

Gowers Review of Intellectual Property

Intellect Response

About Intellect

Intellect is the UK trade association for the IT, telecoms and electronics industries. Its members account for over 80 per cent of these markets and include blue-chip multinationals as well as early stage technology companies. These industries together generate around 10 per cent of UK GDP and 15 per cent of UK trade. For more information about Intellect go to <http://www.intellectuk.org>.

Intellect welcomes the opportunity to respond to the Gowers Review of Intellectual Property and is pleased to offer the following comments.

This response is structured to outline Intellect's headline views on IP; answer the four general questions posed by the call for evidence and then where appropriate, comment on the specific questions raised in the call for evidence.

Introduction

Intellectual Property (IP) underpins the hi-tech sector. IP is of major importance to Intellect members, large and small. A robust IP regime is vital to securing investment in many technology start-ups as well as encouraging investment by larger companies.

Whilst we believe that the current IP regime generally meets the needs of our industry, we appreciate the efforts of the UK Government in seeking improvements in the legislation itself, the implementation and the delivery mechanism including the operation of the UK Patent Office.

In general Intellect's members are looking for:

- certainty and consistency in rights at the European and international level
- protection sufficient to attract investment in innovation

and, especially for smaller companies:

- initiatives reducing costs
- better information on how IP can impact upon business models
- freedom from unjustified claims of infringement

It is our view that whilst digital convergence and technological development are creating disruption and change, this does not affect the principles of IP protection. The introduction of new delivery mechanisms does not undermine the fundamental nature of IP or the rights of the creators and holders. It simply means that there are different challenges in terms of how IP rights are traded and protection is enforced.

However there remains a fundamental commercial distinction between the role of IP in covering technical developments and the role of IP in covering artistic content. Any IP framework needs to support innovation in both areas without adversely impacting either.

IP rights must continue to strike a balance between all stakeholders, creating a market that works for everyone from consumers to rights holders. IP rights must facilitate a sustainable value chain of creation and distribution.

Strengthening the UK's IP framework

Intellect supports the UK's current IP framework and appreciates the commitment shown to this framework by Government and the Patent Office.

We believe that the current framework has the flexibility to protect innovation in the 21st Century although there are steps which could be taken to further improve the scope for IP protection and therefore give the UK a competitive edge in an innovative, knowledge-based economy. We believe it is unnecessary and perhaps counter-productive to pursue further EU harmonisation or to substantially redefine the balances reflected in current UK IP legislation. However we urge the Government to continue to evangelise to our European partners how important a strong IP framework is to a successful knowledge economy. Given the importance to the strength of UK economic growth of businesses that derive much of their value from IP, we believe the UK has firm reasons to make this case a cornerstone of its domestic and EU policy agenda.

Beware unintended consequences of changes to IP regime

The convergence of technologies and service present new opportunities for the sharing of IP, meaning more choice and flexibility for creators and consumers. New forms of use of IP can be addressed and managed under the current IP regime by technological developments, such as DRM technologies, and do not necessitate a fundamental review of IP.

We recognise concerns over the complexity of overlapping rights, especially in the creative industries. On the other hand the use of a single right in various contexts can also cause confusion. In particular the use of copyright to protect both artistic content and computer software carries risk that changes made to suit one domain may impact in unexpected ways on others.

Software, including source code, executable and on-line applications, are content for the purposes of copyright. Their intangible nature means they have been delivered using online digital systems since these have existed. However, the environment for distribution,

licensing and use of software is very different from the environment for distribution, licensing and use of artistic content. In addition, the understanding of licence obligations and the development of good working practice in the software industry is more greatly advanced. In consequence, a significant number of competitive licensing and rights management systems with related business models are working in the market place. Significant steps are taken to draw users' attention to licences and licensing restrictions. While similar developments are to be expected in distribution, licensing and use of artistic content, this market is still undergoing rapid developments and the understanding of IP considerations by the different stakeholders is not fully developed.

As noted above, certainty is necessary for long term investment. We ask that changes, if any, proposed to user or developers rights, are tested against sound economic data and against all kinds of content to ensure that they do not adversely affect the viability and competitive landscape of these multiple licensing and distribution regimes and their related business and development models including open source.

Need for further awareness raising

Intellect recognises that digital technology has made copyrighted materials easier to distribute, and therefore easier to steal. The policing of copyright has never been an easy task but more could be done by raising people's awareness of what acts they can legitimately perform. Lack of knowledge is a significant factor in issues relating to 'digital theft': knowledge of copyright law; knowledge of the commercial impact to creative industries of unauthorised distribution and use of copyrighted materials; and knowledge of technological measures such as DRM which can be used to prevent unauthorised use. The means to achieve IP infringement are readily available, such as digital cameras and computers, giving some consumers the impression that an activity (e.g. copying on to a different medium) is legitimate where in fact it is an infringement.. This is compounded by perceptions that little action will be taken against copyright infringement.

Intellect believes that the laws in place are flexible enough to protect IP in the era of new digital technologies, and that technology can provide the means to allow existing laws to be enforced. The objective for government is to raise consumer awareness about both the laws already in place and how to interact with content legally, and for industry is to work with government in this first objective and to provide technological means for enabling current laws to be implemented effectively.

Need for international perspective

Many of our members operate internationally and would welcome efforts to achieve a level competitive playing field on the world stage of the highest standard. In particular differences in patent law and practice between the USA and other nations, especially Europe, cause concern. European companies accustomed to strict rules on disclosure, added matter and patentable subject matter have problems dealing with the more liberal regime in the US. We believe that much of the current adverse comment on "trivial patents" derives from US

practice. However harmonisation is not an end in itself and the harmonised regime must serve the interests of innovation.

Intellect response to the review's general questions

1. How IP is awarded

- Cost of gaining European IP protection high compared with US.
- Patents must be of high quality without increasing costs

In general, obtaining IP rights is relatively straightforward. Copyrights are obtained by the mere creation of original material, trademarks require a simple application for registration, and trade secrets require adequate internal safeguards against non-disclosure. The patent area has the most complex system for obtaining rights, but this is because its tests of novelty, inventive step and industrial application are a necessary barrier against patent rights being granted for inventions that are not truly novel or industrially useful. Given these complexities, accessibility to the patent system by small and medium-sized enterprises (SMEs) enterprises is an ongoing concern. The fee structure of the UK Patent Office helps in this regard, in that it allows companies to file and get feedback in the form of a search report on their patent applications prior to paying examination fees – this system is quite beneficial to SMEs and should be maintained.

While companies and individuals routinely make trade-offs based on budgetary considerations, the cost of acquiring IP rights in the UK does not seem to be a significant hurdle in many aspects. However, for patent protection the complexity of the subject matter leads to costs substantially higher than other forms of IP. As such, accessibility by individuals or small and medium-sized enterprises (SMEs) to the patent system has been and continues to be an issue. We encourage further dialogue on how to make the patent system more accessible to SMEs.

However for larger companies and many SMEs, national rights are largely irrelevant as European rights are the norm. Here costs are significantly higher due to translations, the costs of international bodies and need to secure standardisation (e.g. groups of three examiners in the European Patent Office). In general costs of securing rights in Europe greatly exceed those in the US.

The average cost of a European patent ranges between 30,000 and 50,000 Euros, compared to approximately 10,000 Euros for a US patent and 20,000 Euros for a Japanese patent, according to the European Commission's figures. Translations of patents into each country's national language account for the biggest part of European patent costs, which could be greatly reduced if the so-called 'London Agreement' were ratified, and patents could be granted anywhere in the EU only on the basis of an application filed in one of the official EPO languages (English, French or German).

Other than the cost constraints in Europe for patent protection, there are no particular barriers for SMEs or large enterprises in the information technology sector to obtain IP rights. Different companies and individuals use different 'mixes' of IP rights - patents, copyrights,

trademarks, trade secrets protection and other types of IP protection -as their business needs dictate.

In general there is concern that patents should be of high quality. To a degree this requirement needs to be reconciled with cost. There is concern that patent searches concentrate on patent literature resulting in grant of patents which lack novelty or inventive step over prior art not mentioned in previous patents. This is especially a problem in emerging technologies.

We consider it important that the UK Patent Office continue the policy of using renewal fees on commercially successful rights to subsidise the costs of early stage processing. This encourages applications for protection and hence innovation.

On the whole, the UK IP system works well within the international system. Importantly, the UK Patent Office seems to have a sufficient number of qualified examiners and adequate examination procedures in place, and thus is known for issuing patents of good quality. Also, the UK system provides search results relatively quickly. We strongly recommend that the Government continues to ensure that this remains the case.

2. How IP is used

- IP generated monopoly is legitimate
- Little evidence of defensive patenting
- Patent quality is important to limit abuse

It is important to realise that the essential commercial value of IP is to secure a return for those who generate and/or disclose it to the public. This return may be secured by licence revenues or by securing a limited monopoly in the market place. Securing such a monopoly is a legitimate use of IP and encourages others to innovate around the monopoly. It should also be noted that a strong IP portfolio can help smaller business and start ups to attract venture capital.

The fact that the UK has one of the most well-developed IP systems helps promote innovation and helps UK-based businesses deliver growth to the UK economy. The high level of research and development, innovative products and services (as evidenced by patents issued for 'novel' inventions), software innovation and cultural products and services in the UK is proof of this. The inventive and creative industries rely on the IP system to attract their initial investment, to achieve a good return on investment, to afford reinvestment in even more new products and services, and to achieve a good market value. As the DCMS has found, more than 1 million jobs, 8 per cent of GVA, and 4 per cent of UK exports depend on the copyright-based creative industries alone.

The call for evidence refers to "defensive patenting". This term is used for a variety of activities, but appears to be used here to refer to securing IP rights (normally a patent) with the intention of depriving the public of the benefits of an innovation by preventing use by others whilst the owner himself does not exploit the IP. We are not aware of any significant cases of this type and point to the compulsory licence provisions of the Patents Acts directed specifically at this possible abuse. Where such an event is perceived it is more frequently

due to other factors such as lack of demand or inability to bring the technology to market at an economic price.

Reference is also made to “patent thickets” and the concern over “patent trolls” discouraging innovation. Our members are aware that these practices can occur but are not commonplace and suggest the remedy lies in the quality of patents as discussed above. The current Patent Office consultation on “inventive step” is relevant here, although it must be recognised that assessment of inventive step is difficult for a patent examiner at an early stage of the technology’s life.

The term “defensive patenting” has another more common and much less sinister meaning, namely the practice of patenting technology which the applicant intends to bring to market not to exclude others, but to pre-empt patenting by others or as an insurance policy to provide negotiation leverage against risks of infringing third party patents. These activities tend to encourage competition and we believe this type of “defensive patenting” is unobjectionable.

3. How IP is licensed and exchanged

- Industry content with licensing

In general Intellect’s members report that licensing of IP works well. Licensing is commonly conducted by SMEs and professional advice appears to be available at reasonable cost.

In many cases, licensing of IP rights is simple and speedy, for example through the standard end-user licence agreements that are used widely by software developers and online services. These provide clarity about where IP rights lie when, for example, installing proprietary software on multiple computers, reproducing run-time modules of development tools, and even distributing entire libraries of open-source code.

Other cases, particularly negotiation of individual IP licences, can be more difficult and time consuming, given the wide variety of IP rights and the complexity of areas like patents. The ease of licensing seems to be improving, however, as licensing becomes more commonplace. It must be remembered that the very currency of IP is a set of rights to license or not license as the rightful owner sees fit, which even under international law must be respected.

The claimed barrier of IP rights to research and development is illusory. Certainly in the IT sector, no research and development comes to a halt as the result of IP rights, and to our knowledge there have been no legal cases challenging true research and development. However, from a practical perspective issues can arise when research and development is turned into commercial products and services.

IP encourages the exchange of technology and co-operation between companies which again is probably more important to smaller companies less able to bring complex innovations to market alone.

However variations in law between countries can cause a barrier to international licensing and undoubtedly add to cost and uncertainty.

4. How IP is challenged and enforced

- Cost and ease of enforcement varies substantially between countries and between industries
- UK is probably in the mid-range

Challenging IP will always be more expensive than preventing grant of unjustified rights in the first place. The UK Patent Office provides reasonable routes to challenge registered rights at the national level. International challenge can be much more expensive due to variations of law and practice between states.

Enforcement of IP rights works reasonably well in the UK, although costs are an issue. Civil litigation involving IP rights suffers from the same high costs as virtually every other kind of litigation. The need for both solicitors and barristers to bring such cases adds to the costs. Copyright and trademark cases are relatively streamlined. Patent litigation is more complicated, but this is due to the more detailed substantive law and fact-intensive enquiries involved in a patent case. However Patent Office routes to challenge and enforcement provide more cost-effective routes and non-binding opinions may assist in dispute resolution.

Criminal enforcement of trademark and conspiracy-to-defraud laws works reasonably well. Criminal enforcement against software copyright crime is rare in the UK, which is surprising given that this is the preferred method for dealing with commercial copyright counterfeiting in most countries. Criminal enforcement against patent infringement is not available in the UK, is not appropriate, and should remain excluded. It is important that threat of criminal sanctions should not be used to prevent bona fide competition where rights are conscientiously believed to be invalid or where there is inadequate notice of rights.

Alternative Dispute Resolution (ADR) may be suitable where the rights owner seeks monetary compensation, but where an injunction to keep competition off the market is required (as is the IP owner's right) necessarily the courts must be involved or at least binding arbitration, which can be at least as expensive. From the public interest point of view, ADR has the disadvantage of not developing the body of case law and potentially leaving invalid rights in place.

The cost of litigation is a barrier for all companies, but especially for SMEs. IP enforcement insurance tends to be hard to secure and expensive due to lack of certainty and actuarial data. Companies are wary due to some exclusion clauses applied in the past.

In countries where copyright and trademark counterfeiting and piracy are rife, the principal problems are inadequate legislation, inadequate enforcement procedures and remedies, and inadequate government commitment to dealing with the problem. We appreciate the efforts of the UK Government and the European Commission in encouraging countries with emerging markets to address such problems, and would like to see additional progress in this area.

In the patent area, the principal barrier to efficient enforcement in Europe is the lack of a truly unitary patent court system or a common patent court of appeal between EU member states. In some matters this has produced inconsistent judgements as to the validity or infringement of EPO-granted patents in different EU member states' courts. The proposal of the European Patent Litigation Agreement to implement a unitary European patent court and appeal system, as well as the proposed London Agreement to limit the translation requirements for patent applications and litigation, would be welcome steps toward fixing these problems and improving patent litigation consistency in Europe.

Response to review's specific questions

Term of protection of sound recordings and performer's rights

No comment

Copyright exceptions – fair use/fair dealing

The private copying exception in current UK copyright law, although seemingly narrow, strikes a careful balance between the interests of copyright owners and users of copyright materials, and is consistent both with the UK's obligations under the EU Copyright Directive¹ and TRIPS², both of which impose strict limits (the so-called "three-step test") on the scope of private use exceptions.

Intellect believes the best mechanism for managing private use is thorough individual licensing, as it is now, and there is no need to modify the scope of the current statutory private use exceptions. Indeed, the digital environment, offers more flexible solutions for individually licensing consumers.

Moreover, extending the scope of the current statutory private use exception would beg the question of compensation, which in turn raises the spectre of copyright levies in the UK at a time when the European Union is looking at initiatives to ensure that Member States phase out levies altogether in the digital environment to comply with the Copyright Directive.

Copyright – digital rights management

DRM is an enabling technology that is relatively new and will evolve over time. In essence it is a set of technologies that enables individuals to protect private information and content owners to protect their intellectual creations and, if they so choose, to allow others controlled rights of access, under commercial or non-commercial terms, in the digital age. DRM is an essential tool for ensuring that content owners can ensure a return on investment in a digitally enabled knowledge economy but should not be used to circumvent fair use provisions of existing law.

¹ Article 5.2(b) and Article 5.5 Directive 2001/29/EC

² Article 5.2(b) and Article 5.5 Directive 2001/29/EC

DRM technologies enable content to be delivered in ways tailored to suit the consumer's specific requirements. These new offerings allow consumers to pay only for the kind of use they actually want. This will allow different business models to emerge.

Most users' familiarity with DRM technology is currently rather limited and DRM is often viewed as simply taking away one's ability to share protected music or video. However, as DRM technologies evolve, the current DRM solutions not only become easier to use, but new DRM applications enable both enterprises and individuals to protect their own information (whether it is banking information, personal data, medical records, business data or an individual's own IP). Over time there will be an increased awareness and acceptance of the positive benefits these technologies can provide.

Virtually any technology can be abused or used inappropriately in certain circumstances. Familiarity and increased awareness will help reduce such issues. This is true not only from a user's perspective but also from the perspective of technology developers, content owners and distributors.

DRM does not have its own moral or legal perspective. It is a technology that behaves as the content owner or distributor programs it to do.

There are some underlying principles that Intellect believes are important to ensure ongoing DRM innovation which will deliver most benefits for consumers:

- DRM technologies enable content creators/owners/distributors to offer increased consumer choice, product variety and pricing options. DRM also enhances security and privacy. The UK Government should continue strongly to support the deployment and protection of DRM technology, as it consistently has done to date in international negotiations such as the WIPO Treaties, and in existing EU directives.
- Government should not pick winners by mandating technologies. DRM development and deployment must remain voluntary and market-driven. Government-mandated technologies quickly become outdated, depriving consumers of new features, increased functionality and potential benefits from new products.
- One of the Government's concerns should be ensuring that the established common sense practices of consumer protection are respected in selling DRM protected digital content.
- Interoperability among DRM technologies needs to develop through industry led efforts, not by regulation or government imposed standards.
- The ongoing development of industry-led international standards should be supported by the UK Government

Please also see the Intellect submission to the recent Parliamentary All Party Internet Group inquiry on DRM - <http://www.intellectuk.org/download.asp?file=486>

- **Copyright – orphan works**

No comment

- **Copyright – licensing of public performances**

No comment

- **Patents - utility models**

It appears to Intellect that utility models would occupy the space between registered designs and patents. As such they would tend to complicate an already complex picture and unless subject to the same criteria and examination as patents would run counter to the certainty we seek. We note that where utility models exist there is no commonality of criteria or standards and this again adds to complexity.

- **Pharmaceutical Supplementary Protection Certificates (SPCs)**

No comment

- **Trade marks –international issues**

Some concerns were expressed that European trade marks have caused problems for companies trading under unregistered trading styles. This has caused problems over the “sunrise” provisions for .eu domain names. SMEs in particular need to be made more aware of the impact that European marks may have on their business.

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

Our members report a lack of understanding of the current system of design rights in some quarters and a suspicion that the system is not being used to maximum advantage.

The UK unregistered design right is more useful than the EU unregistered design right given the much longer term. In some respects the UK right is better equated to unfair competition laws in some European states. UK has no statutory unfair competition law and companies are obliged to rely on common law remedies such as passing off requiring a high burden of proof.

It has been suggested that UK Registered Designs should be abolished in favour of the European Registered Design system. We understand this is based on a greatly reduced application rate for the national right. However at present there is a lack of track record on enforcement of European Registered Designs and abolition of the UK national right would be premature

- **Legal sanctions on IP infringement**

Whilst supporting criminal sanctions for counterfeiting and piracy, we believe such terms must be narrowly defined. The threat of criminal sanctions for inadvertent infringement or actions which are believed to be legitimate but ultimately held to infringe would create a major disincentive to innovation, especially, but not exclusively in the software industry.

Criminal sanctions for patent infringement should not be introduced, as these are more likely to inhibit innovation than deter counterfeiting and piracy.

However, there is no coherent reason for distinguishing between physical and internet copyright infringement. Given that there are nearly 1 billion internet users worldwide and that perfect copies of works like software can be distributed online quickly and extensively around the world, the level and damage of online infringement can be every bit as serious (truly on a 'commercial scale', regardless of motivation) as the worst physical piracy cases. Civil and criminal sanctions for copyright and trademark infringements should be the same for physical and online activities provided there is clear notice of rights.

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

As discussed above, competition law may restrict the use of IP rights, but should not affect the grant of such rights. The impact of competition law needs to be as clear as reasonably possible and the normal sanction should be compulsory licensing rather than total deprivation of rights. The international WTO and copyright treaties provide a useful dividing line: Competition law need not and should not interfere with 'normal exploitation' of IP, which also implies that remedies should not go further than necessary to address particular abuses.

- **Parallel imports/international exhaustion**

Many hardware and software producers who operate global businesses can suffer from the problems associated with parallel trading. Indeed many of the recent High Court cases have involved technology products.

Intellect feels however that the existing legislation is sufficient. Intellect does not believe there is any need for a review of current "parallel trading" laws and recommends that the current principles should remain.

Other topics

IP Policy

The Patent Office is very effective in its dual roles of registration and policy formulation but Intellect feels that more needs to be done at the political level with the approach to IP policy development.

Since IP is concerned with industries of various types, we believe it to be important that the central responsibility for development of IP policy should remain within DTI & Patent Office. The challenge for ministers is to find an effective method of ensuring strong links to HM Treasury, DCMS and the Home Office on enforcement as well as other departments representing stakeholders. At present, this does not seem to be the case and it is clear that this very review proves this point; having been announced by HM Treasury not the DTI which

is the lead department on IP, whilst also taking over from a previously announced copyright review being run by DCMS. It is particularly important that a structure is established that ensures that IP remains at the top of the political agenda and not just because one particular minister has taken an interest.

Such a reorganisation would free up resources within the Patent Office to focus time and budgets on measures to improve the quality of patents, along with the important educational work they already undertake.

IP Awareness

Public awareness is important for broad-based participation in and support of the IP system. The Patent Office's IP awareness campaign, website and television advertising provide very good examples of the kind of awareness activities that help make the IP system accessible to companies and individuals. We would encourage this activity to continue and for the appropriate funds be made available to the Patent Office to continue these activities. In general terms, the international community is aware of the uses and benefits of the IP system, but the continued strong support of the UK government is needed to defend this system against unwarranted attacks in national, EU and international forums.

We also recommend that the Patent Office is given resources to help raise awareness amongst MPs and MEPs about the importance of IP to the UK economy. This could be done in a range of ways, including possibly renaming the Patent Office to emphasise that it is responsible for all types of IP protection, not just the Patents system.

Increase business support

It is often argued that the cost of obtaining IP protection is prohibitive, particularly for small and medium sized enterprises. With this in mind, Intellect suggests that there is scope to offer further support to business to encourage use of IP protection. Ideas include:

1. Provide an incentive to encourage small businesses to maximise their IP portfolio,. We support the recommendation to extend the R&D tax credit to cover the legal fees incurred by small businesses during the patent application process
2. Patent Office offer advice to companies on how to register for IP protection in other countries
3. Reduction of European patent costs through early implementation of the London Agreement
4. Wherever possible offer guidelines to reduce the amount of basic legal guidance companies are forced to get
5. Allow companies to search more easily

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