

It's a jungle out there

The Hargreaves report is a fresh take on intellectual property law in the digital economy, says **Martin Delafaille**

A government-commissioned report on the functioning of the UK's intellectual property (IP) system has just been published. The report, known as the Hargreaves report after its chairman, Professor Hargreaves, makes sensible and sometimes radical recommendations, particularly in relation to copyright, having met stakeholders and received submissions over a five-month period from interested parties throughout the creative industries.

The report is thin on specifics, but nevertheless offers a fresh approach. Whether the government will agree to support the proposals, including a so-called 'digital copyright exchange', is not yet known. It estimates that the economic impact of implementing the recommendations in the report would be to add 0.3 to 0.6 per cent to annual GDP growth. That may not sound much but it represents between £5.5bn and £7.9bn a year.

In November last year, David Cameron launched a review of the UK's IP framework with a mandate to examine how to ensure that it does the best possible job in encouraging innovation and growth. IP rights (mainly patents, copyright, design rights and trademarks) incentivise innovation through the reward of a monopoly for innovative investment, yet overly rigid rules and procedures can act as barriers to innovation.

In this context, the majority of productivity, growth and job creation in the UK during the last decade has come from innovative small and young firms. The question was whether the IP system was doing enough, or hindering their development. Cameron, having being told by executives of Google that they could not have started their company in Britain because of UK copyright law, asked the review to consider whether the UK's IP framework needed to be adapted to "make them fit for the internet age" and in the interests of encouraging both innovation and growth.



The report, published by Professor Ian Hargreaves of Cardiff University on 18 May, concludes that the UK's current IP system is falling behind what is needed and makes ten specific recommendations covering policy initiatives, copyright and patents.

Policy initiatives

Hargreaves emphatically argues that, historically, UK IP policy has followed a flawed pattern of extending IP rights despite there being no evidence of clear economic benefit. Whereas that policy has undoubtedly benefitted established IP owners, the effect had been to hinder the development and opportunities of the small and innovative firms that are the core drivers of the British economy.

To realign the UK's stance on IP policy, Hargreaves argues that future policy should be evidence-based and founded on sound economic grounds, rather than being stuck to the rigid rules of protection and enforcement that have traditionally held sway.

Hargreaves also rightly identified that UK digital businesses can only thrive to their full potential if a solid international framework were put in place. That international framework should be actively shaped by the UK government, with a particular emphasis on supporting greater IP harmonisation in Europe and pressing for a single EU patent and single EU patent court, discussions on which have dragged on in Europe for well over a decade.

Copyright exchange

The current failings in the IP system are especially apparent in the area of copyright, with the law (principally covered by the Copyright, Designs and Patents Act 1988 (as amended)) struggling to keep up with the technological developments that have occurred over the past two decades. Although the report's recommendation to legally allow "format shifting" (e.g. transferring music from CD to an mp3 player) has garnered much press comment, the most radical recommendation relates to the licensing of copyright works.

Although digital creative industries rank third in exports (behind advanced engineering and financial and professional services) and are undoubtedly important to the UK economy, they are handicapped by a matrix of licensing inefficiencies and statutory restrictions. The report gave the example of the BBC taking almost five years to assemble the rights necessary to launch its iPlayer service, while other media players reported that licensing discussions are inconsistent, with some users denied licences without clear explanation. Google also claimed small digital businesses are being forced to change their products to avoid using copyrighted materials because of the difficulty associated with getting permissions.

Hargreaves suggests that a solution to the problem would be the creation of a digital copyright exchange, a 'one stop shop' for the clearance of all digital rights

where licences in copyright can be easily bought and sold. The review calls on the government to appoint a senior figure to oversee its design and implementation by the end of 2012, and to implement a package of incentives and disincentives to encourage rights holders to take part. One incentive would be to provide for greater damages for infringement of works available through the licensing exchange than for other works.

Although many have welcomed the recommendation, there is some scepticism as to whether this bold change will ever happen, not least because it will require the government to put its full weight behind it and give companies incentives to sign up. Will this be regarded as sufficiently important to be a priority in the legislative timetable?

Orphan works

The review also found that the UK system for dealing with 'orphan works' (copyright protected works whose author cannot be found) seriously hinders innovation. Because the copyright owner cannot be identified and located, orphan works are not, for example, available for use by filmmakers, archivists, writers, musicians and broadcasters. In addition, there are vast quantities of historical and cultural records such as period film footage, photographs and sound recordings that cannot be incorporated in contemporary digital works for fear that a copyright owner may reappear and sue them for damages. Such works therefore remain commercially unavailable.

The report concluded that the issue of orphan works cannot be deferred any longer and proposes that the government should legislate to enable the mass licensing of orphan works, and a clearance procedure put in place for use of individual works. In both cases, a work should only be treated as an orphan work if it cannot be found by a search of the databases involved in the proposed digital copyright exchange.

'Fair use' exceptions

The issue that attracted most press attention when the review was first announced was David Cameron's somewhat controversial suggestion that Britain might adopt a 'fair use' limitation on copyright, like that used in the US. In the US, the concept of 'fair use' is a defence to copyright infringement which builds on certain general principles, through case law, to develop permitted uses of copyright works.

Although noting the flexibility that a 'fair use' defence might provide under UK law, the report indicates that government lawyers advised that significant difficulties would arise in any attempt to implement an open-ended exception into European law. Instead, again looking at what economic benefits could be by extending copyright exceptions, Hargreaves has recommended



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that private individuals should legally be able to 'format shift' content they have bought and that there should be a broad exception for library archiving. Copyright law should also no longer impede non-commercial research by blocking text and data mining of scientific literature, or the creation of parody works. The creative industries have, perhaps unsurprisingly, roundly welcomed Hargreaves' rejection of a US-style 'fair use' system which, they argued, would seriously affect their businesses.

Patents

The report indicated that the most striking aspect of the patent system has been the worldwide increase in the number of patent applications over the last few years, leading to delays and backlogs at many patent offices. Hargreaves recommends that the government take a lead role in promoting international efforts to cut backlogs and manage the boom in patent applications by 'work sharing' with patent offices in other countries.

A significant proportion of these pending patents relate to computer and IT technology, industries where innovation builds cumulatively on previous inventions, rather than fields such as drug

development, where upfront costs are high. Hargreaves noted that 'patent thickets' had developed in these industries, by which he meant a dense web of overlapping rights that a company must hack its way through to commercialise new technology.

The report notes, for example, that a current generation smart phone may well be covered by hundreds of patents owned by tens of rights holders. The resulting 'thicket' leads to a market crowded with patents of overlapping scope. It is often unclear where the boundaries of protection afforded by one patent lie with comparison with another, which ultimately hinders further innovation.

The report notes that various attempts to tackle this issue have developed in the market, namely cross-licensing, patent pools and open technology standards, but that the cost of participation in such schemes is prohibitive for SMEs. Hargreaves recommends that the

government investigates ways of limiting the adverse affects of patent thickets, including working with international partners to establish a patent fee structure set by reference to innovation and growth rather than solely by reference to patent office running costs. The structure of patent renewal fees might be adjusted to encourage patentees to assess whether to maintain lower value patents, so reducing the density of patent thickets.

Importantly, the review also argued that the government should ensure that patents are not extended into sectors, such as non-technical computer programs and business methods, without clear evidence of benefit. To do so would exacerbate an already delicate situation, given the pace of change in the digital world and the strongly sequential nature of innovation in computer programs.

Professor Hargreaves' report, which is the fourth IP review in six years, has been generally welcomed by practitioners and the creative industries. The government has indicated that it will now fully study the report, but how far they will actually implement it is still up for debate.

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