



HM Government

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## The Government Response to the Hargreaves Review of Intellectual Property and Growth

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## Foreword

Britain's future depends on harnessing knowledge and ideas to their full potential. That is true for each of us individually: developing our own skills and abilities brings many rewards. It is also true for the UK as a whole. UK business invests more in intangible assets than physical ones, and nearly half of that intangible investment – £65 billion in 2008 – was in intellectual property (IP). IP's contribution to the UK's economy is therefore both substantial and vital. Its wider impacts on society, in terms of culture, education and basic human rights such as freedom of expression, are no less important.

The Government's ambition is to build on the UK's great strengths in all these areas by making it easier to use IP to create value across the economy and across our society, in ways that are fair to everyone, while continuing to deter the infringements of IP that threaten its value.

In May this year, Professor Ian Hargreaves delivered his report, "Digital Opportunity: an Independent Review of IP and Growth", which set out a powerful vision for the UK's future success through better uses of IP. The Government is grateful to him and his team for their hard work and particularly commends their resolution to ground their report in reliable evidence.

This response to that report sets out the Government's broad acceptance of its recommendations and outlines how we propose to act on them. It also indicates the way we will be tackling online copyright infringement, both through the Digital Economy Act and through voluntary action by responsible businesses.

This is not the limit of the Government's ambitions for IP. We are publishing alongside this document the UK's IP Crime Strategy and International strategy for IP, which expand on our plans to defend brands and creative content from illegal copying and to encourage other countries to share our vision for a future where more value is created from IP not just in the UK but across the world.

Ultimately, success will come down to the creativity of UK people and innovation by businesses, not Government action. We are simply trying to create the best conditions to encourage innovation and growth.



*George Osborne*

Rt Hon George Osborne MP  
Chancellor of the Exchequer



*Vince Cable*

Rt Hon Dr Vince Cable MP  
Secretary of State for  
Business, Innovation and Skills



*Jeremy Hunt*

Rt Hon Jeremy Hunt MP  
Secretary of State for  
Culture, Olympics,  
Media and Sport.



## Introduction: Intellectual Property and Growth

The need for a strong and growing economy is evident to everyone. It is the foundation of our wealth as a society and our ability to do things we value, individually and collectively. So the Government has made encouraging growth a centrepiece of its policy. We want to achieve strong, sustainable and balanced growth that is more evenly shared across the country and between industries.

The Intellectual Property (IP) framework is a vital part of the business environment. We want to see a framework that helps a wide range of UK businesses to invest profit and expand as much as possible.

In November 2010 the Prime Minister announced an independent review of the IP framework, to maximise its support for innovation and growth. The review, led by Professor Ian Hargreaves and supported by a panel of independent advisers, published its report *Digital Opportunity - A Review of Intellectual Property and Growth* on 18 May 2011. We are grateful to Prof. Hargreaves, his panel and to the many people and organisations who contributed to the review through its call to evidence or meetings with the team. We have also valued hearing initial reactions to the Review and its findings from a range of commentators.

*Digital Opportunity* is an apt title. The choice Prof. Hargreaves has outlined for the UK is clear: change now to make the most of our strong position or risk losing it through missed opportunities. He puts it starkly: “The UK’s intellectual property framework, especially with regard to copyright, is falling behind what is needed.” The Review paints a picture of an IP system that is the foundation for a substantial proportion of the UK’s innovation and economic growth but which needs to adapt to meet the challenge of new technologies. The potential benefits it identified from making those changes are considerable: adding between 0.3 per cent and 0.6 per cent to the size of the UK economy by 2020 – between £5 billion and £8 billion – and cutting deadweight costs in the economy by over £750m.

The Government believes this is fundamentally the right view. The IP framework has considerable strengths and supports many successful UK businesses in global markets. UK firms invest more in IP and other intangible assets than in tangible ones: £137 billion of intangible investment against £104 billion of tangible investment in 2008. This scale means that even relatively small improvements in the IP system can make an appreciable difference to the UK economy. We are prepared to make changes to give the UK the IP system that best equips us to meet current conditions and opportunities and that can develop further to meet future ones. Of course, this is in the context of a global IP system. The UK must work within international agreements and European law, as well making the case with international partners for changes to meet the challenges of the future.

It is from this perspective that the Government is responding to the Review. Our aim is to provide clarity about the direction of our thinking and the immediate action we will be taking, which in many cases will be to prepare more detailed proposals for consultation. Our overall goal is to have measures in place by the end of this Parliament that will do justice to the Review’s vision and will already be delivering real value to the UK economy and to the creators and lawful users of IP. We have committed to no further major review of the IP system in this Parliament.

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## Challenges and opportunities: the Review's findings

The Government is broadly in agreement with arguments set out in the Review's foreword and executive summary. In the limited time available, the Review had to focus on what it saw as key areas for improvement in the UK IP system. It therefore has more to say on some IP rights, such as copyright or patents, than others such as trade marks which are also very important to the UK. This reflects not only the Review's terms of reference and choices but also the evidence shared with the Review.

The Government will not neglect issues outside the scope of the Review's conclusions – for example, the European Commission's forthcoming proposals for reform of the EU trade mark system – but we will be devoting considerable effort to the Review. A detailed government response to the Review and its recommendations is set out below, following the structure of the *Digital Opportunity* report's executive summary, **with the Government's plans for action in bold text**.

### 1. “Intellectual Property is important to growth”

The Government accepts the Review's overall conclusion that IP is important to growth and that IP laws are, in some cases, obstructing growth. The Government is particularly concerned to reduce barriers to creating viable IP-using small firms, whether in existing industries or in new niches. IP is intensely valuable to the UK; that value can be increased if we act effectively now and will decrease if we do not.

Of particular concern both to the Review and to the Government are missed opportunities beyond the core IP-owning industries: vital medical research held up, cultural and commercially useful works locked away for generations and crumbling in archives for want of an owner to give permission for their use, and great business ideas that can't be turned into successful, growing businesses. The Government wants to provide effective and fair ways for these opportunities to be grasped. We absolutely endorse the Review's view that we must not put our hugely important creative industries – or any other IP-led business sector – at risk by what we do. Managing that risk includes not only responding effectively to the challenges posed by technology, such as issues around enforcement of IP rights, but also seizing the opportunities for growth that technology opens up.

### 2. “The IP framework is falling behind and must adapt”

The Government shares this concern. There is a constant need for the IP system to adapt to new forms of innovation, creativity and technology, but that need is now particularly marked in copyright because technology has made copying and communicating many works very easy and created opportunities for the widespread and efficient use of digital content. As the Review notes, the advent of 3D printing may herald a time where copying material objects becomes similarly straightforward. Cloud computing and the ‘internet of things’ are based on ever-increasing flows of data. There are implications here for privacy and security that go far beyond IP but have a bearing on future public policy, IP included.

The challenges of today are around digital copying. That is where most adaptation is currently needed. But the Government is aware that the next need for change may come from a very different place. That is why we see flexibility in the IP system as highly desirable, although it needs to be balanced with as much certainty as possible to encourage investment.

### 3. “Evidence should drive policy”

Fundamentally, the Government agrees with not only the Review’s headline conclusion but also with its underlying critique: too many past decisions on IP have been supported by poor evidence, or indeed poorly supported by evidence<sup>1</sup>. This is true at an international level as well as domestically. **Recommendation 1** of the Review calls on the Government to make decisions on IP policy on the basis of good evidence, balancing economic objectives and the needs of various groups.

Government is of course always seeking to base decisions on good evidence<sup>2</sup>. The challenges involved in doing so are by no means confined to IP policy or to the UK<sup>3</sup>. The Review identifies two particular difficulties in the IP field: a near-total lack of high-quality evidence on some issues and an overabundance of effective lobbying.

To deal with the first issue, **the Government has strengthened the IPO’s economics team and begun an ambitious programme of economic research with partners<sup>4</sup>. IPO will publish its research programme for the coming year, including work in response to the Review, in Summer 2011. The fundamental issue however is that key data is held by business and other organisations. IPO will work with those organisations to help them offer good-quality evidence; our challenge to them is to do so.** There is also a link here to the Review’s Recommendation 10 concerning the IPO’s capacity to give independent advice, which is covered below.

To deal with the second concern, **the Government will in future give limited weight in IP policy-making to evidence that is not sufficiently open and transparent in its approach and methodology, and we will make it clear where we are taking this view. IPO will set out guidance in Autumn 2011 on what constitutes open and transparent evidence, in line with professional practice. The Government is conscious that smaller businesses and organisations face particular challenges in assembling evidence and will assess their contributions sympathetically, with the same emphasis on transparency and openness.**

While working hard to improve the quality of evidence available, the Government recognises that perfect evidence is an ideal. As the Review recognises in its discussion of IP enforcement, it is sometimes necessary to “guess and get on with it”<sup>5</sup> where the alternative is inaction in the face of poor information. We are determined to have an IP system that is the best possible incentive for UK growth, and we want to make rapid progress towards it, informed by emerging evidence.

It is also important to stress that **while the Government’s focus is firmly on economic growth, issues of fairness and social impact are also important in the context of IP rights. The Government will consider these impacts together with economic considerations in making domestic policy on IP and in seeking a well functioning international framework, in line with good evidence.**

1 See Digital Opportunity: A review of intellectual property and growth, Ian Hargreaves, 2011, p93-94

2 Better Policy Making, Centre for Management and Policy Studies, November 2001

3 See for example: Challenges of evidence-based policy-making, Australian Public Service Commission, 2009 (<http://www.apsc.gov.au/publications09/evidencebasedpolicy.htm>)

4 See the IPO’s economics pages at <http://www.ipo.gov.uk/pro-ipresearch.htm> for details, including publication of new work and the 2011-12 work programme.

5 *Digital Opportunity: A Review of Intellectual Property and Growth*, Ian Hargreaves, 2011, p81, para 8.48

### *Evidence and international policy*

Evidence is a key part of making the UK's case in international fora and with other governments, and for demonstrating the UK's global attractiveness as a destination for investment in IP. As the Review recognises, getting the IP framework in the best possible shape to support innovation and growth in the UK requires strong and consistent action at the international level<sup>6</sup>.

*Digital Opportunity* calls for the UK to resolutely pursue its international interests in IP, particularly with respect to emerging economies such as China and India, based on firm economic evidence (**Recommendation 2**). **The Government's strategy for doing so is set out in *The UK's International Strategy for Intellectual Property*, which we are publishing alongside this response. It sets out a plan for action internationally on the recommendations in *Digital Opportunity*, including the immediate priority of establishing a European patent court and unitary patent title with real benefits for business.** Such benefits to business should not come through exposing the UK to disproportionate costs.

The strategy also sets out how the UK will work to influence global patent reform; pursue progress at European level on important copyright reforms; push for further reforms at key international IP institutions; and pursue our interests in emerging economies. This includes a network of IP attachés to support UK business interests, policy interests and provide a focal point for supporting UK businesses with IP related issues overseas and by tailoring our approach to IP policies and agreements according to individual countries' level of economic and social development.

## 4. “A digital copyright exchange will facilitate copyright licensing and realise the growth potential of creative industries”

The Government agrees it is right to help develop effective markets in copyright licensing where they are not emerging spontaneously. We believe a Digital Copyright Exchange (**Recommendation 3**) has the potential to offer a more efficient marketplace for owners and purchasers of rights, as well as opening up new markets to creators who may not have previously been able to access them.

As the Review notes, many licensors of copyright have their own databases of rights information and some – such as collecting societies – have published clear tariffs for certain uses. What these individual efforts do not add up to is a mechanism that would readily allow potential licensees – whether businesses or conceivably consumers themselves – to readily assemble and pay for a package of rights to do a particular thing, such as a community group staging and recording a musical and making available on the internet clips from that recording. Nor do they collectively serve as a comprehensive and accessible source of information on rights ownership that would make innocent infringement of copyright less likely and deliberate infringement more culpable.

Making it easier for rights owners, small and large, to sell licences for their work and for others to buy them, with quicker, less burdensome (and increasingly automated) transactions, would be of clear benefit to the UK. The Review predicts a Digital Copyright Exchange could add up to £2.2 billion a year to the UK economy by 2020.

6. *Digital Opportunity*, p21, para 3,1



The Government, therefore, wants to see a Digital Copyright Exchange (DCE), or something like it, that enables a functioning digital market in rights clearance and acts as a source of information about rights ownership. The ownership information is clearly a prerequisite for the marketplace and would itself be a powerful tool against infringement (there would be no excuse for not checking a single, publicly accessible register) and a valuable first step in any diligent search for the owner of possible orphan works.

The Government's view is that a successful DCE fundamentally rests on its commercial attractiveness: it would have to create value for both sellers and purchasers of rights. To do this, it would need to:

- Attract a 'critical mass' of material that is available, and readily licensable, through the exchange. The Review makes some suggestions as to incentives that may be used to ensure this occurs rapidly; the fundamental incentive for participation in the longer term will be access to new markets. **The Government will work to ensure that Crown copyright materials are available via the exchange from day one, or as soon as possible thereafter, and will encourage public bodies to do likewise.**
- Be a compelling proposition to rights holders but not compulsory. We believe compulsory participation could be contrary to the Berne Convention and, more importantly, distort the market. But experience in the United States and elsewhere suggests that a voluntary system can be incentivised without violation of Berne.
- Allow prices to be set or negotiated by the rights holder, subject to controls on unfair competition (such as the tariffs currently set by the Copyright Tribunal).

- Serve as a genuine marketplace independent of sellers and purchasers, for example on the model of independent traders using amazon.co.uk to sell goods, rather than simply being an aggregated rights database
- Be open to access by individuals and businesses, free at the point of use, to open standards that mean firms can readily write software to automate access and provide services that rely on information gathered or licences purchased via the DCE, to facilitate the development of businesses in the emerging markets supported by the DCE.
- Be run on a self funding basis, fees being charged on licensing transactions through the exchange rather than the upload of rights data or search of the database.

The Review identifies a number of challenging issues that will have to be overcome to make this a reality. Government is not best placed to do this.

Consideration is currently being given to how this complex project is best taken forward, and by whom. The Government will announce these arrangements in due course. The person or persons commissioned to lead this work will be asked to:

- **facilitate the creation of a viable financial model for the DCE;**
- **bring together industry partners and sectors of the creative world to create a framework for a distributed rights exchange and the necessary supporting systems to allow a functioning licensing system by the end of 2012; and**
- **report on progress, by the end of 2011, including on:**

- **the need and scope for incentives to participate in a DCE, which would need to be effective, consistent with international and domestic legal obligations and sensitive to consequences on other sectors of the market or the creative industries in general;**
- **work with competition bodies to resolve any issues that may arise from the creation of a DCE; and**
- **development of a model for the DCE that takes account of these factors.**

Although the intention is for any exchange to be run on a self-funding basis, there will of course be costs in setting up the processes and infrastructure required. **The Government will be looking carefully at what the appropriate roles for itself and of industry partners might be in supporting this work.**

## 5. “Further steps to modernise copyright licensing...”

### *Cross-border licensing*

The Government welcomes the Review’s identification of opportunities for UK licensing bodies in European moves to improve the operation of copyright licensing (**Recommendation 3**). An efficient and flexible cross-border licensing framework is essential to the creation of a single EU market for content that smaller firms can readily enter and succeed in. **The Government welcomes the European Commission’s initiative in proposing a cross-border licensing framework and will work with UK interests and the Commission to develop proposals that are compatible with current effective licensing models in the diverse industries affected.**

### *Orphan Works*

There are opportunities too in respect of so-called orphan works (**Recommendation 4**). The Government agrees with the Review’s fundamental premise that it benefits no-one to have a wealth of copyright works be entirely unusable under any circumstances because the owner of one or more rights in the work cannot be contacted. This is not simply a cultural issue; it is a very real economic issue that potentially valuable intangible assets are simply going to waste. **The Government will this autumn bring forward proposals for an orphan works scheme that allows for both commercial and cultural uses of orphan works, subject to satisfactory safeguards for the interests of both owners of ‘orphan rights’ and rights holders who could suffer from unfair competition from an orphan works scheme. These would include diligent search for rights owners, licensing at market rates for commercial use and respect for the rights of ‘revertant’ owners that come forward. The Government will look to the DCE and other searchable sources of information on copyright works to deal with problems of misattribution or loss of ownership data from works.**

The Government will this autumn also bring forward proposals for extended collective licensing to benefit sectors that choose to adopt it, and look to maximise the benefits it could bring to smaller creative firms and individual creators in particular.

### *The role of collecting societies*

Copyright collecting societies play a major role in copyright licensing. The Government sees collecting societies as an important part of the UK's future success whose status would be reinforced by visible adherence to good practice. Like the Review (**Recommendation 3**), the Government has heard a range of concerns about the operation of copyright collecting societies in the UK and elsewhere: from members on questions of transparency and governance, and from licensees concerning what they see as heavy-handed, misleading or unfair practice in charging for usage of works. The EU is looking at the need for a common standard within Europe, which the Government welcomes; such transparency would be in the interest of UK creators and rights holders. If the UK is going to be a leader in European licensing, we will need also to be a leader in good practice. This is particularly true if we are to introduce an orphan works or extended collective licensing regime.

We recognise the valuable work done by collecting societies such as PRS for Music to adopt codes of conduct, and the development of a model code under the aegis of the British Copyright Council. These are a good start, but for them to be demonstrably effective they will need to become more robust; enforceable codes with independent review mechanisms. **The Government will publish minimum standards for voluntary codes in early 2012 and consult with collecting societies on their implementation. We will look both at how standards might be strengthened and how to give official recognition when high standards are met. The Government will also draw up proposals for a backstop power that allows a statutory code to be put in place for a collecting society that evidence shows has failed to introduce or adhere to a voluntary code incorporating the minimum standards.**

## 6. “Copying should be lawful where it is for private purposes, or does not damage the underlying aims of copyright...”

There is a fundamental role for copyright in providing appropriate incentives for the creation of valuable works. The Government has no intention of prejudicing this role, on which much value for the UK depends. We nonetheless believe the Review is right to identify activities that copyright currently over-regulates to the detriment of the UK, and to propose changes to tackle the problem (**Recommendation 5**).

The Government sees the areas where copyright restricts activity to no direct commercial benefit as doubly wasteful: neither new opportunities nor incentive to invest in copyright works result from them. Nor does the Government regard it as appropriate for certain activities of public benefit such as medical research obtained through text mining to be in effect subject to veto by the owners of copyrights in the reports of such research, where access to the reports was obtained lawfully. We recognise that some publishers view licensing of text mining as a legitimate commercial opportunity; however we are not persuaded that restricting this transformative use of copyright material is necessary or in the UK's overall economic interest. We also share the Review's concern that a widespread flouting of copyright through private copying in particular brings the law into disrepute: it is not appropriate simply to tolerate unlawful private copying where it is not commercially damaging. For these reasons, **the Government agrees with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, subject to three important factors:**

- **That the amount of harm to rights holders that would result in “fair compensation” under EU law is minimal, and hence the amount of fair compensation provided would be zero<sup>7</sup>. This avoids market distortion and the need for a copyright levy system, which the Government opposes on the basis that it is likely to have adverse impacts on growth and inconsistent with its wider policy on tax.**
- **Adherence with EU law and international treaties.**
- **That unnecessary restrictions removed by copyright exceptions are not re-imposed by other means, such as contractual terms, in such a way as to undermine the benefits of the exception.**

**The Government will therefore bring forward proposals in autumn 2011 for a substantial opening up of the UK’s copyright exceptions regime on this basis. This will include proposals for a limited private copying exception; to widen the exception for non-commercial research, which should also cover both text- and data-mining to the extent permissible under EU law; to widen the exception for library archiving; and to introduce an exception for parody. We are committed to doing so in ways that do not prejudice the provision of appropriate incentives for creation of works through the copyright system and will consult widely on the basis of sound evidence.**

## **7. “Building future-proofing into the legislative and regulatory framework...”**

The Review recognises that the UK’s scope for action on copyright exceptions is limited. It makes the case for broader changes at the EU level in order to enhance economic growth now and – through building in adaptability to new technologies – in the future. In the Review’s judgement, and the Government’s, there is a need for a wider set of exceptions at EU level to achieve this, again without prejudice to the provision of appropriate incentives for creation of works (**Recommendation 5**).

Having accepted the general case for broader copyright exceptions within the existing EU framework, the UK will be in a stronger position to argue that other flexibilities are needed now and in the future. Enabling medical and other scientific research is an essential goal in itself for both its economic impacts via innovation and its social importance. The idea is to encourage new uses that “do not directly trade on the underlying creative and expressive purpose” of works.

**The Government will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies including use of data for research. We support a review of relevant EU legislation to this end and will be in dialogue with European partners to identify how this can best be achieved. IPO will make the removal of EU-level barriers to innovative and valuable technologies a priority to be pursued through all appropriate mechanisms.** Given the possible time required for change at EU level, the Government will also explore what more can be done at UK level.

<sup>7</sup> See for example the summary of Prof. Martin Kretschmer’s Comparative study of copyright levies in Europe, 2001, which was jointly funded by ESRC and IPO (full report to be published)

## 8. “Adapting the patent and design frameworks to changing circumstances...”

### *Patents and innovation*

The Review notes the value of patents and identifies concerns about the patent system, both from an operational point of view (backlogs and worries about patent quality) and in terms of its impact on innovation. In particular, it is concerned that patents in some business areas and concentrated ‘thickets’ of patents in some technologies are anti-competitive and hence anti-innovation (**Recommendation 6**). The Government takes a similar view and therefore:

- **The Government will resist extensions of patents into sectors which are currently excluded unless there is clear evidence of a benefit to innovation and growth from such extension.**
- **IPO will continue to set challenging targets<sup>8</sup> for the reduction of its patent backlogs. Global backlogs will be reduced through work-sharing with other patent offices that meet the UK’s exacting quality standards and we will encourage greater use of suitable mechanisms, including the Patent Prosecution Highway.**
- **IPO will investigate the scale and prevalence of issues with patent thickets, including whether they present a particular problem to SMEs seeking to enter technology sectors. IPO will then explore options for addressing any problems identified, which could include coordinated international changes to patent fee structures if the issues prove to be international in scope. IPO will publish findings on the scale and prevalence of patent thickets by November 2011.**

### *Design and design rights*

The Review also identified a lack of evidence concerning IP and the design industry (**Recommendation 7**). The Government recognises the very limited evidence available on the impact of design rights, and that there are divergent views as to whether IP is a positive or negative influence on particular design sectors: is the UK’s design sector large because of or in spite of what the Review called a “patchwork of intellectual property right provision”? Nonetheless, the Government has heard clearly the concerns that the design rights system in the UK may not be adequately geared to the needs of business. In response:

- **IPO has commissioned research on the relative levels of design registration in the UK compared to France and Germany, and whether the UK’s lower level of registration has any impact on the UK’s competitiveness. This research will be published later this summer. IPO will consider whether this provides a sufficient assessment of the Review’s presumed relationship between design rights and innovation. If not, IPO will commission further research, with conclusions to be reached by the end of 2011.**
- **IPO will by the end of 2011 publish its assessment of the case for simplification of the design right system, and in particular whether there is a need for a UK unregistered design right alongside the EU right.**
- **The possible inclusion of design rights (particularly unregistered designs) in the DCE or equivalent will be built into work on the Exchange from the beginning.**

<sup>8</sup> IPO’s current agency targets can be found at: <http://www.ipo.gov.uk/about/whatwedo/ourperform/ourperform-target.htm>

## 9. “Effective enforcement requires education, effective markets, an appropriate enforcement regime and a modern legal framework...”

An effective IP enforcement regime – and the UK’s is one of the best in the world<sup>9</sup> – is a necessity for any advanced economy. The Government shares the Review’s perspective that intellectual property rights (IPRs) cannot fulfil a useful function unless they are enforceable. There are two main implications of this view:

- There is a fundamental reason to ensure that valuable IPRs are enforceable, and
- Where society - both users and owners - acknowledges in practice that the enforcement of rights is uneconomic or unreasonable, for example over private copying, these should ideally be taken out of scope of the IP system through properly limited exceptions. Otherwise respect for legitimate enforcement is diluted.

The Government is therefore committed to an effective IP enforcement regime both in the UK and globally. A key factor in achieving this is reliable evidence, which is particularly challenging in respect of IP infringement because much infringing activity takes place away from the eyes of rights owners and enforcement bodies. Strong evidence is a necessity for the UK’s capability for proportionate and effective enforcement. We acknowledge that not all the evidence put forward in this area is up to the standards of the best<sup>10</sup>, and that many studies have more to do to show their methods and conclusions are sound<sup>11</sup>. The

Review’s suggestion that “the cost of IPR infringement is neither negligible nor overwhelming in economic scale”<sup>12</sup>, while plausible, is therefore itself open to challenge. But it is hard to argue with its assessment that “copyright infringement is a stubborn fact of the digital landscape which might well get worse and which justifies serious government effort in identifying the right mix of measures to address it”<sup>13</sup>, and similar arguments apply to other forms of infringement such as counterfeiting.

The Government therefore accepts the spirit of the Review’s argument that a combination of education, effective markets, appropriate enforcement and modern laws is likely to be most effective in preserving the value of IPRs for their owners, subject to the test of evidence about what is actually effective.

On enforcement, the Government take the Review’s emphasis on stronger market offerings (**Recommendation 8**) as an implied criticism of what is currently available to consumers. The Government appreciates this is something of a chicken-and-egg situation where rights holders want to see stronger enforcement regimes in place before investing in new services but by delaying their investment are creating a gap in legitimate provision which is being filled unlawfully. The Government has considerable sympathy for the rights holder position and is acting to support it, not least through encouraging the creation of a Digital Copyright Exchange that facilitates new legitimate provision and the ready identification of infringement. As the Review notes, the challenge faced by rights holders is similar to that of other businesses: how to construct a distinctive product offering that consumers are willing to pay for. That is not something in which Government sees itself having a direct role.

9 The Taylor-Wessing Global Intellectual Property Index (<http://www.taylorwessing.com/ipindex/>) rates the UK as second only to Germany.

10 *Digital Opportunity*, p.69, para 8.9

11 *Digital Opportunity*, p.73, para 8.16

12 *Digital Opportunity*, p.73, para 8.17

13 *Digital Opportunity*, p.76, para 8.23

Inaction is however not an option. The issue of online infringement of both copyright and (through sale of fake goods) trade marks is a pressing one for many firms. The Government will continue to devote effort to deterring IP infringement online (including through implementation of the Digital Economy Act) and offline, as its partners do, in parallel with seeking to improve the evidence base.

The Government's position is that:

- Action against IP infringement, and particularly IP crime, is and will remain one of a range of priorities for enforcement, including by the police, Trading Standards and HMRC.
- The finite public sector resources available should be allocated to meet the most serious problems, including but not limited to organised criminal activities.
- Rights holders must continue to take responsibility for the exercise and protection of their rights and to educate and guide consumers.
- Further evidence including impact assessment is urgently needed to inform future priorities for enforcement action.

In consequence,

- **Government and public sector enforcement bodies will work with industry, with a particular focus on supporting efforts to develop new legitimate digital markets, tackling organised IP crime and enhancing the availability of high-quality evidence.** This will tie into the efforts described above to implement recommendation 1 on improving the quality of evidence more generally.
- **In pursuit of good data to inform enforcement of copyright online, the Government agrees that it would be desirable for Ofcom to begin establishing benchmarks and data on trends in online infringement of copyright as soon as possible. Government will work with Ofcom to agree how this might best be achieved.**
- **The Government is publishing alongside this document a cross-government IP Crime Strategy that commits us to better-coordinated action to make the most of scarce resources, including on online infringement of copyrights and trade marks. Progress on the strategy will be reported in annual IP Crime reports from summer 2012 onwards.**
- **The Government is also publishing today a statement<sup>14</sup> setting out how it plans to move forward with implementation of the Digital Economy Act initial obligations, following a successful defence of the Act's provisions in judicial review.** In particular, it sets out that:
  - **Following the judicial review ruling, the Government is removing the obligation on internet service providers (ISPs) to contribute towards the costs of Ofcom and the independent appeals body in setting up and administering the regime.** We do not intend to revisit the sharing of other costs between ISPs and copyright owners.
  - The Government has received further advice from Ofcom on the potential costs of the DEA appeals system, which we are publishing today. **In order to minimise the risk of the system being disrupted by vexatious or non bona fide appeals, we are introducing a £20 fee for subscribers to appeal. The fee will be refunded if the appeal is successful.**

<sup>14</sup> A policy statement on the implementation of the Digital Economy Act can be found at <http://www.culture.gov.uk/publications>

- Ofcom's Code of Practice, setting out the details of how the initial obligations will work in practice, will be published shortly.
- Following advice from Ofcom - which the Government is publishing today - **site blocking will not be brought forward at this time. However, the Government is keen to explore the issues raised by Ofcom's report and will do more work on what other measures can be pursued to tackle online copyright infringement.**

In addition, the Government believes that smaller firms have legitimate concerns about their ability to enforce lower-valued IP rights claims through the courts. Although arbitration may be a better option for resolving smaller cases in some instances, access to the courts at a proportionate cost should act as an incentive to settle or arbitrate as well as being a means of resolving less tractable but straightforward disputes. **The Government will, subject to establishing the value for money case, introduce a small claims track in the Patents County Court for cases with £5000 or less at issue, initially at a low level of resource to gauge demand, making greater provision if it is needed.** This track, recommended by Lord Justice Jackson and the IP Court Users Committee, is unlikely to be suited to the complexities of patent disputes but could be useful for copyright, design and possibly trade mark cases. This makes a change of name to reflect the PCC's role across IP rights even more important in providing clarity to business. In line with the Jackson review and *Digital Opportunity*, therefore, and also subject to establishing the value for money case, **the Government will consider renaming the PCC to be the Intellectual Property County Court.**

## 10. "Helping SMEs to realise the potential of IP..."

A key focus of both the Review and the Government's response to it is the need to support the growth of SMEs, particularly innovative SMEs, in IP-using sectors. In addition to other issues noted around enforcement and market access for SMEs, the Review highlights smaller firms' difficulties in finding reliable and cost-effective advice on IP (**Recommendation 9**). **Later this year IPO will set out its plans to improve accessibility of the IP system to smaller companies, including access to lower cost providers of integrated IP legal and commercial advice.**



## 11. “Creating an IP framework which adapts to changes in technology and markets requires changes to the IPO...”

The Government is committed to policies based on sound evidence and to the transparent operation of public bodies. The Review found past decisions on IP did not always live up to this standard, apparently influenced by strong lobbying from interested parties. The Government believes it is important to avoid not only the fact but also the appearance of bias and therefore believes there is a good case for change to the IPO that will support more evidence-based decisions in future (**Recommendation 10**).

The Government’s preference would be to retain IPO as a body combining practical experience of the IP system through its rights granting and advisory functions with policy responsibility for IP. Separation of the two would create further risks of lobbying leading to disadvantageous outcomes, and it is right for Ministers to carry ultimate responsibility for IP policy as part of the Government’s wider innovation and growth policies. Clarification of IPO’s mandate and structure would also assist progress on other recommendations such as the provision of low-cost IP advice to smaller firms. While we believe there is a place for developing policy out of the public eye, it is in line with the Government’s wider commitment to transparency for IPO to offer its economic analysis of policy issues more publicly than at present.

**The Government will explore options for a future role for IPO that involves a strengthened focus on innovation and growth, a greater emphasis on publicly available evidence, enhanced ability to promote competitive markets whilst retaining Ministerial oversight of IP policy; and will bring forward these proposals by the turn of the year (i.e. late 2011 or early 2012).**

The Review makes a specific call for IPO to be able to clarify the applicability of copyright law in ways that can be taken account of by business and the courts (**Recommendation 10**). The Government recognises the potential benefits of greater clarity in the application of copyright law, in particular the application to new technologies and opportunities. Uncertainty can lead either to unintentional infringement, or to opportunities being lost because of fear of infringing. We note in particular that schools and other educational institutions are often required to make many difficult judgements in this area. **IPO will set out plans for a copyright opinions service at the turn of the year.**

The Government also notes the review’s suggestion that a review of the Copyright Act is overdue. We will reflect on this in the context of the other policy measures. In particular, an effective copyright opinions function in IPO could help establish priorities for legislative change by identifying areas of practical uncertainty for business, particularly smaller business, to supplement the judgement of the legal profession and academic commentators.

## Next steps

The recommendations made by the Review are of different kinds, in terms of the steps necessary to deliver them. Some point directly to legislative and institutional action; others require further development before the Government brings forward proposals. Many of the measures proposed will be the subject of consultation in the coming months, and the Government will consider how to minimise the potential impact of this volume of consultation on business and other interested parties.

**The Government will consult on the detail of how it will proceed over the next few months and will set out our plans in a White Paper in Spring 2012 with a view to legislating in this Parliament where necessary.** IPO will use its annual reports to illustrate progress in implementing the Hargreaves Review.

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## Annex A

RECOMMENDATION	ACTION	TIMING
1. Evidence	<p>IPO will publish its research programme for the coming year, including work in response to the Review.</p> <p>IPO will set out guidance on what constitutes open and transparent evidence, in line with professional practice.</p>	<p>Summer 2011</p> <p>Autumn 2011</p>
2. International priorities	<p>The Government's strategy is set out in <i>The UK's International Strategy for Intellectual Property</i>, including the immediate priority of establishing a European patent court and unitary patent title with real benefits for business.</p>	<p>Published 3 Aug concurrent to Govt. Response</p>
3. Copyright licensing	<p>The Government will bring forward arrangements in due course to establish how a Digital Copyright Exchange could work in practise.</p> <p>The Government will work to ensure that Crown copyright materials are available via the exchange and will encourage public bodies to do likewise.</p> <p>The Government welcomes the European Commission's initiative in proposing a cross-border licensing framework and will work with UK interests and the Commission to develop proposals that are compatible with current effective licensing models in the diverse industries affected.</p> <p>The Government will publish minimum standards for voluntary codes and consult with collecting societies on their implementation.</p> <p>The Government will also draw up proposals for a backstop power that allows a statutory code to be put in place for a collecting society that evidence shows has failed to introduce or adhere to a voluntary code incorporating the minimum standards.</p>	<p>Report on progress by the end of 2011</p> <p>Linked to DCE timetable</p> <p>Report on progress by Spring 2012</p> <p>Autumn 2011</p> <p>Early 2012</p>
4. Orphan works	<p>The Government will bring forward proposals for an orphan works scheme.</p> <p>The Government will bring forward proposals for extended collective licensing to benefit sectors that choose to adopt it, and look to maximise the benefits it could bring to smaller creative firms and individual creators in particular.</p>	<p>Autumn 2011</p> <p>Autumn 2011</p>

RECOMMENDATION	ACTION	TIMING
5. Copyright exceptions	<p>The Government will bring forward proposals for a substantial opening up of the UK's copyright exceptions regime, including a wide non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving. We will consult widely on the basis of sound evidence.</p> <p>The Government will aim to secure further flexibilities at EU level that enable greater adaptability to new technologies.</p> <p>IPO will make the removal of EU level barriers to innovative and valuable technologies a priority to be pursued through all appropriate mechanisms.</p>	<p>Autumn 2011</p> <p>Report on progress by Spring 2012</p> <p>Report on progress by Spring 2012</p>
6. Patent thickets and obstructions to innovation	<p>The Government will resist extensions of patents into sectors which are currently excluded unless there is clear evidence of a benefit to innovation and growth</p> <p>IPO will continue to set challenging targets for the reduction of its patent backlogs. Global backlogs will be reduced through work-sharing with other patent offices that meet the UK's exacting quality standards.</p> <p>IPO will publish findings on the scale and prevalence of patent thickets, including whether they present a particular problem to SMEs seeking to enter technology sectors.</p>	<p>Report on progress by Spring 2012</p> <p>Report on progress by Spring 2012</p> <p>November 2011</p>
7. Design rights	<p>IPO will publish research on relative levels of design registration in the UK and impact on UK competitiveness.</p> <p>IPO will consider whether this research provides a sufficient assessment of the Review's presumed relations between design rights and innovation. If not, IPO will commission further research.</p> <p>IPO will publish its assessment of the case for simplification of the design right system, and in particular whether there is a need for a UK unregistered design right alongside the EU right.</p> <p>The possible inclusion of design rights in the Digital Copyright Exchange or equivalent will be built into work on the Exchange from the beginning.</p>	<p>Summer 2011</p> <p>End 2011</p> <p>End 2011</p> <p>Linked to DCE timetable</p>

RECOMMENDATION	ACTION	TIMING
8. Enforcement	<p>Government and public sector enforcement bodies will work with industry, with a particular focus on supporting efforts to develop new legitimate digital markets, tackling organised IP crime and enhancing the availability of high-quality evidence.</p> <p>The Government agrees that Ofcom should begin establishing its benchmarks and data on trends in online infringement of copyright. The Government will work with Ofcom to agree how this might best be achieved</p> <p>The Government will provide annual progress reports on the cross-government IP Crime Strategy.</p> <p>The Government will, subject to establishing the value for money case, introduce a small claims track in the Patents County Court for cases with £5000 or less at issue.</p> <p>The Government will consider renaming the PCC to be the Intellectual Property County Court.</p>	<p>Ongoing</p> <p>Autumn 2011</p> <p>Summer 2012</p> <p>Autumn 2011</p> <p>Autumn 2011</p>
9. SMEs	IPO will set out its plans to improve accessibility of the IP system to smaller companies, including access to lower cost providers of integrated IP legal and commercial advice	Late 2011
10. An IP framework responsive to change	<p>The Government will explore options for a future role for IPO that involve a strengthened focus on innovation and growth, a greater emphasis on publicly available evidence, enhanced ability to promote competitive markets whilst retaining Ministerial oversight of IP policy; and will bring forward proposals</p> <p>IPO will set out plans for a copyright opinions service.</p>	<p>Dec 2011/Jan 2012</p> <p>Dec 2011/Jan 2012</p>





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