



Submission to the Gowers Review

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FIELD FISHER WATERHOUSE



Summary

On Wednesday 5 April 2006 Field Fisher Waterhouse hosted a seminar to discuss the Gowers Review. Selected contacts of Field Fisher Waterhouse and members of the Research & Development Society were invited to attend. A list of attending organisations is attached as Appendix A, together with a list of the job titles of the attendees, and information as to their IP portfolio and interest in IP. This information has been provided in this manner in order to respect the wishes of some of the attendees that such information, and their comments set out below, are non-attributable.

The attendees represented a wide range of businesses, but each saw IP as a means of protecting the business as well as generating revenue streams. Each attending organisation recognised that their business would suffer without an effective IP regime.

A copy of the programme forms Appendix B. It can be seen that the morning divided into three short presentations which addressed differing facets of the Gowers Review, and then a number of break out discussions. The break out discussion groups were as follows:

1. How IP is acquired.
2. How IP is used.
3. How IP is licensed/exchanged.
4. How IP is challenged/enforced.
5. IP in the new media and convergence era.

These mirror the General Questions, as well as some of the Specific Questions set out in the Call for Evidence of the Gowers Review. The key messages emanating from each group are set out below in a quasi bullet point format in order to enable the key conclusions to be quickly assimilated. We would be happy to elaborate or provide further on any of these issues.

The responses are broken down into the above categories, plus an additional section of comments that spanned the discussion groups. Where an issue relates to a specific point as identified in the Call for Evidence this has been marked.

It should be noted that we have endeavoured to capture as accurately as possible the points considered to be of most interest to the respective discussion groups. The views set out below do not, therefore, necessarily represent the opinions of the authors, Field Fisher Waterhouse, the Research & Development Society nor any particular attendee.

How IP is acquired

(General Question 1)

Software and business method patents

1. There were differing views on the ability to patent software in the UK/EU versus the USA. The minority view was that what could be patented in the UK/EU was similar to that in the USA and the problem was more one of perception than reality. The majority view, however, was that there were difficulties in patenting software in the UK/EU which has the following effects:
 - Stifling innovation;
 - An inability to openly communicate with potential venture capital partners and/or customers due to the fear of being unable to enforce the rights in the software. This leads to difficulties in obtaining finance; and
 - Difficulties in valuing software which could not be patented.
2. These problems were enhanced because of the difficulties in enforcing rights in a software programme purely through copyright protection, in particular due to the difficulty of proving copying, and the inability to rely on copyright to protect the underlying structure of the programme following recent judgements in this area¹ - see also 12 below.
3. Attendees also expressed frustration at the inability to patent business methods in the UK/EU compared to the USA.
4. There was general agreement that differences in patent protection in the UK/EU and the USA lead to commercial difficulties, and a desire was expressed for greater commonality between countries as to what could and could not be patented. It was, however, felt that the Gowers Review would not be able to resolve this problem due to the constraints of patentability under the European Patent Convention as well as other EU law constraints.

Biotech patents

5. Various opinions regarding the patenting of biotech patents were raised including:
 - That the US position of allowing product patents for genes stifled innovation;

¹ e.g. *Navitaire Inc v easyJet Airline Company Ltd & Bulletproof Technologies Inc* [2004] EWHC 1725 (Ch)

- The moral dimension had to be considered when granting such patents;
- That the ability in the UK to only protect an application rather than the product was limited; and
- The monopoly granted should not be too broad and should primarily reward the effort expended.

Inventive Step

6. The UK Patent Office consultation on the inventive step requirement was discussed. Although opinion was divided the majority favoured raising the threshold. It was quite common for people within a field to develop technology concurrently and come up with the same invention/concept about the same time. If only clearly inventive patents were granted, it would be less likely that enterprises would be deprived from carrying out a process or creating a product for something which they had independently come up with, but which had been patented at an earlier date.
7. Irrespective of whether a different threshold for inventiveness were to be set by the UK Patent Office, the current problem would remain that the UK Patent Office does not have sufficient information at its disposal to determine whether a patent application is inventive. In addition, it was generally felt that the quality of UK Patent Officers (as well as officers in other patent offices) was poor and should be improved.

Time taken to grant patents [Specific Question: Patents - utility models]

8. The representatives from smaller enterprises felt that if the scope of what could be patented could not be changed, it would help to shorten the time taken to grant patents. It was pointed out that in many countries patents could be granted within a year but the smaller enterprises felt that this was still too long.
9. The possibility of a “utility model” system allowing the patenting of simple inventions through a fast track was discussed. Interest in a utility model patents system was expressed by representatives from SMEs if it would result in the granting of patents after a few months. Others felt that a utility model system, while superficially attractive to SMEs, would, however, be used primarily by those with deeper pockets to play the system to acquire utility model patents quickly while the main applications were pending.
10. It was pointed out that, in some cases, enterprises did not wish to patent too quickly and it was better to have a pending patent as this uncertainty was good for patentees. During the development of a product/process, enterprises often revised the most important aspect of an invention that needed protection. The

advantage of a pending patent was that, if the specification was sufficiently detailed, the claims could later be shaped to cover the most valuable aspect of the invention. If the period to grant were to be significantly shortened this could have the effect of increasing costs (if applicants then felt compelled to file a number of applications to keep their options open), or reducing the value of any subsequent patent if the opportunity to shape it during prosecution were lost due to the speed of grant.

Cost of patent protection

11. The cost of acquiring patent protection was discussed. There was general agreement that the UK official fees were small. The main problem identified was the cost of translating patents to obtain patent protection throughout Europe. The effect of this was that, compared to the US, obtaining patent protection for the similar sized European Economic Area was much more expensive. Political issues meant that there did not seem to be an easy solution to this pressing problem.

The Copyright Gap

12. The difficulty of establishing copyright in the “look and feel” of software was discussed. The cost, time taken and creative endeavour required to create the underlying structure of software or the look and feel (of, for example, how and the order in which man-machine interaction takes place), often is greater than writing the lines of software code, which once the structure is in place is comparatively straight-forward. Yet the latter would be protected by copyright but not the former - this was felt to be fundamentally wrong. Patent protection sometimes might fill the gap, but often can not. Thus there is a gap in IP protection for the significant development effort that can (and often does) go into develop the structure (or “plot”) of the software. (This problem of the gap in protection because copyright does not adequately cover “plots” arises in other areas, e.g. TV format rights, manifested itself in different forms during the seminar - see further below.)

How IP is Used

(General Question 2)

Valuing IP and raising finance against intangible assets based on IP

1. It was felt that there was a disconnect between those that value IP and those who work with it on a daily basis - many accountants have no affinity with technology or intangible rights. It was recognised that this is different in other countries (particularly the US) where accountants and lawyers often have a technical background and frequently perform asset valuations.
2. A point of discussion was the need for greater transparency and clarity with respect to the valuation of IP assets and how they could be used to raise finance. It was felt that a better understanding may lead to a more robust attitude toward the use and acquisition of IP assets.

How well does the UK IP system promote innovation?

3. The UK IP system is regarded as sufficient but expensive. Internationally, the UK IP right was regarded as robust and comparatively quick to obtain. However, the strong value of the pound (£) and the degree of expertise required to obtain registration in many instances made it expensive and possibly, also, unaffordable to SME's. Furthermore, in view of the very high cost of enforcing all types of IP in the UK there was an intrinsic disincentive to obtaining protection. It was felt that the ease with which the IP system provides for protection is directly proportional to the way in which the IP system promotes innovation. IP protection is seen as a reward for appropriate innovation.

Use of other methods used by the government to encourage innovation, such as public funding?

4. The mere fact that there was a lack of awareness of methods used by the government to encourage innovation, such as public funding underlines that these initiatives need to be clearer and more widely promoted so that companies are aware:
 - of the funding or initiative available; and
 - how best they could make use of such initiatives.

The usefulness of data on patents and other forms of IP as means of measuring innovation

5. Relying on data as to the number of patent filings, for example, as a barometer of innovation can produce a misleading impression. For example, does the fact that more patent applications are filed by German companies and citizens than those in the United Kingdom mean that:-
- There is more innovation taking place in Germany;
 - It is easier/cheaper to file patent applications in Germany thereby encouraging applications;
 - The cost of enforcement in the UK is perceived as being too high thereby discouraging patent applications; or
 - In Germany there is a greater awareness of patents and more of a culture of filing patent applications.

Any, or all, of these could be the reason behind such a statistic (and clearly there could be other reasons) making it dangerous to draw a conclusion that because the UK lags behind Germany on patent filings it is a less innovative nation, although it may be less effective at protecting such innovation through patent filing.

Offensive use of IP rights, i.e. IP obtained not to develop products, but only to prevent others from doing so? [Specific Question: Trade Marks - international issues]

6. At the Community Trade Mark Office there is currently no “intention to use” requirement when filing a trade mark. This, particularly when combined with registering the trade mark across broad classes, can effectively block a legitimate business from using a brand for a number of years. It is recommended that the Community Trade Mark Office adopts a practice in line with that in the UK, namely that there has to be an intention to use the trade mark.

How IP is Licensed/Exchanged

(General Question 3)

Compulsory Licences [Specific Question: Coherence between competition policy and IP policy]

1. Participants considered whether compulsory licensing for the copyright regime would encourage use and exchange of IP, by analogy to patents where in narrow circumstances compulsory licensing exists. It was acknowledged that there would be difficulties with compulsory licensing on a broad range of copyright, and that it would be most likely to succeed with some narrow subject matter, some examples of which are set out below.
 - The US music compulsory licensing system provides to the author a “first right to use” to make a recording. Thereafter others can use the work as long as a fixed fee (set by a central body) is paid. The right holder has no power to refuse to grant a licence.
 - Although the IT industry representatives thought sharing IP for a reasonable return was attractive they did not see compulsory licensing being embraced by their sector and believed the industry erred on the side of protectionism. They have sophisticated revenue models for licensing and would want to exploit the rights themselves.
 - The loss of control over work in compulsory licensing was seen as a major disincentive to invest in areas such as software and had to be balanced against perceived needs for wider exploitation.
 - A fundamental tension between IP and competition law was noted. The EU had recently examined compulsory licensing in context of Microsoft and allowing others access to inter-operability information in relation to their software. The subtext in the Commission’s and courts’ treatment of the case was that there were different ‘qualities’ of IP and weaker forms may be more vulnerable to a compulsory licence (e.g. as happened in the TV schedule cases and with Microsoft’s APIs (application programme interfaces)). Only those IP rights which are so fundamental that everyone has to have access to them would be subject to compulsory licensing (the “essential facility” argument).
 - Participants noted that the Microsoft case reflected quite common practice for licensors, when Software APIs are licensed to customers to allow customers to design inter-operable software but no licence/access was given to the underlying source code. The common practice reflected EU-wide copyright

law which prohibited licensors from banning a licensee's decompilation of a programme to achieve inter-operability if API information is not made available by the licensor. The industry has been more flexible with less valuable rights and will give customers the right to use and adapt the product for their benefit.

- It was felt that software should not go into a sphere where the owner of the rights lost control over licensing but were compensated with royalties. Generally, copyright software programmes with any commercial value at all would be exploited and the market would regulate the economic value of a work and whether it became widely published.

The above illustrates the inherent tension between those that have IP rights and those that do not. It was felt that the present balance in this tension is about right with competition law providing an effective restraint on those that seek to abuse their IP position. There should not be any form of compulsory licensing, except in the case of non-use and then only in relation to patent rights where non-use could stifle a technology.

Negotiating licences

2. In addition to the core IPRs recognised by statute and common law there were developing rights such as personality and TV format rights. These often needed to be contractually developed and attached to existing IP rights in order to exploit them and complexities in licensing were therefore always present.
3. Participants had experienced problems licensing TV formats abroad. As there was no clear right that could be pointed to in the UK it made it more difficult to assert that there was such a right in other jurisdictions. It was felt that rights in TV formats should be recognised with a stand alone right, as relying on the current amalgamation of rights complicated acquisition and licensing.
4. Those in the media industry regularly had to unpick bundles of rights to licence products and it was problematic to identify exactly who owned which rights. This was less of an issue for the IT industry where ownership was normally clear (apart from some narrow issues surrounding open source and patents).

Copyright Registration

5. There was a discussion as to whether some sort of depository of copyright works would be valuable (as for instance in the US and some other American countries):-
 - Because media rights are fast developing systems of registration of IPRs could be problematic in any fast moving industry.

- TV programme makers felt that a central depository would make it easier to link right holders to other works and that it would make sense to share copyright and would feed innovation.
- A contrary argument (at least against compulsory deposit of works) was that when a licensor has problems with proving its rights, full warranties and indemnities cannot be given, which will erode the value of the work and impact on the licence fee paid. Therefore, it was felt that economics and the market sorted out little issues without the need for a deposit system.
- A system for registering copyright is in place in the US and it was felt that this must assist with licensing and enforcement (as registration could serve as evidence to assert claim of right ownership). A reduced cost of IP enforcement should be an incentive to register.
- In considering a voluntary central depository for copyright works, it should incentivise people to deposit work rather than penalise those who don't.

Barriers to licensing [Specific Question: Copyright - orphan works]

6. Programme makers who licensed out their programme formats face difficulties when the licensee failed to exploit those rights to produce programmes. Others who wished to exploit a licence could then be denied the opportunity to do so. Programme makers felt that where right holders have previously granted rights which have not been exploited, the rights should revert to the grantor. Although this could be dealt with by contract with many such contracts being drafted without legal advice it was felt by some that it would be useful for there to be a statutory provision (which could be over-ridden by contract) that an exclusive licence terminates where there has been no effective exploitation after a reasonable period of time. Codifying “effective exploitation” and “reasonable period of time” would not be possible as it would be different in each case, and it would be necessary for the courts to resolve the meaning which would introduce uncertainty.
7. In all sectors participants felt that problems arise where a licensor of a small component of IP in a bundled package of rights sought a disproportionately high licence fee stifling the profitability of producing bundled works. This was particularly a problem when despite all endeavours having been taken to identify such IP rights and the rights holder beforehand, the rights holder asserted its rights later. It was felt that in such circumstances the rights holder should not be in a position to prevent the product coming to market, through a form of compulsory licensing.

Standard licensing terms

8. It was felt that any standard licensing terms should not be compulsory, and that it would be difficult to impose these across the board. However, promoting standard terms could help in some sectors.

Copyright Scheme

9. There was debate on whether there should be a central publishing scheme to be used where there is low value copyright which has not been exploited. This would be voluntary and linked to standardised licensing. It would allow for browsing and use of materials by people who might not otherwise have a chance to exploit it. An IPR owner who could identify a channel to market for their work would be unlikely to use such a service.

Collecting Societies [Specific Question: Copyright - licensing of public performances]

10. The collecting societies are seen as a necessary evil. They are considered, however, to be unduly obstructive. If clarification is sought of their tariff terms because something is not clear, the collecting societies can sometimes simply refuse to offer clarification and have been known to respond with a very unhelpful statement that it is all set out in the tariff. Likewise if someone seeks assistance because they wish to do something not fully in line with an existing tariff and needs guidance as to what to do.
11. It was felt that the collecting societies' monopoly position contributed to this arrogance.
12. The US model where there are a number of collecting societies covering the same licensing is considered to be a better model. It gives the licensee some power as if it does not like the terms it can just licence works from one of the other collecting societies. Obviously this does restrict the choice of works, and can be difficult to work with but does give the purchaser some power, which is considered to be more effective than the system in the UK where an application has to be made to the Copyright Tribunal (with attendant high costs, often in the £100k's) to challenge licensing terms. Competition among collecting societies would also benefit artists as the societies would then compete to provide the best service to those artists. Providing that there were only two or three licensing bodies for public performances the additional costs of dealing with two or three bodies rather than one would be small in comparison with the benefits that competition would bring.

How IP is challenged/enforced

(General Question 4)

Problems with enforcing the main different forms of IP

1. There is a big gap between trade mark protection and passing off which is not helpful when trying to protect a brand. It allows people to avoid trade mark infringement and passing off, but still to effectively use another's trade mark for their gain. (E.g. the O₂ v 3 bubble trade mark case - which would have led to an easy unfair competition injunction in Germany but which resisted infringement proceedings in the UK). This gap should be addressed possibly with unfair competition law as exists in Germany.

The cost of enforcement

2. Some companies feel that it is too expensive to litigate in the UK. Whilst small issues are easy to deal with cheaply, large matters are too costly.
3. It is important to weigh up the potential damage to the brand before considering whether it is worth taking any action in the courts.
4. CFAs (Conditional Fee Arrangements) can be a way of dealing with cases on a more cost efficient basis, but often law firms are not willing to take them on. This is particularly so for patent infringement actions where the patentee always faces the risk that the infringer could unearth a previously unknown piece of prior art which could turn a strong case into a very weak one.
5. Contingency fee arrangements (where the law firm takes a percentage of damages as its fee) are quite widely used in the US. In the UK damages are likely to be much less than in the US (due to the smaller market size and generally lack of multiple damages), and the commercial value often lies in the injunction; therefore it is unlikely that many UK law firms would act in an IP case on this basis.
6. There is a culture of people refusing to back down and admit infringement in the UK and more issues lead on to become larger matters. This adds to costs.
7. It is not cost that deters rights owners from pursuing their IP rights in the UK, but it is the uncertainty of outcome, and a perception that the UK courts are anti rights holders.
8. In depth discovery/disclosure is arguably not required at all in many cases. All it does is serve to increase costs.

9. The fact that the Patent Office had introduced a mediation service, the Woolf reforms generally and the “preliminary indication” in trade mark disputes, were all seen as good for the purposes of speeding up the system and lowering cost. It was felt that the current consultation by the Trade Mark Office on “relative ground examination” was in principle also a good initiative.
10. One solution discussed was the setting up of IP protection pools, ideally with some stamp of legitimacy via official government backing. An enterprise would pay to join a pool. A committee would then review and decide which IP would form part of the pool. Ownership and revenue/royalties obtained from IP placed in the pool would partly rest on the originator and on the pool. The pool would need to enter into any arrangements with third parties, including Non-Disclosure Agreements (“NDAs”). Enforcement of IPRs would be coordinated and funded by the pool. This would provide greater protection for SMEs which currently find it difficult to enforce IPRs, particularly of software programs which had either not been patented or could not be patented. (The delegate who was most in favour of this approach submitted a follow-up paper on this topic, which is reproduced in full in Appendix C.)

Alternatives to litigation

11. Arbitration is viewed as being almost as expensive as litigation and just as time consuming. There can also be problems with enforcement of a decision reached in arbitration.
12. Mediation in principle is viewed as a better way of resolving a dispute as you do not need to consider the law and it leaves more room for a commercially acceptable resolution for both parties.
13. It is not possible to make the full use of mediation if it is made compulsory. Often when a party has no intention of resolving the issue by mediation all that is achieved is that time and money is wasted. Pushing mediation on parties can have the effect of degrading the tool of mediation. It is good to encourage mediation, but not to compel it.
14. ADR routes are not that well known especially to smaller parties. They should be given a higher profile so that people are aware of what they are.

IP litigation insurance

15. The problems of the cost of litigation are not solved by insurance. It was viewed by many as a total waste of time.
16. In practice dispute insurance often leads to another dispute as to whether the insurance policy applies in that particular case. It was felt that this is because

underwriters do not fully appreciate what it is they are covering and therefore try to reduce their liability as much as possible.

17. There have been instances of the insurer actively helping the other side (without the knowledge of the insured party) with a view to undermining the case so that cover could be withdrawn.
18. It was suggested that rather than paying a premium for the insurance a levy would be a better system, but it was appreciated that this would be very difficult to administer.

The impact of litigation risk on investment in innovation

19. In terms of patents, the risk of litigation can effect innovation. Large companies now outsource their R&D and get warranties to cover potential claims letting others take the risk. This can limit those that are willing to undertake such innovation and can cause the work to go overseas where the added complication of suing out of the jurisdiction can give the outsource R&D establishment some comfort that is not available to those in the UK.
20. However, others (perhaps smaller companies) did not think that the risk of litigation would effect innovation as inventors would continue to invent and try to protect what they saw as an invention.

Barriers to efficient and successful challenge and enforcement internationally?

21. The existence of the pan-European procedures (such as a trade mark injunction) was viewed as a very useful tool, mainly because it could make a huge saving to the costs involved in enforcement. It should be extended to all IP rights. There is a problem in the fact that IP is traditionally a territorial right, but with the emergence of the internet international boundaries and increasing globalisation international boundaries are becoming less important to business and business would rather regard their IP rights on an international rather than territorial basis.
22. It is most important to harmonise the Design Right and Patent law internationally. Copyright was viewed as a more complex matter and separate procedures can easily be coped with.

IP in the new media and convergence era

Section 20 CDPA - communication to the public [Specific Question: Copyright - digital rights management]

1. Changes to broadcasting laws are seen as a good thing. Non-linear products/platforms are on the rise and need to be accommodated legally.
2. Peer-2-Peer (“P2P”) is seen as a huge risk from the point of view of content owners. P2P networks expose content owners to real risk of content infringement.
3. DRM (digital rights management) must be interoperable and universal throughout all media industries - it would be anti-competitive to allow many different formats of DRM.

On Section 28A - making of temporary copies [Specific Question: Copyright - fair use / fair dealing]

4. Exceptions to copyright infringement (private use etc) must be clear, and scope of fair use must be explicit and controllable
5. If I have bought a music track - I should not be restricted in how I use it, and provided I do not make copies for others I should be permitted to copy it how I wish and from one format to another.
6. Ring-fencing of rights is useful for the division of revenue as it gives both content owners and licensors of content greater control over their output.
7. BBC’s free content-download services confuse the public. The public perceive such free downloads as legally and morally acceptable (as do the free DVDs that come with newspapers), and this can lead the public to assume that other content is also “free”.

On Section 70 - recording for the purposes of time-shifting [Specific Question: Copyright - fair use / fair dealing]

8. Time-shifting at home is permissible. If, however, the actual recording takes place remotely on the network rather than at home (i.e. it is controlled from home but physically happens elsewhere), this is not permissible. The law needs to be updated to reflect the fact that technology now allows one to “record” remotely, and that this should be permissible in the same way that time-shifting recording done at home is.

9. The time-shifting exception does not apply to non-linear broadcasts. It was agreed that this should not be changed as the ability to obtain content "on demand" is inherent in non-linear broadcasting and there is no need to time-shift.
10. "Slingbox" (a device that allows you to tune into your television from anywhere in the world) is seen as a problem from a licensing point of view because licensors will effectively lose their territorial control over content.
11. Broadcasting companies can be technology agnostic - developments in technology just changes the way in which content is licensed - i.e. broadcasters must be able to adapt to any new development in media technology.
12. Post-Grokster - the law relating to secondary infringement of copyright in the UK remains unclear. The Courts decide each case on their own particular facts making it very difficult for content providers to know when they are in breach of the law: this makes marketing their services very difficult. This area of the law must be clarified.

General points [Specific Question: Copyright - fair use / fair dealing]

13. Police do not always understand the offences.
14. There is a lack of public awareness - households believe that they have more rights in relation to content than they actually do. Warnings should be clearer - perhaps cigarette pack-style warnings.
15. There is a general attitude problem - anarchic/anti-globalisation feelings towards large corporations. The large corporations can fuel this attitude by their conduct; e.g. consumers do not like restrictions such as regions on DVDs - books are not regionalised - why should DVDs be so? Corporations need to take responsibility themselves; they need to realise that if the public are being treated unfairly (e.g. paying more for a download in one jurisdiction than another) then the public may feel it legitimate to redress the balance by making unauthorised copies.
16. Enforcement must be practical - if the legislation does not work then it must be removed/replaced - criminal offences must be just that.

[Specific Question: Current term of protection on sound recordings and performers' rights]

17. After the seminar a paper was received from a delegate arguing against a change in copyright duration. Although this was not discussed with other delegates, this paper is attached in full at Appendix 4.

General comments

The Timetable of the Gowers Review

1. Each of the delegates regarded IP rights as being very important, and accordingly considered the Gowers Review to be important as attested by the fact that they were prepared to attend such a seminar. There was criticism, however, of the short time period in which the public has been invited to submit its responses to the Gowers Review. While it is anticipated that there will be an opportunity to comment upon any legislative changes that might flow from the Gowers Review, it was felt important that the relevant public should have a greater opportunity to influence the Gowers Review at an early stage.

Knowledge of IP Rights

2. There is generally a lack of awareness of IP rights in the UK, both by those in business and the general public. This could lead to inadvertent infringement of IP rights, in particular copyright. More worryingly those coming out of university and into business often had no education on the IP rights which might, and often do, form the bedrock of such businesses. Two attendees that had read engineering at university (one graduating in the 1980's and the other in the 2000's) stated that never during their three or four years at university had they received any tuition about patents (let alone any other form of IP right). Other engineering courses provide a single one hour lecture on IP rights over the whole course. It was considered wrong that students could spend three or four years acquiring the skills to drive innovation, but not receive any, or any adequate, education on how to use IP rights to protect such innovation for exploitation. It is acknowledged that changes to the IP legislative regime will not address such ignorance, but it is hoped that the Gowers Review body might be able to exert some pressure on the appropriate bodies to encourage greater education on IP rights, in particular (but by no means exclusively) within Higher Education establishments.

Recommendations

As will be appreciated from the above, there was not always unanimity of views among the delegates. Where there was a degree on unanimity among those who expressed an opinion set out below are those main recommendations.

1. In order to avoid handing an economic advantage to the US in the software field, the ability to obtain patents for software should be brought into line with that in the US. Further there should be greater publicity of the extent to which software is already patentable and the danger of relying on copyright to protect software.
2. The translation costs of patenting across Europe urgently need to be reduced.
3. There is a need for greater publicity of Government initiatives to encourage innovation. Too many differing initiatives can muddle and deter take-up.
4. The Community Trade Mark Office should adopt a practice in line with that in the UK, namely that there has to be an intention to use the trade mark.
5. Greater protection needs to be given to “plots”, where the plot could be: the plot of a novel; the underlying structure of a computer programme; TV formats; etc., possibly by the creation of separate stand-alone rights.
6. Collecting Societies should have their monopolies removed and each broken down into two or three collecting societies that would then compete to obtain licensees and compete to acquire material to licence.
7. The introduction of an unfair competition law similar to that which exists in Germany to plug the gap that exists between trade mark protection and passing off.
8. There should be thought given to the scaling of litigation so that simple cases can be dealt with at less expense.
9. ADR should not be compulsory but should run in parallel with litigation in cases where the parties are amenable to it.
10. The Patent Office opinion service should perhaps be adopted for other IP rights in addition to patents.
11. Whilst there was an acknowledgement that IP is territorial, international harmonisation was voiced as being very much desirable. It was recognised that it had had a good effect in relation to trade marks and should if possible be extended to other forms of IP especially patents.

12. DRM (digital rights management) must be interoperable and universal throughout all media industries - it would be anti-competitive to allow many different formats of DRM.
13. The time-shifting exception to copyright infringement should be extended to enable recording to be done outside of the home.
14. Higher Education courses in the creative, engineering and science fields need to include teaching about IP rights.

Appendix A

Attendees

List of Companies attending

Accenture
Audio Visual Independent Distribution Ltd
Avid Technology Europe Limited
B4U Network (Europe) Ltd
BBSRC
British Screen Advisory Council
British Sky Broadcasting Ltd
Calvert Consulting/UCL
Celador International Ltd
Defence Procurement Agency
Ericsson
Field Fisher Waterhouse
Fujitsu Services Limited
International Intellectual Property and Technology Consulting
Jetix Europe Ltd
Johnson Matthey Centre
Laura Ashley Ltd
Lehman Brothers
Lush Limited / Cosmetic Warriors
Mathys & Squire
Mercury Interactive (UK) Ltd
NESTA
O2 (UK) Ltd
OpenPlan Solutions Limited
Paramount Comedy
Pershing Ltd
Royal Society
Steria Limited
The Patent Office
Turner Broadcasting System Europe
UK Patent Office
Voom Graphics Limited

Job titles

Assistant Director
Associate Counsel x 3
Chief Executive Officer
Commercial & Legal Affairs Executive
Contracts Manager
In-house Counsel x 4
Director x 3
Head of Business and Affairs
Head of Legal
Head of Legal and Business Affairs – IP
In-house lawyer IP
Intellectual Property Lawyer
IP Counsel
Legal Advisor
Legal and Commercial team
Legal Correspondent
Legal Counsel
Manager Business and Legal Affairs
Manager, Patents
Managing Director
Paralegal
Partner - x 4
Patents and Licensing Director x 2
Principal x 2
Science Base and Innovation Policy x2
Senior Legal Advisor & Company Secretary
Vice President – Legal Affairs
Vice President Group (Legal)

IP Portfolio

20,000 patent families worldwide. All types of IPR.

Trade mark protection in many jurisdictions as well as copyright and design right protection for our products.

Our IP portfolio consists of, among others, various trade marks, patents, designs, copyrights, databases and Internet related matters. We have registered and pending trade marks in 90 countries. Also, our in-house design team designs our products and packaging, promotional material and shop furniture, so that the copyrights and design rights on all of these items fall into our own IP portfolio. Our patents have been granted and are applied for in the major markets.

Primarily patents: 400 patent families; 100 active trademark families; 200 domain names.

Our IP is in the products that we create. We have many technologies and patents to protect them. Our focus is mainly on the protection of the IPR in our software and hardware.

We hold nearly 500 patents, mainly in Europe, USA and Japan

All recordings mastered belong to us as costs of re-mastering are considerable. In addition, we also record new recordings and produce various visual programmes for distribution on DVDs. We have over 1000 CD albums and 100 DVD titles. All IP we hold.

Various well-known and TV formats and programmes, TV theme music, interactive applications, over 400 related trade marks around the world, small quantity of non-TV brand/properties

Owner/Licensee of one of the largest libraries of kids TV in the world for Europe & Middle East. We also do acquisitions for primarily Europe & the Middle East & sometimes world (a few hundred properties in the Acquisitions Library). We always we get TV rights but sometimes get Merchandising, Home Entertainment &/or Non-standard/new media rights as well. We also own or are the equitable owner of a trade mark portfolio. This is a very large portfolio and is managed by a related company from the US. The remaining portfolio is quite small as the owners who we acquire rights from often have the obligation to TM register and protect the marks.

Software development (source and binaries). Preparing patent application on rendering technology (graphics). Graphical user interface design. (Used in demonstration software only)

Our company is principally a services provider and has some product offerings. As part of its services offering it routinely licences its own IPRs and procures necessary third party rights where required either by way of sub-licence or by way of direct grant.

All member revenue is dependent upon IP (copyright) across the broad spectrum of rights.

Publisher of Scientific journals. Funds research.

SME rights and protection, from creation through to commercialisation.

Copyright and medical works and trade marks.

Copyright in our channels. Brands.

Brand management of our channels trade marks, including registration of marks worldwide and where possible acquisition of relevant domain names to completely protect brands. Some copyright in production.

Channels – copyright and trade marks for channel, own programming and third party acquired programming. DRM protection for the channels.

Patents, trade marks and confidential information.

Trade marks handled from the US – not many trade marks other than our company name and our advertising straplines. Mostly we own/create copyright (reports, design docs, code), patents (various), design rights (user interfaces etc), database rights.

Academic interest, lecturing in law.

Appendix B

The Programme

How to find us

Field Fisher Waterhouse, 25 Abchurch Lane, London EC4N 3DF



Registration 9.00am
Start 9.30am
Finish 1.00pm

This seminar has a capacity of 100 seats, 3.75 CPD points

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FIELD FISHER WATERHOUSE



Gowers Review of Intellectual Property Call for Evidence

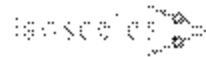
Wednesday 5 April 2006
FFW Offices, EC3N

A morning seminar discussing the Government's independent review to examine the UK's intellectual property framework

Held in association with



and



Gowers Review of Intellectual Property Call for Evidence

Wednesday 5 April 2006, 9.30am – 1.00pm

Recognising the central role IP plays in knowledge-based economies and the importance to the UK economy of IP, the Government has asked Andrew Gowers to conduct a review of the UK's IP regime. As part of this review, Gowers proposes an interim report on key issues raised by copyright, new music and patents related to submit their own written suggestions.

Many of our clients have expressed an interest in contributing to the review process. You are invited to a two day's seminar which will provide a convenient forum for experts from across and across the sectors to discuss their business needs. The output of the seminar will be incorporated into a report which will be submitted to the Gowers Review.

This is an opportunity for you to influence IP law in the future. We look forward to seeing you and receiving your own business.

For further information please contact our seminar enquiries department.

Programme

9.00 – 9.30	Registration and coffee	10.45 – 11.05	Coffee break
9.30 – 9.45	Chairman's introduction	11.05 – 12.00	Break-out sessions <ul style="list-style-type: none">• an opportunity for the audience to pose in real time on the IP review to the UK• what are the results of the IP regime, do we still get enough for the UK economy?• what is the problem?
9.45 – 10.00	Digital Rights including Copyright <ul style="list-style-type: none">• digital law• copyright ownership: to whom with the pace of development in digital rights and digital marketing?• protection of trademark• new file formats	12.00 – 12.50	End of feedback from the break-out sessions <ul style="list-style-type: none">• a summary of each group will give a brief oral summary of the group's needs/ideas
10.00 – 10.25	Technology including Patents <ul style="list-style-type: none">• the industry• patent law reform• possible solutions	12.50 – 1.00	Concluding remarks from the Chair
10.25 – 10.45	Discussion <ul style="list-style-type: none">• is IP regulation appropriate to the pace of change?• what are the key issues in relation to patents and trademarks?	1.00 – 2.00	Lunch

After the seminar all the relevant points from the day will be incorporated into a single document, copies of which will be distributed to attendees and submitted to the Gowers Review.

Appendix C

IP Protection Pool: IP+PP

Set-up: establish a legal pool into which I can contribute IP – can be core IP or ancillary IP, but it must be vetted:

- SME pays £5-10,000 to join IP+PP, selects IP to contribute to the IP+PP – offsets admin costs, establishes self-policing entrance policy.
- committee reviews and decides IP to accept into pool on basis of innovation, NOT commercial upside (that is up to the company / market)
- The IP ownership split is between 50-90% to the IP+PP, rest remains with originator – this may change over time but only if accepted by the IP+PP administrator
- Any organisation can join – large enterprises add stability and up-lift to the heft of the IP+PP if confrontations occur.
- Think of a fund into which I contribute assets in hope of receiving key services & support, future protection, and possible income in the future.
 - o The fund has “share rights” that it distributes based on:
 - IP value – starting value is set by some established methodology
 - Future value is based on actual commercialisation of the assets
 - Tenure: early joiners get rights at earlier prices, patient members get growth of those shares in terms of rising value of the IP+PP itself
 - Take-out: valuation events lift everyone as IP assets are realised in value.
 - o This IP+PP value makes it attractive to run it and be a part of it over time.

Operation: IP+PP is run as a service, looking to diversify it's IP portfolio within the remit: IP+PPs are set up for sectors: software, media, biotech, etc. – each one is focused on that sector. There are 100s of IP+PPs.

- IP+PP provides core, basic services to participants for their fees: economies of scale, improved quality of service provision, focus on SME-level services.
- Services: IP+PP interests are aligned with participant organisations' interests:
 - o Patent, trademark, copyright guidance (but not necessarily undertaking – that should remain commercially-led action) – the IP+PP may consider seeking such protections, but there is an issue to discuss on how that decision is made and what the repercussions are.
 - o Legal & accounting guidance
 - o Commercial review, mentoring for improved commercial exploitation
 - o Collaboration with associated companies in the pool for synergies.
 - o Insurance on a pool-wide basis (therefore, more economical because risks are diversified) providing extra protection layers to payers.

- At some stage, the IP+PP has excess cash to risk protection requirements and service costs (that is, it has benefited from commercialisation of IP assets and the cost to protect the IP becomes more economical as the fund matures and grows, and the services become more efficient, resulting in excess 'cash') = distribution dividend to participants based on 'share rights' in the fund
 - o Older members get more
 - o Patient members get more – if you leave, you remove your 'rights'
 - o Larger value IP contributors get more

Participating organisation benefits:

- protection of core / ancillary IP assets in a more efficient manner – part of something is better than all of nothing
- diversification of IP risk – owns a part of the IP+PP, which itself has a diversified set of IP assets
- will organisations hesitate? Maybe, but:
 - o current moves towards shared IP assets (free source, shareware, cost to protect, etc.) argue that companies will find this attractive over time
 - o non-IP benefits accrue over time (funding is easier due to familiarity with IP of companies, services are top-quality and improve the overall business, and pay-back is possible from the IP+PP)
 - o the cost to protect continues to rise, especially with India, China, other countries failing to protect IP and yet business is increasingly done there – there is less reason to hold it close to the chest in a hyper-competitive world

Protections offered: IP+PP offers levels of protection that no one can afford or even get otherwise:

- if untoward things happen to a participating enterprise in the IP that has been contributed, then the IP+PP can act to correct that transgression:
 - o IP+PP is much bigger than the individual organisation
 - o The IP+PP has a 'stamp' of government authority (local authority / government-sponsored vehicle to get IP+PPs going) = harder for cheaters to live with being transgressive
 - o The NDAs now have more power: they are properly drawn up, and are engagements between the IP+PP, originator and prospect.

Sponsors: there is already in place the infrastructure to set-up and run the IP+PPs in an efficient, effective manner:

- Local regional development organisations:
 - o Access to funding for companies, which will be more readily available because of the higher level / quality of IP protection – the chicken & egg dilemma of SMEs is shifted more towards the SME's favour

- Regional focus, efficiencies, collaboration
- Operational infrastructure is but an add-on to existing operations.
- VCs / VCTs: may want to expand their business into this new area of innovation, opportunities, and prospective companies for investment:
 - They get to know the companies' IP better, facilitating venture / expansion investing
- A government-sponsored Newco to provide the set-up and operation of IP+PPs across the UK:
 - Compliments to regional organisations / Business Eyes = different focus, with specialist services = must be independent.

Appendix D

Changes to the Period of Copyright Protection: Right or Wrong?

The vexed question of copyright protection for sound recordings has come to the fore once more. Certain artists in the United Kingdom are campaigning for copyright protection to be extended to seventy-five years rather than the current limit of fifty years. This would restore copyright and enable them to obtain royalty payments for any re-release of their old recordings made between 1931 and the present day. At present, the defining date is 1956.

Why should this move be challenged? First of all, the current use of public domain material is entirely legal and the present situation has been established in law since 1957. It has worked to the advantage of all concerned. It has meant that much specialist material, recorded in the 1920s, 1930s, 1940s, and the 1950s, has been expertly re-mastered by specialist labels and made available to audiences, new and old. In almost every case, this material would not have been considered for reissue by the companies presently holding the original masters. Indeed, it has conveniently absolved them of the need to deal with the issue of such material. Some organisations may have selected certain artists for reissue but many others have adopted a piecemeal approach with their back catalogues, producing albums often without the benefit of expert remastering and sound restoration.

The reissue programmes developed by such UK companies as Living Era, JSP, Hep, Frog and Avid, for example, have enabled new audiences to appreciate classic jazz and swing (or brass band music, folk and light orchestral works) in wonderfully listenable form. More to the point, these companies have kept their issues in catalogue and accepted levels of sale that major companies would not even contemplate.

Furthermore, the assumption by certain popular artists that they are being denied royalties by the present copyright limitations may not always be justified. In many cases, these artists signed contracts during the early part of their careers that brought them one-off payments rather than continuing royalties. Session musicians were treated in exactly the same way, paid a session fee or a specific sum per side recorded. No residual payments were offered or expected. One musician who played a key part in a number of Lonnie Donegan hit records recalled that he earned £5 for each recorded track. There were no additional payments even though the recordings on which he appeared achieved 'hit' status and sold in many thousands. The record companies soon recouped their costs and made valuable profits on this basis. Surely, enough is enough?

It can easily be argued that the pop artists presently pushing for change have, in most cases, been able to maintain successful well-rewarded careers and some continue to record for major labels on a lucrative basis. Should they persist in their campaign and achieve a change in UK law, a whole swathe of great music will lay unheard in company archives. While the original performing artists may not benefit obviously, due to the contracts enacted at the time, a retrograde step like this would reduce payments to composers, arrangers and music publishers. Is it fair to allow a limited number of well-heeled performers to limit these areas of potential

reward for the very people whose backroom activities helped to make performances by their predecessors so successful?

Major companies who have reissued past recordings have tended to concentrate on prominent artists (Glenn Miller or Ella Fitzgerald, for example) rather than other creative performers who only achieved minor fame. Often their master tapes and metalwork have been lost, damaged or corroded due to neglect, changes of ownership and disinterest. Specialist reissue houses thus have to look for top quality pressings (both 78rpm and LP vinyl) and spend time transferring and remastering this material. Quite often the performances involved were recorded by small labels long since defunct.

This is time-consuming specialist work and it is to the credit of British specialist sound engineers that their prowess is recognised throughout the world. Much of this expertise would go to waste if the proposed change is implemented.

It is no exaggeration to suggest that the bias in this proposal is towards chart-style pop music, an already over-burdened area and one where the artists involved have often been financially successful. Why penalise the listening public and deny them access to much wonderful music at the whim of this small minority of performers? let's leave well alone and continue to allow a wonderful legacy of music to be made available to collectors and newcomers alike.