

UK Government responds to the Hargreaves Review

The Government has released its response to the Hargreaves Review (an analysis of our current IP regime commissioned by the Government, discussed in our earlier client alert *Fit for the internet age? The Hargreaves Review of Intellectual Property and Growth*). The Government “broadly” extends its support to the conclusions and recommendations contained in the Hargreaves Review. Although the Response does not contain details of the legislative agenda that will flow from the Hargreaves Review (which is set to be included in a White Paper due to be released in spring 2012 following further consultation with stakeholders), it does provide clear signals as to what changes the Government will endeavour to make. These are discussed below.

Evidence versus lobbying

The Government shares Professor Hargreaves’ concerns that evidence generated by business is often biased and it states that there is “a total lack of high quality evidence on some issues and an over abundance of effective lobbying”. Going forward, the Government wants “open and transparent” evidence to be at the heart of policy-making. Therefore, according to the Response, the Government has already strengthened the economics team (the team in charge of research) of the UK Intellectual Property Office (IPO) and, later this summer, the IPO will set out a research programme and issue guidance on what will constitute “open and transparent” evidence. The Government says that “the fundamental issue ... is that key data is held by business and other organisations. IPO will work with those organisations to help them to offer good quality evidence; our challenge to them is to do so.” Let’s hope that the Government will see that there is value in evidence generated by business (especially if it satisfies the IPO’s new “open and transparent” criteria) rather than “shut out” important stakeholders whilst placing the burden of evidence generation on not-for-profits and similar organisations.

International priorities

The Response directs readers to *The UK’s International Strategy for Intellectual Property* for information about the Government’s proposals on supranational intellectual property policy. However, it does suggest the Government will focus on monitoring eastern economies such as China and India, and that it strongly supports the establishment of a European Patent Court and a unitary patent for the whole of the EU.

Copyright licensing

Digital Copyright Exchange (DCE). The Government is keen to “push ahead” with plans to establish a DCE. It wants to see a DCE, or something like it, that “enables a functioning digital market in rights clearance and acts as a source of information about rights ownership” and to “serve as a genuine marketplace independent of sellers and purchasers”. This sounds like a combined copyright register and online catalogue for copyright material. The Government will aim to make the DCE “commercially attractive” to rights owners rather than make participation compulsory (which is prohibited by the Berne Convention, the international treaty that has helped harmonise copyright laws across the globe). However, making the DCE commercially attractive may be very difficult in practice given that major rights owners are unlikely to want to line up their intellectual property for the world to see and financial incentives are unlikely to sway them unless significant. The Government also suggests that rights owners will be allowed to set prices (subject to controls on unfair competition) but does not say whether different owners will be able to use different terms for licensing the use of their material. An ambitious timetable for the DCE initiative aims at implementation for the end of 2012. However, ministerial support for DCE seemed weak at a debate in the House of Commons last month (discussed in our client alert *UK MPs discuss the Hargreaves Review*) so achieving this goal may be challenging.

Cross-border licensing framework. The Government supports the European Commission's proposal for a cross-border licensing framework and will report on progress early next year.

Copyright collection agencies. The Government is sympathetic to concerns about copyright collection agencies. It recognises their value but wants to make them "more robust" as part of the UK's journey to becoming "a leader in European licensing". It wants to achieve this by requiring them to implement codes of conduct that adhere to minimum standards set by the Government and by introducing a "backstop power" that allows a statutory code to be put in place for collecting societies that fail to implement or adhere to a voluntary one.

Orphan works

The Government describes the UK's current treatment of orphan works as "a very real economic issue" and says that "potentially valuable intangible assets are simply going to waste". (At the moment, works protected by copyright cannot be used without the rights owners' consent, however hard it is to track the owner down). So the Government plans to bring forward proposals for an orphan works scheme to this autumn and to extend collective licensing to other sectors that choose to adopt it.

Copyright law exceptions

The Government agrees with Professor Hargreaves that "copyright currently over-regulates to the detriment of the UK". So it plans to substantially open up the UK's copyright exceptions regime, including a wide non-commercial research exemption covering text and data mining, limited private copying exemption, parody and library archiving. Some of these exceptions are more controversial than others. A private use exception (i.e., allowing people to copy material or change its format for private, non-commercial use) is widely viewed as acceptable, probably given that US copyright law already has a similar exception, whereas a parody exception is a concern for rights owners such as record labels.

All of the proposed exceptions should successfully remove obstacles to growth that exist in our copyright regime. For the instance the text and data mining exemption will facilitate new discoveries by scientific researchers by giving them more freedom to analyse published journals and the private use exception could open the door to online services such as the Google and Amazon cloud-lockers (which allow users to offload their digital music collections to the internet for access from any device). However, given that extending exceptions in copyright law was a feature of the Gowers Report (a similar report to the Hargreaves Review commissioned by the last Government in 2005), and that yet more consultation is planned, one wonders how quickly these proposals will reach the statute book.

Patents and innovation

The Government echoes the Hargreaves Review in relation to patents. It says that patents in some technologies are anti-competitive and hence anti-innovation and so is unlikely to extend patents to sectors from which they are currently excluded (including software) unless there is clear evidence of a benefit to innovation and growth. A number of stakeholders have voiced concerns that this makes the UK "unattractive", given that other jurisdictions extend patent protection to a broader range of technologies (including software). The Response states that the IPO will continue to set challenging targets for the reduction of its patent backlogs and that, by November 2011, it will publish findings following an analysis of the current scale and prevalence of patent thickets (the protective practice of filing for a number of overlapping patents) including whether they present a particular problem to SMEs seeking to enter technology sectors.

Design and design rights

The Government has accepted Hargreaves' challenge to look more closely at the UK's design right regime to check that it is adequate for the needs of businesses. The IPO will publish research on relative levels of design registration in the UK and impact on UK competitors this summer and then it will go on to consider whether further research is needed. By the end of this year, the IPO will publish its assessment of the case for simplification of the design right system and whether there is need for a UK registered design right alongside the corresponding EU right.

It will also consider whether to include design rights in the Digital Copyright Exchange without an initial examination of the application. The fact that UK registered designs can be obtained without prior examination by the IPO means that the Government could inadvertently allow organisations to market and charge for the use of material which in reality is not protected by any IP rights.

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