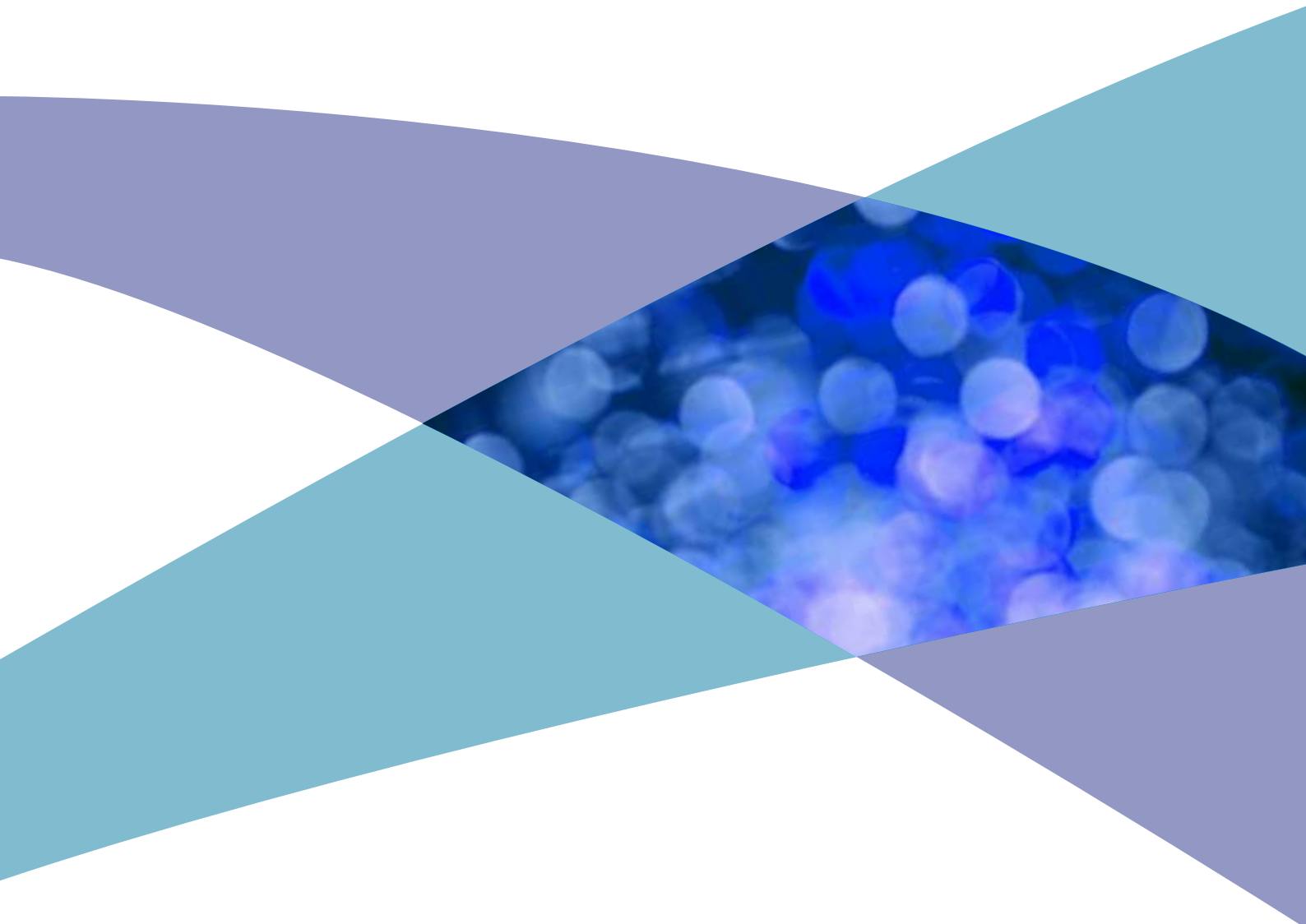
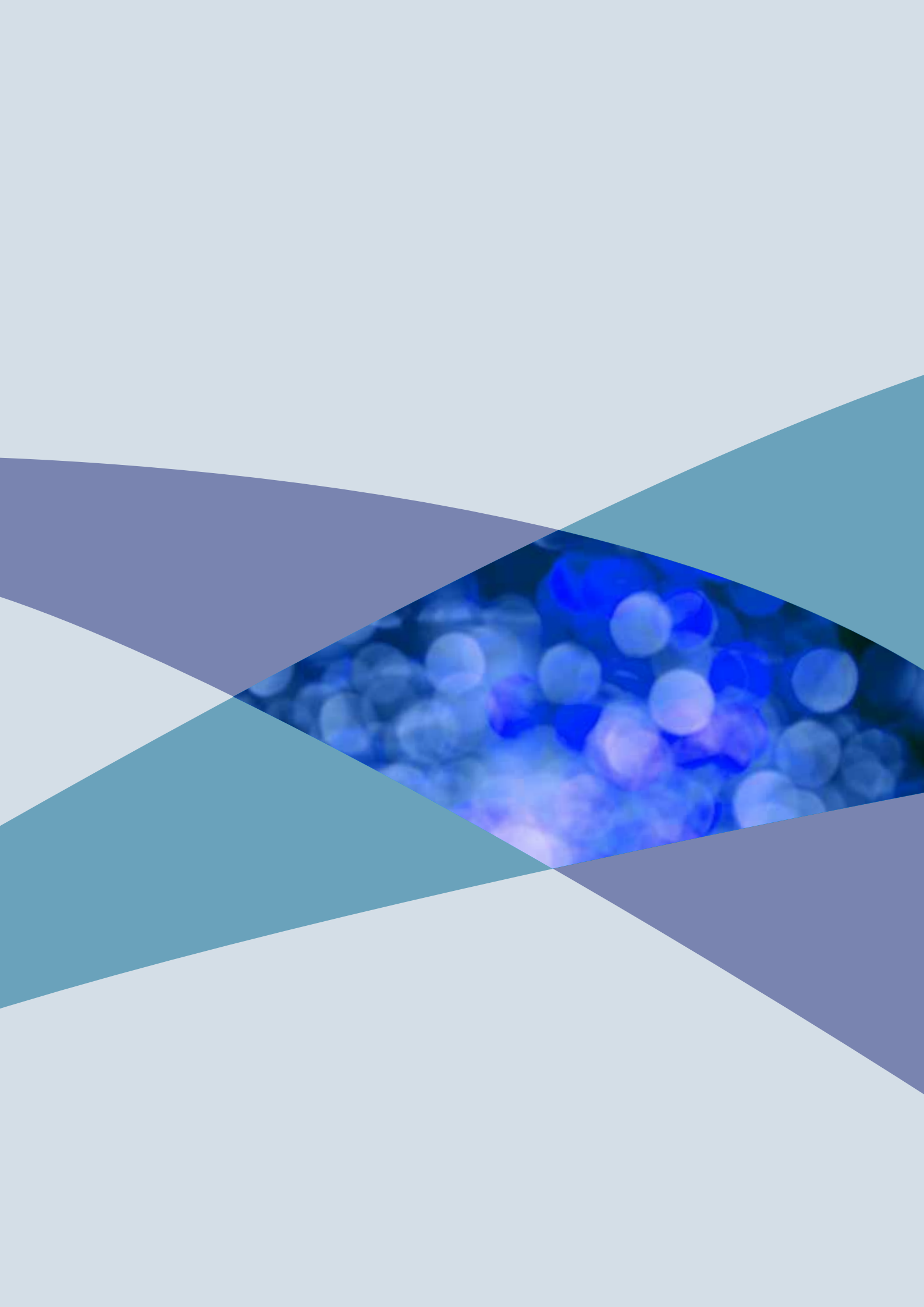




**INTELLECTUAL**  
PROPERTY OFFICE

# The Role of the Intellectual Property Office





# The Hargreaves Review

In 2011, Professor Ian Hargreaves published his review of intellectual property and growth. He concluded that the IP framework needed to be more responsive to change and that in several policy areas, notably copyright, it had failed to keep pace with technological developments.

In coming to this conclusion, he argued that intellectual property policy had been insufficiently directed towards the objective of economic growth and that there had been instances in which IP policy had been developed in ways that were inconsistent with the economic evidence. He noted the influence of persuasive and skilled lobbyists, representing industry sectors whose business models were built upon the commercialisation of IP and who had a strong interest in shaping policy. In contrast, consumers' lives are increasingly touched by IP, but their interests are more diffuse. The Review argued that the result of this was that the development of IP policy did not effectively balance the interests of existing rights holders, potential new entrants to a market, and consumers.

To improve the focus of IP policy on growth, the Review proposed that the Intellectual Property Office, as the Government body responsible for advising Ministers on the development of IP policy, should have an overarching legal mandate to promote innovation and growth, and state that IPO decisions will be based in evidence and take due account of the impact of the IP system on innovation and growth.

The aim of the proposal was to improve the way in which the IPO gathers evidence to inform the development of policy. To do this, the Review proposed four new functions:

- A duty to keep under review the impact of IP and IP rights, and market positions founded on IP rights, on innovation and growth, including adverse impacts on competition and the competitive spur to growth, and to report annually.
- Powers to prepare one-off reports on specific areas or cases where there appears to be detriment to competition or consumer welfare.
- Powers to require information to support the exercise of these reporting functions.
- Powers to make recommendations to the competition authorities, and to fund investigations that competition authorities may make as a result.

## Recommendation 10 of the Hargreaves Review

The IPO should be given the necessary powers and mandate in law to ensure that it focuses on its central task of ensuring that the UK's IP system promotes innovation and growth through efficient, contestable markets. It should be empowered to issue statutory opinions where these will help clarify copyright law. As an element of improved transparency and adaptability, Government should ensure that by the end of 2013, the IPO publishes an assessment of the impact of those measures advocated in this review which have been accepted by Government.

The Government has consulted on the recommendation on statutory opinions to clarify copyright law, as part of the copyright consultation, launched on 14 December 2011.<sup>1</sup> A summary of responses to this consultation was published on 14 June 2012.<sup>2</sup> The focus of this paper is the first part of that recommendation, on the role of the IPO.

## The Government Response to the Review

The Government accepted the Review's overall conclusion that IP is important for economic growth, and agreed with the underlying critique that there has been an insufficient evidence base for too many past decisions on IP. While the IPO's economics team has been strengthened, the Government has been considering what further changes need to be made to support more evidence-based decisions in the future.

The Government wishes to retain the current structure of the IPO as an Executive Agency, combining practical experience of the IP system, gained through rights granting and advisory services, with policy responsibility. There are advantages in maintaining an organisation which has a blend of technical expertise and policy development skills, and the development of policy should not be done at arm's length from Ministers.

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1 <http://www.ipo.gov.uk/consult-2011-copyright.pdf>

2 <http://www.ipo.gov.uk/copyright-summaryofresponses-pdf>

## What is an Executive Agency?

- Part of a Government department.
- Defined business unit headed up by a Chief Executive
- Operates with a degree of autonomy from Ministers and the main department. Ministers do not concern themselves with the day to day running of Agencies – but are directly accountable to Parliament and the public for the overall performance of Agencies and for their continued existence.
- Staffed by civil servants.
- Typically deliver a service.

This paper sets out the Government's ideas on how to deliver a strengthened focus for the IPO on innovation and growth, a greater emphasis on publicly available evidence, and an enhanced ability to promote competitive markets.

## Innovation and Growth

In developed economies, such as the UK, the primary driver of long-term growth is improved productivity. Economic evidence suggests that there is a strong correlation between innovation and productivity.<sup>3</sup> Innovative businesses grow twice as fast, both in employment and sales, as businesses that fail to innovate.<sup>4</sup>

The purpose of the IP regime is to incentivise innovation. IP rights encourage investment in new technology, brands and the creative industries. They enable rights holders to gain appropriate remuneration from the sale of products and services. Without IP rights, such investment may be too risky as competitors could copy the innovation, without bearing the costs of development. However, the Hargreaves Review identified a number of areas where the IP system had failed to adapt to technological change and where opportunities for growth were therefore being missed.

In its response to the Review, the Government noted its determination to deliver “an IP system that is the best possible incentive for UK growth”<sup>5</sup>

3 See BIS (2011), *Innovation and Research Strategy for Growth*. Economics Paper No. 15. Available at <http://www.bis.gov.uk/assets/biscore/innovation/docs/e/11-1386-economics-innovation-and-research-strategy-for-growth.pdf>.

4 NESTA (2009), *The vital 6 per cent*. Available at [http://www.nesta.org.uk/areas\\_of\\_work/economic\\_growth/assets/features/the\\_vital\\_6\\_per\\_cent](http://www.nesta.org.uk/areas_of_work/economic_growth/assets/features/the_vital_6_per_cent)

5 <http://www.ipo.gov.uk/ipresponse-full.pdf>, p.3.

The Government recognises that the IPO has statutory duties connected with its rights granting activities, but lacks underpinning duties or functions directed towards the objective of promoting innovation and growth.

It is, however, important to note that, although growth is the Government's top priority, there are other issues that sometimes come into play when developing policy on IP. While IP makes a substantial contribution to the UK economy, it also has an impact on society as a whole – on culture, education and the dissemination of knowledge and information.

The Government therefore considers that the most effective way of strengthening the IPO's focus on innovation and growth would be to require it **to report annually on the extent to which its activities had promoted those two ends**. This increased transparency would act as a powerful incentive to develop policy based on the best available evidence, and to be clear about the respective weightings given to economic and social impacts on individual policy issues. Where the data are not as robust as we might like, a requirement to report will act as a spur to improve the quality of evidence.

## Publicly Available Evidence

The Government is committed to making decisions on IP policy on the basis of good evidence. To that end, alongside the Copyright Consultation, the IPO issued guidance on evidence used in the development of policy.<sup>6</sup> This guidance sets out the standards to which the IPO aspires and which it seeks from those organisations and individuals that submit evidence to the IPO. The Government however recognises that perfect evidence is an ideal and that there will be instances where it is necessary to make a reasonable decision based on the current state of knowledge, even if this is incomplete. In such cases, we will be clear about the assumptions that have been made.

The IPO, in common with all Government departments that advise on policy, conducts Impact Assessments for new regulations. (A regulation is defined as "a rule or guidance with which failure to comply would result in the regulated entity or person coming into conflict with the law or being ineligible for continued funding, grants and other applied for schemes".<sup>7</sup>) These are independently scrutinised by the Regulatory Policy Committee and are available on the BIS IA Library.<sup>8</sup>

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6 <http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf>

7 HM Government (2010), Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort, <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/r/10-1155-reducing-regulation-made-simple.pdf>.

8 <http://www.ialibrary.bis.gov.uk/>

Guidance on preparing impact assessments prompts policy developers to consider the impacts of policy options on the wider economy and, where appropriate, on competition. Competition impact assessments should be conducted where any of the following conditions are met:

- the policy would directly limit the number or range of suppliers;
- the policy would indirectly limit the number or range of suppliers;
- the policy would limit the ability of suppliers to compete; or
- the policy would reduce suppliers' incentives to compete vigorously.

The scale of effort devoted to producing the impact assessment should be proportionate to a number of factors, including the sensitivity, novelty and scale of impact.

In line with its wider commitment to transparency, the Government wishes to place a greater emphasis on publicly available evidence in IP policy making. This means making this evidence, including Impact Assessments, more accessible to interested parties. **The IPO will therefore publish, alongside its Impact Assessments, a summary stating the impact that its analysis indicates the policy will have on innovation and growth.** Whilst Ministers will retain oversight of all material published by the IPO, and have responsibility for policy decisions, it is expected that this summary will be signed by the Chief Executive and Chief Economist of the IPO.

The IPO also takes a transparent approach in developing and delivering its programme of economic research. The forward programme is discussed with stakeholders and all research projects are subject to peer review through Expert Advisory Groups.

## Competition

Competition encourages firms to innovate, to gain legitimate advantage over their rivals, through new or differentiated products and services, or lower prices. In economies which are dynamic, the most competitive and efficient firms expand and new firms enter the market. The less competitive firms either shrink or leave the market altogether. Such markets are described as "contestable". Evidence shows that it is in these economies that productivity grows faster.<sup>9</sup> This enables financial investment and human resources to be allocated more efficiently.

<sup>9</sup> Albert Bravo Biosca (2010), [Growth Dynamics. Exploring business growth and contraction in Europe and the US]. Available at <http://www.nesta.org.uk/library/documents/GrowthDynamicsWebv3.pdf>

The same pattern seems to hold at the level of individual industries. Where there is contestability, technology spreads more quickly, with bigger positive effects on productivity.<sup>10</sup>

This is why the Hargreaves Review stressed the importance of competition and contestability in markets as a necessary condition for innovation, enterprise and growth.

As has already been noted, IP rights incentivise innovation, and they do this by offering a quasi-monopoly. The existence of such rights has led to vigorous debates over the relationship between IP and competition, but there is now increasing recognition that IP rights are not in themselves anti-competitive, but that the economy may be harmed if the system is abused.<sup>11</sup> If IP rules are badly designed, they may entrench existing firms' positions and acts as barriers to the establishment of new firms or markets.

Given the important role for competition as a driver of growth, the Hargreaves Review recommended that the IPO be given new functions in this area. The Government has carefully considered these proposals.

The Government agrees that there needs to be mechanisms to allow for the effective management of issues where IP and competition intersect. However, it does not believe that the IPO should duplicate the functions of competition authorities. The Government also is mindful of the need to ensure that the independence of competition authorities is preserved, and seen to be preserved.

With these principles in mind, the Government believes that, where appropriate and permitted under both competition and intellectual property legal regimes, the IPO should strengthen its cooperation with the Office of Fair Trading (OFT). **The IPO has therefore agreed a Memorandum of Understanding (MoU) with the OFT.**

The MoU provides a framework for this strengthened cooperation. Its key features are:

- procedures for the IPO to refer to the OFT cases where it considers that there may be competition concerns;
- sharing of knowledge, expertise and best practice in areas of mutual interest;
- sharing of information, where appropriate and as permitted by law; and
- technical and policy assistance, where appropriate and as permitted by law, on projects of mutual interest.

<sup>10</sup> Mark Franklin, Peter Stam and Tony Clayton (2009), "ICT impact assessment by linking data", [ONS *Economic and Labour Market Review*], 3(10), pp. 18-27.

<sup>11</sup> See for example Joaquín Almunia (2012), "Antitrust enforcement: challenges old and new", speech given at the 19<sup>th</sup> International Competition Law Forum. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428>.



The IPO and OFT will monitor the operation of the MoU to ensure that there is effective cooperation and constructive communication between the two organisations. The IPO will also seek to agree this framework with the Competition and Markets Authority, when it is formed.

## What Next?

In responding to the recommendations in the Hargreaves Review, the Government seeks to implement practical proposals that will provide a sharper focus on the IPO's objective of promoting growth and innovation, act as an incentive to enhance the steps the IPO is taking to improve the evidence base on which policy is made, and strengthen the IPO's relationship with the competition authorities.

The Government will keep these measures under review and will propose further changes, if necessary. These may include more radical changes to the structure of the IPO.

If you have any comments on the proposals set out in this paper, please send them to [iporole@ipo.gov.uk](mailto:iporole@ipo.gov.uk) by 28 September 2012.







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