

Capital Law / IP Wales® Inaugural Annual Intellectual Property Lecture

As delivered by Professor Ian Hargreaves at the SWALEC Stadium, Cardiff, on 6th October, 2011

Thank you. When Capital Law and IP Wales® asked me to deliver this inaugural lecture, I was naturally enthusiastic about the opportunity to enjoy the undivided attention of such a distinguished audience.

I was also keen, however, to make the point that my thinking in the last year about intellectual property has had more than one goal: three in fact.

As author of the intellectual property review commissioned by the coalition Government in London, my mandate, and so my goal, was to identify the economic shortcomings of today's legal framework.

As Professor of Digital Economy at Cardiff University, my aim is to understand the countless ways in which the internet is changing our lives and to consider how we might react.

My third persona is as author of a review last year on creative industries in Wales, conducted on behalf of a Cardiff Bay coalition Government. With a career spent mostly in the news media behind me, I am concerned about Wales' creative industries and the wider subject of the creative economy of Wales, which involves understanding the many ways in which creative skills are critical to the success of enterprises right across the economy, from advanced manufacturing to financial and business services.

It was this third concern which led me to ask Kate Dumbleton to share this platform. She embodies the spirit of the creative micro-business in Wales. As you have seen, she makes beautiful jewellery, which draws deeply upon the creative legacy of Wales. She is also a significant exporter to markets beyond Wales.

I ran into Kate, who is our neighbour in Penarth, the day I got the call from the Government's Intellectual Property Minister asking me to lead a review of the relationship between intellectual property issues and economic growth. She was, therefore, the first person to give evidence to the Hargreaves Review.

That was last November. The following day, David Cameron gave a speech in East London, at what the press like to call Silicon Roundabout in Shoreditch, proclaiming his commitment to the growth of innovative high technology companies in the UK.

This is what the Prime Minister said about our IP system:

"The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called "fair-use" provisions, which some people believe gives companies more breathing space to create new products and services. So I can announce today that we are reviewing our IP laws, to see if we can make them fit for the internet age. I want to encourage the sort of creative innovation that exists in America."

In light of these comments, the review became branded among those who suspected its intentions as "the Google Review." Newspapers have a lot at stake in this debate. The Daily Mail in April predicted that the Review would enable "the parasitic monster" from Mountain View to destroy the British way of life.

The Review was, by the standards of these things, a quick piece of work: from terms of reference to publication in six months. Such a short timescale meant leaving a lot of important things aside. Discussion of trademarks, for example, was not included within the terms of reference; nor were fiscal issues and nor, I'm sorry Kate, was design but I'll come back to that.

What did we try to do? Essentially, the review re-phrased and then answered the Prime Minister's question: could it be true that laws first established three hundred years ago to establish a right to financial reward for creators and inventors, are today getting in the way of innovation and creativity and so coming at avoidable economic cost? In short, could we get a better deal for the British economy on IP?

I set some ground rules. I told the excellent and highly experienced team which supported the review from the UK Intellectual Property Office (headquartered less than ten miles from here - in Newport, just off the M4) that we would aim for a report of not more than 60 pages. It came in at twice that length, proving once again Mark Twain's maxim that short letters take more time to

write than long ones. We would limit ourselves to ten recommendations (which we achieved) and we would hit the deadline, which we did. Roughly speaking, we devoted a month to planning and team-building; two months to soliciting inputs to the review and explaining our approach; two months to sifting the evidence and a month writing the report.

The aim was to examine the strategic direction of policy and to explore the case for shifting course. We did not set out to cover every detail of policy. Nor did we pursue a counsel of perfection. Our goal was practical advice to Ministers: something actionable in today's political circumstances.

In the review's foreword, we answered our re-cast of the PM's exam question with a single word: Yes – the IP framework is indeed causing some economic problems. Choosing my words carefully, I wrote: "the UK's intellectual property framework, especially with regard to copyright, is falling behind what is needed."

That sentence is followed immediately by two very important additional points:

"Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors."

BUT:

"This does not mean that we must put our hugely important creative industries at risk. Indeed, these businesses also need change, in the form of more open, contestable and effective global markets in digital content and a setting in which enforcement of copyright becomes effective once more."

That is the review's argument: to make our digital economy and our markets in digital content work to best advantage we need to re-balance IP law so that it protects what it was always intended to protect but avoids regulating and inhibiting what it was never designed to regulate.

I don't say this in the review, but if I were asked what scale of strategic course correction is needed to get the Intellectual Property ship back on course, I would say 20 to 25 degrees. So not a de-stabilising U-turn, but one which, over time, will involve substantial changes and which, well executed, will deliver substantial economic gains. The economists who dissected the review after it had been completed, but before it was published, estimate that taken together the review's reforms would add to the structural growth of the UK economy by between 0.3 and 0.6 per cent of GDP a year, as well as wiping £750m a year of transaction costs from the digital economy. Given where we are on economic growth, struggling for every fractional percentage point, this is a worthwhile harvest from what, in the scheme of things, is a relatively modest and technical set of reforms to the supply-side of the UK economy.

These numbers, of course, are only educated guesses. But if you stop and think about the effect that the internet is having upon your own life and our economy, the numbers are plausible, perhaps even conservative. We all know from personal experience the extent to which the internet is changing the way we do things. How we shop, learn, navigate, make things, work, socialise and much more. These are the consequences of a communications revolution which is not yet two decades old and which has probably not yet run half its course, based upon the fact that two thirds of the world's population still don't have direct access to the world wide web.

Our understanding of the dynamics of the digital economy in terms of its impact upon growth, productivity and employment is still embryonic. A study released by the McKinsey Group shortly after we completed our review puts up some numbers, based upon a study of the internet economies of the Group of Eight leading world economies (The G8) plus those of Brazil, China, India, South Korea and Sweden.

McKinsey finds that among these 13 countries, the internet contributes 3.4 per cent of GDP; the figure is 6 per cent for the UK. More strikingly, the internet has accounted for 21 per cent of all economic growth in the last five years in the G8 countries. The bulk of this additional economic value – three quarters of it – is occurring not in companies we think of as being high tech, but in traditional businesses such as manufacturing, retail and business services. This is the digital economy.

The authors of the McKinsey report urge all governments to pay very close attention to their internet eco-system. A dozen years ago, when I first came to work in Cardiff, I urged the then new National Assembly Government to declare the year 2000 the year of World Wide Wales on the World Wide Web.

The emergence of this digital or internet economy has not, however, been pain-free. For some firms it has brought turbulence and decline. In my own field of journalism, old advertising models are broken; new competitors abound and business models have been turned inside out. Established players sue upstarts they accuse of stealing copyright material.

Because the internet enables perfect copies of songs, books, photographs, newspaper articles and video to be made and distributed globally at near-zero cost, this opens vast, new, global markets for creative businesses, along with unprecedented personal and cultural opportunities. But this global, digital market in downloads, or increasingly in streamed material from the so-called "cloud" of data storage, also requires new models for payment. These models must take into account the risk that ill-judged moves are vulnerable to challenge, whether by new competitors or by consumers who can and do resort to alternative supply chains, some of them outside the law.

Another indicator of the rise of the digital economy and its elder cousin, the knowledge economy, is the way that businesses increasingly invest not in plant and buildings, but in intangible assets like brand, patents and copyright. Today, UK firms are spending one third more on intangible investment than on physical assets. Our economic success depends more than anything else upon the way we deploy these intangible assets, otherwise known as our ideas.

Another thing we know about this knowledge economy is that most of the innovation and jobs come not from big corporations but from smaller companies. Firms identified as small, young and innovative have accounted for more than half of all new jobs in the UK since 2002. That's true in biotechnology as well as creative industries.

Another way of thinking about this is to talk about a country's creative economy. It's important to distinguish this from a country's creative industries - companies whose entire raison d'être is creative outputs such as music, television, designs, fashion, architecture and software. In the

creative economy, we seek to understand how creativity is adding value across all business sectors: for example the design element in advanced manufacturing or the marketing and product development aspect of financial services.

According to work by NESTA, the National Endowment for Science, Technology and the Arts, more creative people today work outside the creative industries than inside them¹.

In the UK, the number of creative workers is estimated at more than 2 million; moreover these are relatively well paid jobs with growth rates which have exceeded those of other employment categories in the last decade. There's a lot we still don't understand about digital economy and creative economy. We do know, however, that we want more.

This, then, is the economic horizon for IP policy. The historical context is also important, but we don't have time to explore it any detail this evening. Suffice to note that in France, the earliest bestowing of authors' rights occurred in the tumultuous weeks following the French Revolution in 1793. Rights secured in such circumstances have deep roots, but the founding fathers of IP also recognised that a balance has to be struck between locking rights down and disseminating knowledge.

Thomas Jefferson is known to all as the principle author of the Declaration of Independence and the Third President of the United States. Among IP specialists in this audience, he is also known as a member of the first American patent-awarding body. But it was also Jefferson who said: "If nature has made one thing less susceptible than all others of exclusive property it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me..... Inventions then cannot, by nature, be a subject of property."

No wonder debates about the intellectual property rules stir such deep passions. Jeffersonian commitment to freedom of expression is constantly cited in the American debate on rights and it lies beneath the point referred to in David Cameron's Silicon Roundabout speech.

¹ Beyond the creative industries: mapping the creative economy in the United Kingdom. Higgs, Cunningham and Bakhshi. 2008

Google does indeed argue that the principles upon which its algorithmic search technology is based rely upon Jeffersonian freedom of expression in the interpretation of copyright law. Facebook says the same about the rights issues which abound in its own business model, which rests upon user-generated content. Other American corporations, however, among them the biggest names in Hollywood, along with the likes of Microsoft and Apple, have meanwhile built businesses which depend heavily upon the protection of IP rights and their management in a digital environment.

David Cameron's speech in November indicated some longing for the Jeffersonian way. The United States has dealt with the dilemma of balancing the interests of rights owners with the claims of free expression through a distinctive legal framework which includes the defence against allegations of copyright theft based upon "Fair Use." This legal regime has encouraged American innovators, Google among them, to take the chance of launching new products which may violate IP rights in the belief that they will be able to resist any subsequent challenge from rights owners in court with the argument that their use of the contested material was and is "fair."

When it comes to copyright exceptions, Europe and the UK have long had a more statute-based, prescriptive approach, preferring to grant latitude to those who have a good case for escaping the claims of copyright through a menu of defined exceptions. My review concluded that the American case-law based approach could not be successfully translated into a UK context, where the law is framed by the over-arching construct of the European Information Society Directive. I did, however, also conclude, that the UK has currently not got the balance right in copyright law.

This is a crucial judgment and some contest it. Those who do so must answer some difficult questions. If the law is in such good shape, why is there such extensive and in some cases systemic illicit use of copyright material? How can consumers respect a law which makes them outlaws for transferring a song they have bought on a CD to a laptop and then to an MP3 Player? Or for backing it up? How can Martin Brennan, who invented a machine to simplify the transfer of your domestically owned song files to your hi-fi via his "Brennan" music player deal with the fact that the Advertising Standards Authority then required him to post a label on every machine explaining that its use would violate copyright law? How can anyone make sense of a law that requires a Welsh music video parody posted on YouTube to be removed for violating copyright, only to find

that it then became a link in a proliferating global chain of parodies including one featuring a roster of Welsh stars, broadcast on BBC Television on behalf of Comic Relief?

Nor are these the crowning achievement of copyright's absurdities. That prize must go to the current situation with regard to out of copyright works whose authorship is unknown – so called “orphan works”. This has led to a century's backlog of books, music, photographs and film being locked in vaults, with librarians unable to obtain permission even to copy for the purpose of preservation. Is this a sound legal and institutional framework? I don't think so.

Nor is the argument for reform new. The Gowers Review five years ago made the case and made it well for a wider base of copyright exceptions and for more weight to be given to evidence of economic impact, especially in proposals to extend the duration of copyright. In spite of this, copyright's reach has continued to lengthen, as in the current EU extension for the protection of sound recordings to life plus 70 years; so-called “Cliff's Law” in homage to the saintly rock and roller whose backing band made the first album in my own pre-teen collection. The most recent copyright extensions have been carried through in spite of clear assessments carried out by our own Government which indicates that they involve demonstrable costs to the wider economic interest.

Copyright is not only causing confusion in markets for creative goods. It is also starting to cause difficulties way beyond the creative industries because computerised copying of files is today basic to numerous emerging technologies, such as the use of text and data mining in medical research, which enables scientists to make connections between vast stretches of data and so pursue new discoveries and treatments. As digital copying becomes a core business process across the economy, we need to ensure that copyright law does not unintentionally get in its way. With the data “cloud” above us, offering mobile access to all of our digital resources, and the so-called “internet of things ahead”, where objects will be able to communicate with each other to deliver new services and products, no-one should be surprised that our copyright law, drafted before the internet became a commercial phenomenon, is past its sell-by date. These are not the conditions in which innovation and growth are likely to thrive.

My proposed reform of the copyright, however, starts not with a change in the law, but with the idea of a Digital Copyright Exchange, which can be pursued at once. The aim of this exchange is

to make it quicker, easier and cheaper to buy and sell digital content on-line in a marketplace which is more transparent to new competitors. My review invites the Government to use its convening power, along with a few incentives, to persuade interested parties to join the exchange. Technically, the Exchange will comprise a network of interoperable data-bases, some of them already in existence.

The main challenge is not technical but political, with a small P: to persuade rights holders to participate. I envisage an Exchange run in a business-like way to an agreed code of practice, governed by its stakeholders, and offering those who use it important amenities, such as low-cost resolution of disputes.

If the UK gets on with this task, we will enhance our lead in the European time zone in digital content markets. You can sniff the potential by considering London's current role as a hub for financial markets and related services. There is, however, no time to lose. Since the review's publication, I have been made aware of interest in this idea not only from within Europe, but from China, the United States and elsewhere. This is a seriously time-limited opportunity.

A UK Digital Copyright Exchange would help ensure that in future legitimate services in music, film, books and the rest are at least as easy to use as their illegitimate counterparts. For creators, including micro-businesses like Kate's, they will offer new and simpler routes to global licensing transactions: a place to trade brand new creations, alongside newly liberated orphan works.

There is much else in the review's ten recommendations. On patent, we looked closely at the risks to innovation from growing levels of patent registration, along with the spread of patent thickets and other devices designed to block rather than initiate innovation. We explored differential patent registration and renewal fees, but I was not convinced by the time we had to report that we had bottomed this out. It is important to note that in the world of patent, the quality of data available to analyse these economic trade-offs is much better than in copyright. As a result, policy judgments can be, and I think generally are, better informed. My review also adds its voice to the case for a unified European patent system, where the economic benefits appear substantial.

This takes us to the two over-arching themes in the review's recommendations. One speaks to the importance of establishing a credible evidence base for all IP policy, so that copyright lobbyonomics no longer trumps economics. Evidence-based policy making is also, I believe, the key to longer term success in making arguments in the international forums where most IP law is ultimately framed.

The second over-arching point concerns smaller companies. I have already made the point that small, innovative companies contribute more to job creation than any other class of firm in the UK. There is also evidence that these small firms need access to a more integrated IP advice system, which brings together legal and commercial knowledge, in order to succeed within an IP legal framework of great complexity. Small firms also need lower risk access to legal arbitration, through an extension of the small claims court.

The review also has an important chapter on enforcement, which notes the significant copyright enforcement powers now on their way into the system as a result of the passage through Parliament and the courts of the 2010 Digital Economy Act.

It will be important that Ofcom, in advising upon the DEA's deployment against online rights infringers, gathers good evidence on the working of these new measures and so supports an iterative process of design and re-design. We must not lose sight of the point that effective enforcement of IP rights can only occur in a context of well-functioning legitimate markets, based upon rules that are as simple as possible and judged reasonable in the eyes of most people.

What about design, Kate? I didn't realise the day we first spoke about it that design was not really included in the review's terms of reference. That struck me as very odd given the economic importance of UK design: it is the biggest single source of intangible investment in the UK economy.

Design is also subject to untidily complex and overlapping UK and EU regimes regarding registration of rights, which UK designers don't make much use of. Digital technology is re-shaping design business at some speed, not least through the emergence of three-dimensional copying. So, in the review, I asked the Government to put in hand a detailed evaluation of the current design rights regime, with a view to improving it. I strongly encourage designers to engage with

this work. I hope that in good time the Digital Copyright Exchange will play its part in offering designers like Kate improved, low-cost ways of addressing global markets and protecting their rights.

That, one way or another, mops up nine of the review's recommendations. The tenth is all about institutional structures. I invited Government to consider why the IPO has not been, until relatively recently, more concerned to understand the economic impact of its own work. The same is true of the World IP body WIPO, by the way, and the US Patent and Trade Mark Office, both of which recruited their first economists in the last five years.

The explanation is that IP law is, quite simply, a bigger factor in our economy than used to be the case. It used to affect mainly artists and their business managers. Today, it is reaching into the whole digital economy. So, if the Government is now persuaded that our own IPO should take into account economic evidence, rather than focusing essentially upon its role as an administrator of rights, we need the IPO to have a mandate in law to that effect. Equally important, if the IPO is to play an active role in identifying emerging competition policy issues in markets built around IP, as I believe it should, it needs both the mandate and the capability.

In August, the Government published its response to my review and, I am pleased to say, it accepted all ten recommendations. A process of pre-legislative consultation is now under way on orphan rights and copyright exceptions, along with other steps to develop the Digital Copyright Exchange and other measures. Given that I answered the Prime Minister's November question about Fair Use and Google, with a No, Prime Minister, it would be churlish to find fault with such a supportive Governmental response and I do not intend to do so.

It will, however, be a long road ahead to re-dress the balance in IP law in a way which balances the legitimate interests of rights holders with the need to accommodate and harness the economic creativity and drive of the internet. We will need determined Parliamentarians, capable of sorting the economics from the lobbyconomics. We will need a policy drive which is capable of surviving ministerial re-shuffles and other political hazards. Only if we manage this, will we reap the promised economic benefits.

What, finally, are the lessons for Wales from this story?

The challenge is to secure Wales' position in the UK's creative economy and to ensure that Wales participates more vigorously in the final two thirds of the digital revolution than it has in the first third. We can afford no more stumblings on the road to securing decently quick broadband and an end to mobile non-spots across Wales. If there is an opportunity to bring forward the Welsh Government's 2015 target for broadband completion, as part of a response to a weakening economy, Wales should grab the opportunity.

A successful creative economy also means better teaching of technology in schools, so that more young people combine software writing skills with creative and literacy skills. We also need to achieve further value in the way universities, business and the public sector work to exchange knowledge and generate new ideas.

We know that 99 per cent of Welsh creative businesses are small and medium sized enterprises. So we need to make sure that our business support systems are built to meet their needs: the Welsh Music Foundation offers good insights here. On IP, small firms told the review that they want a blend of legal and commercial advice, not an off-the-shelf legal primer.

A dozen years ago when I was trying unsuccessfully to launch my World Wide Wales campaign for the year 2000 - (its other element by the way was to build a new rail link to connect South Wales to Heathrow and market Heathrow as our local airport.) ... I used to argue that the internet offered the first communications technology in the history of mankind that would not be defeated by Welsh mountains and population dispersal. Today, there is increasing evidence that the internet can help light up a constellation of creative micro-businesses, located in live-work homesteads across Wales and with unprecedented access to international business opportunities. Along with some great urban clusters, not least here in Cardiff, that's what the Wales creative economy can look like.

Planning to boost creativity is, to be sure, hard. It often feels like a contradiction in terms. I'm sure that like me you've thought today about the great Steve Jobs, whose death was announced early this morning. A colleague sent me a video of Steve talking to a graduation ceremony at Stanford. Two points stood out for me.

The first was his own college experience. He drops out. Sleeps on other people's floors. Eats at Hare Krishna. Goes to classes in calligraphy, which fascinate him and, he says, later inspire the elegant discipline of the Mac's proportionate typography. Creativity is often serendipitous. Steve's advice to the Stanford graduates is pretty straightforward: Do What You Love and Don't Settle until you have found What You Love. Because only then will you do your best work.

The digital economy, [economy digidol], is good for Wales. As such it needs to be considered in every aspect of the Welsh Government's economic and business thinking. A modernised and liberalised IP regime will help generate the creativity, innovation and growth that Wales needs to deliver more 21st century jobs. Creative industries have an important place within that vision. As I put it in the title of the review I wrote for the Government here in Wales last year, creative industries are "The Heart of Digital Wales."

Thank you.