

Response to the Government consultation “A Communications Review for the Digital Age”

(See http://www.culture.gov.uk/what_we_do/telecommunications_and_online/8109.aspx)

Background

This is a collaborative submission from a group of academics based in the UK with expertise in information technology law and related areas. The preparation of this response has been funded by the Information Technology Think Tank, which is supported by the Arts and Humanities Research Council and led by the SCRIPT/AHRC Centre for Research in Intellectual Property and Technology, University of Edinburgh.

This response has been prepared by Dr Catherine Easton.

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This response has been approved by the Executive of BILETA (the British and Irish Law, Education and Technology Association <http://www.bileta.ac.uk/default.aspx>) and is therefore submitted on behalf of BILETA.

In addition, this response is submitted by the following individuals:

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Question 1: What could a healthier communications market look like? How can the right balance be achieved between investment, competition and services in a changing technological environment?

A healthier communications market needs to be flexible enough to support innovation while also facilitating competition and ultimately providing the best possible service for the end user. While an effective framework should allow for sustained economic growth, the wider social benefits and additional social value of a healthy communications market should be the central focus of key regulatory initiatives.

BIS’ Trade and Investment White Paper outlined the key aim of a single market in digital services and this is to be applauded. It is the harmonisation of regulatory initiatives in the light of increasing convergence which will allow the communications market to develop with required speed and flexibility. Innovation, however, will only be possible with financial investment, and this relies upon certainty and the ability of the market to return profit.

A healthier communications market should:

- Enshrine the principle of technological neutrality in the light of increasing convergence
- Ensure that any wide-scale legislative review is based upon a flexible framework of long-term growth in order to promote stability and investor confidence
- Aim to achieve a common regulatory framework
- Aim to achieve a level of pluralism by relying upon competition law to discourage the growth of private monopolies, promote diversity and limit concentration
- Reflect the EU policy of moving away from sector-specific regulation and towards horizontal regulation
- Ensure the development of an efficient, cost-effective regime as overheads often passed on to the end-user
- Ensure flexibility and match the speed of change by taking a broad policy framework approach and leaving details to co- and self-regulation.
- Accept that both infrastructure and content regulation is now increasingly regulated in an international and decentralised manner and work towards the implementation of key EU harmonising Directives.
- Accept that boundaries are increasingly being blurred between production, distribution and consumption and that current economic models in the sector need to be supported to respond to these developments.
- Aim to decrease the cumulative regulatory burden on SMEs

- Be vigilant in relation to the ability for increased convergence to lead to multi-platform monopolies and work in liaison with the European Merger Task Force to ensure plurality
- Ensure that any regulation is proportionate to the wider aims of social benefit and economic development and that the competition regime is free from political influence
- Maintain the safe harbour rule in relation to ISPs as mere conduits. ISPs should continue not to be liable for content or be required to make value judgements (enshrined, for example, in Article 12 of the E-Commerce Directive (Directive 2000/31/EC))

Question 2: What action can be taken to facilitate greater innovation and growth across the wider competition regime, and how can deregulation help achieve this?

To lower the regulatory burden there needs to be further alignment of competition and copyright law provisions. Any IP reforms need to be subject to Competition Impact Tests which need to be applied at a UK level to avoid SMEs moving to other environments.

Question 3: Is regulatory convergence across different platforms desirable and, if so, what are the potential issues to implementation?

The historic growth of the broadcasting sphere and the telecommunications sphere were based in different regulatory aims. The traditional arena of broadcasting, due to social and cultural concerns, was subject to strict content-based regulation whereas telecommunications policies have developed with a focus upon economic growth and the development of infrastructure. Now due to technological convergence with the infrastructure relating to, for example, fixed line, mobile services, 3G and digitally-enabled TV systems converging there is a need for the regulatory regime to harmonise. Lessons learned from the different spheres need to complement each other.

The application of different levels of regulation to providers at each level is serving as a hindrance to true competitive development. There is a need for a holistic, dynamic approach, with an aim to provide ex ante, anticipatory regulation which focuses upon socially desirable aims. However, this should not be sector-specific but should address the communications industries as one, including pay-TV providers. This regime should promote open and fair entry-level access on a non-discriminatory basis to promote growth. To avoid de facto monopoly situations across multiple platforms there is a need for full transparency of ownership.

Furthermore, given the blurring of both product and geographical boundaries there is a need to ensure that any provisions in this area are international in nature as any other approach would hinder the development of UK innovations.

The following is recommended:

- An effective Cross-border collective rights management scheme should be developed with a concerted move away from any focus on territorial licensing
- The law needs to be applied to require the amendment of any collective society model contracts which do not enshrine cross-border principles of non-discrimination in relation to cross-border licensing
- Following the approach taken in the case of CISAC (2006), there is a need to avoid blanket territorial restrictions which conflict with the principles against effective territorial monopolies
- The European Commission’s current proposal on cross-border licensing and reciprocal representation agreements should be supported, as should the development of the Framework Directive on collective rights management for use of music online

Question 4: What barriers can be removed to facilitate greater exports and inward investment and make the UK more globally competitive in digital communications?

Innovation and growth in the creative sphere need to be supported with a key focus being facilitating the development of SMEs and new start ups to support creativity and the generation of ideas. There is a need for an effective financial regime which encourages investment. However, due to the global recession and the associated increase in risk-averse investments, SMEs can suffer as they present a higher risk. There is a need for wider digital and creative industry-focused policies which provide the foundations for growth a focus on new, small innovative new starters. Suggestions include:

- Greater financial incentives such as micro-financing schemes to increase venture capital investor confidence digital SMEs
- Promoting access to finance by increasing investor understanding of the nature of digital and creative industries, as this has previously inhibited growth. The creation of the industry-established Creative Industries Council is to be welcomed. This should facilitate schemes to educate financial industries in the nature of digital start ups and the developmental timescales inherent in the generation of returns. However, this needs to be supported financially and managed with a specific view to increasing diversity and widening consumer choice.
- Schemes to fund SMEs’ access to cross licensing, patent pools and open technology standards need to be supported. An overarching innovation network which supports start ups, connects with funding incentives and provides tax advice needs to be maintained, perhaps with a lead taken by the Creative Industries Council. Support to

SMEs should be streamlined with the development of strong support initiatives such as the “peer to patent” scheme. Specific advice should be given to freelancers with regard to gaining financial backing and developing in the business environment.

- Skills shortages in digital and creative industries should be addressed with apprenticeships created in liaison with SMEs. In relation to research in higher education, links need to be strengthened to allow greater innovator choice in relation to the provision of investment in order to increase SME investment in university-based creative innovations. There needs to be full transparency in relation to a perceived skills gap and concrete statistics in relation to industry need to be openly available. Greater liaison is needed between educators and industry in relation to the wider need and courses developed which actually meet the need and do not just focus on popular areas such as video gaming. Given its importance to the UK’s economy, the digital and creative sphere should be given similar treatment as STEM subjects in relation to educational development
- There is a need to reform and simplify the role of collecting societies, particularly in relation to the music industry. There is a need for a more open approach to licensing which facilitates innovation. This can be achieved by increasing transparency, with the societies’ structure and operating costs being made more easily available to the public. There could be further moves towards transparency with the publication of information about how EU competition law interacts with collective societies’ work. There is a need for harmonisation at an EU level, perhaps following USA’s approach of intermediate supervision based on principles of non-discrimination in relation to the granting of licences. The EU approach with regard to reciprocal representation agreements should be followed.
- The CDPA should be amended to relax provisions relating to “format-shifting” to bring the regulatory regime into line with the approaches taken in the USA and other EU countries. This allows creators to exploit direct and indirect network effects in order to attract consumers and then ensure that any related innovations, for example in the areas of music and e-books, achieve interoperability. This would better enable innovators to break into the UK markets.
- The Digital Copyright Exchange needs full support, implementation as a priority and incentives for growth. The development of databases linked to orphan works should be a priority.
- The purchasing power of the State should be exploited with a development of a Guide to public sector procurement which focuses on IP issues, and a provision of a more easily accessible Contract Finder with a focus on access for new-start ups and SMEs.
- In relation to the dominant position test in competition law, the “innovation balance test” which specifically places the matter with the framework of technological realities and future developments is to be preferred.

In an increasingly digital world, we rely on mobile and fixed line phone services, e-mail and the internet. Efficient management of both the spectrum and broadband infrastructure supporting the effective delivery of these services underpins growth in the communications market.

The Electronic Communications Framework is the European-wide regulatory framework that covers all transmission networks and services (including access) for electronic communications. The Framework was originally agreed in 2002 and revised in December 2009. The Government is currently implementing those revisions. The intention is to enhance competition in the communications sector, in part through further liberalising spectrum markets, and to reduce the regulatory burden to help create the conditions for growth and innovation.

We are also aiming to have the best superfast broadband network in Europe by 2015. Our approach is a combination of targeted financial support with £530 million available up to 2015 to support broadband rollout and regulatory and policy interventions aimed at reducing barriers to private investment in superfast broadband networks. These were set out in "Britain's Superfast Broadband Future" published on 6 December 2010.

Outside of the scope of the Framework and separately from the work taking place on the superfast broadband network, we are looking to test the objectives of spectrum policy. This work recognises that the rapid increase in demand for data rich services means there are competing and varying demands for its availability. How spectrum is regulated is therefore fundamental not just to the communications sector, but to the wider economy. The questions below are intended to provoke discussion and frame our developing work on spectrum management issues.

Question 5: What further market and regulatory developments would lead to widespread take-up of superfast broadband? What regulatory action would government need to take to make superfast broadband more readily available in a) urban areas; and, b) rural areas?

Question 6: What are the competing demands for spectrum, how is the market changing and how can a regulatory framework best accommodate any rapidly changing demands on spectrum and market development?

Question 7: How should spectrum be managed to deliver our growth objectives whilst also meeting our policy objectives of furthering the interests of citizens and consumers in relation to communications matters?

Given its status as a scarce resource, the allocation and regulation of spectrum is of crucial importance to the long-term development of a healthy communications market. In doing so the following principles should be upheld:

- The central tenet of the regulation of spectrum should be the preservation of net neutrality
- Spectrum should be allocated with regard to the principles of equality and non-discrimination in relation to the size of commercial operations and technological sector
- Given developments in convergence, spectrum should be allocated irrespective of platform. Any release of spectrum created by, for example, the move from analogue broadcast transmissions should not be earmarked for a particular sector.
- The development of a secondary market in spectrum rights, while providing competition and increased flexibility needs to be regulated to ensure the achievement of a level-playing field and stability

Question 8: How should the UK engage on an EU/International level in relation to spectrum?

Question 9: Is the current mix of regulation, competition and Government intervention right to stimulate investment in communications networks?

In general, there is a need to redesign the notion of the long-term public interest in order to allow the promotion of wider social advantages brought by the digital economy. This may not be protected by full reliance on the boundaries set by competition law.

The following can be recommended:

- The merging of the Competition Commission with the competition-focused arm of the OFT in order to streamline the functions
- Expansion of the Copyright Tribunal with an increase in its budget and personnel with an aim to facilitate low-level claims and support for defendants

Creating the right environment for the content industry to thrive

People can currently access a wide range of quality content and services through a growing variety of, increasingly, digital platforms. Our aim is to drive the growth of UK content production across all platforms.

We want to ensure that, as the market changes, we are best placed to lead the world in generating new and innovative content which is valued by UK citizens and accessible to all. The Hargreaves Review of Intellectual Property and Growth, to be published shortly, will set out proposals aimed at stimulating economic growth across the economy, including content creators and distributors, through the IP system. The response that the Government will make to the Hargreaves Review will set out our overall policy for IP, which can then form the foundation for any reference to IP issues by the Communications Review.

The public policy challenge is to apply a coherent set of principles to the continuing convergence of content provision, deregulating where necessary in order to achieve the right balance between appropriate protection for the public while enabling rapid innovation, better services and sustaining freedom of expression. The questions below provide a broad context for our approach and we would appreciate as much detail and verifiable data as possible included in any responses.

Question 10: Are there disproportionate regulatory barriers to investment in content? If so, what are they and how can increased investment in UK content production be encouraged?

Question 11: Should the core focus of public service broadcasting be on original UK content?

Question 12: What barriers are there to innovation in new digital media sectors, including video games, telemedicine, local television and education?

Question 13: Where has self- and co-regulation worked successfully and what can be learnt from specific approaches? Where specific approaches haven't worked, how can the framework of content regulation be made sufficiently coherent and not create barriers to growth, but at the same time protect citizens and enable consumer confidence?

End of submission