targeted on alleged infringers), customer empowerment (to allow them to manage their accounts), new and attractive services and targeted sanctions (with proper judicial protections). Where ISPs have a role that we can play we are very happy to work with the content industry on these. We discuss below our views of the two specific proposals made in the DBR – requiring ISPs to notify alleged infringers and ISPs providing certain information on serious offenders.

Notifying alleged infringers (action 13)

The DBR proposes an obligation “*requiring ISPs to notify alleged infringers of rights (subject to reasonable levels of proof from rightsholders) that their conduct is unlawful*”. We will comment in more detail on the proposal when more detail is available. Broadly we are in agreement with this proposal but with the following provisos:

Rightsholders actively pursue other measures

Rightsholder (RHs) must actively, properly and effectively pursue their role in education, alternative services and prosecutions. Without this the effect of other initiatives (such as this) will be limited. More generally, it would be wholly unreasonable that an industry that has been the author of its own demise from illegal filesharing does not ‘self-help’ and take the lead role in tackling the problem.

Rightsholders pay all costs

RHs must pay all the costs ISPs incur in full. The RHs benefit from these actions, ISPs do not¹. Every economic principle suggests that unless there is a compelling reason otherwise the beneficiary should pay.

If ISPs are required to pay it will mean that in effect law-abiding ISPs and law-abiding customers (the majority do not illegally fileshare) will be taxed to protect the rights and profits of music and video companies. That would be fundamentally wrong and fundamentally unjust. We would not ask RHs to pay for our revenue protection activities (such as debt collection) – there is no justification for them to ask us to pay for their revenue protection activities.

Having the RHs pay will also maximise economic efficiency. By the rightsholders paying it effectively internalises the cost and ensures they make cost efficient trade offs. For example, in deciding how many letters to be sent if RHs do not pay the full cost they would be incentivised to ask for more and more letters to be sent even if the marginal net benefit of more letters was negative.

ISPs decide on content of letters

Whilst we are happy to work with RHs on the content of communications to our customers we must have final discretion over the actual copy and messages sent to our customers and the form of communication (including any materials issued on behalf of third parties). These are our customers and it is wholly inappropriate for RHs to dictate messages to them.

We need to ensure that the messages properly reflects the facts. In particular:

- make clear the claim of infringement is merely an allegation

¹ RHs suggest that ISPs benefit since it will reduce use of our networks. This is not a benefit that is relevant in this context since we have the ability to manage the traffic of customers if they are high users

- provide a clear explanation for the reasons why the allegation may be false (i.e. the evidence, in terms of identifying the actual individual, is unreliable due to wifi hijacking, other users)
- highlight that the account holder is not legally responsible (in respect of copyright infringement) for the actions of other users of the account or for securing their wifi network
- outline the steps that account holders could take to reduce illegal filesharing on their account
- the letter must not ‘scaremonger’ or make unfounded and unreasonable threats as has been done previously by some RHs²
- stress that the handing over of personal details will only happen with proper judicial authority and proper judicial protections

Obligation must apply to all ISPs

All ISPs must adopt these measures else ISPs who do adopt them will be at a competitive disadvantage and distort competition.

Providing information on serious infringers (action 13)

The DBR proposes 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 understand that this would entail ISPs identifying accounts where there have been multiple alleged infringements and informing RHs of these but without providing the account holder details. RHs could then use this information to request a Court to issue a Court Order requiring the ISP to disclose details of the account.

It is difficult to comment in detail on this with such a sketchy outline. However, on the basis of what we have understood we have a number of concerns:

- the approach relies on unreliable evidence (as described above) and there remains a risk of false allegations
- we think that RHs can get reasonably accurate views on serious infringers without this assistance
- it raises a number of data protection and privacy concerns particularly in respect of collecting and storing information in relation to individuals accounts
- it places the ISP in the invidious position of monitoring its customers behaviour

If an approach like this is adopted then a number of issues must be addressed

- RHs must actively, properly and effectively pursue their role in education, alternative services and prosecutions

² For example, Davenport Lyons letters demanding £500 compensation.
http://www.bbc.co.uk/blogs/watchdog/2008/12/davenport_lyons_threatening_le.html

- the costs must be fully paid by the RHs (for the reasons explained above) and RHs must indemnify ISPs for any liabilities that may arise
- any action taken as a consequence of this information being provided must be proportionate. For instance, no threatening letters must be sent without sufficient evidence
- all ISPs must adopt these measures else (a) ISPs who do adopt them will be at a competitive disadvantage and (b) the measures will be less effective / ineffective since individuals could move ISPs to avoid being identified

We do however, support the idea of RHs taking direct action in the Courts against infringers. We think this will provide a deterrent to make notifying alleged infringers more effective. Critically, this approach to imposing a sanction will come with proper judicial procedures and protections which will ensure citizens rights are protected and any sanction imposed is proportionate.

Rights agency (actions 11 and 12)

The DBR proposes the setting up of a Rights Agency though it is unclear about its role and remit which has been confirmed by subsequent discussions. It appears to us that the Rights Agency is ‘an answer looking for a question’. It is a vehicle without a clear remit or responsibility. This needs to be clearly defined.

There have been a number of suggestions for what the Rights Agency could do. Some of these are, we think, fundamentally inappropriate and flawed. For instance,

- We are concerned that it could be used as a vehicle for introducing ‘back-door’ legislation or obligations on customers or ISPs. If it is felt that other obligations need to be introduced (we don’t think there is a need) then these must be properly discussed and consulted upon with full and open scrutiny and transparency. They must not be decided in a closed forum.
- There has also been a suggestion that the Rights Agency is used as a place for ‘trading’ rights to overcome the complexities and difficulties in getting rights clearances today. Whilst there exists a problem we fundamentally disagree that a government agency or public sector body is the right solution to this. This should be done by the private sector.
- Another suggestion was that the Rights Agency becomes some form of enforcement role. We have a wholly adequate enforcement function today (the judiciary). We see no reason to create a parallel force

The Rights Agency may have a role in terms of monitoring (e.g. research, understanding impact of notifications etc) that could be used to inform future initiatives and/or as a forum for discussing other possible voluntary collaboration or approaches (e.g. education, empowering customers). If this is done consumer representative bodies (such as the Communications Consumer Panel and the Open Rights Group) should be included in the group.

We also have a broader concern that the Rights Agency may become an unrestrained and bureaucratic body that consistently expands its role (in part to

justify its existence) and it doing so unnecessarily interferes and adds cost. This would suggest that if the Rights Agency is set up it must both have a very clear and bounded remit and also must be able to be closed down after a period of (say) 2 years.

Our last point in respect of the Rights Agency is that RHs must pay all its costs. Assuming that the Rights Agency is aimed at protecting copyright in some form the benefit from these actions is to RHs. If ISPs are required to pay it will mean that in effect law-abiding ISPs and law-abiding customers will be taxed to protect the rights and profits of the content industry. That would be fundamentally wrong and fundamentally unjust.

Universal Service Commitment

The objective underpinning the universal service commitment (USC) is one that we wholeheartedly support – we see broadband and digital inclusion as a key enabler of social cohesion and economic growth. However, making a minimum broadband speed available to all homes might cost upwards of £1bn and could have a big impact on the existing telecoms sector – therefore it needs to be carefully designed and implemented. In particular, we need to ensure that the way in which this is done does not harm competition, is cost effective, provides value for money and does not penalise existing customers through an unwarranted broadband tax.

Underlying this commitment is a desire that “*everyone should be able to be part of the digital economy and digital society*”. One of the barriers to this is the availability of (say) 2Mbps services that the USC will address. However, there are other barriers that are equally or more important – it is critical that the DBR does not lose sight of these and takes steps to address them.

Firstly, is addressing the 40% who can get broadband that don't it up – the barriers here are typically affordability and lack of appreciation of the value broadband can provide. Therefore, there is a need for demand-side initiatives alongside these supply-side initiatives. It would be crazy to spend potentially billions of £s building networks to address the 5% who can't get 2Mbps broadband and ignore the 40% who can get it but don't take it up.

Secondly, is to make sure that the market continues to deliver as much as it can. The market has already delivered both in terms of high coverage and high uptake based on competition and low prices. However, this is currently threatened by Ofcom's proposed price rises for the key MPF LLU service of up to 36%. These possible rises are quite simply 'profiteering' – they are not justified by BT's real costs.

A leading economist has estimated that these price rises could exclude 0.8m homes from broadband.³ Thus if these changes are permitted they will be working against the governments objective that “*everyone should be able to be part of the digital economy and digital society*”. Furthermore, the government will find the level of

³ http://pressoffice.talktalk.co.uk/uploads/files/Dr_Doyle_report.pdf

government intervention required to ensure everyone can be part of the digital economy and digital society will rise and rise.

We recognise that the issue of BT's LLU prices is addressed primarily by Ofcom but we see it as critical that government does not lose sight of the major negative impact that they might have on achieving the governments objectives.

In respect of the USC, we see a number of issues that need to be resolved:

- What exactly is the commitment? What speed is it, how is speed measured, to how many (98%, 99%)?
- What price does the consumer pay? How is the price set (since there is no national price for broadband today)? Are there exceptional cases where the customer pays extra – as per rule today for voice USO?
- How does the commitment evolve over time? Surely, one would expect the appropriate speed to increase over time and so there is a need to ensure that whatever investments are made are future proofed the need for higher speeds in future
- How is the service provided? Do the networks wholesale⁴, are they obliged to, are they banned from retailing, what are the wholesale terms?
- How will the scheme avoid damaging, eroding and undermining existing investments or 'chilling' future private sector network and service investments? For instance,
 - a customer might be happily being provided with a service from an ISP (such as TalkTalk) based on LLU
 - If a USC service is provided (say by mobile) at a subsidised price it could unfairly under-cut the service we provide on the basis of subsidy
 - This could happen for many categories of customers including those with over 2Mbps (who are happy to downgrade to a lower speed for a lower price)
 - Clearly, if there is no wholesale service then the ISP will become totally excluded
- How will the scheme ensure that the subsidy is targeted where it is needed so that it is not used by consumers who can get 2Mbps+ already but want to access a cheaper service? How can the provider identify whether a consumer meets the criteria?
- How should the award be structured? The structure will affect what technologies are feasible e.g. if done by small regions defined by BT's network then wireless might be disadvantaged
- How is it funded (given there is likely to be a shortfall between revenue and cost)? We believe that since the benefit for this is a broad social and economic one it is appropriate that it is broadly funded. This would suggest that the primary funding should come from taxes i.e. HMT. If there is some contribution from industry then it should probably include fixed telecoms, mobile telecoms

⁴ Whilst if BT/Openreach develop network services under the USC is it likely these will be wholesaled by Openreach (due to SMP and equivalence obligations) the same is not true of mobile broadband and satellite.

and content industries (particularly the BBC) based on the value they accrue and/or ability to pay

- How will the USC relate to the community schemes that are likely to spring up?

More generally we believe that whatever is done must:

- Be properly justified as being value for money
- Be very transparent and open to scrutiny

We look forward to working with the DBR team and others developing this concept.

Next generation access

We very much support the advent of super-fast broadband or next generation access networks and the new services that customers can look forward to enjoying in future. We are working closely with Openreach in developing their wholesale GEA product and will take part in the trials they will soon be commencing.

However, today there is little paid-for demand for these higher speed but significantly more expensive services. This reflects in large part that most consumers are content with the current service and price they get from today's networks. We think that as demand develops the markets will be able to deliver the higher speeds that consumers require (and are willing to pay for) either through enhancements to current networks or through new generation access networks. We see the market as the right mechanism to deliver these new networks without interference or intervention from government.

However, there is are important roles for government and regulation:

- in removing unnecessary barriers to investment (e.g. rating and civil works rules)
- enabling other operators to invest in their own NGA networks either instead of or alongside BT by using wholesale products such as sub-loop unbundling and duct sharing. If we allow BT to be the only company that can use its 'monopoly' copper and ducts assets to develop these new networks then we will have weaker investment and competition and consumers will lose out
- longer term there may be a role for targeted public intervention to address the areas where markets are not delivering and there is a clear value for money case for public intervention

Thus we broadly support the approach outlined in the DBR.