

Confidential response to Government Proposals for a Rights Agency from O2, Orange, T-Mobile and 3

Introduction

Consultation is welcome – the market is demanding change

1. A new film, *The Boat that Rocked*, recently premiered in London. It depicts the trials and tribulations faced by Radio Caroline as it attempted to break the monopoly provision of broadcast pop music to the 60s generation.
2. The film serves as a timely reminder of the disruption that arises when there is a major disconnect between what the public wants to buy and what the market is providing. Ultimately this is an argument that the customer is always going to win but the process of finding a new equilibrium can be painful and unsettling.
3. The UK is once again at a point in time when the market is demanding change. We therefore commend the Government, through the Digital Britain agenda, for catalysing the discussion about how this might best be achieved. We also welcome the opportunity to comment on the Government's suggestions for a Rights Agency.
4. In our submission to the interim report, we expressed reservations about the idea of a Rights Agency. Now that we have seen fuller proposals, our reservations remain but we are better placed to comment.
5. The Government has identified most of the issues: the need for new business models, consumer education and more efficient clearance processes. But we are not at all persuaded that dealing with these ingredients in the one bowl will make for a successful recipe. There is too much emphasis on preserving the status quo. Even the name sets the wrong emphasis on where action needs to happen.
6. Although the issues identified have some linkage, we feel that they would more fruitfully be pursued independently, driven by business imperatives rather than regulatory ones.

New business models

7. The Government rightly recognises the need for new business models and we agree that they are absolutely necessary. It is certainly true that it remains extremely difficult to negotiate with the rights bodies and to agree terms that would allow innovative content services. However, we do not agree that creating an 'industry' body of slightly unusual construction (i.e. one that is owned by industry but with Government very much lurking in the background) is the appropriate way of pursuing this objective. Furthermore, the topic of Rights is not the only one that is inhibiting faster progress.
8. There is also the issue, identified in the Caio Review and the Digital Britain Report, of how network providers can be incentivised to increase capacity in line with needs of the content suppliers. The success of the BBC iPlayer and the proposed Canvas project has brought the matter into sharp relief and its one that needs addressing.

9. In broad terms a new settlement will have to align the interests of consumers, content providers and the distribution networks so that content such as music, films and games are presented to the customer in a format and at a price they are willing to pay.
10. It will also be necessary, in an on demand environment (wired or wireless), where the consumers' consumption levels have an impact on capacity, for an element of the pricing to connect volumes and revenues so that there is some way of moderating consumer's consumption. Furthermore some way must be found of aligning the interests of the content provider and network distributor by both dealing with the copyright issue in partnership and sharing the proceeds of market growth. To this end we welcome the Government's stated position of allowing differential service levels for different types of content and applications. This is an absolutely critical element to finding a new market dynamic that is acceptable to producers and consumers.
11. We strongly believe that these new models will be negotiated commercially between the leading players and not by an industry body. They are likely to include elements of advertising funded provision and possibly rely less on the exploitation of secondary rights, such as digital album sales. There are already signs that the greater interest in music has made the value of live performance increase dramatically.
12. We are concerned that, far from facilitating the process, the proposed Rights Agency, will actually inhibit it by holding out the hope (amongst some) that it will be possible to cling to the status quo.
13. In our view, this is not right path to delivering what customers want. The status quo must change. Solutions must be found which benefit all parties.
14. The new models will be established eventually because there is a commercial and economic imperative for this to happen. We expect the process to be painful but we should not be prolonging it by supporting the old ways. The Government's Information Age Partnership is a forum that may catalyse the process but we do not see the need for the Rights Agency to do this as well.

A role in consumer education?

15. The Government has also suggested that the Rights Agency be a body to promote consumer education. But such bodies already exist and are recognised. The Government's document mentions FACT. This is an organisation backed by some very large organisations and which has a budget of roughly £4m per annum. What would the Rights Agency be doing that a well established organisation such as FACT could not do or, in fact, is already doing?
16. As matters stand, the content providers' position is that networks should provide extra capacity for new content, pay for education by sending letters to customers infringing copyright and cutting off those that fail to respond. It is not hard to see that this is a one sided and unsustainable position. The Government should not be forcing the networks to participate in an organisation that delivers no apparent benefit to them and is duplication of work already in hand.

A Role in clearing rights?

17. A further suggestion is that the Rights Agency performs a role in facilitating rights clearance.
18. Again, the Government is correct to identify that rights clearance for the digital media is complicated, cumbersome and time consuming. The MBG has responded to the Government's previous consultation on the reform of copyright suggesting that this whole area needs looking at again but at a European level, not at a UK level.
19. It is primarily up to the rights owners, and self evidently in their commercial interests, to establish rights clearance bodies and processes that make it easy for those that want to exploit those rights to do so. It is our perception that they have failed to do so and we would certainly encourage rights owners to re-examine their arrangements so as to maximise the business opportunities.
20. We would encourage the collecting societies in instituting a speedier, smoother process for rights clearance, and the application by the societies and the rights-holders of variable charging models with rates which allow sufficient margin for a distributor to make attractively-priced new services viable. If the practices of the collecting societies could be simplified, and their hitherto inflexible business models relaxed, there are a number of new services that would flourish to the benefit of service providers, consumers, and the rights-holders themselves. We note that the IPO covered this topic in its recent consultation on the future of copyright. We would also encourage them to assess whether changes to the copyright regime/EU laws would assist the process.

A body to draft and oversee a co-regulatory code?

21. The suggestion that the Rights Agency help to draft and oversee a co-regulatory code appears to be a rehash of a previous proposal on which the Government consulted and concluded did not command any industry support.
22. We are therefore surprised to see (Annex B Clause 4) the government appearing to reintroduce the idea of a co-regulatory structure back into the debate. The role of Ofcom as set out raises additional concerns and we would seriously question the merits of empowering Ofcom to impose a Code where agreement amongst industry cannot be reached and to impose further charges on industry to finance both its own costs and that of potentially yet another body.
23. Needless to say we could not support Ofcom being given the power to fine ISP's for non-compliance with a code of the nature suggested in the discussion paper.
24. We are surprised to see certain issues return to the table, from various technical measures and sanctions against users to ultimately a suspension of a user's account. We cannot see how such a measure can possibly be compatible with one of the foremost goals laid out by the Digital Britain plans in creating universality of access to broadband.

Conclusion

25. We welcome the Government's attention in this important area. As recognised by the government in its discussion paper, any involvement of the Rights Agency in commercial discussions must inevitably raise anti-competition concerns. Furthermore, the expense of attempting to enter this difficult arena should not be under-estimated and it should be again highlighted that there remains significant concerns around the appropriate funding of said Agency.

26. The proposed Rights Agency is a curate's egg, containing a diverse set of issues. We very much support the Government in provoking the discussion but we strongly feel that, while all these and other issues need to be pursued to a greater or lesser extent, it would not be productive to do so within one agency.

27. We would be pleased to discuss our comments in more detail if that would assist.