The Hargreaves Review

The independent report by Professor Ian Hargreaves published in May 2011 under the title: "Digital Opportunity – A Review of Intellectual Property and Growth". The review had been commissioned in November 2010 because of concerns that the existing IP legal framework was not effective in supporting and promoting innovation and growth in the UK.

The terms of reference focused on identification of barriers to growth in the IP system, and how to overcome them, and how the IP legal framework could be adapted to enable new business models being developed in the new digital age.

The review team met with many organisations during the review period, held a number of events with interested groups, commissioned and reviewed research, and received almost three hundred documents giving written evidence.

The review reported its findings in 11 chapters and included 10 recommendations. In fact, there were other recommendations within the document and one particularly important recommendation from the Patent Judges in England and Wales which the review urged the government to implement.

Ten recommendations

The ten recommendations are as follows:

1. Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.

2. International priorities. The UK should resolutely pursue its international interests in IP, particularly with respect to emerging economies such as China and India, based upon positions grounded in economic evidence. It should attach the highest immediate priority to achieving a unified EU patent court and EU patent system, which promises significant economic benefits to UK business. The UK should work to make the Patent Cooperation Treaty a more effective vehicle for international processing of patent applications.

3. Copyright licensing. In order to boost UK firms' access to transparent, contestable and global digital markets, the UK should establish a cross sectoral Digital Copyright Exchange. Government should appoint a senior figure to oversee its design and implementation by the end of 2012. A range of incentives and disincentives will be needed to encourage rights holders and others to take part. Governance should reflect the interests of participants, working to an agreed code of practice.

The UK should support moves by the European Commission to establish a framework for cross border copyright licensing, with clear benefits to the UK as a major exporter of copyright works. Collecting societies should be required by law to adopt codes of practice, approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets.

4. Orphan works. The Government should legislate to enable licensing of orphan works. This should establish extended collective licensing for mass licensing of orphan works, and a

clearance procedure for use of individual works. In both cases, a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange.

5. Limits to copyright. Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work. The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.

6. Patent thickets and other obstructions to innovation. In order to limit the effects of these barriers to innovation, the Government should:

- take a leading role in promoting international efforts to cut backlogs and manage the boom in patent applications by further extending "work sharing" with patent offices in other countries;

- work to ensure patents are not extended into sectors, such as non-technical computer programs and business methods, which they do not currently cover, without clear evidence of benefit;

- investigate ways of limiting adverse consequences of patent thickets, including by working with international partners to establish a patent fee structure set by reference to innovation and growth goals rather than solely by reference to patent office running costs. The structure of patent renewal fees might be adjusted to encourage patentees to assess more carefully the value of maintaining lower value patents, so reducing the density of "patent thickets".

7. The design industry. The role of IP in supporting this important branch of the creative economy has been neglected. In the next 12 months, the IPO should conduct an evidence based assessment of the relationship between design rights and innovation, with a view to establishing a firmer basis for evaluating policy at the UK and European level. The assessment should include exploration with design interests of whether access to the proposed Digital Copyright Exchange would help creators protect and market their designs and help users better achieve legally compliant access to designs.

8. Enforcement of IP rights. The Government should pursue an integrated approach based upon enforcement, education and, crucially, measures to strengthen and grow legitimate markets in copyright and other IP protected fields. When the enforcement regime set out in the DEA becomes operational next year its impact should be carefully monitored and compared with experience in other countries, in order to provide the insight needed to adjust enforcement mechanisms as market conditions evolve. This is urgent and Ofcom should not wait until then to establish its benchmarks and begin building data on trends. In order to support copyright holders in enforcing their rights the Government should introduce a small claims track for low monetary value IP claims in the Patents County Court.

9. Small firm access to IP advice. The IPO should draw up plans to improve accessibility of the IP system to smaller companies who will benefit from it. This should involve access to lower cost providers of integrated IP legal and commercial advice.

10. An IP system responsive to change. The IPO should be given the necessary powers and mandate in law to ensure that it focuses on its central task of ensuring that the UK's IP system promotes innovation and growth through efficient, contestable markets. It should be empowered to issue statutory opinions where these will help clarify copyright law. As an element of improved transparency and adaptability, Government should ensure that by the

end of 2013, the IPO publishes an assessment of the impact of those measures advocated in this review which have been accepted by Government.

Government response

The Government published its response to the report in August 2011 and included a table giving its proposal for action in relation to each recommendation and indicated a timing for the action. At the same time as publishing its response, the IPO published a document outlining the UK's international strategy for IP. The Government's response to the report had indicated that it was prepared to make changes to the IP system to better serve the UK economy but conceded that it had to work within the many constraints of international agreements and European law, and would have to persuade international partners in order to make some of the changes recommended. Particular points of interest from the Government response include the following:

Recommendation 1 that evidence and not "lobbynomics" should drive IP policy was acted upon very quickly and the IPO has established a strong economics team. The team has published a research programme and started a number of projects. The Government has made it clear that limited weight will be given to evidence that is not sufficiently open and transparent in its approach and methodology but acknowledges the difficulties that SMEs have in assembling evidence.

Recommendation 2 was considered in the UK's international strategy for IP document. The Government has indicated that the IPO should continue and expand its activities within WIPO, EPO, OHIM and other international organisations. They have proposed the establishment of a network of IP attachés in strategically important countries to promote UK business interests and support UK businesses with IP issues.

In the EU, the Government has indicated that it intends to push hard for agreement on a unitary EU patent which delivers real benefits for business. As will be seen in the separate article in this issue, the likelihood of obtaining a suitable unitary EU patent, and particularly the associated court system, is looking increasingly unlikely. The review quoted research that suggested that removal of EU country barriers in IP could increase UK national income by over £2 billion a year by 2020; however, it is likely that the system being proposed at this time will lead to a loss of UK national income rather than a gain.

Recommendation 3 proposed the setting up of a Digital Copyright Exchange (DCE). It is not possible to have a compulsory DCE in view of the provisions in the Berne Copyright Convention but the Government believes such a system could be set up with incentives that would make it attractive to rights owners. The Government has appointed Richard Hooper as the senior figure who would oversee and implement the DCE. In addition to encouraging the music industry and other industries to join the DCE, there will be a consultation on voluntary codes of practice for collecting societies.

The Government has confirmed in its response to Recommendation 4 that it will be bringing forward proposals for dealing with orphan works. It is likely that the proposal will be linked in some way to the DCE proposal.

Recommendation 5 was considered by many to be the most contentious of the recommendations in that it covered the copyright exceptions. A consultation paper is expected before the end of 2011 and is likely to propose bringing those in the UK copyright laws fully into line with the broadest range of exceptions given in the EU Copyright Directive. The Government has also suggested that it intends to work with The European Commission and the EU member states to further amend the exceptions to copyright to enable the law to adapt to new technologies rather than inhibit them. The Government intends to permit non-commercial text and data mining but whether this will be sufficient to enable the new research tools proposed for analysis of published medical data to produce meaningful results is to be seen. The consultation paper will also bring forward proposals for dealing with attempts by copyright owners to negate the exceptions by use of contract terms.

The review had little to say on the substantive law on patents in its recommendation 6 and consequently the response also had little say other than to confirm that the IPO will resist attempts to permit protection of inventions of a non-technical nature; business methods will only be considered for patent protection if they fulfil the requirement of being technical. Those wishing to see the law changed in this area will have to bring forward evidence that any changes will promote innovation and growth.

The Government response has confirmed the IPO's commitment to reducing patent backlogs and will seek to further develop work-sharing with other patent offices where quality control can be assured. The one area of the patent section of the review that was considered contentious by some industry sectors concerns patent thickets; the Government has made no proposal for dealing with thickets but has requested the IPO to commission and publish research on the scale and prevalence of patent thickets. The first thing that needs to be done in this area is to define what is meant by a patent thicket and then determine whether thickets exist.

Although not formally within the remit of the Hargreaves review, the number of submissions which cited problems with the overlapping scope of design rights, whether registered or unregistered and whether European in origin or UK rights, together with doubt about the scope of coverage of designs by the copyright acts strongly suggested that the system for protection of designs was not fit for purpose. Recommendation 7 was welcomed by the designs branch of the creative economy, not least because it acknowledged its importance to the UK economy. The IPO economics team have published a number of papers on the design system and a proposal for simplification of the design system is expected in late 2011 or early 2012.

Recommendation 8 of the review covered a number of aspects in relation to enforcement of rights. The success of the Patents County Court (PCC) under its new leadership has been widely welcomed although there is still work to do to ensure SMEs are aware of the PCC and are able to take advantage of it service. The Government confirmed in its response to the review that it would, subject to establishing the value for money case, introduce a small claims track in the PCC for cases with £5000 or less at issue, initially at a low level of resource to gauge demand, making greater provision if it is needed. This work on the value for money case has now been completed and it has been confirmed that a new small claims track will be introduced at the PCC. It is anticipated that this will come into effect some time in 2012.

The IPO has been given the remit to improve accessibility of SMEs to the IP system in order to fulfil the recommendation 9 of the review. It is still to be seen how the IPO will achieve this aim and the closing of the IPO's Search and Advisory service in November 2011 will not have helped.

The Government has committed to make changes to the IPO that will make it focus better on its role in supporting innovation and growth whilst still retaining its primary role as a rights granting authority. It has confirmed that the policy advisory role will remain within the IPO but has committed the IPO to offer its economic analysis of policy issues for public scrutiny and carry out its policy development more transparently. The other aspect of recommendation 10 which caused some concerns when the review was published concerned the idea of the IPO offering a copyright opinions service; the IPO's plans for this service have yet to be published.

The recommendation in paragraph 10.26 of the report which came directly from the Patent Judges in England and Wales was that a full review of the Copyright Act was overdue; the Ministers were urged in the report not to allow constraint of Parliamentary time or other considerations to prevent the copyright Act being brought up to date. It appears that Government intends to reflect upon this recommendation in the context of the other policy measures but it has not given any timetable for doing so other than suggesting that an effective copyright opinions function in the IPO could help establish priorities for legislative change by identifying areas of practical uncertainty. The fact that there is a need for a copyright opinions service surely suggests that the Copyright Act is not in a suitable shape

for modern business and commerce and strongly teaches away from further delay in having the Act reviewed by a judicial committee.

Roger Burt, 15 December 2011