

Gowers Review of Intellectual Property

Response from British Telecommunications plc (BT)

INTRODUCTION

BT is a significant originator of IP, with an inevitable interest in protecting this asset to safeguard its commercial interests. BT is also a heavy user of third party IP. Therefore, BT supports a balanced IP system that provides appropriate reward for investment in innovation but does not excessively inhibit commercial freedom, damage the general economic interest, or interfere with the legitimate interests of consumers.

This need for balance applies equally to all sectors of the networked, knowledge economy. If the UK is to sustain its competitiveness internationally, then all players, large and small, including individuals, must be able to innovate and be rewarded for doing so. The rights awarded by the IP framework domestically and internationally must be proportionate and consistent with sound economic principles. For example, we believe that there is no rational basis for the creation of an IP framework that places greater weight on the rights given to the creative industries producing digital content than those given to the industries investing in innovative infrastructures and devices and new services derived from them.

This question of balance has many facets, and in an area characterised by rapid changes in technology that can suddenly open up new possibilities for service and product provision, it is particularly important to ensure that IP rights do not unwittingly act as a barrier to entrepreneurial development of innovative services. For example, BT's vision of the future includes an explosion of new services being made available by thousands of providers to, potentially, millions of users. The low cost and ease of innovating and reaching potential customers, or of individuals and small geographical or interest group communities being able to use broadband and the internet to 'publish' material, will provide opportunities that older technology would have rendered uneconomic.

BT also believes that the IP system needs to be of high quality (for example, in terms of the reliability of its examination of applications for rights). This is in the interests of all users of the system, large and small.

In this document we provide comments in response to the questions in the Call for Evidence paper that are of relevance to BT. We have adopted the numbering and lettering of the questions in that paper.

GENERAL QUESTIONS

1. How IP is awarded

(a) We have not encountered particular barriers obtaining IPRs in the UK because of system complexity, although we would welcome greater alignment of UK Patent Office (UKPO) practice with that of the European Patent Office (EPO) on issues such as patentability of computer implemented inventions and inventions rejected as mental acts.

(c) Although BT is generally happy with the current UK system for securing patents, the bulk of our patents are obtained through the EPO rather than the UKPO, because our normal overseas patent filing practice makes this a more cost-effective route.

(e) We do not support proposals to increase pre-grant fees and lower renewal fees. The current UKPO policy of using renewal fees from commercially successful patents to subsidise early patent costs is a sensible approach that is attractive to all users of the system, particularly SMEs. We would also welcome greater transparency of the UKPO accounts in order to give users of the system confidence that all UKPO fee income is being properly deployed to promote innovation.

(g) BT's innovation is increasingly being implemented through software-based technologies. The ability to be able to protect our heavy investment in this innovation is of vital importance to us, and we take the view that patent law and practice should accommodate advances in this field, just as has happened in other areas of technology. The political debate in the European Parliament on the patentability of computer-implemented inventions last year was, in our view, ill-informed and based on myths about the patent system and its impact on the economy and innovation.

Equally, we are supportive of all efforts by Patent Offices to improve the rigour of their searching and examination of patent applications, to ensure a strong system that precludes users from obtaining patents of dubious validity in any area of technology. Such dubious patents can hinder the development of competing products and damage the interest of all companies large and small. We look forward to contributing to the recently announced Patent Office consultation on inventive step requirements for patentability.

(i) As noted in (c), the majority of our UK patents are derived via the EPO route. This route could become even more cost-effective for UK patent applicants if the London Agreement on European Patent Translations is ratified by all member states – currently, the French government is opposed. The Agreement would allow member states to waive the current requirement for a full translation of European patent specifications on grant, and this would lead to a significant reduction in patent procurement costs. Such reduction would be of significant proportional benefit to small businesses.

The failed efforts to create a Community patent system over the last three decades mean that an opportunity for achieving an even more cost-effective route has been lost. However, we believe that it would be counter-productive to force through such a system on the basis of political compromises, given the complexities of patent law.

2. How IP is used

(a) BT primarily uses: **patents** to protect the most commercially promising inventions arising from its development of new technologies, products & services; **trade marks** to protect the brands used to market its products and services; **registered designs** to protect the physical designs of new products, such as telephone instruments; and **copyright** to protect a range of material, especially software.

(b) Seldom.

(c) Our practice is influenced by general practice in this sector, particularly with regard to our need to maintain our defensive capability.

(d) We do not routinely value our IP, although we conduct ad hoc valuations of our most valuable IP asset (our corporate trade mark) and small tranches of patents (the latter usually in the context of licensing activities).

(e) Very rarely (note that we are not engaged in manufacturing).

(f) We believe that the UK IP system promotes innovation reasonably well, although we do not understand why the UKPO seeks to “plough its own furrow” on certain issues (see 1(a)). The UKPO continues to take a much more restrictive approach than the EPO to the interpretation of Article 52(2) EPC. The UKPO appears to take no heed at all of decisions of the EPO Boards of Appeal – despite such decisions being given due weight by the House of Lords (Lord Hoffman stated: “These decisions are not strictly binding upon courts in the United Kingdom but they are of great persuasive authority; first because they are decisions of expert courts (the Boards of Appeal and Enlarged Board of Appeal of the EPO) involved daily in the administration of the EPC and secondly because it would be highly undesirable for the provisions of the EPC to be construed differently in the EPO from the way they are interpreted in the national courts of a contracting state”). It is equally undesirable for the UKPO to be out of step with the EPO.

(g) A very small proportion of BT research is publicly funded.

(h) We use such data as one measure when conducting comparative studies in our sector.

(j) This question appears to flow from the commentary in the third bullet of the Introduction to the Call for Evidence. This commentary does not appear to recognise the way in which patents work in industry sectors such as electronics, telecommunications, and computing which are characterised by incremental invention. Patents on unexploited technology do not represent an important barrier to market entry and do not significantly inhibit research and development. Government regulation, lack of sufficient funds, undeveloped markets, etc. often provide greater disincentives to exploitation than do patents. After all, unless a patent is protecting an existing or future market (possibly of an alternative product) it is unlikely to be in the patentee’s interest to prevent all commercial activity within the patent’s scope. Of course, compulsory licensing provisions exist in the UK (but not the US) as a means to “unlock” patents on uncommercialised inventions.

The activities characterised by the commentary as defensive are not ones that we encounter very often. Moreover, they are not activities that we would typically associate with the term “defensive”. For example, in large measure, we regard our patent portfolio as a “defensive” asset, serving as a valuable commercial tool to deter aggressors, but our objective for acquiring patents is broader than that. Invariably, at the time of first filing a patent application, we cannot predict the technical or commercial prospects of an invention, and it may be many years before these become apparent. Indeed, even in a sector often noted for the pace of its technical advancement, we have a surprising number of patents, nearing the end of their term, covering inventions that are only just becoming commercially valuable. We have not maintained these patents over the years to prevent others from undertaking research and development in similar areas (and we do not believe that they have had any such effect), and if we seek to secure an equitable return on our original research investment now by seeking out licensees, we do not understand how this hinders innovation. Again, in sectors such as telecommunications, where overlapping patent rights are an unavoidable fact of life, we see no evidence that the existence of patent on unexploited inventions acts as any sort of barrier to research and development.

The situation may be different in areas of empirical invention, such as pharmaceuticals, where overlapping patent rights seem to be less common.

Of course, as stated in 1(g), we fully support improvements to the quality of search and examination of patent applications to reduce the number of dubious patents that could give rise to problems we suspect this question is addressing.

3. How IP is licensed and exchanged

(a) BT would support any initiative that facilitates more timely and effective procurement of licences to use copyright material generally. Equally, care is needed to ensure that the collecting societies are not allowed to establish disproportionate power that could be abused to the disadvantage of users. A smooth running and cost effective content licensing system will allow many small players to enter the market.

(g) BT has a strong interest in the promotion of open standards to support the effective procurement and maintenance of its network, with the economies-of-scale necessary to provide a competitive service to consumers. This area is currently of particular interest to us as we build our 21st Century Network and will potentially increase the number of small suppliers who can sell into BT.

IPRs should not, in our view, be regarded as mutually incompatible with these aims, provided that the licensing mechanisms are in place to achieve the appropriate balance, and that there are safeguards to ensure that these mechanisms are not abused (for example, through patent “ambushes” in standards fora).

(j) No – for the reasons stated in 2(j), the commercial prospects of our patents may not become clear for many years, and we may not judge it prudent to commit to granting licences during that time.

4. How IP is challenged and enforced

(b) BT considers the cost of IP enforcement in the UK to be excessive by international standards although we recognise the challenges of establishing a cost-effective system with the necessary checks and balances to handle an area of such complexity. However, we view this barrier as a systemic one relating to the costs of securing legal redress through the legal system in the UK generally. It is not peculiar to IP and, in our view, cannot be resolved simply by tinkering with the IP framework in the UK.

(c) We occasionally use other methods such as mediation services. We would not consider using the Patent Office opinion service until it has a well-established track record for rigorous and respected opinions (and we would have preferred that the resources devoted to this by the Patent Office were instead directed at search and examination quality improvements).

(d) We do not use IP litigation insurance.

(g) BT invests significantly in broadband infrastructure and services. We are opposed to any moves which would seek to make Internet Service Providers (ISPs) responsible for monitoring and policing copyright infringement on the Internet. The principal role of the ISPs is simply to act as provider of a delivery conduit for material (that may, or may not, enjoy copyright protection). They cannot afford the costly burden of any obligations to police those rights. Furthermore, any engagement they have with such issues has to be consistent with their need to respect customer

confidentiality and privacy. This area was carefully considered in the formulation of the E-commerce Directive. Many small start ups (sometimes starting life as non-commercial activities by individuals) who are innovating service provision are benefiting from freedom from onerous obligations and the increased certainty which the Directive has provided.

SPECIFIC ISSUES

- **Current term of protection on sound recordings and performer's rights**

(a) BT enjoys a constructive relationship with the owners of copyright in content delivered by its networks. We respect their rights and their need to exercise those rights in appropriate circumstances, and we regard questions on matters such as the term of copyright protection as ones for them (the term of BT's own copyright protection is not a material issue for us).

- **Copyright exceptions – fair use/fair dealing**

(a) (b) and (c) Arguments over these issues at the time of the recent EU Copyright Directive on Copyright in the Information Society were detailed and protracted . BT does not think it would be useful to upset the delicate balance by making substantial changes in these areas. It should be borne in mind that copyright covers much more than just artistic and literary content and that changes to the fair dealing regime could have wide impact beyond the entertainment industry. The pragmatic regime in the UK seems to work reasonably well. See also our comments on DRM issues below.

(d) See our comments on DRM issues below,

(e) Establishment of some form of levies regime is the inevitable corollary of the introduction of a private copy exception (this is a requirement of the EU Copyright Directive). BT opposes such a move since we are not convinced that user costs would be outweighed by user benefits. Experience from other EU Member States indicates that the increase in the price of the services and devices affected could be very significant. This will clearly constrain market development. The administration of levies is unavoidably characterised by arbitrary decisions regarding the level of payment and distribution of revenues. This fact will also have market distorting effects.

- **Copyright – digital rights management**

(a) Interoperability - a situation where users are able to consume content on the device of their choice, regardless of the content's source or format - will favour a user-friendly experience and market growth. Our view is that players in the market should continue to pursue development of agreed standards. Governments and the EU Commission should continue to encourage them to reach consensus as swiftly as possible, but should not intervene actively to pick or favour "winners" (and inevitably "losers" too).

BT would not support establishment and enforcement of a "fair use" exception which effectively prohibits over-narrow DRM implementations. This view is based on the following considerations:

- As already noted above, establishment of such an exception will involve the introduction of a levies regime with wide-ranging negative effects.

- Although some current DRM implementations do limit *de facto* freedoms previously enjoyed by UK users, this choice is generally linked to the capabilities of specific technologies. It is not a reflection of the fact that UK law provides for no private copy exemption.
- Looking forward, BT believes that market forces will respond to general consumer concerns about interoperability. More specifically, service providers which offer DRM implementations with the freedoms that users want will be those that prosper in new digital content markets.
- Unlike their counterparts in other countries, such service providers will not have to worry about undermining private copy doctrines and the guaranteed income which associated levies provide. To this extent, the current UK legal framework favours a market-led solution.
- A fair use exception designed to ensure interoperability would need to be flexibly defined. DRM technologies, though, are intrinsically incapable of providing a matching degree of flexibility since such technologies can only enforce fixed, non-ambiguous usage rules. Attempts to introduce such an exception would therefore have a counterproductive impact on the development of digital content markets. If rightsholders are unable to implement their chosen business model, they are less likely to make their material available.
- Alternative solutions to legitimate concerns regarding the impact of DRM – e.g. to address tensions with existing UK copyright exceptions and access to content following expiry of copyright – have not yet been fully explored.

- **Copyright – licensing of public performances**

(a) BT has not experienced particular problems with such licences.

- **Patents – utility models**

(a) BT has always been opposed to the introduction of utility models (“petty patents”). We think that such a system would undermine efforts to ensure a strong patent system. In this respect, we are convinced that any sort of second tier patent system would simply introduce further complexity and unquantifiable exposure to risk from a flood of low quality rights that would hinder innovation rather than promote it. All firms would face these problems, but we consider that SMEs would find the consequential costs hardest to bear.

- **Trade Marks – international Issues**

(a) BT is a frequent user of the European route.

(b) With reference to the current UKPO consultation, we favour bringing UK practice into line with the European system on the question of examination on relative grounds.

- **Legal sanctions on IP infringement**

(a) The IP framework in the UK already provides a wide range of legal measures to support effective sanctions for IP infringement. BT supports appropriate and proportionate remedies for infringement of IP. For example, we oppose European Commission proposals for criminal penalties for patent infringement. The threat of criminal proceedings in this field impacts on businesses of all sizes but has a disproportionately large effect on small businesses and individual start-ups.

(b) Although we recognise the need for appropriate remedies to be available to combat commercial scale piracy, we believe that the current trend for excessive demands for criminalisation of ordinary citizens in the domestic context will put at risk the dynamic impact of the Internet as an engine of growth. Criminalisation of ordinary technicians in the lab or software developers in small enterprises on their PCs will simply stifle innovation without providing significant benefits to the IP owner. The detailed technical arguments associated with IP infringement, with their huge reliance on expert evidence and the parallel arguments over invalidity and entitlement are not suited to the forum of the criminal trial.

- **Coherence between competition policy and IP policy**

(e) All IP (and indeed, at some level, all property rights) by its very nature involves some element of restriction on competition. The competition authorities have shown themselves to be alert to deal with anti-competitive behaviour. We believe it would be a mistake to make changes to IP law in this regard. If changes are perceived to be necessary they should be made to competition law.

- **Parallel Imports/International Exhaustion**

(a) Not being heavily involved in manufacturing, BT does not have direct experience of these issues. We believe that it will be important to deal with them through EU and world trade discussions rather than to adopt national positions.

OTHER ISSUES

- **Database Rights**

BT believes that it is important that investment in essential commercial databases is protected by Database Rights and would support moves to repair the damaging uncertainty brought about by recent ECJ decisions.

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