



House of Commons

Business, Innovation and Skills
Committee

The Hargreaves Review of Intellectual Property: Where next?

Government Response to the Committee's 1st Report of Session 2012–13

Third Special Report of Session
2012–13

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Business, Innovation and Skills Committee

The Business, Innovation and Skills Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Business, Innovation and Skills.

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The current staff of the Committee are James Davies (Clerk), Neil Caulfield (Second Clerk), Peter Stam (Committee Specialist), Josephine Willows (Committee Specialist), Ian Hook (Senior Committee Assistant), Pam Morris (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant).

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Third Special Report

The Committee published its First Report of Session 2012–13, *The Hargreaves Review of Intellectual Property: Where next?* on 27 June 2012. The Government's Response was received on 29 August 2012 and is appended to this Report.

Appendix: Government Response

Introduction

The Business, Innovation and Skills Select Committee's inquiry into this important area of policy has been a timely and valuable complement to public discussion, and to policy-making.

The environment in which Intellectual Property of all types operates is changing fast. The Government is determined to ensure that the framework can adapt appropriately, so that it can continue to deliver its core aims in this changing environment, and in relation to developing technologies. We warmly welcome the Committee's interest in Intellectual Property issues, and look forward to its continuation.

Below are the conclusions and recommendations of the Committee, and specific responses by Government.

Evidence-based policy

(Recommendation 1) We welcome the Hargreaves Review's recommendation of a more evidence-based approach to intellectual property policy development. Although we agree that certain estimates used to support recommendations in the Hargreaves Review might be criticised as optimistic, the Review itself acknowledged that further economic analysis would be necessary. We welcome the Intellectual Property Office's reassurances that more detailed analysis is on-going and trust that it will pursue that work and act on external criticism of data and methodologies. We also agree that the involvement of the Regulatory Policy Committee as an independent auditor of economic analysis is a sensible policy development. (Paragraph 12)

The Government is committed to delivering high quality, informed and influential policy on Intellectual Property. In pursuance of this the Government has significantly strengthened the analytical capability of the Intellectual Property Office (IPO).

The Office will continue to develop policy in a transparent and balanced way based on evidence and with a range of stakeholders. The forward research programme is discussed with stakeholders, and all research projects are subject to peer review. Best practice in the conduct of research is drawn into new projects where appropriate.

The Government will continue to develop economic analysis in relation to the Hargreaves recommendations and will continue to work with the Regulatory Policy Committee, as appropriate in the course of further policy development and implementation.

Format-shifting

(Recommendation 2) We endorse the approach taken in the Consultation on Copyright to the issue of format shifting. We expect this issue to be an early opportunity for a greater degree of evidence-based policy-making in the intellectual property area. Without wishing to anticipate the outcome of that process, we suspect that a copyright exception based on personal use or use within the private sphere might prove most practicable and justifiable. (Paragraph 36)

The Government welcomes the Committee's support for seeking a solution on private copying (including format-shifting), and notes the Committee's initial view that a solution for personal use or use within the personal sphere may be appropriate. The Government will carefully consider the Committee's recommendation to take account of evidence relating to actual lost sales versus opportunities for further revenue. Any potential exception would be sufficiently narrow to cause only minimal harm to rights holders, thus not requiring a system of compensation such as a levy.

Parody

(Recommendation 3) Given the consensus that policy in the area of intellectual property should move forward on the basis of a better evidence base, we believe that before proceeding with a potential policy exception for parody there should be a closer examination of certain economic issues including, possibly: (i) the actual transactional costs involved in negotiating licences; (ii) the comparison between those costs and the anticipated benefits; (iii) how much creative activity is actually stifled by the current legal situation; and (iv) what proportion of parody cases might lead to an allegation of moral rights infringement, and what the costs of resulting disputes would be. (Paragraph 42)

(Recommendation 4) In its review of responses to the Consultation on Copyright, we recommend that the Government give due weight to economic data on the potential benefits and disadvantages of implementing a parody exception and take such data into account in its eventual decision. (Paragraph 43)

(Recommendation 5) On a possible exemption for parody, we are inclined to agree with the Government's proposal for a fair dealing exception, but with disapplication of the exception where there is reputational damage and subject to a robust assessment of the economic benefits. We recommend that the definition of unfair reputational damage should make provision to protect (within the exemption) genuine political and satirical comment supportive of free speech. (Paragraph 47)

The Government notes the Committee's observations and will continue to explore those issues. The Government considers that much of the protection of the kind the Committee suggests would be implicit in a fair dealing exception, underpinned by an unchanged moral rights framework.

Content mining

(Recommendation 6) We believe that policy on content mining should have regard to potential risks. Revenue might not provide the necessary investment to support data access and the successful UK scientific publishing business might be disadvantaged. However, policy should also recognise the potential benefits of content mining, the core contribution of researchers and the need for ready access. We believe that publishers should seek rapidly to offer models in which licences are readily available at realistic rates to all bona fide licensees and we encourage the Department to promote early development of such models. (Paragraph 65)

The Government welcomes the Committee's recognition of the value of this technology, and of the need to support it further, while minimising risks. The Government is determined to develop a framework which gives the best support to research over the long term, which includes maintaining successful and secure research publishing. The Government will continue to consider this issue and the Committee's recommendations on it.

Revision of the CDPA, and the timetable for implementation of Hargreaves

(Recommendation 7) We did not hear any arguments in favour of retaining the UK's copyright statute in its current form. This legislation was enacted before computers became commonplace, and needs rewriting. We recommend that the Government put measures in place for bringing up to date and consolidating the UK's principal copyright statute and related legislation at the earliest opportunity notwithstanding the likely need for earlier measures to reflect the recommendations of the Hargreaves Review. (Paragraph 77)

(Recommendation 8) The Enterprise and Regulatory Reform Bill paves the way for certain reforms to copyright including through secondary legislation. We understand that there is also a possibility of further measures requiring primary legislation being introduced in this parliamentary session, but that others might be delayed. We urge the Government to press ahead as soon as possible with measures to reform copyright where the case is made out for urgent change to support growth in the economy. We recommend that the Government set out a clear timetable for all such measures covering both primary and secondary legislation. (Paragraph 78)

The Government notes the Committee's views on the Copyright, Designs and Patents Act, and will consider this issue further.

The Government agrees that new technologies continue to offer new challenges to the legal framework, and the effective operation of it. However, we do not consider that a full and comprehensive revision of the Act could be delivered easily or swiftly. The review of Company Law took ten years. Inevitably, this is a moving target. EU policy continues to develop, as do international initiatives. There are serious questions about how much new consolidation can or should be done at national level, in the context of that parallel activity. Any revision would also be the subject of very considerable pressure from different stakeholders concerned to shape the law according to their own vision, both during the

drafting process and during the legislative process, and would need considerable time and space in the legislative programme.

The Government fully recognises the Committee's concerns, but believes that the immediate priority is to act where change is needed now. Following the Hargreaves Review, the Government is proposing a considerable group of measures for implementation. Furthermore, at Budget 2011 the Government committed to "no further broad reviews of the IP rights regime during the lifetime of this Parliament".¹ We will consider further, and we will discuss in more detail with the legal experts.

On the timetable for implementation, the Government welcomes the Committee's recommendation to press ahead as soon as possible with measures to reform copyright where the case is made out for urgent change. For Hargreaves measures in the current Enterprise and Regulatory Reform Bill, subject to Parliament's approval for the Bill, the Government is continuing its productive discussions with a range of stakeholders on the detailed operation of the policies and envisages consultation on the draft secondary legislation as we move from 2012 to 2013. Schemes would then be introduced by secondary legislation on or after the October 2013 common commencement date.

The timetable for future work on the Digital Copyright Exchange will depend on the recommendations of Richard Hooper's report, and how those are taken forward by business, users and potentially also the Government.

On other Hargreaves copyright measures, the Government has set out its intention to publish its response to consultation later this year, and will outline a timetable for implementing measures taken forward at that stage.

Orphan works

(Recommendation 9) We support the development of an orphan works scheme provided that appropriate protection for rights holders is included. We agree that the Copyright Tribunal should have jurisdiction over licensing but we recommend that it, or an alternative body with appropriate powers, be given authority to block usage in instances of particular potential harm to rights holders or where monetary compensation might not suffice. (Paragraph 86)

(Recommendation 10) We recommend that evaluation of a potential orphan works registry include consideration of the need for author's rights of identification to persist over and against any waiver that has previously been made contractually. This might take the form of a presumed right of identification on the registry (notwithstanding any previous waiver) unless other factors apply such as the scope of the waiver itself. (Paragraph 89)

On orphan works, the Government welcomes the Committee's support for the development of an orphan works scheme provided that appropriate protection for rights holders is included. The Government has proposed powers for the Secretary of State to implement an orphan works scheme subject to certain safeguards, including mandatory diligent searches with verification by an independent authorising body, so self-certification

1 *The Plan for Growth*, HM Treasury/BIS, March 2011, p.100, http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf

will not be possible. Remuneration would need to be set aside at a rate appropriate to the type of work and type of use. These safeguards and further operational details will be set out in secondary legislation. The Government will consider the Committee's observations and recommendations very carefully.

With regard to the powers of the authorising body, the Government is considering the scope of the scheme and whether the authorising body should, for example, restrict any adaptations that might be considered derogatory. It may, however, be difficult in practice in some circumstances to ascertain when instances of particular harm might occur or where monetary compensation might not suffice.

With regard to the authors' right of identification, this is a moral right. Under the proposed scheme, the assumption would be that moral rights had not been waived but had, in fact, been asserted, because in many cases it would not be known whether this was the case or not. Therefore, any licensed use of the orphan work should carry a credit where the name of the creator is known. This would also be an appropriate piece of information to put on the orphan works register to help with identification, but there will also be many occasions when the names of creators/rights holders is not known. In those cases the licensed use of the work would carry information to say that it has been licensed as an orphan work and give details of how to claim ownership.

The proposed Digital Copyright Exchange

(Recommendation 11) We can see many potential benefits in principle to a digital copyright exchange provided that it makes best use of technology to avoid bureaucracy and the replication of existing systems. We conclude that Richard Hooper's review of copyright licensing options and a possible digital copyright exchange is an important stage in policy development and it is critical for that review to examine the costs and benefits of the possible models fully so that policy proposals are credible. (Paragraph 108)

The Government welcomes the Committee's support for this. We look forward to Mr Hooper's report.

Collecting societies

(Recommendation 12) We agree that statutory regulation of collecting societies should be a last resort. The collecting societies have accepted the need for change. We support the proposal to introduce regulation by way of a voluntary code backed up by the establishment of an ombudsman. (Paragraph 114)

The Government welcomes the Committee's agreement that copyright collecting societies should adopt codes of conduct. Following the recent consultation, we will be publishing minimum standards on which these codes should be based. In addition, we will legislate for a reserve power to put in place a statutory code for a collecting society which fails to self-regulate.

The Government agrees that statutory regulation should be a last resort. Collecting societies will be given every chance to self regulate. The reserve power will only be used where this fails. However, it was clear in evidence from the Hargreaves Review and from

the Government's subsequent consultation that users of collecting societies, many of whom are small businesses, feel that codes need to be enforceable to provide real protection. The reserve power provides that reassurance.

Designs

(Recommendation 13) We welcome the review of UK design law being undertaken by the Intellectual Property Office. The present complexity of the design protection system in the UK might be acting as a disincentive to use and hence as a brake on innovation. If a revision of the law is called for by the industry, the Government should press forward with proposals for implementing a new and simplified structure of design rights following that review. (Paragraph 119)

The Government welcomes the Select Committee's support for the ongoing work on the reform of the design legal framework.

We note the Committee's suggestion for a simplified structure for design rights. Despite the complexity of the current system, a completely new structure for design rights does not seem to be what users want. According to responses to the 'call for evidence' both registered and unregistered types of UK design right have a place in protecting the work of UK designers. Currently the Government does not have a decided position on the way forward, but in view of these responses, the proposed consultation focuses on improving the way the existing rights work. The Government will be engaging with as wide a group of stakeholders as possible, during further policy development.

Patent thickets

(Recommendation 14) Patent thickets are clearly an area that requires in-depth analysis. We therefore applaud the level of detail as well as the alacrity with which the IPO approached its initial study. Further work needs to be done to establish whether a proportion of increased patent filings has derived from the wish to support negotiating strategies. We look forward to hearing more on this from the further studies being conducted on behalf of the IPO. (Paragraph 127)

The Government welcomes the Committee's support for work to explore the scale and prevalence of patent thickets, including whether they present a particular problem to small to medium enterprises (SMEs) seeking to enter markets. The Government will consider the Committee's recommendations in the course of further policy development.

The first part of this work, a report on patent thickets, has been published on the IPO website. The Economics, Research and Evidence team at the IPO have initiated a second section of work on thickets, including research to provide further insight into the potential barriers to entry for SMEs and points of entry and exit into and out of the technology space. It is expected that the outcomes of this research will be delivered in November 2012. Once the second report has been issued, and the evidence reviewed, a policy decision will be made on the need for and form of any future action.

In parallel, the Patent Informatics Team of the IPO will develop the thicket detection techniques over the next 12 months to allow the IPO to continue to provide further value-added services. The scope for further work on the increase in patent filings which may be

linked to negotiating strategies will be considered, but lies beyond the current remit of that project.

The proposed unified patent and patent court system

(Recommendation 15) It is clear to us and the European Scrutiny Committee that the Government's current negotiation strategy for a Unified Patents Court is not fit for purpose. As a matter of urgency the Government needs to take a firmer stand for UK interests in the UPC negotiations than was manifested in the recent evidence session held by the European Scrutiny Committee. In particular, it needs to set out clearly defined options for outcomes acceptable to the UK and a robust strategy on how to translate those options to an acceptable overall solution. Such a strategy has to clearly state the Government's position on avoiding European Court of Justice jurisdiction, avoiding the risk of remote and costly litigation for UK business, and neutralising or mitigating the effects of any bifurcation regime. Furthermore, that strategy should include a cogent argument for locating the central court in London and not one that relies upon hope and aspiration. Anything less runs the risk of undermining the competitiveness of British industry. (Paragraph 148)

(Recommendation 20) We have major concerns about the proposed Unified Patents Court treaty. The treaty has the potential to offer great benefits to the UK but only if UK interests are protected. The Government's current approach does not provide a robust defence of those interests. We believe that the Government needs to reconsider its strategy and the capability of the negotiation team as a matter of urgency. (Paragraph 170)

The Government notes the Committee's comments on this issue. The Government is committed to the creation of a Europe-wide patent system that brings real benefits for businesses, consumers and the economy. We have listened to our stakeholders, lobbied hard and secured some important decisions in the UK's favour. The agreement achieved in the European Council represents a major success for the UK and for businesses. The Government will continue to work hard to ensure the detailed arrangements reflect the needs of UK users.

Enforcement

(Recommendation 16) We applaud the work that is being done by way of informal approaches to intermediaries to discourage pirated content. Furthermore, the recent April 2012 decision of the High Court to insist that internet service providers block file-sharing by pirated content sharing sites is to be welcomed. We encourage the Government to press forward with bringing sections 3 to 16 of the Digital Economy Act fully into force, subject to proper review after implementation. (Paragraph 160)

The Government welcomes the Committee's recognition of the importance of enforcement and the recent achievements of government in this field, in particular in addressing online infringement.

The Government agrees that the High Court's decision to require internet service providers to block file-sharing by pirated content sharing sites is welcome, as is the copyright owners' action in utilising the protections provided under existing legislation.

The Government also welcomes the Committee's endorsement of our approach to encouraging intermediate content providers to cooperate with copyright owners in making illegal sites less financially rewarding in relation to advertising and other revenue streams.

The Government will continue with its approach to these issues, and is constantly building on its links with both rights holders, content providers, ISPs and others.

The Government intends to continue implementing the online infringement of copyright provisions in the Digital Economy Act as the Committee recommends. The Secretary of State for Culture, Media and Sport laid the draft Sharing of Costs Statutory Instrument in Parliament on Tuesday 26 June. On the same day Ofcom published the Initial Obligations Code and started a one month consultation under s.403 of the Communications Act 2003 as well as consulting over a 12 week period on the implementation of the Sharing of Costs Statutory Instrument. Government still expects the first notifications to be sent under the system in the first quarter of 2014, and for this to make a significant impact on unlawful peer-to-peer file-sharing.

In addition to this activity in online infringement; the Government is making significant and ongoing changes to the Patents County Court which will dramatically improve access to justice for SMEs wanting to protect their IP rights. These changes have reduced costs and streamlined the process. The IPO also continues to coordinate the IP Crime Group, which brings together government, industry and enforcement agencies to identify and disseminate best practice, co-ordinate enforcement activities and raise awareness of IP crime.

Advice for SMEs

(Recommendation 17) We are impressed with the range of solutions that the Intellectual Property Office has developed to address SME needs in the area of intellectual property. This is an important area to address to support growth in the economy and we recommend that in its Response to this Report the Government set out in detail its commitment to this service in terms of money and resources. (Paragraph 167)

The Government welcomes the Committee's positive appraisal of plans to address SME needs. Ensuring that these businesses, which make up 99% of UK enterprises and nearly 60% of UK employment, can maximise the value of their intellectual property assets is key to economic growth. We are continuing our discussion of the proposals in our paper 'From Ideas to Growth' document with businesses, their representative organisations, advisory partners and others.

Conclusion

(Recommendation 18) A considerable amount of high-quality work on policy development has been undertaken in the year since the Hargreaves Review. It will be important to maintain that momentum alongside the more rigorous approach to policy formation that Hargreaves recommended. Conclusions are near to formation in many areas, and the Government should press ahead with measures to implement new policy in those areas as soon as possible. We recommend that the Department act swiftly to bring in legislation to that effect. (Paragraph 168)

(Recommendation 19) While we recognise that the Government is undertaking a major reform in a complex area, changes are both necessary and urgent. We therefore will expect the Government to set out its road-map for implementation, including a timetable for legislative action, in its Response to our Report. (Paragraph 169)

The Government is grateful for the Committee's appreciation of the work done so far.

The Government is now proceeding with legislation to implement the proposals on orphan works, extended collective licensing, and the regulation of collecting societies, in the Enterprise and Regulatory Reform Bill now before Parliament. The ERR Bill has just completed its Commons Committee stage, and is expected to reach Report and Third reading in the autumn.

The Government will set out plans in relation to the other proposals deriving from the Hargreaves review, including copyright exceptions as soon as possible. We have summarised the next steps on patent thickets, designs and online enforcement above.