

# Digital Britain: Olswang's Top Ten Talking Points

**OLSWANG**



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At 239 pages, the final Digital Britain report (the "**Report**") is certainly not a short read for those interested in the future of the UK's media, communications and technology sectors, but it is a must-read. The Report promotes the future of the media, communications and technology industries and sets out a roadmap for the digital economy in the UK. Below, Olswang sets out the top ten findings in the Report, looking at the issues they seek to address, the conclusions of the Report and some thoughts on what happens next.

1. Broadband Initiatives
2. The Licence Fee
3. The Future of Channel 4
4. Digital Piracy
5. Wireless Spectrum
6. Digital Radio
7. Local Media
8. Tax Relief for Video Games
9. Security and Safety
10. Future of Copyright

# 1. Broadband Initiatives

## Issue

In an online world, those consumers who do not have access to high speed broadband are increasingly disadvantaged. In a digital economy, pervasive broadband access is a necessary pre-condition for the UK to be a global leader in the development of digitally based applications, content and services and for the Government to deliver more public services online. However, the significant capital costs of extending both current generation broadband (i.e. services delivered over existing infrastructure at a typical speed of 2Mbits/s) and rolling out next generation broadband (i.e. services delivered over optical fibre at speeds exceeding 50 Mbits/s) mean that the market is unlikely to deliver the Government's objectives in this area. The Report both sets objectives and starts to answer the big question: where does the money come from?

## The Report:

- proposes upgrading the current narrowband universal service commitment to a broadband universal service commitment that all households will have access to broadband no slower than 2Mbps by 2012. This will address not only coverage in rural areas, but also current 'not-spots' and will be co-ordinated by a new QUANGO, the 'Network Design and Procurement Group';
- proposes to fund the (as yet uncosted) broadband universal service commitment through a mixture of commitments and (as yet ill-defined) expectations. As trailed in the budget, there will be direct funding using the Digital Switchover Help Scheme underspend (estimated at £200m) with the balance expected to be made up via "*commercial gain through tender contract and design, contributions in kind from private partners, contributions from other public sector organisations in the nations and regions, the consumer directly for in-home upgrading and the value of wider coverage obligations on mobile operators*";
- reiterates the view that fibre-based next generation broadband will provide a wider supply-side stimulus to the economy by creating innovation and other economic benefits and is required to maintain the UK's international competitiveness. Having identified that the market is likely to only deliver next generation broadband to the first two-thirds of the UK (mainly in urban and sub-urban areas), the Report proposes the creation of a 'Final Third Next Generation Fund' to subsidise next generation broadband roll-out to the 'final third';
- proposes a 50p per month per fixed line (levied on both BT's copper and Virgin Media's cable telephony lines) retail levy from 2010. As almost all current generation broadband market competitors use BT's unbundled copper lines, this will also impact the customers of providers such as Carphone Warehouse and Sky.

## Analysis

Immediately described as a "tax" across the media, the 50p per month per fixed line levy was perhaps the most radical and surprising part of the Report. Whilst next generation broadband requires significant investment, it is not clear that the levy is either targeted at the right people or will provide the required funding. By way of example, early adopters in urban areas who already have access to upgraded next

generation fibre broadband and who use mobile networks for voice calls will not pay the levy, while lower income users in semi-rural areas who rely on their fixed line (but who perhaps don't have access to broadband at all currently) will see their phones bills rise by a disproportionate amount. The levy will only accelerate mobile substitution for voice calls and will contribute less over time. Alternatives such as linking the levy to all connections, voice minutes or data usage were presumably discounted as too complex. Although BT and Virgin Media were thought to be the most likely recipients of money from the Next Generation Fund, other companies with a substantial local networks (particularly gas and electricity companies), local authorities, mobile operators and Wimax providers could also be beneficiaries.

**Further reading from the Report** - Chapter 3a (A Competitive Digital Communications Infrastructure), paragraphs 32 to 79

## 2. The Licence Fee

### Issue

Ofcom has identified a range of content where there are gaps in what is provided by the public service broadcasters other than the BBC. Programming for older children and regional news are two of the main areas where a plurality of providers is thought to be desirable as a matter of public policy and therefore funding is required.

### The Report

- highlights that the licence fee is the existing major source of non-commercial funding for content and is the most suitable source for this funding;
- states that the Government will consult openly on the option of a contained contestable element of the licence fee (approximately 3.5% of the total) to be used by or channelled through other organisations, but delays any decision on how this will actually work as the amount to be distributed will not be decided until 2013 (when Digital Switchover is concluded, the **universal service commitment** has been met and the ring-fenced part of the licence fee previously used for those commitments will be available);
- states that the contained contestable element would be independent of the overall level of the licence fee;
- identifies as a key area for debate ways to ensure that the contestable element is truly contained and does not become over time another general tax (for example, by the BBC Trust and the Government agreeing an amendment to the BBC Agreement specifying a maximum percentage of the licence fee which other organisations could apply to access).

### Analysis

"Top slicing" of the licence fee remains hugely controversial. To some, it is the thin end of the wedge, while to others the principle has already been established in relation to Digital Switchover and the only question is who receives the ring-fenced fund from 2013. The Report suggests that the contained contestable element of the licence fee could be *"used by or channelled through other organisations, primarily for news"*. The Report stated that the consultation would take place by the end of September 2009 and with an election due within a year at the latest, it looked like something that the next administration would have to deal with. The statement by Jeremy Hunt, shadow Culture Secretary, in the debate on the Report, appeared to be a portent of the future: *"£100 million a year to give to other broadcasters? If that money really is spare, should we not first consider giving it back to licence fee payers, which is what nearly three quarters of them have said that they want?"*. However, Culture Secretary Ben Bradshaw stated in Parliament that the Government will expedite the consultation process which could result in legislation before the election.

**Further reading from the Report** - Chapter 5 (Public Service Content in Digital Britain), paragraphs 16 to 40

## 3. The Future of Channel 4

### Issue

Securing Channel 4's long term future and stable financial footing – and in particular its projected funding gap which has been estimated at up to £150m by 2012 – is seen as key to maintaining a plurality of public service content. Options previously discussed in the media include a joint venture with BBC Worldwide, a merger with five and allocating Channel 4 a slice of the licence fee.

### The Report

- does not come out in favour of any specific funding option, although it rules out a private sector solution (i.e. privatisation) or direct Government subsidy to fund the projected funding gap;
- supports the series of partnerships being developed between Channel 4 and BBC Worldwide by making it clear to both parties that the Government will facilitate such joint ventures (if commercial terms can be agreed) with the appropriate approvals and any relevant regulatory clearances;
- believes that Channel 4's remit should be updated to re-invent its public purposes for the digital age, where Channel 4 "*should be the open new media authority providing the seed-corn for creative innovation in the multi-media world*" and should champion and promote creativity and new talent across all digital media;
- looks forward to considering a commitment from Channel 4 to children's content (which would stimulate innovation and competition in the children's television market).

### Analysis

The Report makes it clear that Channel 4 has an integral role to play in the Government's vision of a digital Britain but offers no immediate solution to Channel 4's financial difficulties, effectively leaving Channel 4 to fend for itself. It also encourages Channel 4 to distribute content across all media but is not willing to relax the Terms of Trade with independent producers. It could be worse for Channel 4 though - its management vigorously and consistently opposed the idea of a merger with five and the channel will be relieved that this solution was not imposed by Lord Carter. In addition, Channel 4 will also be pleased that the Report favours its preferred solution, namely a joint venture with BBC Worldwide, even though the Report does not impose this outcome. Tantalisingly, the Report signs off on Channel 4 by saying that "*alternatives to the joint venture with BBC Worldwide have also emerged over recent months*" which the board of Channel 4 will explore, so the speculation over Channel 4's future doesn't seem to be over just yet. Watch this space.

**Further reading from the Report** - Chapter 5 (Public Service Content in Digital Britain), paragraphs 41 to 56

## 4. Digital Piracy

### Issue

The content industries in the UK, and in particular music, are suffering from the effects of illicit peer-to-peer file-sharing via the internet. The BPI's 2008 figures indicate that such file sharing costs the UK music industry £180m per annum, while an IPSOS Mori survey from 2007 suggests a total cost to the UK's TV and film industries of £152m from piracy. With court proceedings slow, time consuming and expensive, rights holders have been lobbying for legislation to compel ISPs to take action to curb copyright infringement over their networks. ISPs have resisted such legislation, claiming that they are not responsible for policing the actions of their users or enforcing copyright.

### The Report

- sets out three objectives of Government policy: (i) to encourage the growth of legal download services; (ii) to educate and inform the consumer as to what is and is not lawful; and (iii) to provide for a graduated response by rights holders and ISPs so that they can use existing civil law to reduce unlawful activity;
- states that Ofcom will have a duty to secure a significant reduction in unlawful file sharing by requiring ISPs to notify the holders of accounts suspected to have been used for copyright infringement and making available to rights holders (on the basis of a court order) data to enable serious repeat infringers to be identified and court action taken;
- provides for backstop powers for Ofcom (via secondary legislation) if notification and potential court action are not seen to be working after a 12 month period, including the ability to compel ISPs to impose technical measures to reduce copyright infringement (such as protocol blocking, bandwidth restrictions and content filtering);
- proposes that the trigger for the move from the notification system to the backstop powers should be if a 70% reduction in unlawful file sharing is not achieved (to be calculated by taking the number of unique individuals notified that their account had infringed copyright and assessing what proportion of those notified have stopped such unlawful file sharing).

### Analysis

Given the strongly divergent views between rights holders and ISPs, it is not surprising that the Report is essentially a compromise that pleased no-one. For the rights holders, the Report's proposals are too little to be implemented too late: factoring in the time required for primary legislation (even if this can be passed within the lifespan of the next Parliament), the 12 month trial period and the need for secondary legislation, should the notification approach prove ineffective (as many rights holders fear) it could take until 2012 for the backstop measures to be implemented. For the ISPs, the question is who will pay for the notification and enforcement regime, with Orange stating that its law-abiding customers should not be required to subsidise rights holders' actions. Furthermore, the calculation of the trigger for the backstop powers could be controversial, as the reduction sought is 70% of those notified rather than 70% of all those actually

unlawfully file sharing – a calculation which seems open to abuse by tech savvy consumers. Overall, the Report has done nothing to stop the ongoing dispute between the two interests.

**Further reading from the Report** - Chapter 4 (Creative Industries in the Digital World), paragraphs 13 to 31 and the separate **BIS consultation paper**

# 5. Wireless Spectrum

## Issue

The Government has three main objectives in relation to the UK's wireless infrastructure: (i) a rapid transition to high speed mobile broadband; (ii) progress towards universal coverage in 3G; and (iii) maintaining a highly competitive mobile market. The differing circumstances and incentives of the existing mobile operators have led to disputes over Ofcom's proposals for re-allocating existing spectrum for 3G uses and delays to planned new spectrum auctions through litigation, and so (on the back of the Independent Spectrum Broker's May report) the Government has looked at how a broader approach to both existing and future spectrum could provide a solution.

## The Report

- sets out the proposals for combining the spectrum to be released by analogue switch-off (800MHz) and the 3G expansion band in a single auction of 10MHz-width blocks of spectrum in 2010;
- aims to ensure that each of the five existing mobile operators and potential new entrants can bid in the auction with a realistic opportunity to acquire sufficient spectrum to build next generation networks capable of providing broadband speeds of up to 50Mbps in major markets;
- proposes an overall spectrum 'cap' per operator for a fixed time, to prevent undue consolidation of holdings;
- proposes, subject to pricing and coverage conditions, to make the existing 3G licences indefinite (as opposed to having a 20-year term), which is designed to encourage long-term investment and assist in the universal service commitment.

## Analysis

Although the Report does not follow the recommendations of the Independent Spectrum Broker appointed by the Government in every respect, it does accept that a holistic approach to spectrum (across existing holdings, new spectrum and the digital dividend from analogue switch-off) is required to ensure competitive mobile broadband deployment. However, given the differing stakeholders' interests, much remains to be done to unblock the current logjam and turn aspiration into reality, including what the Government terms 'guiding technical arbitration' on some of the details. The auction in 2010 will employ a different methodology to that used in the sale of 3G licences in the UK in 2000, which may limit the total amount paid to the Treasury, as the primary aim will be to create a successful mobile broadband market in the UK rather than raise revenue.

**Further reading from the Report** - Chapter 3a (A Competitive Digital Communications Structure), paragraphs 99 to 111

# 6. Digital Radio

## Issue

Although the Report states that there are approximately 9 million DAB sets already in homes and cars in the UK, analogue switch-off in radio is lagging behind television and there is a lack of commitment to the DAB platform.

## The Report

- proposes that all national broadcast radio stations are DAB-only from the end of 2015 (with FM to be used only for very local services, effectively community radio);
- focuses on the BBC extending national DAB coverage to a level comparable with FM radio and the supply chain delivering a range of DAB radios below a £20 price point to make the transition economic;
- proposes giving Ofcom additional powers in respect of commercial DAB multiplexes to merge multiplexes (including merging the regional multiplexes to form a national "D2" multiplex, increasing coverage areas and extending licences to 2030 in order to encourage longer-term investment);
- proposes that the Government will work with the car industry to enable the majority of the vehicles to be connected to digital before 2015.

## Analysis

The Government has firmed up a commitment towards a switch-off date for analogue radio, which can only help the future growth of DAB. With the commercial case for digital radio in the UK failing miserably, this kind of market intervention is likely to be the only way to achieve a full transition to digital. There is a suggestion that "iTrip"-like devices, offering very short-range FM transmissions of the output of a DAB receiver, might be one way to lessen the impact of making millions of FM radios obsolete.

**Further reading from the Report** – Chapter 3b (Radio: Going Digital), paragraphs 21 to 34

# 7. Local Media

## Issue

Local and regional online and offline press (and in particular local newspapers that are part of highly leveraged groups) is struggling to survive and, with ITV scaling back its regional commitments, provision of local news (other than by the BBC) is falling. Given the importance of news and local journalism to democracy, this state of affairs could create the potential for a democratic deficit.

## The Report

- states that Ofcom is conducting a statutory review of the media ownership rules;
- describes what are termed "Independently Financed News Consortia" ("**IFNCs**"), essentially interested parties which could provide regional news for the Channel 3 licensees, potentially out of the **contained contestable element of the licence fee**, with a view to a full roll-out across the UK from 2013;
- proposes that the Government will discuss with the BBC Trust how the Digital Switchover underspend can be used to fund regional news pilots before 2013.

## Analysis

The Office of Fair Trading reviewed the local and regional media merger regime in the UK following publication of the interim Digital Britain report. Its conclusions are that this regime, which is broadly the same across all industries, is well placed to take into account both cyclical and structural developments in the industry (e.g. competition from the internet) because it is evidence-based and capable of reflecting market realities. Such a conclusion suggests that efforts to help regional news-gathering are therefore likely to focus on the licence fee rather than a commercial solution. For ITV, there is the clear suggestion that its regional news obligations will fall away by 2013. Time will tell whether local newspaper groups are winners of IFNCs or whether this scheme will contribute to their decline.

**Further reading from the Report** - Chapter 5 (Public Service Content in Digital Britain), paragraphs 67 to 81

# 8. Tax Relief for Video Games

## Issue

The UK has historically been among the world leaders in the development of video games and the industry is reported to contribute more than £1bn to the UK's Gross Domestic Product. However, the UK's position is being eroded as other countries encourage both companies and developers to relocate via targeted tax breaks.

## The Report

- warns that UK games development is predicted to drop gradually down the world rankings and in 2009 (on its current trajectory) the UK is expected to fall to 5th behind Canada and, for the first time, South Korea;
- commits the Government to work with the industry to collect and review the evidence for a tax relief to promote the sustainable production for online or physical sale of culturally British video games.

## Analysis

Lobbying through the Games UP? campaign (which represented the key video games producers, developers and trade bodies such as ELSPA and TIGA) clearly paid off with the commitment in the Report for the Government to work with the video games industry to consider a tax credit. This should hopefully put the UK video games industry on a level playing field with Canada and France, which already have similar tax breaks. Anything which helps indigenous digital industries is to be welcomed, but in the same way that the film industry sometimes finds it difficult to define a "British film" for tax purposes, there must be questions over what is a "culturally British video game". Would an action adventure game developed solely in the UK qualify or would that game have to be set in a UK location? This is a developing area and is also something that the Conservatives are looking into as part of their creative industries review.

**Further reading from the Report** - Chapter 4 (Creative Industries in the Digital World), paragraphs 90 to 108

# 9. Security and Safety

## Issue

While most of what is illegal offline is also illegal online, it is much harder to take enforcement action when a criminal is operating in the digital domain. The internet is not easily subject to national borders and laws and international collaboration is required.

## The Report

- states that there is a significant role at national level for measures to shape a safe online world (for example, the Government has developed a Cyber Security Strategy to deal with organised crime and terror);
- identifies that there will be increased legal requirements on security standards flowing from a new European framework;
- proposes that the Office of Fair Trading takes a stronger role in online consumer protection and its five point plan will be addressed in the Government's forthcoming consumer white paper which will deal with how UK enforcers and businesses can better work together to tackle online fraud;
- highlights the role of individuals in protecting their own personal data, which will be emphasised by the Information Commissioner's new code of practice on "Personal Information Online".

## Analysis

This is not one of the sexier areas of the Report, but is probably one of the most important for individuals on a day to day basis. There is growing awareness of the importance of personal data amongst the UK population, fuelled mainly by identity theft and high profile data losses and the Report sets out some of the next steps that will be taken in relation to keeping individuals and businesses on their toes.

**Further reading from the Report** - Chapter 7 (Digital Security and Safety)

# 10. Future of Copyright

## Issue

Copyright legislation and practice was not designed to deal with a digital world and many provisions are outdated as content is distributed in different ways via digital networks. Consumers want an inexpensive way to gain legal access to digital content. This debate goes much further than simply the file-sharing issue.

## The Report

- states that the Government intends to introduce legislation to enable commercial schemes for dealing with orphan works to be established on a regulated basis - possibly with a move towards "extended licensing" through collecting societies, on the Nordic model;
- commits the Government to moving forward on the IPO's Copyright Strategy, with a promise to work on the strategy and to continue to look for ways to make it easier for people to license rights – looking at the balance both between creators and business and between business and users;
- dismisses a broader "fair use" doctrine as being a matter for European legislation;
- commits to keeping under review the issue of private copying and format-shifting levies and to inviting Ofcom to assess the cost/benefit of introducing such levies, but comes out against both these levies and introducing a retransmission right, both sought by some within industry.

## Analysis

This issue is very much in a holding pattern with the main question being whether the Government will see this area as a priority for legislation or other further action before its mandate expires.

**Further reading from the Report** - Chapter 4 (Creative Industries in the Modern World)

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# About Olswang

Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, the Firm has grown to a team of over 600, including 96 partners, across four European offices. In addition, Olswang has a formal alliance with a major US firm Greenberg Traurig LLP and a long-established best friends network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2009 for the second year running at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine, and was named Corporate Team of the Year – Mid markets at The Lawyer Awards 2008.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last five years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

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We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

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At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

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