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Changing the IP system to support innovation and growth? *Evidence and proposals from the UK's Hargreaves Review of IP*

There is plenty of doom and gloom around the world economy at the moment and, as you will have read, we in Europe seem to have our fair share. However, the good news for those of us in IP is that our focus is not on preventing disaster but enabling success. So that's an upbeat tone. The question we are all looking to answer is: how do we create the best conditions to support the innovation and growth our economies need to enhance the lives of our people and also help reduce the debt mountains with which we are grappling? To answer this question we need to know what drives innovation and growth. And whether our actions as policy makers are helping or hindering these objectives?

As you've heard, in the UK, just as in the US, we rely predominantly on the economic outputs of businesses with intangible assets, including IP. Firms in the UK invest more in IP and other intangible assets than in tangible ones.

That means getting the IP regime right is vital if we are to ensure innovation and growth. And not just for the sake of the existing rights holders but also for new innovative businesses and for consumers. That regime impacts on our ability to sell goods and services across the world and our future competitiveness across a wide range of business sectors: from the creative industries to technology based services, and from new retail models to advanced manufacturing.

Last year, as in the US, our then new coalition Government recognized the importance of getting the IP system in a fit state to support growth. That's why our Prime Minister, David Cameron, commissioned Professor Ian Hargreaves to look at the IP system and how it could help the UK economy grow and support innovation.

Ian concluded that the IP system was not keeping pace with the changes to technology and markets, particularly in the area of digital technologies. So the Hargreaves Review and the UK Government's response emphasise the importance of reforming our IP system to stimulate both technology and content creation to help deliver the innovation and growth we want to see.

I want to talk about enforcement in the context of the Hargreaves Review. First, the importance of patent system reform in order to ensure that patents genuinely promote rather than impede innovation; second, the challenge of building a copyright system responsive to the needs to the digital age, and; third, creating a viable IP enforcement strategy. Underpinning our delivery of all these recommendations, is our work with key international partners (such as the United States), which we have also set out in an International Strategy, which I'll touch on.

1. Patent system reform (and backlogs)

Globally, one of the great strains on the innovation system is the ever growing backlog of unprocessed patent applications as patent offices' struggle to keep pace with increased demand. Our office first published a report by London Economics on the cost of patent backlogs in March 2010. This report said a year's additional delay in processing patent applications, which was foreseen happening shortly if nothing was done, would cost the global economy \$10bn.

I know that many applicants (and their attorneys) are happy for their application to take as long as it takes. But backlogs cause delays which affect more than just patent applicants. They affect investors who are reluctant to invest in new technologies not protected by a patent.

Innovators can't take legal action against infringers until their patent is granted. And they affect competitors who can't innovate around an invention until they know what the final level of protection will be. Put simply, delays inhibit innovation, stifle competition and restrict growth.

There is no silver bullet to improve this position; action needs to be taken on a number of fronts. Of course additional resources can help, and I know the US is doing that. But in the long run I suggest the main focus should be on working smarter, not harder. Let me review progress on some of the main techniques for smarter working.

First, worksharing. The IPO and the USPTO have been at the forefront of efforts to encourage work sharing and reduce duplication in patent processing. In April, Lady Wilcox (the UK's Minister for IP) and David Kappos announced the second year of our fruitful collaboration with the USPTO. This is paralleled by agreements we have with other offices such as Canada and Australia.

I'm pleased that the UK IPO has now got online with its patent document and inspection service –IPSUM. IPSUM is similar to the USPTO's PAIR system in that it allows free online access to documents from the file of published patents. IPSUM will offer savings to business but it will also make it easier for patent offices around the world to understand why IPO examiners did or did

not grant a patent. This should enable worksharing, speeding up patent processing and helping reduce the world wide backlog of applications.

Things might be easier if everyone was working to the same rules, at least in theory. Patent law harmonisation is once more rising up the agenda, especially now that the America Invents Act has been signed into law, moving the US to a first-to-file system. For me, greater harmonisation of global patent law has the potential to bring real benefits.

But it does need to go hand-in-hand with the practical efforts we are making to reduce duplication – worksharing would undoubtedly be easier in a harmonised system.

Another mechanism for worksharing where progress is being made is the Patent Prosecution Highway, or PPH. As many of you may know, the PPH allows applicants receiving a favourable report at a first office the opportunity to request accelerated treatment at a second office. So you in effect get to jump the queue in return for addressing the key problems with your application, which allows our offices to work more efficiently. A number of our companies are starting to use the PPH as a key competitive feature. We've recently made the PPH between the UK and US simpler to use for applicants, and are looking forward to increased use.

I think it's worth mentioning that the PPH works in unison with the PCT, the world's primary worksharing platform. We think a properly functioning PCT can be an excellent tool for tackling backlogs but that it is nowhere near fulfilling its potential. There is too much reworking of the initial international search, and variable quality. We need to change the behaviour of both applicants and Offices so that as much as possible of an application for worldwide patent coverage is considered only once.

To work towards this goal our Prime Minister launched in May last year the UK's PCT fast track initiative. PCT Fast track allows applicants to benefit from accelerated national examination in the UK if a positive International Preliminary Examination Report on Patentability is received. The service provides an incentive for PCT applicants to file higher quality applications and to amend their application in the international phase to overcome any objections raised. It reduces duplication. But maximum benefits of this initiative will only come through other offices introducing similar schemes to what we have in the UK.

Of course the nirvana of all these efforts would be a global patent. In the EU we have been inching towards our own version of that for member states. So far we have taken 40 years and lost a couple of countries along the way. As President Obama noted at the G20 last week Europe is a complicated place. But I believe we are now in the final stages of constructing a patent and equally important a common juridical system which for the first time will ensure consistency of approach across the majority of the EU.

These initiatives are all good steps to improve the patent system but they don't address the fundamental question behind the issue: why are there are so many patents applications in the first place? Is there a more fundamental problem we have to deal with? And with the huge filings being made in China, are we on a trajectory that will make things even more of a problem?

The most important dimension to this question is not simply the numbers but whether the increasing volumes of patents are helping or harming innovation. As Professor Hargreaves noted, too much IP protection is not necessarily a good thing. Evidence suggests that, after a certain point, it has a cumulative and detrimental effect.

But where that certain point is, is very much harder to determine. Part of the answer can come from looking at the competition analysis, and Hargreaves suggests the UK IP Office should have more power to investigate markets. We're looking into that in detail working closely with the UK's Office of Fair Trading. I shall be talking during my visit here to US competition authorities and I know Dave has begun a dialogue which we're keen to replicate. But we are also starting to do more detailed research on the scale and prevalence of patent thickets and clusters, which is the thorny issue of the moment.

The issue may not be about how many patents there are, but how they interlink and cover the field to the exclusion of others, or how easily they can be worked around. We think this is important but I should stress we've not yet reached conclusions

2. Copyright reform

Let me now turn to what was the primary focus of the Hargreaves' report - copyright. For millions of consumers, copyright now impinges on their daily lives – whether they share family photos online, quote other people in a blog post, or burn a CD. The consequences can be unpredictable: For example, in 2009 an American student Justin Gawronski's copy of Orwell's *1984* was deleted from his Kindle because of a licensing dispute – rendering the notes he'd made unusable. This being the US, naturally he sued.

The Hargreaves Review's premise was that we should prevent copyright over-regulating activities that do not prejudice its central objective, namely the provision of incentives to creators. The removal of unnecessary and disproportionate copyright regulation from businesses, individuals and other

groups would, he believed, help to encourage innovation, and provide new opportunities for economic growth.

Of course, copyright remains of course an important protection for intellectual property. The UK has a vibrant creative sector justifiably reliant on copyright. But many people, both users and content owners told Hargreaves that it was too difficult, too costly and too time consuming to access copyright material. To try to make this market work better Hargreaves proposed a Digital Copyright Exchange: a sort of online copyright shop, through which businesses could advertise their ownership of copyrights and buy and sell licences to use them. He argued that a Digital Copyright Exchange would provide a bigger market for licensed copyright material.

He saw the immediate beneficiaries from a transparent, efficient digital copyright exchange to be: firms delivering new bundles of content services through existing technology and firms aiming to introduce new services using new devices or software systems presenting content to consumers in new ways.

In the last four years Apple has built new businesses worth £1.6 billion a year in profits from doing the second of these. The ability for smaller niche service providers to compete in these types of markets is limited by the cost and complexity of rights acquisition. The markets themselves are less competitive than they otherwise would be, and the range of consumer offerings is restricted.

Of course, bringing a Digital Copyright Exchange into being will be a challenging proposition. But there is a huge level of interest in the UK in this. We knew that when we said yes to it. But I've also been struck by the high level of interest. It is an idea that is gathering momentum and there are a lot

of initiatives being undertaken worldwide – from international institutions like WIPO to universities like Stanford who, working with industry partners, have created a marketplace for exchanging and using academic content in course materials. We believe that it's worth investing time and effort into getting this off the ground.

We also plan to tackle the difficult issue of so called orphan works. We believe there are substantial opportunities for growth if we can unlock the many thousands of works which cannot currently be used because nobody can identify their owner. With suitable safeguards digital reproduction of these works will mean new opportunities for both cultural and commercial organizations.

But a copyright regime fit for the digital age also has to address the right boundary beyond which protection is not justified. Copyright should not impede legitimate activity as defined through the exceptions to copyright law. While the UK Government wants to ensure that copyright maintains its incentives , it also believes there is a strong case for ensuring that it does not unduly obstruct the use of new technologies for instance in the cause of scientific research. Professor Hargreaves looked at whether introducing the US fair use system would benefit growth in the UK. But your system is relatively unique and does not translate easily to Europe, particularly for new internet based business models. Instead Hargreaves noted that the maximum benefits are likely to be delivered by broader copyright exceptions within the existing EU framework. We will be implementing these in the UK. In the longer term we would like to see further flexibility built into the EU framework to allow this and to support the development of an EU system that is adaptable to future technologies. This is an issue we are starting to explore with EU partners.

3. Enforcement

Next I'd like to say something about the importance of effective enforcement.

Hargreaves called for a balanced and, above all, effective approach to enforcement. He made some strong recommendations about the transparent use of evidence, particularly in the enforcement area, and provided a wealth of supporting information and studies.

Enforcement covers a huge range of activity from tackling illegal downloading from the internet, to stopping criminals trying to make money from IP theft, to ensuring innovators can protect their patents from infringing companies. The same enforcement approach will not be appropriate for all these different types of activities.

One area which we will be taking forward is in helping small firms to get justice when their IP is infringed. Evidence presented to the Hargreaves Review indicated that small and medium sized firms were dissuaded from enforcing IP rights because of the fear of high court costs. In the last year, we've made improvements to the UK court system to make it easier for smaller firms to bring cases and protect their IP. And other ways to help resolve disputes continue to be available, including the mediation and opinions services we offer. And we'll be taking that forward with the Small Claims Court.

One of the most politically difficult areas is effective and proportionate enforcement to tackle internet piracy. In the UK, we're pressing ahead with the Digital Economy Act's initial obligations on internet service providers to send notification letters to those of their subscribers who are alleged to be

infringing copyright online. We're discussing with internet service providers, how best to do this.

However, a recent court case demonstrates that the UK's legal framework can be an effective tool to tackle online piracy. The Newzbin2 judgment demonstrates that copyright owners can seek blocking injunctions through existing legislation – if they choose to do so. That case has recently encouraged rights holders to ask BT to restrict access to the Pirate bay website, which is one of the largest illegal websites serving the UK. BT has said that it will not take action without a court decision. This shows that there's a bit of a snowball gathering pace.

Reducing piracy and infringement is not just about enforcement. I suspect Hargreaves is right when he says that technology will continue to challenge the assertion of rights; that consumers will continue to want what technology can do over what some rights owners will let them; and that firms have little choice but to sell into this context. Business models will need to adapt.

Our conclusion is that there needs to be a three-pronged strategy to reducing infringement: first, to make legal use of IP easier, for instance through simple licensing systems; second, to educate users about the consequences of infringement; and thirdly, to ensure effective enforcement mechanisms.

4. International

Finally, I'm here because we must think globally if we are to provide a sufficiently attractive IP framework for our businesses. Our International Strategy, published alongside the Government Response to the Hargreaves Review, sets out how we intend to do this.

There are three elements to our strategy.

First, we want to see a well-functioning IP framework: I've touched on some of the key issues this raises for patents.

Second, we recognise the importance of good national regimes the world over. We want a level playing field for protection and enforcement of IP rights. To help this in the UK we aim to strengthen our ties with key international partners by following great US precedent and establishing an international network of UK IP attachés which will offer support for UK policy positions overseas and help UK business operate in new markets. Our UK-China attaché has been selected and will take post by the end of the year and we hope to announce a further appointment to cover the Americas by mid-2012.

Third, we want to ensure that the international IP framework strikes the right balance between industrial and development priorities. It should support economic development in low income countries and help mitigate global issues, like public health concerns and climate change.

CONCLUSION

With the help of Professor Hargreaves, in the UK we've looked hard at the question I outlined at the beginning of my talk: how do we create the best conditions to support innovation and growth? My message from the UK today is that our Government recognizes at the highest level the critical role that IP plays in recovery and we want to be in the forefront both in helping design those systems and implementing them effectively.

Thank you.