EIP

The Hargreaves Review: Destinations without Routes

By Andrew Sharples, Partner and head of EIP Life

Digital Opportunity: A Review of Intellectual Property and Growth (commonly known as The Hargreaves Review) was published on 18 May 2011. The Review aims to address the question of whether the IP framework in the UK is sufficient to promote innovation and growth in the UK economy, and in particular to answer the question, "Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing growth". The Review decides that this is the case at least in some areas, most notably copyright, and goes on to make a number of recommendations as to how this can be addressed. Whilst some of these suggestions are quite specific, there is a lack of detail as to how the Review's recommendations might be implemented. This is not surprising given the breadth of the Review and the relatively short time frame in which it has been prepared (five months); indeed, the Review acknowledges that it is "focused upon the main issues, at the risk of ignoring important points of detail". However, many of the recommendations are ambitious in nature, and it is these very points of detail not considered by the Review which will determine whether or not these ambitions are realisable.

The Review covers a number of broad areas, although by far the greatest focus is on two issues; copyright in the digital age, and the need to base assessment and policy on solid evidence.

Evidence

This is the theme running throughout the Review, namely that there is a lack of real

evidence underpinning the assessment of aspects of IP, in particular in relation to the levels and impact of piracy and counterfeiting. The Review recommends that the
p2 Government should in future develop the IP structure in relation to objective evidence, rather than weight of lobbying, and that to date the perspective of consumers has played too small a part in the UK's IP policy.

Copyright

The major focus of the Review is copyright, and in particular the shortcomings of the copyright system in the digital age. The headline conclusion is that it is presently too difficult to obtain licences of works whether individually or en mass.

The proposed solution is multifaceted but relies primarily on the creation of a Digital Copyright Exchange ("DCE"). This would be a common, standardised platform for licensing works. Whilst voluntary, the Review clearly envisages the vast majority of works eventually being part of the exchange. There are a score of cited benefits, including greater transparency and speed and reduced administration and cost. However, the Review also acknowledges that to encourage uptake there will need to be disadvantages to not being part of the exchange; suggestions include greater damages for infringement of works included in the exchange; applying sanctions under the Digital Economy Act only in relation to works included in the exchange; giving creators the right to withdraw from publishing agreements where the publishers do not place works on the exchange; and perhaps most controversially, treating works not placed on the exchange as "orphan works" (of which more below).

The Review does not advocate that the government creates the DCE (so as to avoid "a nightmare of IT procurement followed by the birth of a white elephant") but instead brings together interested parties to find ways of overcoming divergent interests. How these divergent interests are to be overcome is not clear though, and almost as soon as the Review was published criticisms were made of the viability of this proposal. Certainly the goal of establishing the DCE by the end of 2012 seems optimistic.

Additional calls are made for legal changes at EU level to establish cross-border licensing, although no further suggestions as to how to achieve this are made. The development of extended collective licensing, by which collecting societies which act on behalf of most rights holders in a sector can assume the ability to represent all rights holders in that sector absent an explicit opt-out, is supported.

The problem of orphan works, i.e. works for which the rights holder cannot be identified, is addressed, the suggestion being that after a diligent search to locate the owner, orphan works should be deemed to be licensable for a nominal fee. This would free up

the use of large bodies of works in the national archives. However, it is suggested that a diligent search would simply require checking if a right is contained in the DCE, and, if not, treating it as an orphan work. This could effectively introduce a requirement for copyright registration, and it is questionable whether this would be consistent with the UK's obligations under the Berne Convention to provide copyright without a registration requirement.

In addition to licensing, the Review also strongly supports the need for increased exceptions to copyright. It stops short of calling for the incorporation of a US-style blanket exception for fair use, due to doubts over the legal viability of such an approach. Instead, the Review recommends urgently introducing exceptions which are feasible within the EU framework and which the UK has not yet implemented, including exceptions for using analytics for non-commercial research and private copying by enabling users to make copies for their own and immediate family's use on different media. At the same time, efforts should be made at the EU level to introduce additional exceptions, such as for analytics and data mining for commercial purposes, extending the non-commercial research exemption to all forms of copyright works, extending the archiving exception and introducing an exception for parody. Finally a change to the law is recommended so that these exceptions cannot be overridden by contract.

A recurring theme is the lack of clarity and understanding in copyright law, and the Review recommends that the UK Intellectual Property Office ("IPO") be given powers to publish formal opinions clarifying the application of copyright law, which although not binding would nevertheless be required to be taken into account by the courts. This is one of several proposed extensions of the role of the IPO (as set out below).

The Review acknowledges that copyright raises legitimate questions of culture, fairness and "just reward", but that these were outside the scope of the Review, which focussed on economic considerations.

Finally, the Review agrees with the submission made by the Patent Judges of England and Wales that a comprehensive review and redrafting of the Copyright Act is long overdue.

Patents

The Review acknowledges that the evidence from users of the patent system suggest the system as a whole is functioning reasonably well. Nevertheless, the Review highlights several areas for action.

Most prominently, the Review cites the need to establish an EU patent and that the

Government should "attach the highest immediate priority" to establishing an EU Patent Court.

Patent office backlogs resulting from increased patenting are cited as a problem which could give rise to business uncertainty, higher costs in establishing a business' freedom to operate, and potentially granted patents of lower quality due to pressures on patent offices. Increased worksharing, i.e. intensifying efforts already in place, is suggested as the way to achieve this, along with improving confidence in the PCT system so that the prior art search carried out at the International stage is more readily accepted by national and regional patent offices so that additional searches are not required.

Patent thickets, i.e. multiple parties holding multiple patents which cover a given technology, are described as a problem for SMEs entering the market. The Review acknowledges that cross-licensing, patent pools and open technology standards can be effective measures for addressing this, but goes further, suggesting a significant increase in renewal fees from the 6th year of a patent in order to discourage the maintenance of lower value patents. The Review acknowledges that the UK should not act unilaterally as to do so would disadvantage the UK, but instead suggests the UK pursues this approach internationally. However, the Review doesn't address the fact that the large patent portfolios this measure would seek to impact tend to be held by the largest companies with the deepest pockets, and so there must be a question as to how effective such a step would be and whether it would disproportionately affect SMEs and other users of the patent system.

The divergence between the UK and the rest of Europe with regard to patenting computer implemented inventions is commented upon. Whilst the Review accepts the need for consistency (which was appealed for in many submissions during the Review), it concludes that the UK should continue with its divergent approach, and instead press the rest of Europe to adopt the UK's stance. Intriguingly, the Review suggests that the European Patent Office ("EPO") has moved towards allowing more computer implemented inventions, with an implication that the EPO and to a lesser extent the UK permit non-technical computer implemented inventions. Notably, there is no evidence cited for this conclusion, and in fact the European position has now been consistent for many years, with the UK moving away from this in recent times. Further, the UK and European patent offices already operate a policy of refusing to grant patents for non-technical inventions.

Designs

The importance of designs to the UK is emphasised, and it is suggested that presently the patchwork of rights (registered and unregistered design rights both at the UK and

European level, with overlapping aspects of copyright and trade marks) is not meeting this need. However, the Review concludes that there is insufficient knowledge of the relationship between design rights, innovation and growth and suggests that the IPO should conduct a review of this in the next 12 months. How feasible this will be given the government's recent commitment not to conduct further IP reviews during the present Parliament remains to be seen.

Trade Marks

Other than noting that more work is required to assess the relationship between counterfeiting and innovation, there is very little mention of trade marks in the Review.

Enforcement

With regard to copyright enforcement, the Review notes that whilst enforcement is necessary, ever stronger enforcement is unlikely to deter piracy; instead education and in particular the development and expansion of legitimate markets for digital content is necessary. For counterfeiting, the Review notes that more co-ordinated approaches to IP crime are still in their infancy, and proposes that the IPO takes an evidence based approach to monitoring this. Likewise, the changes to the Patents County Court are too recent to be assessed, but the Review does conclude there is an additional need for a small claims track for low value IP claims.

Finally, the Review states there is an urgent need for Ofcom to monitor the effects of the Digital Economy Act in order to provide recommendations on how it might need to be adjusted.

The IPO

The Review proposes an expansion of the role of the IPO in a number of ways. One suggestion is to improve the availability of IP services to SMEs, whether by directly providing such services or working with a network of trusted providers. This is in part designed to provide lower-cost advice to SMEs, and also to overcome the problem that whilst patent and trade mark attorneys are legally regulated, the presence of other unregulated service providers enables less reputable outfits to win business.

Further suggested functions the IPO could adopt include a duty to monitor the impact of IP on innovation and growth, the preparation of one-off reports on cases and areas where there appears to be a detriment to competition or consumers, powers to make recommendations to competition authorities and, notably, powers to require evidence in support of these functions (although the nature of such powers is not discussed).

Conclusions

p6

The Review acknowledges that a theme running throughout the submissions made during the review process is the need for stability in the system, to ensure confidence and understanding. Nevertheless, the Review concludes that changes are needed, substantially so in the area of copyright, and consequently a number of proposals are made. Many of these are not new, and as the Review acknowledges several were made as part of the Gowers Review of IP in 2006, but remain locked in the "too difficult" file. However, there are reasons why many of the previous proposals have been difficult to implement, and it is these details which must be addressed if the goals of the present Review are to be achieved. Understandably, the Hargreaves Review in most cases fails to address these details, but it is only by addressing such details that progress can be made.