
Kluwer Copyright Blog

UK: Examining the Hargreaves Review of Intellectual Property [by Luke McDonagh]

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The dust has now settled on the Hargreaves Review – officially known as “A Review of Intellectual Property and Growth” – which was published during May 2011. The main focus of Professor Ian Hargreaves’s review was copyright law and he made a number of interesting recommendations in this area.

Firstly, one of the major points made in the report is a firm rejection of the introduction of a US-style ‘fair use’ exception. The report noted that there were two major reasons for this rejection; it was strongly opposed by rights holders and it was generally thought that any such innovation may run afoul of EU law, and in particular the terms of the Information Society Directive. Considering that Prime Minister Cameron had commented that he would like to see a more flexible, technology-friendly copyright system in the UK, this may be a blow to the coalition’s plans. However, the review did recommend a number of extensions to the current ‘fair dealing’ provisions under the CDPA. These include exceptions for ‘format-shifting’, ‘parody’ and archival copying, as well as proposals to extend the list of works covered by fair dealing for the purpose of non-commercial research. An exception for mass digitisation of works for the same purpose was also proposed. The review also called for a legislative clarification in the law with regard to ‘contracting out’ of fair dealing provisions.

Secondly, a major innovation in the review is the idea of a ‘Digital Copyright Exchange’. This idea is focused upon setting up a non-governmental digital market place in order to better facilitate copyright licensing. In particular, the review argues that such an exchange would help to clarify the ownership of copyrights and better allow the tracing of rights holders. In doing so it may be possible to utilize the exchange in order to carry out a ‘diligent’ search in the case of an orphan work (see further below). Participation in this scheme is to be voluntary, but Hargreaves recommends that the government should issue incentives to encourage rights holders and collecting societies to take part in the hope that the exchange will eventually make copyright licensing more efficient. In some ways this proposal would appear to be a voluntary form of copyright registration, though one which is arguably within the terms of Berne since no author would lose his or her rights by failing to register with the ‘DCE’.

The third major proposal in the review primarily concerns legislation for the mass digitization of orphan works. Hargreaves recommends a scheme of ‘Extended Collective Licensing’ in order to allow mass digitisation of such works. This proposal

argues that large collections of works, such as those at the national archives, ought to be digitized without the explicit permission of the rights holders. In this view, rights holders would have to opt out of the scheme. Any works that are not opted out of the scheme will be digitized and the use will be paid for by means of a small licence fee, to be held by the relevant collecting society until such occasion the author comes forward or a reasonable period of time has passed. However, this idea may involve not only the digitisation without permission of orphan works (whose rights holders cannot be located despite a diligent search) but also those who merely fail to opt out of the scheme e.g. due to ignorance of the scheme. Hargreaves attempts to take account for this by calling for negotiation between the parties once a rights holder has come forward concerning licensing future use of the work. Moreover, he argues that any liability for prior use of the work should be covered by a government licensing scheme. Overall the scheme is ambitious and although it may prove to be controversial amongst rights holders, there is an emerging consensus both at the UK and EU level that something must be done in order to allow mass digitization of orphan works. The full text of the review is available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>

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