

Fit for the internet age? The Hargreaves Review of Intellectual Property and Growth

Professor Ian Hargreaves' much anticipated review of the UK's intellectual property regime was published on 18 May 2011. We provide a snapshot of its key features.

Overview

In 2006, the Gowers Review of Intellectual Property suggested that the UK's IP regime was more or less satisfactory and not in need of radical overhaul. However, Professor Hargreaves says that the copyright regime "cannot be considered fit for the digital age when millions of citizens are in daily breach of copyright, simply for shifting a piece of music or video from one device to another". As well as looking at format-shifting and other copyright issues, the new Review looks for ways to unclog the patent system and to make enforcement easier. There are no magic answers, and Hargreaves' hands are to an extent tied by EU law, but some of his proposals could give a jump-start to an IP regime that is often behind the times.

Key features of the report

Copyright - Licensing

- A headline feature of the report is the proposed establishment of a Digital Copyright Exchange, namely an on-line store to make it easier to license content. Rights owners would not be forced to join, but the vision is one of "one-click", one-stop automated licensing, with participants making licence terms fully transparent. The Exchange would not be run by the Government (so the spectre of another troublesome public IT procurement exercise is avoided) but somehow prodded into existence by it - maybe with incentives to join up in the form of higher damages for copyright infringement of content on the Exchange. The Exchange would also have an impact on orphan works, explained below.

- Hargreaves' other proposals on copyright licensing include:
 - UK support for EU moves towards cross-border copyright licensing, with licensing bodies (such as those which operate in the music industry) able to compete by granting licences beyond their national boundaries but operating under transparent codes of practice, and in some circumstances being able to license even the content of those who have not signed up to membership; and
 - legislation to enable licensing of orphan works, i.e. those whose rights owners are hard to track down. If the Digital Copyright Exchange takes off, it would then be enough for a user to say "I looked in the Exchange and the rights owner of this content was not there" to be free to use the work just by paying a statutory fee.

Copyright - Exceptions

- Hargreaves echoes Gowers' calls for the UK to implement additional copyright exceptions already available to it within the EU copyright law framework, including format-shifting, parody, non-commercial research and library archiving. In this way, the law would come into line with the reality of private digital copying and it would no longer be an infringement to make a copy of a track from a CD onto one's own MP3 player. Hargreaves wants the UK to legislate to ensure that parties cannot contract out of these exceptions. So, for example, a subscription to an electronic publication could not restrict the user from making use of the content within the statutory exemptions, such as those which relate to private research.

- Although the Review decides against recommending a US-style defence of fair use, it does suggest that the UK should work with the EU to provide additional exceptions to give more “flex” in a time of rapid technological development and that are “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.” Rather than each new form of copying automatically being illegal until the law catches up, the aim is to create broader exceptions (e.g. to allow non-infringing use of text and data analytics by researchers). These further exceptions would have to be agreed at an EU level because of copyright harmonisation within Europe.

Patents

- The Review examines what the Government can do to free up patent office backlogs (given that it can take 10 years for a European patent application to be granted) and suggests that (although patent renewal fees are only a small portion of the total costs of patenting) a fee hike might discourage the filing or renewal of low-value patents. It also favours keeping the current European restrictions on patenting software (limiting patents to where the software has a technical effect) and the rules against patenting business methods, where Europe takes a different approach from the US.

Design Rights

- Hargreaves thinks that too little is known about design rights and he wants the UK to apply a magnifying glass to this neglected area over the next 12 months. Any organisation that relies on design rights as a means of protection for their innovative efforts should carefully monitor the situation to ensure they have the opportunity to participate in any subsequent consultation (although Hargreaves argues that IP policy should be directed by “objective evidence” rather than lobbying). The Digital Copyright Exchange might cover design rights as well as copyrights.

Enforcement

- Echoing Gowers’ objective of reducing the cost of IP litigation, the Review notes that “IPRs cannot succeed in their core economic function of incentivising innovation if rights are disregarded or are too expensive to enforce”. It therefore proposes the introduction of a small claims track for low monetary value IP claims in the Patents County Court (still intended to be re-named the Intellectual Property County Court to reflect its remit).
- Hargreaves notes the difficulties of combating digital piracy, but calls for a “big push to expand the legitimate market for digital content”. In other words, it is for rights owners to develop products which users are prepared to pay for even when infringing copies are available free of charge – like the iTunes model.

The Intellectual Property Office’s role

- Hargreaves proposes a dramatic increase in the IPO’s role, by giving it an overarching legal mandate to pursue economic objectives, so that it can make evidence-based recommendations to the UK competition authorities. Moreover, the IPO should be able to issue statutory opinions on the law, which the courts would be obliged to take account of, giving it a proactive role which could help avoid litigation.

International Co-Operation

- Last but not least, Hargreaves emphasises that “the UK should attach the highest immediate priority to achieving a unified EU patent court and EU patent system” – both awaited for many years and seemingly still a long way from the statute books.

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