What’s in the Hargreaves’ Report and what could it mean in practice?

Professor Ian Hargreaves’ report “Digital Opportunity – A Review of Intellectual Property and Growth” was published on 18 May 2011. It concludes 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 innovation and economic growth.

The Review followed an announcement by David Cameron in November 2011 that there should be an independent review into how the UK’s intellectual property system can better drive growth and innovation.

In particular, Hargreaves was asked to look at what the UK could learn from the US’s “fair use” rules covering the circumstances in which copyright material may be used without the rights-holder’s express permission. The US fair use exception is far more flexible and less rights owner friendly than the European approach to exceptions. Hargreaves has concluded that it would not be beneficial to introduce a “fair use” type exception. Quite rightly, he concluded that it was unlikely to be legally feasible in the UK, given our obligations under European law.

Instead, he states that the UK can achieve many of the benefits of a fair use exception by adopting copyright exceptions already permitted under European law.

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The Recommendations

Here is a brief summary of some of Hargreaves’ recommendations:

- The Government should bring together rights holders and other business interests to create the world’s first Digital Copyright Exchange. Hargreaves envisages that this mechanism would make it easier for rights owners to sell licences to their work and for others to buy them. He recommends that the Digital Copyright Exchange should be designed and implemented by the end of 2012, along with an agreed code of practice.

- The UK should support moves by the European Commission to establish a framework for cross border copyright licensing.

- A common code of practice for copyright collecting societies should be adopted, approved by the Intellectual Property Office (IPO) and the UK competition authorities, to ensure that collecting societies operate in a way that is consistent with the further development of efficient, open markets.

- Legislation ought to be introduced to release “orphan works” (works to which access is effectively barred because the copyright holder cannot be traced) for use. Hargreaves advocates the establishment of an 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.

- A private copying exception to copyright protection should be introduced to allow format shifting (works could then be legally copied into different formats e.g. CD to MP3).

- An exception to copyright protection should be introduced to allow use of copyright material in parody. The review gives the example of the recent parody Newport State of Mind (based upon Empire State of Mind, by Jay-Z) which resulted in action by the rights owners to have it removed from YouTube. In the US, many previous parodies of the same song have not attracted such action, probably because US fair use exceptions often permit parodies.

- The Review recommends an exception to allow scientific and other researchers to use modern text and data mining techniques. Hargreaves recommends that the Government should press at EU level for the “introduction of an exception allowing uses of a work enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work.” For instance, in data mining or search engine indexing, copies need to be created for the computer to be able to analyse. However, the copy created does not (directly) compete with the value of enjoying the underlying work.

- Hargreaves envisages a new role for the Intellectual Property Office (IPO): the IPO should be given the necessary powers to focus on its central task of ensuring that the UK’s IP system promotes innovation and growth. As part of that task, the IPO should be empowered to issue statutory opinions where these will help clarify copyright law. For example, it would issue opinions where new developments in technology and markets create fresh uncertainties.

- In terms of enforcement, Hargreaves recommends that the Government should introduce a small claims track for low monetary value IP claims in the Patents County Court. The Review describes these cases as ones where the claimant is sometimes more concerned with discouraging future infringement than with the monetary value of the claim. The Review also recommends that the Patents County Court (the PCC) be renamed the “Intellectual Property County Court” to reflect the fact that, despite its name, the PCC deals with trade mark, designs and copyright cases as well as patents.

- Hargreaves recommends that the UK should attach “the highest immediate priority to achieving a unified EU patent court and EU patent system.” At the moment, there are 38 different patent regimes within Europe. Currently, national patents have to be relied upon and litigated separately in different countries, according to the laws in those countries.
Comment

The Digital Copyright Exchange – complex and expensive?
While the concept of the world’s first Digital Copyright Exchange is an interesting one, we predict that it will be greatly resisted by the larger players in the creative industries. It will take hugely significant amounts of time, resource and commitment from rights holders to ensure that all relevant rights to all relevant works are recorded within the Exchange. Issues that arise include:

- Who will police whether rights are being accurately recorded within the Exchange? The opportunity for abuse is immediately apparent, with many disputes over ownership being flushed out at the outset of the Exchange.
- How will limitations on licences (e.g. territorial restrictions or particular restricted uses) be recorded? Some licences will have a string of limitations attached to them, making the Exchange quite complicated to navigate for a lay person.
- Who will fund it? It is unlikely to be the Government given these times of austerity. Therefore, funding is likely to come from within the creative industries. Is this a cost that the industry can stomach or will this be seen as yet another cost to the creative industries, along with those of tackling digital piracy?
- How will it relate to existing forms of collective licensing? The UK already has sophisticated collective licensing organisations (e.g. PRS for Music). What role will they have to play in the new scheme?

If the obstacles can be overcome and the Exchange is adopted, there is a further question mark over whether opting out and not entering details of copyright works is a practical option. The Review recommends that registration should be optional, but if a work could be deemed to be an orphan work if it does not appear in the Exchange, the incentive to enter details of the work is obvious. If, in practice, the Exchange is not optional, we will be introducing a system which is tantamount to a requirement to register copyright works. This could fundamentally change the nature of copyright law.

Registration of copyright is something which has been rejected in most countries. In particular, international conventions, principally the Berne Convention, provide for the harmonisation of rights at an international level without a requirement for national registration.

Gowers all over again?
A number of the other points explored in this Review have already been thoroughly reviewed by the previous Government in recent years. In 2005, Gordon Brown commissioned a review of the intellectual property rights of the UK. Andrew Gowers’ report was published in December 2006 and recommended a limited exception for format shifting. Following the review, the Government consulted stakeholders on the proposal and came to the conclusion at the end of 2009 that the new exception was likely to be too complex. For example:

- How many format shifts would be allowed?
- Would the exception be retrospective?
- Would there have to be a requirement to keep an original copy to evidence initial purchase?
- How would rights holders be compensated? Would a levy on digital media products be introduced?
- Most significantly, which classes of works would be subject to the exception? Sound recordings and films, or works of all kinds?

With the rapid growth of markets for digital forms of other content (such as audio and ebooks), some rights holders argued that an exception could seriously undermine emerging business models. If photographs were included within the exception, photographers would lose the right to control reprints of their work, which could undermine their incentives to create.

These issues are all going to need to be explored again if a format shifting exception is to be introduced and, presumably, we are going to see the same hurdles arise once again. We will have to wait and see whether this Government also abandons introduction of the exception due to the complexity of drafting palatable legislation.
As for parody, following Gowers’ recommendation that an exception be introduced, the IPO concluded in 2009 that most respondents to the earlier consultation expressed no interest in a proposed exception for parody, caricature and pastiche and that there was not sufficient justification to introduce such a new exception in the UK. However, the then Government concluded that there was scope for further debate within an EU context about the potential for a non-commercial use exception, which if implemented could cover some parody. **It will be interesting to see whether the Coalition Government comes to a different conclusion from that of the Labour Government.**

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