

The Hargreaves Review, Copyright and the Creative Industries

The Business, Innovation and Skills Committee has revealed that it intends to conduct an inquiry into the Hargreaves Review of Intellectual Property.

The Inquiry will focus on the recommendations set out in the Hargreaves Review and the Government's implementation of its recommendations.

Adrian Bailey, the committee chairman, has asked for written evidence from the creative industries, which should have been submitted by early September 2011.

There is a strong likelihood that the committee will also call for oral evidence and seek contributions from senior music, publishing and film executives.

The Hargreaves Review was an independent review of the UK's Intellectual Property laws to ensure that they are "fit for the internet age". The goal of the review was to identify barriers to growth within the IP framework of the UK.

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In relation to copyright, the Review concluded that the UK's current IP system is lacking. Some of the problems identified were:

- a) Difficulties dealing with the widespread problem of copyright infringement.
- b) The danger that millions of orphan works remained inaccessible or are at risk of being irrevocably lost.

In order to address some of the identified problems the Review made the following recommendations:

- Establishing a licensing system for orphan works to extend collective licensing for mass licensing of orphan works, and a clearance procedure for use of individual orphan works.

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E-Disclosure

During the course of Court proceedings in the Civil Courts, there is an obligation on each party to a dispute to disclose all relevant documents. This includes all electronic documents.

Accordingly, the reference to E-disclosure has been given to the search for and disclosure of all relevant electronic documents. Considering the vast amount of information which is currently held in an electronic format today, E-disclosure can be a vital stage in a dispute when considering the evidence in favour of and against the position adopted in such proceedings.

Electronic documents include emails, word processed documents, all data and documents on computers, laptops and handheld devices, as well as all databases and calendar files. They also include mobile telephones, CDs, DVDs and disks and archived and deleted data.

The Civil Procedure Rules require all parties and their advisers to undertake a reasonable and proportionate search for all relevant documents (including all letters and hard copies) and so far as electronic documents are concerned, this will usually mean that search parameters, date limits and key word searches can be used.

Factors that may be relevant in deciding the “reasonableness” of a search for electronic documents include the nature and complexity of the proceedings, the significance of any document which is likely to be located during the search and the



number of documents involved. The difficulty and expense of retrieving any particular document which will include how accessible it is, their location, the possibility of locating relevant data, the cost of recovery, disclosure and providing inspection and the likelihood that electronic documents will be altered in the course of recovery, disclosure or inspection are all relevant in this exercise.

By using search parameters and/or key word searches which sets out the criteria for relevant documents to be identified, the searching process for electronic documents can be managed in a proportionate and cost effective manner. Without using such searching methods, each electronic document would have to be printed and reviewed to determine whether it should be disclosed. This would be time consuming, costly and possibly disproportionate to the size of the claim or the dispute.

Electronic data disclosure software is available in the market which can be used to assist in the search process. Whilst electronic documents often hide data which the author may have

thought has been deleted (such as previous versions of a document or amendments – called “metadata”), if appropriate, such software can be used to search for and collate the electronic data without damaging any metadata.

Once a search has been undertaken and all relevant electronic documents have been identified and collated, they must be disclosed to the other parties to the proceedings (unless a document is privileged) and the parties must co-operate in order to determine the appropriate format by which electronic documents are listed on disclosure and can then be inspected and copied by the other parties.

The total volume of electronic documents can be compiled on a database or disclosure management system and scanned copies of hard copy documents can be taken. This will result in an electronic database of all documents which will be used in proceedings and which can be reviewed and used by the parties’ lawyers and ultimately the Court. When large amounts of electronic documents exist (in addition to hard copy documents) this is the most cost effective and practical way of managing the E-disclosure process, and there are occasions where it may be appropriate for both parties to use the same electronic disclosure software to assist with their disclosure obligations.

Finally, the exercise of E-disclosure is of course complimentary to the general rules of disclosure in proceedings of all other documents which may be relevant to the issues in dispute and whether they exist or have existed.

Contentious Probate – the burden of proving that a Will has been procured by actual undue influence

There are several situations that commonly arise in cases involving disputes over inheritances. It is helpful to divide these disputes up into cases that involve disputed lifetime gifts and those that involve gifts that have been made by Will.

Where the complaint is about gifts that have been made prior to the Deceased's death (and perhaps defeating long established testamentary intentions set out in a Will), disappointed beneficiaries will often wish to consider the Deceased's mental capacity at the time the gifts were made, whether the gifts were procured by actual undue influence by the recipient and also the more discrete principle of presumed undue influence. Invoking the principle of presumed undue influence is available to a disappointed beneficiary where the lifetime gift recipient has enjoyed a relationship of trust and confidence with the Deceased. Once the disappointed beneficiary has evidenced that relationship, the Court will usually put the burden of proving that the Deceased acted of his or her own free will onto the lifetime gift recipient. Failure to discharge that burden will usually then result in the lifetime gift being returned to the Estate.

Where there is a Will the options are more limited and the cases are understandably more difficult. The disappointed beneficiary will want to



be assured that the Deceased had mental capacity when the Will was made. They will also want to consider how the Will was made and whether the statutory formalities were complied with when the Will was executed. Finally, actual undue influence by the preferred beneficiary or a third party might explain an apparently perverse final Will. This latter option has most recently been considered in the case of Gill –v- Woodall and Others.

Claims that Wills should be declared invalid for actual influence seldom succeed. The reported successful Claims since the Wills Act 1837 came into force apparently do not even get in to double figures. The Woodhall case did succeed, and at first instance. The judgment for the disappointed beneficiary was then upheld on appeal for different reasons. The case involved a couple who had repeatedly made representations to their daughter and son-in-law during

their lifetimes that they would inherit their farm. The Trial Judge ultimately found that Mrs Gill was coerced by her “domineering and bombastic” husband to favour the RSPCA over her daughter and that she was particularly vulnerable to that coercion as result of a psychiatric disorder. The Appeal Court later found that Mrs Gill, who would not leave her husband and only left her home to avoid being left by him, could not have understood and approved the terms of Will that she made favouring the RSPCA.

Each contentious probate case turns on its own facts. They are fascinating not least because the star witness is unfortunately often the deceased, making ascertaining the facts a challenging task.

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- Establishing a cross-sectoral Digital Copyright Exchange (DCE) to allow potential licensees to quickly identify and contact the relevant right-holders and automating the licensing process as much as possible.
- Requiring collecting societies to adopt codes of practice, approved by the IPO (Intellectual Property Office) and UK licensing authorities to ensure that they operate in a manner that is consistent with the development of efficient and open markets.
- Introducing new copyright exceptions to cover format-shifting, parody, non-commercial research and library archiving. The review rejected the idea of introducing an equivalent to the US style “fair use” exception.
- Government should legislate to ensure that all copyright exceptions are protected from being overridden by contract.

On 3 August 2011, the Government responded to the Hargreaves Review and broadly accepted all of the recommendations. The Government set out the actions it intends to take in relation to copyright:

- In autumn 2011, proposals for an orphan works scheme and extending collective licensing to benefit sectors that choose to adopt it, will be brought forward.
- Bringing forward arrangements to establish how a DCE could work in practice. The Government has indicated that it will report on progress by the end of 2011.
- Publishing minimum standards for voluntary codes for collecting societies and consulting with them on their implementation in autumn 2011. The Government will also draw up proposals for a backstop power that allows a statutory code to be put in place for non-compliant collecting societies.
- In autumn 2011, bring forward proposals for a substantial opening up of the UK’s copyright

exceptions regime, including a broad non-commercial research exception covering text and data mining, limited private copying exception, parody and library archiving.

The Government has indicated that it will set out its plans in a White Paper in Spring 2012 with a view to legislating in this Parliament where necessary.

The response to the Hargreaves Review creates an ambitious task for the Government in the months to come.

Reaction to the Review

Overall the creative industries have responded positively to both the Review and the Government’s response, with many taking a sigh of relief that the introduction of a US style fair use exception has been rejected.

Many were also pleased about the recommendation of extending the copyright exceptions. For example, an exception that will cover limited private copying will mean that copying a CD to a computer will no longer be classified as infringing behavior.

Looking forward, the creative industries have already made their case to the Government that it should allow them to lead the way in any attempt to build the DCE.

Over the course of the next few months the creative industries have an opportunity to play a significant role in the development of the UK’s intellectual property laws particularly in relation to copyright. It will be interesting to see how both the Government and the creative industries deal with this challenging but necessary task to ensure that right holders are adequately protected, while extending exceptions to the copyright regime where legitimate. It seems that all parties concerned are committed to striking the right balance.

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