THE HARGREAVES REPORT: [1]
HOGARTH CHAMBERS' RESPONSE

ANOTHER MIXED BAG

Executive summary

On the plus side, the Report shows a refreshing scepticism towards some of the lobbyists' more extreme assertions. More importantly, it contains some genuinely innovative proposals which could help drive growth: the idea for a digital copyright exchange (which should be achievable with enough political backing); the suggested EU exception for uses such as data mining and search engine indexing (which may prove rather more challenging to implement); and some useful ideas about patent thickets (ditto).

But other elements of the report are far less striking. Many of the proposals have been seen before (in the Gowers, Jackson and IPUC Committee reports or in the Digital Economy Bill) or are already waiting to be implemented (in the Digital Economy Act). The proposals for educating file sharers, SMEs and the general public, while laudable, are underwhelming. We doubt whether a change of name, however sensible, will really have much effect on the (now very effective) Patents County Court or whether a new Copyright Act (however desirable) will benefit anyone except Judges and practitioners. Finally, it is disappointing that the needlessly complex "thicket" of design law is simply left to further investigation.

At the end of 2006, we described the Gowers Report as a "mixed bag". The same can be said of Hargreaves. This may explain why the Government is taking a month to decide how to respond. If we think there's anything interesting to say about the Government's response we will comment further.

[1] *Digital Opportunity A Review of Intellectual Property and Growth*, an Independent Report by Professor Hargreaves, May 2011

Chapter 4 - Copyright Licensing

The Report's main aim in this area is to ensure that the system for clearing rights is adapted to serve the market opportunities which digital speeds and volumes make possible. The headline proposal is for a **digital copyright exchange**: an online market place for licences for digital works. The exchange would be convened and funded (but not created) by the Government. Incentives to participate might include: stronger remedies (e.g. higher damages) for infringement of works which are available on the exchange; the disapplication of the Digital Economy Act to works which are not; a requirement that any orphan works search (see below) would involve checking the exchange; and giving authors the right to withdraw from contracts with publishers/record companies if works were not made available on the exchange. The exchange will no doubt need to be coordinated with the agreement for online access to out of commerce books which is currently being sponsored by the European Commission.

Many of the incentives will require legislation and most will be controversial. Careful thought will be needed to ensure they are consistent with the Berne Convention's prohibition of formalities and the Enforcement Directive. It remains to be seen whether any incentives which are eventually introduced will be enough to persuade content owners to participate.

Also in this area, the Report recommends the resuscitation of the Digital Economy Bill proposals for **extended collective licensing of "orphan works**", that is works whose author cannot be ascertained after a reasonable search. Mass licensing of collections which include some orphan works would be operated by collecting societies. Licensing of individual orphan works would operate under a Government scheme. The owner would be paid a licence fee (which would often be nominal) if he or she appeared within a specified time. These ideas will once more face stiff opposition, particularly from photographers. At the same time the Government will have to be careful to avoid overlap and confusion with the recently announced EU proposals in this area.

Finally, in the field of collective licensing, the Report invites the Government to support the Commission's proposals (not yet published) for a framework for **cross border licensing**. In addition, it suggests new legislation to require **collecting societies** which have not already done so to adopt codes of practice to be approved by the IPO and competition authorities. In fact, such legislation seems unlikely given that European proposals in this area are to be announced shortly.

Chapter 5 - Copyright exceptions

The Report rightly criticises the existing permitted acts regime as being too inflexible to face the challenge of new technologies and too difficult for non-lawyers to understand.

At the UK level, the Report recommends the implementation of a number of permitted acts which were proposed by the Gowers Review in 2006 but not implemented (the Report decries this "failure of the copyright framework to adapt"):

- a limited **private copying** exception to permit format shifting within the family;
- an extension of the **non-commercial research** exception to the full range of media (and, going further than Gowers, to the use of analytics and data mining);
- extension of the **archive exception** to all categories of works; and
- a new permitted act of **parody**.

In general, the Report suggests, permitted acts should not be capable of being overridden by contract. All these changes will require extensive amendments to the CDPA 1988 (or its successor –

see below) and although much of the groundwork has been done, it remains to be seen if there is the political will to implement them.

At the EU level the Report recommends that the Government should press for a new exception allowing **uses enabled by technology which do not directly trade on the underlying creative and expressive purpose of the work**. Examples given are data mining and search engine indexing where (according to the Report) the technology provides a substitute for someone reading the documents and does not compete with the work's normal exploitation. This is an interesting idea but it receives no mention in the Commission's recently announced Intellectual Property Strategy; accordingly the immediate prospects for its implementation must be bleak at best.

Chapter 6 - Patents

In respect of patents the Hargreaves Report identifies a number of issues as obstructions to innovation. One is **patent thickets**, a profusion of applications (primarily in the computer technology, telecoms, pharmaceuticals and machine tools sectors) leading to heavy burdens on patent offices and overlapping patent protection with disparate owners. The resulting thickets render effective exploitation of innovations difficult, especially for SMEs, cause disproportionately high numbers of disputes in those sectors, sometimes clogging the court system, and can also act as obstacles to entry for SMEs. Patent thickets also provide rich pickings for patent trolls.

Possible routes through these thickets are identified, but the obstacles to implementing them imposed by international obligations (especially the EPC) and the need for garnering international support from competitors are perhaps not fully comprehended. The suggestions include:

- Taking a leading role to promote international efforts to cut backlogs, including by work sharing between patent offices in other countries.
- Working to prevent the extension of patenting to business sectors where the incentive effect of patents is low compared to the overheads imposed by them.
- Adjusting the financial incentives (fees) operative on applicants/proprietors when applying for and assessing whether or not to renew.
- Ensuring that only high quality patents (whatever they are) are granted and/or promoting early low-cost challenges, for example by way of opposition.

These suggestions are in addition to the sectors/markets' own developments of standards, patent pools and cross-licensing.

These proposals, if carried forward, will presumably also have to be harmonised with the Government's "**Patent Box**" aims, part of its proposed corporate tax reform aimed at delivering a more competitive system. Those proposals include further incentivising R&D efforts through revised reliefs/tax-credits and reducing corporation tax on income from the exploitation of patents to make the UK a more attractive place to hold patents. Areas of debate flowing from the "Patent Box" initiative include: how to assess income from patents, whether and if so how to calculate and so incentivise own-use exploitation and, of course, how to prevent misuse of the resulting changes to the tax system.

The Government's stated intention is to bring forward appropriate regulation in the 2012 Finance Bill. It will be interesting to see whether these two initiatives master the winning technique for a three-legged race and fall into step, or each proceed at different paces with the risk of unintended consequences.

Chapter 7 – Designs

Professor Hargreaves noted with surprise that Designs were not specifically mentioned in his terms of reference "unlike patents and copyright". Actually, the word "patent" does not appear there either, though there is copious reference to IP rights, which might have been expected to include designs. Be that as it may, the Hargreaves Report makes no concrete recommendations for changes to design law.

The Committee was well aware of the importance of design rights to the UK economy. Some evidence was received by the Committee as to problems faced by some designers who find their ideas being taken without compensation by those to whom they demonstrate them, and as to the problems of SMEs whose designs are taken without compensation by major retailers. The absence of criminal sanctions for design infringement was also noted.

On the other hand, the Committee also foreshadowed the possibility that design right could, like copyright, have a freezing effect on worthwhile enterprise. It mentioned the (admittedly controversial) notion that the fashion industry actually benefits from copying, and it was concerned about the possible implications of future 3-D copying machines (which on the one hand might be convenient engines of piracy, but on the other might become vital tools in many trades, like photocopiers).

Given the overall paucity of evidence about the merits or demerits of the existing system, the Committee confined its recommendations to a need for further investigation, and we cannot do better than quote its short and simple conclusion:

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.

Chapter 8 – enforcement and disputes

Much of this chapter is devoted to setting out the varying levels of "pirate activity" believed to exist and the estimates of its effect on the economy in general and on the creative industry sector itself. The Report highlights the absence of any reliable figures in this area and the absence of disclosure of the methodology in many of the assessments produced by the rights holders' pressure groups. Nevertheless the Report does attempt to come up with a range for the financial effect. The effect on the economy in general is relatively small since not having to spend money on legitimate purchases of material protected by, for instance, copyright, will mean that the consumer has more money to spend on other purchases. So far as the effect on the creative industries is concerned, the effect is, of course, greater but even so there is not necessarily any correlation between someone who downloads infringing music and a loss of sale by a rights owner.

The Report proposes a three pronged attack to attempt to combat the perceived problem caused by the growth of digital technology: (1) **education** to change the seeming social acceptability of copyright infringement; (2) **improved enforcement measures** and, in particular, the bringing into force of the measures included in the Digital Economy Act; and, (3) **industry changing its business models** to make licensed materials available to a high quality and at a reasonable price. It emphasises that all three prongs are important and each one, in isolation, is unlikely to be effective.

The Report has a short section on counterfeiting, emphasising that the same problem of obtaining verifiable figures for the prevalence and economic effect exists even in the real world of counterfeiting. This section is significant since it includes consideration of the value of trade marks in encouraging investment and creating business growth.

Finally there is a discussion of the cost of enforcing IP rights. There are two concrete proposals: (1) to rename the Patents County Court as the Intellectual Property County Court to broaden awareness of its wider function; and (2) setting up a small claims track for low value IP matters, particularly where the priority is preventing future activity rather than recovering damages. Both of these measures were proposed by the Jackson Review but not implemented when the Patents County Court was revamped.

The Report also advocates an increased and more demanding role for the IPO in leading the way in collecting reliable evidence on the links between counterfeiting and innovation, mirroring the European proposals to give OHIM the responsibilities of the European Observatory on Counterfeiting and Piracy

Chapter 9 – SMEs

This chapter explores the relationship between SMEs and IP. In addition to the improvements recommended in chapters 3 – 8, the Review identified three further areas that were of particular relevance to SMEs.

First, the evidence was found to reveal a gap in the IP knowledge of SMEs; secondly, it was found to reveal gaps in the services available to SMEs; thirdly, and unsurprisingly, the cost of managing IP (encompassing obtaining and maintaining registered rights, and bringing and defending proceedings) was found to hinder SMEs.
The well recognised problem that SMEs with little or no cashflow face in meeting fees for professional advice and for registration does not need further explanation.

The gaps in IP knowledge and in the availability of services are dealt with together. The review assumes that the way in which SMEs are to cure their lack of knowledge is through assistance from a relevant service provider. However, even in obtaining such services, SMEs are already hindered by a lack of knowledge: the range of different types of service provider (patent and trade mark attorneys, solicitors, unregulated IP advisors, and the IPO, as examples) means that an SME does not know where best it should go for advice. When it does look, its lack of knowledge can leave it unable to distinguish a reliable advisor from a pretender, and the review heard of costly consequences of poor advice from inappropriate sources.

Aside from the difficulty in selecting the appropriate advisor, the Review found that SMEs keenly desire a single source for advice both on obtaining and on exploiting IP rights.

The Review recommends that the task of solving these problems should fall on the IPO, by offering paid for advice itself, and/or by developing a well organised network of intermediaries to do the same. Which route is adopted is left to the IPO.

The advice SMEs need to fill the gaps identified by the Review is already available from IP professionals (including the IP Bar), so SMEs that do not know where to turn for advice are unlikely to be assisted by a further advisory service from the IPO. However, a service from the IPO that identified the type of advice an SME needed and gave details of approved businesses capable of providing that advice would allow SMEs to settle on the source of advice to meet their needs in a more informed way. If the proposals of Chapter 9 are adopted, that route seems the more attractive.

Chapter 10 – an adaptive IP framework

The Report is highly critical of strategic planning on IP issues in the UK: "It is impossible to avoid the conclusion that there is something deeply and persistently amiss in the way that policy towards IP issues in the UK is determined and/or administered." The criticism is particularly directed to planning, or lack of it, in the area of copyright law. This is partly put down to the origins of the Intellectual Property Office in the Patent Office which had existed under that name since 1852.

The Report comments on the need for any body charged with policy development in this area to be robust. By this is meant having the ability to withstand powerful lobbying by the "persuasive powers of celebrities and important UK creative companies" which have "distorted policy outcomes". It particularly points to the effect on the Digital Economy Act which was heavily amended during its passage into law as a result of lobbying by interested parties.

The Report proposes that the IPO should be given an overarching legal mandate to focus on promoting innovation and growth and subordinating other IP issues to that objective. "This should state that IPO decisions will be based in evidence and take due account of the impact of the IP system on innovation and growth."

The Report proposes the IPO be given new functions including:

- a duty to keep under review the impact of IP on innovation and growth;
- the preparation of reports on specific areas or cases where there is detriment to competition and consumer welfare;
- powers to require information to support the reporting functions;
- powers to make recommendations to the competition authorities and to use fee income to fund investigations in the interests of maintaining healthy and efficient markets.

It is also proposed to give the IPO a statutory function to publish formal opinions to clarify the application of copyright law particularly where new circumstances have arisen or there is evidence of confusion as to what is allowed under copyright law. These would be non-binding on the courts but there would be a duty on Judges to take account of them.

The Report notes and endorses the Patent Judges' call for a review and redrafting of the Copyright Act. However, it seems unlikely that such a step will be taken before the Commission has pronounced on the feasibility of a European Copyright Code.

These proposals are all steps in the right direction but time will tell as to whether there is the political will to put them into effect.

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