

Intellectual Property Lawyer's Association

Response to the Gowers Review of Intellectual Property – Call for Evidence

The IPLA

The Intellectual Property Lawyer's Association (previously known as the Patent Solicitors' Association) was formed in November 1982 to act as a centralised body for law firms in England and Wales with Intellectual Property (IP) practices who wish to lobby for improvements to IP law. Over 50 firms are members of the IPLA and the vast majority of general advice, transactional work (licensing, financing, corporate transactions) and enforcement with respect to all IP rights in England is conducted by these member firms. Many of our member firms also seek to register trade marks and designs (UK and EU), but not usually patents, for their clients. The international nature of IP means that member firms are also familiar with laws and procedures in many other countries, especially the main European jurisdictions as well as the United States of America.

Member firms act for a wide range of clients, from major multi-national groups of companies to SMES and technology start-up companies, as well as universities and private inventors. As a group we accordingly have a significant experience of how existing IP systems work and knowledge of the views of a wide range of clients who may individually only have limited experience of IP.

We have confined our comments to (1) an explanation of our general support for much of the current system for the protection, transaction and enforcement of IP and (2) identifying key areas for reform. Our comments focus mainly on patents about which we have considerable, and in many respects unique, expertise and experience. We anticipate that other bodies, especially those that represent particular industries and technologies, will be in a better position to comment on the application of non-patent IP law.

General comments

The IPLA strongly endorses the acknowledgement of the importance of IP in encouraging investment in R&D and creative industries and the importance of these industries to the UK economy. The current framework of IP legislation has evolved and developed over many years. Generally, the fundamental IP principles have stood the test of time and the challenges of new and evolving technologies. Certainty and predictability are very important, as is cost. Whilst we encourage review of IP laws, we warn against changes to the fundamental principles. In particular, variations to the basic principles which are specific to one industry; e.g. software or biotechnology, should be kept to an absolute minimum. The IP system is also not the place to introduce regulation based on safety or ethics. IP rights provide the owner with a tool to prevent others using those rights without permission. They do not provide the owner with a legal right to do the thing which is the subject of their IP right. IP rights must also be exercised responsibly and in accordance with support for the third world and developing countries and also in accordance with general competition law principles.

New legislation often creates years of uncertainty while different views on the interpretation and application of those new laws are resolved by the courts; for example, there have been numerous cases before the European Court of First Instance and the ECJ regarding the European Community Trade Mark legislation.

Much of the current English IP legislation has been enacted as a result of international obligations. We expect that the Gowers committee appreciates that there is very little scope to make significant unilateral changes to such fundamental international obligations.

Patent Reform

The most important deficiency in the current IP system is the lack of a truly unitary European Community patent right. Such a patent right should be unitary in both obtaining protection and enforcement. The vested interests of a few have meant that the recent proposal for such a right has been delayed and rendered unworkable by political negotiation and compromise, made more difficult by the EU's general discomfort with restrictive language criteria. Unfortunately, in addition to the demise of the Community Patent reforms, France has recently refused to ratify the London Treaty which would have resulted in considerable saving on the largely wasted costs of translating European patents at the national level following grant by the EPO. A Community patent would not be a compulsory system. It would run in parallel to the existing system of patents which would not prevent the use of national patent systems by users who preferred to file initial applications in their own language. The Community patent system would provide a considerable cost-saving and efficiency to those who wished to use it.

The IPLA also strongly supports reform of the system for enforcement of patents in Europe. Generally, we consider that there should be a system for the enforcement of patents across Europe which is fair, transparent, cost-effective, consistent and, within reason, predictable. The European Patent Litigation Agreement (EPLA) devised by the EPO, and which carries widespread support across Europe, would provide a fair, cost effective and workable system of enforcement.

The IPLA urges the Government to put pressure on the EPO to expedite its consideration of patent applications, oppositions and appeals, both in relation to the current system and to a new Community Patent which is administered by the EPO. The current delays are not in the public or patentee's interests and seriously endanger the attraction and use of the EPO. The time from application through to resolution of an appeal from an Opposition decision often exceeds 10 years of which the opposition procedure can take 5-6 years. The UK courts usually deal with the same issues which arise post-grant in 23 years including appeals. About 5-6% of European patents are opposed.

The courts in many European countries will not enforce patents while an Opposition (or appeal) is in progress, mainly because the form of the patent is not settled and there is a risk of inconsistent decisions. The speed of the patent process, and in particular opposition proceedings must be improved.

The IPLA supports any measures which help to provide greater clarity, certainty and predictability of the test of inventive step/obviousness for patents. However, any new measures should not put the applicant to even greater expense or cause additional delay to the grant of patents. We are also wary of replacing one standard which has developed over many years of jurisprudence with a substitute definition or criteria which purport to clarify the position but result in a period of considerable uncertainty while the substitute provision is interpreted and applied in evolving jurisprudence.

We have attached a copy of our response to the recent European Commission Questionnaire on the Patent System in Europe which addresses these issues in more detail.

The Government already provides considerable support for R&D based businesses e.g. in the form of tax credits. We consider that such support should be supplemented by improved information to facilitate public awareness of the role of IP and by ensuring that SMEs receive appropriate professional advice. The professional costs associated with such advice should be part of the costs of R&D within the tax credit system.

Detailed Questions

In relation to the detailed questions set out in the Call for Evidence, the IPLA has considered an advance draft of the submission of the IP Committee of the City of London Law Society and we support and endorse the views set out in their submission. In particular, we believe that accurate, current, clear and searchable information on IP rights should be easily available over the Internet. Generally we do not see a role for utility models in an efficient patent system. However, if increasingly, companies are frustrated by the cost and delay of the European patent system and the availability of an alternative parallel form of protection helps to alleviate this problem then a new system of utility modelled, like the German system, should be considered. We consider that any derogation of IP rights for fair use/fair dealing and experimental use needs to be carefully defined and strictly limited. We are very wary of any suggestions that the enforcement of IP should be limited by making the final remedy of injunctive relief after judgment at trial a discretionary matter and of any other measures which amount, in effect, to compulsory licensing, other than in extreme cases such as the prolonged and unexplained non-use of IP rights or for very significant breaches of competition law.

IPLA

19 April 2006

INTELLECTUAL PROPERTY LAWYERS' ASSOCIATION

Response to the Questionnaire on the Patent System in Europe

Introduction: Who IPLA Are

The Intellectual Property Lawyers' Association (previously known as the Patent Solicitors' Association) was formed in November 1982 to act as a centralised body for law firms in England & Wales with IP practices who wished to lobby for improvements to intellectual property law. Over fifty firms are members of the IPLA and the vast majority of patent litigation in England is conducted by these member firms. The international nature of patent litigation means that member firms are also familiar with procedures in the other main European jurisdictions, as well as in the United States.

Member firms act for a wide range of clients, from major multi-national groups of companies to SMEs and technology start-up companies, as well as universities and private inventors. As a group we accordingly have significant experience of how existing systems work, and knowledge of the views of a wide range of clients who may individually only have limited experience.

The IPLA fully supports the principle of a supra-national system for patent litigation in Europe. It accepts that such a system will lead to increased competition among legal practitioners across Europe. Nevertheless, it recognises that the right supra-national system can bring significant advantages for the clients of its members, and it believes that its members' knowledge and experience place it in a good position to contribute to the design of a system which will be attractive to all users.

We have seen the responses to the Commission's Questionnaire submitted by the English Patent Judges, and by the Licensing Executives Society International, and the IPLA fully endorses their comments.

Section 1 - Basic principles and features of the patent system

1.1.1 The basic features required of the patent system - General

We broadly agree that the features outlined in Section 1 of the consultation document represent the basic features required of the patent system in its broadest sense. However, consideration of the patent system as a whole should not distract attention

from the fact that the major problem with the existing system lies in the system for resolution of disputes.

Through the European Patent Convention, TRIPS and other international treaties, there exists a clear set of **substantive rules** which are generally considered to balance the interests both of right holders and of those who wish to compete fairly with them. A major problem lies in the absence of a unitary system for interpreting those substantive rules. Interpretation is achieved through decisions of the courts (including the Boards of Appeal of the European Patent Office). The lack of a unitary court system with a single supreme appellate court means that the substantive law can be the subject of divergent interpretations in different court systems. National Patent Judges are aware of this, and frequently attempt to harmonise their decisions with the interpretation of the law by courts elsewhere in Europe, but we are not aware that the Boards of Appeal of the European Patent Office (whose decisions are of particular importance as they act as the 'gateway' to granted patents) make any serious attempt to pay respect to the decisions of experienced national courts.

The **processes** for obtaining patents through the European and National Patent Offices are well-established. The need for rigour in the examination of applications, and for speed, especially in post-grant opposition proceedings, are matters which are increasingly being acknowledged and addressed.

Resolution of disputes is the area of greatest divergence. This is not simply a matter of cost, speed and convenience: differences in procedure can lead to different outcomes. For example, materials made available to the court through compulsory disclosure procedures such as disclosure of documents in England or "saisie contrefaçon" and similar procedures in France and other countries, or through oral testimony of witnesses (e.g. in England and Denmark), can bring the court to a different understanding of the factual issues and hence to a different result as compared with the courts in countries such as Germany, Holland and Austria where such procedures are far less developed or non-existent.

The patent system gives rise to many **public policy** issues. We believe, however, that it is preferable to deal with these separately, as is done in the area of competition law. Patent lawyers and the examiners in Patent Offices are not the people best qualified to address ethical or environmental issues. Such matters are best regulated directly. For example, much of the debate about the ethical limits of biotechnological research centres on the grant of patents for the products of such research. But although the patent protection may provide some encouragement for such research, the absence of

patent protection will not prevent it, and it is far more sensible to focus the debate on the ethics of such research than the availability of patents for its results. As the English Patent Judges put it, *“if you disapprove of the making of oncomice [transgenic animals], then you need a law to stop it, not merely refusal of a patent for it.”*

The IPLA’s specific comments on this question are as follows.

1.1.2 **The basic features required of the patent system - Specific**

Inventive step

In terms of reviewing the substantive rules, most pressing is a review of the test for obviousness which should be clear and consistent between the Courts and the Patent Office(s).

Adequate remuneration

The current patent system does not (except in limited areas such as SPCs for pharmaceuticals) distinguish between the time taken to obtain an adequate return in relation to inventions which are products of substantial time and money and those which are the product of more modest investment. Under the 1949 UK Patents Act, the term of a patent could be extended by the Court if it was satisfied that the patentee has not been adequately remunerated by the patent. Introducing a similar procedure might help to redress the balance for inventions which have involved huge R&D costs and/or have taken longer to implement.

1.1.3 **Requirements of dispute resolution procedures**

The first and most important feature of any dispute resolution system is that it should be fair, and should be seen to be fair. The unsuccessful party should know that it has had a proper opportunity to present its arguments, and that they have been properly considered by the court.

Predictability is an essential requirement of any dispute resolution procedure. This is because, if the outcome of a possible dispute is predictable, the dispute can usually be avoided or settled. Speed is also important for a number of reasons. First, industry dislikes uncertainty, and long-running disputes are not conducive to the efficient running of a business. Secondly, it is our experience that delays in litigation lead to increased cost.

It is obviously desirable that dispute resolution procedures should not be too expensive. However, perceptions of what is expensive will vary widely from case to case. Cutting corners in a case of great commercial importance which merits a thorough investigation of all the relevant issues is manifestly wrong; but on the other hand, cost should not be a barrier for SMEs with less profitable products. We believe that, while dispute resolution procedures should be inexpensive, they should also be flexible so as to accommodate the needs of a wide range of disputes.

In this connection, the English court's approach of limiting a big company's costs recovery from an unsuccessful small company, may be an appropriate solution to the problem of disputes between "big" companies and SMEs.

A predictable process requires high quality, specialist and experienced judges to ensure reliable results and consistency of approach.

Practical issues are also important and the convenience of the parties and their advisers should be taken into account in determining the location of Court hearings.

1.2 **Other features required of the patent system**

A major issue in the current European patent system is the speed of oppositions in the European Patent Office. While some applicants may be content for a patent application to take several years to reach grant, it is in the interest of competitors and the public generally that there be rapid resolution of proceedings after grant. EPO opposition proceedings can take many years to resolve. This can interfere with the enforcement of patents and cause corresponding uncertainty as to their lawful existence and/or scope of protection, which can be an obstacle to effective competition.

1.3 **How can the Community better take into account the broader public interest in developing its policy on patents?**

Unfortunately many bad patents are granted. Once granted, these "trivial" patents can form a significant barrier to invention and commerce, particularly for small companies which cannot afford to challenge them post grant. The EPO has in the past been described as a "patent granting factory". Whilst there has been improvement there can be areas of technology where the examination regime is too generous to the applicant. The Community should ensure a more consistent and stringent approach to examination and post grant procedures to avoid similar criticism.

Patents should be seen to protect only inventions making a clear practical contribution. While the EPC includes a requirement that patentable inventions must have industrial application, the test has been interpreted in the EPO to be simply that the product can be made in some form of industry rather than that the invention is declared to have a useful practical application in industry. Interpreting the industrial application requirement more strictly may also help to reduce the number of speculative patents.

Section 2 – The Community patent as a priority for the EU

2.1 By comparison with the common political approach, are there any alternative or additional features that you believe an effective Community patent should offer?

General

The success of the Community patent will depend on its attractiveness to industry. Industry requires quality, affordability and legal certainty from the Community patent system. If the system does not provide this, then it will not be used.

It is therefore crucial to the success of the Community patent, that the views of industry be given greater emphasis when it comes to drafting and agreeing the implementing regulations. A system that predominantly reflects the political concerns of Member State governments, without taking account of the views of industry, risks becoming redundant from inception.

It is hoped that through this consultation process the Commission will become appraised of the views of national and European industry associations and that these views will be given their due weight in the effort to agree the implementing regulations for the Community Patent.

Costs

The comparison between the estimated costs of obtaining a Community patent and the current cost of a European patent is the wrong one for the Commission to make.

The Community patent has to be competitive on an international level. The correct comparison to make is therefore with the cost of obtaining a US or Japanese patent. Under the current proposals, the Community patent would cost significantly more. This is primarily because of the requirement to translate the claims of the Community patent into all 21 official Community languages on grant. In this regard we note that many of our clients consider that the Commission's comparative estimates of the relative costs of European and the proposed Community patents significantly understate the expected cost of the proposed Community patent.

In our opinion, the common political approach needs to be reassessed with a view to making the Community patent cheaper to obtain.

Languages

In assessing the language issue, the Commission may find it illuminating to consider which languages are used in responses to this Questionnaire, particularly by international organisations.

It is recognised that the current proposal of translating the claims of a Community patent into all of the official Community languages is a compromise that was heavily negotiated.

However, industry would still prefer a translation regime, which does not require a patentee to pay for translations for countries/languages in which he has no interest.

In practice, all European patent practitioners are used to working in the EPO languages. When companies need freedom to operate advice, they consult European patent practitioners, who can advise on issues of infringement notwithstanding that the relevant patent may not be in the client's local language. Thus, the translation of the claims into the three official languages of the EPO should suffice.

The implementing regulations could make provision for the filing of translations of the claims into the appropriate languages prior to enforcement of a Community patent. These provisions could be coupled with restrictions on the damages payable in respect of infringements committed before translations were filed in the relevant language.

The common political approach reflects the concerns of governments and is contrary to the wishes and interests of the users of the system. This is clearly wrong. If the common political approach cannot be changed in this respect, then it is hoped that Member States whose language is not one of the EPO official languages will waive their right to require a translation of the claims into their language, in accordance with the London Agreement.

Finally, it is important that the translated claims have no legal status, other than in determining whether innocent infringement might have occurred. Any other proposal would give rise to varying claim scope in different jurisdictions thus undermining the unitary nature of the Community patent.

Judicial arrangements and legal certainty

In order for industry to support the Community patent proposals, it needs to have confidence in the proposed judicial arrangements concerning the patents. This is impossible at the moment as there are no detailed proposals on such arrangements. Industry will not use the Community patent if it does not know how it will be enforced – and has confidence in that enforcement system.

The Commission should be aware that buy-in from industry can only be obtained once the judicial arrangements have been set out in detail. This is a critical matter for industry and not a point of detail to be sorted out later.

In our opinion, the judicial system will need to include the following:

1. Flexibility of location for convenience of users. This will mean the existence of a number of regional chambers of the Community Patent Court. To avoid “forum shopping”, these should be staffed by judges from more than the local jurisdiction, for example from a central panel of judges.
2. The judges in the Community Patent Court will need to be highly experienced in patent matters. If judges are experienced in patent matters, they will have demonstrated an ability to handle technical issues and we believe that there should be a single cadre of judges rather than separate categories of “legal” and “technical” judges.
3. The resolution of disputes at first instance will require procedures for dealing with evidence (which the existing European Court system is not designed or able to handle). The rules of procedure should be crafted to provide rapid and effective dispute resolution within a relatively short time – around one year – as well as procedures for testing evidence, thus allowing reliable findings of fact by the court.
4. Users of the Community Patent Court should have access to effective enforcement procedures (including the possibility of pan-European interim and final injunctions).
5. Any appeal from the Community Patent Court should be to a specialist patent panel (again, with experienced and technically qualified judges) (cf the CAFC in US). If this is to be part of the Court of First Instance, it needs to be a separate

Chamber with its own administration and procedure, which must be capable of rendering a decision within 9-12 months.

6. The common political approach provides for the language of the proceedings to be in the official language of the Member State where the defendant is domiciled. This proposal would result in extensive and burdensome translation requirements. The best proposal would be to use English as the language of the proceedings. Failing that, the language of the granted patent could be used.
7. The judges need to be independent. In particular, they should have no link with the European Patent Office or other granting organisations: there should be separation between the grant function and the review function.

Section 3 – The European Patent System and in particular the European Patent Litigation Agreement

3.1 What advantages and disadvantages do you think that pan-European litigation arrangements as set out in the draft EPLA would have for those who use and are affected by patents?

ADVANTAGES

The EPLA is a fully thought-through litigation system, developed in consultation with users and practitioners. It enjoys considerable support from users and practitioners and can be expected to be a success.

The EPLA also has an advantage in that it can be adopted rapidly. As the system is optional, adoption is not dependent on unanimity - no member state can stymie agreement on a system which is acceptable to users and other member states. Those member states in favour can proceed immediately with implementing the system and the success of the system will then put pressure on any non-participating states to join.

DISADVANTAGES

Careful consideration needs to be given to transitional arrangements. The nature of the enforcement system is an important factor for some patentees when deciding their patenting strategy. Such persons may object if the enforcement system for existing European patents were radically changed retrospectively. This can be avoided provided the new system was compulsory only for patents filed after the new system is introduced. The system would be optional for pre-existing European patents, but, for the same reason, the choice of whether to enforce nationally or through the EPLA system for existing European patents should rest with the patentee. If this were not to be the case, then, as well as being potentially unfair to the patentee, it would also encourage forum shopping and the early initiation of litigation to secure a "preferred" forum.

There is an alternative view on the application of the EPLA to existing patents. Whilst some patentees may regard it as unfair that they would be forced to use a system not in place when they filed for their patents, this might be regarded as being outweighed by the inherent desirability of the new system, meaning that patentees should be obliged to adopt it in all circumstances.

A further disadvantage of the current proposal is that it requires "validity only" actions to be held in the central court. It would be harmful to the system to have regional courts

regarded as inferior to the central court and they should be given an equal standing. This could perhaps be enhanced by not restricting individual judges to just one venue.

OVERALL

The potential disadvantages are matters that can be addressed on implementation. Overall IPLA believes the EPLA has the potential to be a very good system for those who use and are affected by patents.

3.2 **Given the possible coexistence of three patent systems in Europe (the national, the Community and the European patent), what in your view would be the ideal patent litigation scheme in Europe?**

The ideal patent litigation scheme in Europe is one which works to the satisfaction of, primarily, those who use the system and, secondarily, relevant governments. Given that the interests of individual users and governments will differ, a truly ideal system is probably not achievable and should not be the goal. Rather, the goal should be the best available system. Accordingly a system which has sufficient support from users, practitioners and governments to allow it to be implemented promptly and efficiently should be regarded as the most "ideal". The EPLA is the closest to this ideal, provided that the disadvantages identified above are addressed.

The basis for this question is the possible co-existence of three patent systems in Europe. It should certainly not be a goal to have 3 different co-existing systems. There are however grounds for aiming for two systems, a national system and a "European" system allowing supra-national enforcement of European or Community patents. The EPLA system, for the reasons identified above, can be implemented rapidly. The Community patent can then follow if and when agreement on it is reached. However there is no reason why the Community patent should not adopt the procedures implemented for the EPLA.

Issues to be addressed prior to implementation

The Consultation document lists three issues to be addressed before Member States may become party to the Litigation Agreement. Whilst comment on these was not requested, IPLA, on behalf of users and practitioners does not agree with the Commission on these issues:

1. It is unclear what is meant by saying that that Agreement has to be brought into line with the Community legislation in this field. However, the advantage of the

EPLA is that it is a system which, through close consultation, is widely supported by industry and accordingly is ready for a prompt implementation by those countries who wish to participate. Other countries need not join. The Community (and other countries) can join the system once it is up and running successfully. If Community agendas are introduced at the outset, the EPLA will just meet similar problems to those which have hindered the adoption of the Community patent. It is best for the Commission to leave individual countries to proceed with adoption of the EPLA as they choose. The Commission can seek to add a Community Patent to the system or otherwise join once the system is up and running successfully.

2. There is no need for the EPLA to be related to the ECJ, at least not until the Community becomes a member of EPLA and maybe not even then. In this regard, it should be noted that not all potential EPLA member states are members of the EU. Trying to resolve such issues at this stage will just delay adoption of the system when, in the early years at least, it is an irrelevant issue and may always be so.
3. As stated for paragraph 1 above, those countries that wish to join to EPLA should be allowed to proceed with its implementation now. There is no need for matters to be delayed now for the Commission to get a mandate from the Council of the EU. If this were to happen, then the project would be delayed due to similar issues which have hindered the adoption of the Community patent. The Commission can take whatever steps it needs to join the EPLA once the EU Council has resolved the political differences which currently exist.

Section 4 – Approximation and mutual recognition of national patents

4.1 What aspects of patent law do you feel give rise to barriers to free movement or distortion of competition because of differences in law or its application in practice between Member States?

There are two barriers to free movement in the patent system. The first, and unquestionably the most important, comes from the presence of a patent in some Member States, but not in others. This however, is permitted under Article 30. The only solution to this would be to impose a Community Patent System requiring protection in all states. It is not realistic to consider the imposition of a Community Patent System as a total replacement for the existing systems within any reasonable timescale.

There are no other factors of the same level of importance which provide barriers to free movement of goods or distortion of competition. However, a second barrier can arise from the inconsistent procedures of national courts and the resulting possibility of inconsistent decisions – a product being held to infringe a valid claim in one Member State but not in another. Such inconsistent results are not frequent, but the possibility causes uncertainty, particularly where there are significant differences in the speed with which decisions are reached in different Member States.

4.2 To what extent is your business affected by such differences?

Whilst IPLA members are not affected, clients' businesses can be affected in different ways. However, these clients are all affected by uncertainty resulting from the inconsistencies of different national litigation systems. This uncertainty inhibits investment.

4.3 What are your views on the value-added and feasibility of the different options (1) – (3) outlined above [in the consultation document]?

IPLA opposes all three of these ideas.

Paragraph 1 - we would envisage a *specialist chamber* of the European Court of Justice providing a first and second instance, or at least second instance judicial authority. Hence, a system of providing references is not supported.

Paragraph 2 – further harmonisation / approximation of laws is not really necessary: there is already a considerable degree of harmonisation under the European Patent Convention, TRIPs and other international treaties. In any event, the mechanisms available under the European Patent Convention are more suitable than the European

Community Institutions (especially the European Parliament) in providing harmonisation. Attempts to harmonise technical aspects of patent law in recent years (e.g. the biotech directive and computer-implemented inventions) have been unsuccessful. The role of WIPO as a means of achieving broad international harmonisation also needs to be taken into account. It is more important to have practical harmonisation through the harmonisation and integration of the court systems for dealing with patent disputes.

Paragraph 3 – this proposal is opposed most strongly. It appears to suggest the introduction of a yet further system to obtain patents. Patents cannot, however, simply be registered automatically just because they have been obtained in one Member State. Many national patent offices do not formally examine patents. Therefore, if adopted, this suggestion would result in applications being made in a country which did not examine patents, and the bad patents thereby granted being “exported” to other states. Any suggestion that this process could be supervised by the EPO would simply lead to the EPO becoming an appellate body, when it should primarily remain an examining / granting body. The proposal also seems to ignore the existence of the Patent Cooperation Treaty (PCT) system. Finally, depending on the rules governing the period within which patents should be registered, there could be problems caused by the potential inconsistency with the present requirement to claim priority and designate relevant states within one year of first application. Any variation on this principle would cause uncertainty among the public as to what patent rights existed, as well as probably being inconsistent with existing treaty arrangements.

4.4 **Are there any alternative proposals that the Commission might consider?**

There are no further proposals which IPLA has to make.

Section 5 - General importance of the patent system to you

5.1 **How important is the patent system in Europe compared to other areas of legislation affecting your business?**

5.2 **Compared to the other areas of intellectual property such as trade marks, designs, plant variety rights, copyright and related rights, how important is the patent system in Europe?**

As an Association of lawyers whose clients operate in a wide range of industries, it is not possible for us to give specific ratings here. The relative importance of the different intellectual property rights depends to a large extent on the industry sector. For example, copyright is critical to publishing, media and music sectors while trade marks are critical to sectors providing goods and/or services to consumers.

Patents are of enormous importance to manufacturing industry in protecting innovation, and the products and processes that result, thereby encouraging investment in research and development. In our view this makes the patent system of greater importance to European industry as a whole than other intellectual property rights.

For new ventures, particularly in high tech industries such as biotech and electronics, patent protection is very often an essential requirement before initial funding can be raised to get the venture off the ground. For new and smaller enterprises, collaboration arrangements are also frequently necessary to allow the development of a new concept into a marketable product and again, in most cases, are dependent on patent protection.

In addition, patent protection is becoming increasingly important for European industry generally as competition from the developing world means that it depends increasingly upon innovation. European industry therefore needs a workable, affordable and legally certain patent system to protect that innovation.

5.3 **How important to you is the patent system in Europe compared to the patent system worldwide?**

Not applicable.

5.4 **If you are responding as an SME, how do you make use of patents now and how do you expect to use them in the future? What problems have you encountered using the existing patent system?**

The IPLA is not responding as an SME but has knowledge of SMEs' use of the patent system and problems encountered from clients of its member firms that are SMEs.

As indicated above, SMEs use patents to protect innovative concepts so that they can obtain funding and/or enter collaborations to develop those concepts and can market the results with some safeguard from others following their lead thereby protecting their investment.

For SMEs the main problems with the present European patent system are therefore the costs involved - both in obtaining patent protection, primarily due to translation fees, and in enforcing a patent through the courts. A second problem is the quality of the protection afforded by a patent. As obtaining a patent is a significant cost for a SME, it needs to have reasonable prospect that the patent will stand up to later scrutiny by a court if and when asserted against an infringer that raises a validity challenge.

5.5 **Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?**

The response to Section 2 has already highlighted the need to involve and take account of the views of industry in setting up the Community patent system so that it will be attractive to users.

A key part of its attractiveness will be how workable it is in practice by comparison to existing systems. A system that is seen as practically flawed from the outset or that encounters significant "teething problems" on introduction would have its credibility significantly damaged within Europe and internationally.

It is therefore hoped that, if it does not already reside within it, the Commission will involve those with practical knowledge and experience of the current patent systems in Europe in the process of developing the overall legal framework set out in the Common political approach into a detailed set of rules. There should also be a consultation exercise on the detailed rules to enable those not directly involved in the drafting process to comment and highlight practical concerns so that they can be addressed before implementation.

Intellectual Property Lawyers' Association

March 2006

(1) If you would like the Commission to be able to contact you to clarify your comments, please enter your contact details.

(a) Are you replying as a citizen / individual or on behalf of an organisation?
On behalf of an organisation

(b) The name of your organisation/contact person:

Intellectual Property Lawyers' Association

Contact: Rowan Freeland (Secretary)

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(e) Your organisation's website (if available): **www.ipla.org.uk**

Please help us understand the range of stakeholders by providing the following information:

(f) In which Member State do you reside / are your activities principally located? **United Kingdom**

(g) Are you involved in cross-border activity? **Yes**

(h) If you are a company: how many employees do you have? **n/a**

(i) What is your area of activity? **Legal practitioners (solicitors)**

(j) Do you own any patents? If yes, how many? Are they national / European patents? **no**

(k) Do you license your patents? **n/a**

(l) Are you a patent licensee? **n/a**

(m) Have you been involved in a patent dispute? **yes**

(n) Do you have any other experience with the patent system in Europe? **yes**