

# ARNOLD & PORTER (UK) LLP

ADVISORY

AUGUST 2009

## **THE DIGITAL BRITAIN REPORT: PART II: IMPLICATIONS FOR THE CONTENT INDUSTRY**

On 16 June 2009, Communications Minister Lord Carter presented his report “Digital Britain.” The Report was commissioned by the British government to provide a strategy for the development of the digital economy in the UK and to establish a programme of action. The Report makes recommendations across a range of topics spanning the communications sector, including broadband rollout, digital radio, public service broadcasting, and video piracy.

In a previous advisory<sup>1</sup>, we focused on issues of importance to the telecommunications industry. In this advisory, we review the recommendations in the Report concerning content issues and the treatment of creative works.

### **HIGHLIGHTS**

The Report addresses four key issues:

1. Recognising the economic importance of the UK’s creative industries
2. Protecting due reward for creativity (IP Protection)
3. Extending the UK’s public policy framework to embrace interactive content
4. Ensuring that the UK is “digital ready”

The Report says that the UK should aim to be a global centre for the creative industries, as it is for financial services. To accomplish that objective, the Report proposes the establishment of a “digital framework for the creative industries.” It describes the methods by which the government will ensure that the public policy framework is ready for interactive content, and how it will deal with the issues surrounding fair use, orphan rights, and time-shifting. The Report also discusses the introduction of “test beds” in order to ensure that the UK is “digital ready;” tax relief for “culturally British” video games; the promotion of science and technology at a graduate and post graduate level; and the creation of jobs within the games industry.

### **RECOGNISING THE IMPORTANCE OF THE UK’S CREATIVE INDUSTRIES**

The Report states that, in order to maintain growth in the creative industries, and in order to keep up with the changes that are being wrought across the world of

**London**  
+44 (0)20 7786 6100

**Brussels**  
+32 (0)2 290 7800

**Denver**  
+1 303.863.1000

**Los Angeles**  
+1 213.243.4000

**New York**  
+1 212.715.1000

**Northern Virginia**  
+1 703.720.7000

**San Francisco**  
+1 415.356.3000

**Washington, DC**  
+1 202.942.5000

*This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation. © 2009 Arnold & Porter LLP*

**arnoldporter.com**

<sup>1</sup> “The Digital Britain Report: Part I: Implications for Telecommunications Operators, Service Providers, and Users,” available at: [http://www.arnoldporter.com/public\\_document.cfm?id=14554&key=5E2#zoom=100](http://www.arnoldporter.com/public_document.cfm?id=14554&key=5E2#zoom=100)

technology, a new digital framework is required. As digital content is created, it will no longer use the old analogue models of distribution, monetisation, and participation. The ambition of the Report is that the UK should anticipate such changes and, by preparing for them with the proper legislation and investment, remain a creative market leader. The Report therefore attempts to provide guidance regarding the sorts of economic and legislative changes that will be required to maintain such a position.

## IP PROTECTION

It is already the case that 7.5% of total UK music album purchases are digital and a small but growing number of film and television programmes are streamed or are downloaded. Such digital sales will clearly have a large role to play in the future. However, as the Report succinctly states, “at its heart the current model is not working.” This is because a significant proportion of consumers are choosing to access digital content unlawfully, via peer-to-peer file sharing websites.

The British Phonographic Industry (BPI) claims that peer-to-peer file sharing costs the UK music industry £118m per annum (2008). A similar figure is estimated to have been lost in the UK for television and films. Whilst it states that this is unacceptable, the Report also points out that studies in Scandinavia have shown that the biggest users of unlawful peer-to-peer material are also the biggest paid-for consumers of music. The Report’s conclusion is that—where there are easy, affordable, and lawful routes—consumers will take them.

The government will therefore legislate to provide an underpinning for market models that will create an enforcement climate that will focus consumers on legal sources of content rather than unlawful ones, whilst at the same time doing what it can to promote commercial growth in those areas to provide better, faster, and more content-rich legal portals from which consumers can obtain such products.

There are two specific measures that the government proposes should be adopted in order to create this enforcement climate. Internet service providers (ISPs) should be required:

- to notify account holders in an agreed format that their account appears to have been used to infringe copyright; and

- to maintain and make available (on the basis of a court order) data to enable the minority of serious repeat offenders to be identified.

In addition, the government will provide “backstop” powers to the media industry’s regulator, Ofcom, that will allow it to place additional obligations on ISPs to reduce or prevent online copyright infringement by the application of various technical measures (such as bandwidth reductions or protocol blocking). Precisely what the trigger mechanism is that would give both right holders and ISPs strong incentives to make this system work is still being consulted upon. These provisions are intended to be underpinned by a detailed code of practice that should be generated by the industry, but failing that by Ofcom.

The Report says that the government has considered whether there should be a modification of provisions for “fair use” of IP by consumers. The Report concludes that the scope for modernisation of “fair use” is heavily constrained within the EU copyright framework. However, it believes that there may be scope to amend the copyright exceptions regime and that, where suitable exemptions should exist, they may be implemented. It accepts that further work needs to be done on the broader question of the modernisation of fair use rights.

The Report also addresses a number of other rights issues.

**Modernising Licensing.** The 300-year-old copyright framework is constantly being updated, and the Gowers Review of Intellectual Property (a comprehensive independent review of the UK’s intellectual property rights regime) demonstrated that further changes are still required today in order to bring it up to date. The government has launched a Copyright Strategy, which is intended to ensure that such further changes are made.

**Orphan Works.** Orphan works are works that remain in copyright where, despite a diligent search, the owner cannot be found. Some estimates suggest that as much as 40% of the British Library’s archive consists of orphan works. This has an impact on mass digitizing projects. New legislation is proposed in order to deal with orphan works in a manner that would get around such problems by allowing the UK Government to provide permission to deal with and use such works.

**Matched Penalties.** It is proposed that there should be matched penalties for online and physical copyright infringement and that these should be backed up by matched custodial sentences. The government intends to address this issue in conjunction with the other legislative changes detailed in the Report.

**Retransmission.** Section 73 of the Copyright Designs and Patents Act was introduced to allow certain cable operators to avoid having to pay for the retransmission of some broadcasts in order to encourage infrastructure firms to lay cable networks. The suggestion now is that section 73 should be removed in order to allow the levying of retransmission fees—as is the case with satellite broadcasters who at present do not enjoy the benefits of section 73.

However, there is currently only one cable operator, Virgin Media, and as such, removal of section 73 will impact only that firm and the government has decided against the removal of the section for the time being.

**Reuse (or “Time Shifting”).** It has been argued by some rights owners that consumers should pay for recording material and for the right to watch material outside the time within which it was originally intended to be played. A similar system of reuse charges exists within the rest of the EU. However, the government is not convinced that in the current economic climate it would be right to add to the additional cost of recording devices.

## INVESTMENT SUPPORT AND INNOVATION

The Report acknowledges the need for investment support and innovation and discusses some actions that the government can take.

**Digital Test Beds.** The government is keen that there should be a safe harbour within which companies are able to test new digital means of bringing their technologies to market without the fear of creating a new means for pirates to take advantage of their rights. In an effort to support this idea, the government, in conjunction with the National Endowment for Science, Technology, and the Arts, will be establishing a number of online test propositions that they refer to as “Test Beds.” These are effectively low-cost, low-risk trial opportunities for industry to experiment with new ideas in real world environments. An initial budget of £10 million has been allocated to this purpose.

**Games Industry.** It is the government’s intention that there should be tax relief provided for the “production of online or physical sale of culturally British video games.” Precisely how this rather obscurely defined section of the games industry will benefit remains unclear. However, it is clear that there will now be tax breaks for “culturally relevant” games in the same way as there are tax breaks for culturally relevant films.

It is also the government’s intention that there should be a contemporaneous emphasis on excellence in science and technology to make industry jobs available to those that specialise in the relevant areas.

**Film Industry.** The Report notes that the UK Film Council has spent £12 million on its Digital Screen Network which has equipped approximately 240 screens with digital projection equipment. Larger chains are already doing this in preparation for the film industry’s digital future.

**Literature.** The legislation that deals with the public lending right does not deal with audio books and is over 30 years old. With the advent of the e-book, legislative change is now not a luxury but a necessity and the government is aware of, and is amenable to, legislative changes. The Report points out that there will need to be a thorough look at the issues that are raised by digital technology, such as which platforms e-books or other digital formats should be allowed to be played upon, how convergence should be dealt with going forward, and what obligations should be placed upon rights-holders to ensure that they take all of the reasonable Digital Rights Management precautions that are appropriate (i.e., without limiting competition).

---

*We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

**Richard Dickinson**

+44 (0)20 7786 6213  
Richard.Dickinson@aporter.com

**Michael H. Ryan**

+44 (0)20 7786 6155  
Michael.Ryan@aporter.com

**Alexander Watt**

+44 (0)20 7786 6204  
Alex.Watt@aporter.com