



**THE FSB'S RESPONSE TO THE GOWERS REVIEW OF INTELLECTUAL  
PROPERTY  
18 APRIL 2006**

**Introduction**

The Federation of Small Businesses (FSB) is the UK's leading non-party political lobby organisation existing to promote and protect the interests of all who own and/or manage their own businesses in the UK. With 195,000 members, the FSB is also the largest group representing the interests of UK small businesses and the self-employed.

The FSB welcomes the opportunity to respond to the Gowers Review of Intellectual Property and hopes that the comments will be useful. We have not answered all the questions, only those most relevant to our members, as recommended in the consultation document.

**General Comments**

Members in the field of intellectual property and patents (this includes lawyers as well as inventors/business people with an idea and product they wish to protect) noted that the biggest problem for SMEs concerning IP is the cost of obtaining registerable IP rights. There is also a perception amongst members, rightly or wrongly, that the UK Government does little to help SMEs protect their IP to the same level of that in the US. As over 60% of commercial innovations come to the marketplace from SMEs, this is an area that is very important for our members.

The FSB is also aware that a consultation on patent policy has recently closed at EU level. The consultation looked at three major issues of the Community patent, areas for improvement of the current patent system and possible areas for harmonisation. This consultation cuts across some of the areas that the Gowers Review seeks to influence. What communications have the Review team had with the Commission on this area?

**Cost**

The main complaint about obtaining registerable IP rights has been cost. The official fees are seldom a problem except for non-trading individuals. Official fees for a UK patent total £200, a trade mark £200 plus £50 for each extra class and £60 for a design. However IP solicitors and firms of patent attorneys charge around £300 per hour. In the case of patent procurement where complex technology is involved £1000 or more can be spent educating the IP lawyer before any progress can be made.

The solution to this problem could be to make the relevant offices more user-friendly. This has been achieved to some extent by the UK Trade Marks Registry

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where 40% of applications leading to registrations are filed without professional assistance, but this is not widely known and should be publicised more, especially amongst the small business community.

### **Time**

The other main issue, besides cost is the time it takes to go through the patenting process. Many SMEs will not get involved in patents and prefer instead to go straight to manufacturing.

### **Complexity**

To acquire some form of meaningful protection, a business needs to register in at least three categories - and this is just for UK protection, not EU or international protection.

### **Lack of awareness**

SMEs are often unaware of how to find out if their IP has been infringed and how redress can be sought (if at all, when costs are involved). More publicity is required to make people aware of their unregistered rights - common law rights in trade marks, copyright and unregistered design right. This publicity could come from advertising in trade press, online specialist websites easily accessible through search engines or a postal awareness-raising campaign, or a combination of these kinds of methods.

### **General comments on the introduction**

FSB members consulted considered the UK IP system to be complex largely only for patents. The complexity brings a lucrative living to IP lawyers who have mastered the complexity. In recent years a "private applicants" section has attempted to assist patent applicants who are not professionally represented.

So-called "blocking patents" are more a myth than a reality. Compulsory licences are possible.

Infringement of copyright has increased in recent years due to simple audio recorders, wide availability of photocopiers and Internet sources.

### **Specific Questions**

#### **Section 1: How intellectual property is awarded**

- a) **Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?**

A significant barrier to obtaining IP rights for SMEs is lack of knowledge. If IP were to be part of all science and engineering courses at universities etc, people would know what is available to register and what they already possess. Complexity is partly due to lack of knowledge.

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For a small company seeking to innovate, the need for legal advice presents a significant barrier. FSB members would welcome a pre-application advice service that would allow them to submit a product/design/idea and get an initial response quickly, from which a decision can be taken as to whether the potential returns justify the expense.

Standardised, non-disclosure agreements recognised by IP enforcement authorities would also be beneficial.

Allowing short-term IP rights for quick market protection would also be extremely valuable. If the market is not exploited then the rights can lapse, otherwise they can be extended.

**b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?**

From our experience, IP use is understood reasonably well, but how to go about obtaining such rights is limited. In many cases good ideas are simply put on "the back burner" for want of time to explore them fully. Expanding the awareness of international IP rights could be counter-productive, as IP is already too limiting.

The FSB believes that the UK Patent Office site offers a wealth of information on patents and IP rights and should be better publicised to ensure that SMEs and others make use of it.

**c) Are there barriers to obtaining UK IP rights on the grounds of cost? What drives these costs? AND (g) Are there specific barriers to obtaining IP rights in your sector?**

The main barriers, as noted above, are legal costs, administrative costs and time. Also uncertainty is a large barrier. Existing (unexploited) IP awards can also severely limit exploitation of ideas in certain industries (particularly hi-tech, manufacturing industries). Some favour short-term rights for a basic cost: too many (simple) ideas have been thought up and then registered but not exploited. Where rights are not used, they should lapse in a year or two.

The cost barriers become more pressing if IP lawyers are used. As noted above, an hour's professional time usually exceeds the total of fees for a UK patent.

### **Section 2: How IP is used**

**a) What types of IP does your organisation use and why?**

Amongst manufacturing and design businesses, IP tends to apply to the company name, brand and also the products produced and developed.

**b) How well does the UK IP system promote innovation?**

Members were of the opinion that the UK IP system is poor at promoting innovation. However, this may be contributed to the fact that the UK is heavily constrained by the global IP system which is dominated by the US. IP needs to be shorter-term,

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cheaper and easier to access, and less risky. The right to an idea should not be dependent upon being the first to think it alone.

**c) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?**

Members who answered the questionnaire had not leveraged the benefits of public funding. In fact, in the FSB's 2006 Manufacturing Survey (of all its manufacturing members across the UK), a significant 65% were not aware of R&D tax credits.

### **Section 3: How IP is licensed and exchanged**

**a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?**

Licenses are usually easy if two willing partners are involved. Complexity and cost comes through the use of lawyers.

**d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?**

Unfortunately a serious barrier found is that a patent owner will try to exploit the product/design rights for everything they can and may even take advantage of the fact that a business is planning to manufacture as a sign that the market can be exploited. As a result, some businesses may prefer to use unpatented products/designs or even flout the rules. This is unpalatable, but demonstrates that some businesses feel they have no other choice.

**e) Are there barriers to licensing IP on grounds of cost? What drives these costs?**

Yes. The use of lawyers and the need to register in more than one category to have a reasonable level of protection are barriers.

**i) Are there barriers to trade and exchange of IP internationally?**

Internationally, licences can be a problem if parties from the US are involved. Apart from the cost of US attorneys they have a different understanding of the English language to UK English speakers. More importantly, US Anti-Trust law regularly comes into play making a simple agreement complex.

**j) Does your organisation consider renewing patents using "licence of right" provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?**

The lawyers consulted regularly explain the UK Licences of Right provisions to clients and over the years have saved their clients a significant amount of money. Is the UK Patent Office site weak on this point because it could reduce their income?

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Renewing patents using "licence of right" provisions would not be necessary if patents were reviewed and unexploited ideas put into the public arena. That was, after all, the original idea behind the patent system.

### **Section 4: How IP is challenged and enforced**

#### **a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trademarks and design?**

Enforcing IP rights is usually expensive. Infringers will only react and retreat if they receive letters from solicitors with a proven track record of successful IP litigation; these are not cheap. The only low cost enforcement is by engaging local trading standards departments. For trade marks, trading standards have a statutory duty to prevent infringement, [in one recent case a London department obtained an ASBO against a street trader]. The case of Dyson v Qualtex has proved the value of unregistered design right and will probably make it easier to enforce.

The disincentive to register in the first place may mean that the responses received to the consultation reveal just the tip of the iceberg. If the Gowers Review and stakeholders are unaware of the scale of the problem of businesses not registering designs, products, etc, this makes identification of barriers more difficult.

#### **More specific issues...**

##### **Patents - utility models**

#### **Do you have a view on some kind of second tier patent system?**

Second tier patents have been looked at before for the UK and the opinion has been negative. They exist in Germany, but were not passed at EU level.

IP should be entirely granted on exploitation. If a patent or trademark is not exploited then it should lapse. They should be renewed every 2-5 years at the expense and responsibility of the IP holder and may be challenged by 3rd parties that wish to use those ideas. In the event that IP is not being exploited or pursued actively by the holder then adjudication should favour passing that IP to the 3rd party fully under similar terms.

##### **Copyright exceptions - Fair dealing**

Since an EU Directive altered the CDPA 1988 rules the situation is very complex. There is loose wording which will take an expensive court case to have defined.

##### **Trade Marks - International issues**

#### **b) Could the UK trade mark system be improved to work better alongside the European system?**

At present, the FSB considers that the playing field is not level. In the UK, trade mark applications are examined on relative grounds, i.e. will there be confusion with another party's registered mark. The Community Trade Mark Office does not carry

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out such examination so that marks are easier to register there if there is a possibility of conflict. Community Trade Marks have the same legal effect in the UK as nationally registered ones and regularly are cited during relative examination. It is unlikely that the Community Office will institute relative examination so that the UK office should give it up. It should be the same. We will be responding to the Patent Office's consultation about refusal on relative grounds in due course.

### **Designs - registered designs and unregistered design rights**

The situation is very complex as there are both UK and EU unregistered and registered rights. It is too much for most SME's to understand without expensive assistance. However, the UK and EU fees are modest so registration is often worthwhile.

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