

Who Owns the Law?

A New Approach to Intellectual Property¹

By John Howkins

Based on a submission to the Gowers Review

1. Introduction

We welcome the Review, especially its aim to provide a ‘long-term strategic vision’ and its search for ‘balance’. Creativity and innovation have profound effects on society, and so therefore do the laws and regulations that support them, and the way those laws are administered. As the Review says, they are a ‘critical component of success in the global knowledge-based economy’. We would add, ‘and of society.’

2. Summary

It is difficult to evaluate IP laws and regulations unless one first answers the question, What is IP for? It would be like proposing an education policy without deciding what education is for. A review of IP should therefore start by reviewing IP’s objectives.

We believe the purpose of IP is to encourage and support creativity and innovation. It should do this with reference not only to rights-holders and consumers but also to users - individuals who not only consume IP but use and re-use it to develop their own ideas. Above all, it should take account of the public.

IP is not the answer to everything. It is part of an ecology encompassing exclusive rights, regulations, subsidies, fiscal credits, social norms and other interventions that stimulate, support and reward new thinking. The twin goals of individual creativity and economic growth need different strategies in different sectors. Some activities do not need IP. Others depend on it. IP has a role where its benefits outweigh its costs. The task of government is to work out where IP fits this role most appropriately; where it meets public policy goals most effectively.

We appreciate the comprehensiveness of the Call for Evidence but what is needed first is a fundamental questioning of the basic purposes and principles that should guide this vital area of public policy.

Britain’s future IP policies would therefore be greatly helped if the Review made recommendations on the relationship of individual creativity, innovation and economic activity, and the role of IP in this relationship. If the Review feels unable to do so itself, we hope it will suggest who might take on such a role. Without this, Britain’s IP framework will lack direction. We make some proposals below.

¹ See Notes and Appendix at end

3. A Proposal for a UK Framework

The RSA Adelphi Charter of Creativity, Innovation and Intellectual Property reflects this wider approach. The Charter was the result of two years' work by an 18-strong International Commission. Members of the Commission, who represented many interests and countries, are listed in the Appendix.

Although written for all countries we believe the Charter provides a highly pertinent model for the UK.

This section gives the Charter text (in italic) and then makes comments that are specific to the UK and the Review.

'Humanity's capacity to generate new ideas and knowledge is its greatest asset. It is the source of art, science, innovation and economic development. Without it, individuals and societies stagnate.'

Comment (1): We start deliberately with the creative imagination rather than with legal issues. The priority is creativity and innovation.

Comment (2): We list both 'ideas' and 'knowledge' because they are different, just as creativity and innovation are different and as copyright and industrial rights are different. Interestingly, this difference is recognised more in Asia than the UK. The UK, together with other EU member states, has increasingly adopted the language of the EU Lisbon Agenda's 'knowledge economy'. We believe this may hamper Europe's understanding of the processes of creativity and innovation and the public policy interventions best suited to support them.

'This creative imagination requires access to the ideas, learning and culture of others, past and present.'

'Human rights call on us to ensure that everyone can create, access, use and share information and knowledge, enabling individuals, communities and societies to achieve their full potential.'

Comment: We all live off the ideas of others. The creative economy does not depend on inherited land or capital but it does depend on inherited ideas.

'Creativity and investment should be recognised and rewarded. The purpose of intellectual property law (such as copyright and patents) should be, now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation.'

'The expansion in the law's breadth, scope and term over the last 30 years has resulted in an intellectual property regime which is radically out of line with modern technological, economic and social trends. This threatens the chain of creativity and innovation on which we and future generations depend.'

Comment (1). Success in the creative economy depends on individuals having a high level of access, flexibility, diversity, and choice. In the past 30 years these social trends have been greatly strengthened by the spread of digital technology. The result is a high level of openness and collaboration, best demonstrated by what Charles Leadbeater calls ‘user-led innovation’² and Yochai Benkler calls ‘commons-led peer production’.³ Many governments have welcomed these trends and changed their priorities in education, R&D and business support, as well as opening up competition and liberalising market access. In contrast, the same 30 years have seen IP rights become stronger, longer and more restrictive.

Comment (2): The IP framework developed through the 18th, 19th and 20th centuries to cope with companies doing business between themselves. Today, it sometimes has trouble in coping with the new economy in which individuals are creative (1) at home and at work and (2) for their own pleasure as well as for commercial reasons. One of the main challenges facing the IP framework is how to reflect this new reality without losing the advantages of the old, since both will continue and should reinforce each other.

‘We call upon governments and the international community to adopt these principles.

‘1. Laws regulating intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves.

Comment (1): This is the Charter’s fundamental point: IP law should serve wider objectives and these objectives must be agreed before it is possible to generate appropriate laws. Foundations first.

‘2. These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life.

Comment (1): One of the most fundamental rights in a free society is the right to obtain, use and re-use information and knowledge, subject to prevailing law. We all benefit from the free flow of ideas.

Comment (2): This principle is reflected in the Access to Knowledge (A2K) campaign and draft A2K Treaty, which we endorse, especially insofar as A2K leads to the active and creative re-use of ideas.

Comment (3): The ‘right to health’ is critical. It plays a major role in addressing the AIDS, tuberculosis and malaria crises in developing countries. With bird flu, it has become an issue in rich countries. The UK rejected a WTO opt-out of TRIPS that would allow it to import generic drugs, if domestic supplies of patented drugs were insufficient, even in case of a

² Charles Leadbeater, ‘The User Innovation Revolution’, National Consumer Council, 2006.

³ Yochai Benkler, ‘The Wealth of Networks’, Yale University Press, 2006

national emergency. It is hard to justify this decision on public interest grounds.

'3. The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws.

Comment (1): Everyone is in favour of balance, so we must be clear what is lying in the scales. The Charter says IP laws must weigh public and private rights. We urge the Review to recommend that the Government applies an explicit public interest test to ensure the right balance is achieved.

'4. Intellectual property protection must not be extended to abstract ideas, facts or data.

Comment (1): The raw materials of creativity – ideas, facts and data – should never be in private ownership. We specify ‘abstract’ ideas to exclude ideas embedded in a process which may be patentable.

Comment (2): The Review’s exclusion of ‘public sector information’ is regrettable. The recent EU Directive does not pass the public interest test. The EU draft INSPIRE Directive extends privatisation further than is justified by the evidence. We support the campaign to ‘Save Our Data’ (‘our’ meaning data that the public has already paid for).

'5. Patents must not be extended over mathematical models, scientific theories, computer code, methods for teaching, business processes, methods of medical diagnosis, therapy or surgery.

Comment: Computer code is copyrightable; that should be sufficient. We support Free and Open Source Software (FOSS); see below. Business method patents are hard to justify; they usually restrict competition; the detriments outweigh the benefits.

'6. Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary.

Comment (1): The language – ‘proportionate and necessary’ – is common in many areas of public policy and regulation and is enshrined in UK and EU guidelines on good regulation. The Review should either endorse these criteria or explain why IP should be treated differently.

Comment (2): The Review has singled out music recording. There are strong reasons to extend these terms and indeed all terms until, as in the US, they are effectively infinite. Such long terms, especially if granted retrospectively, strengthen the right-holder’s balance sheet and enhance the revenues of artists still in business. These are clear benefits. Against this, the role of government is to promote competition, not windfall profits; and most economists believe

competition benefits from shorter monopolies, not longer ones. Every extension automatically increases the number of ‘orphan’ works which is already a major problem. There are economic arguments for and against, and social arguments for and against. We hope the Review makes a rigorous analysis, as suggested below, #9, and we welcome your points (b)-(e); in particular, the need for evidence; the need to look at related issues such as the exact nature of the rights; limitations and exemptions especially fair dealing and fair use; orphan works; and the principle of ‘Use It or Lose It’.

‘7. Government must facilitate a wide range of policies to stimulate access and innovation, including non-proprietary models such as open source software licensing and open access to scientific literature.

Comment: The global General Public Licences (GPL) for free and open source software, the global Creative Commons licences, and Australia’s AShareNet licensing protocols, are important and beneficial alternatives to proprietary systems. Governments should take the lead in supporting their equitable use in public procurement and education. Competition authorities should ensure users who wish to use alternative licences are not discriminated against. Any government education programme on IP should cover both proprietary and non-proprietary systems.

‘8. Intellectual property laws must take account of developing countries’ social and economic circumstances.

Comment: We should be sensitive to each country’s ways of working. It is narrow-minded to assume that other countries’ views of creativity and knowledge should mirror Britain’s. We should be sensitive to how WIPO Treaties and TRIPs are implemented. The Government made a major step forward in this direction in its sponsorship of the International Commission on Intellectual Property (2002). Further work needs to be done, especially in Africa and Asia. We support the DTI’s development work on IP in Africa. The Development Agenda now being discussed at WIPO provides a rare opportunity to recognise these concerns and enhance Britain’s relationship with other countries.

‘9. In making decisions about intellectual property law, governments should adhere to these rules:

- *There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights.*

Comment (1): The key phrase is ‘automatic presumption’. None of these actions (which constitute the bulk of government policy) should be taken without passing a public interest test.

Comment (2): Rights-holders reasonably seek to protect their asset values. Patent Offices are primarily oriented to customer satisfaction and naturally seek to satisfy rights-holders' wishes. As new technologies are introduced, governments have tended to respond by granting new rights, or extending existing ones, on demand. This cannot be justified without passing a public interest test or demonstrating public 'value for money'.

Comment (3): Governments and Patent Offices have often been too slow, or constitutionally incapable, of recognising non-proprietary methods of creativity and innovation. A nadir was reached in 2003 when WIPO rejected an international proposal to discuss open, collaborative projects. Since then, we detect a new openness at WIPO and in the US and UK. But even so the Government too often ignores the ability of some sectors to flourish with little IP protection, including some that it promotes as models of the creative economy (eg, art, architecture, fashion, software and theatre as well as R&D).

Comment (4): The proposed new broadcasting right may face problems in passing a public interest test. Industry experience shows that there is little need for a new exclusive right to protect webcasting (my experience as chairman of a webcasting company convinced me such a right would put many UK companies at a disadvantage). A new exclusive right would restrict the kind of entrepreneurial activity especially in small companies which the government seeks to promote, and would endanger people's basic rights to make their content public. We understand why broadcasters want more protection, but their claims do not necessarily give public value. How can this new layer of exclusive rights, closing off material whose authors wish to remain in the public domain, be said to be in the public interest?

Comment (5): See comment on music rights, above (#6)

- *The burden of proof in such cases must lie on the advocates of change.*

Comment: In almost all areas of public policy, it is incumbent upon the advocates of change to make a detailed case for government action. Surely IP should be treated the same way? For its part, the government should raise the level of proof required.

- *Change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people's basic rights and economic well-being.*

Comment (1): Public policy should be based on evidence that is true and seen to be true. James Boyle, a member of the Adelphi Commission, has described IP policy as an 'evidence-free zone'. Of course, evidence is not always available, due to lack of data (itself caused by the confidential nature of contracts and the complexity of business processes). Even when data is available, the lack of an agreed economic theory on IP hinders analysis. However, we need more evidence and government should make significantly greater efforts to determine the facts.

We note the comment made by the DTI's Intellectual Property Advisory Committee (see below) in its letter to Melanie Johnson, Parliamentary Under-Secretary of State, DTI, in February 2003: 'The DTI/Patent Office currently do not have any significant capability to identify, calibrate, use and commission useful and relevant research. Therefore, we recommend that the DTI/Patent Office establish the capacity to commission, undertake and use IP research, in order to be a well-founded focus for the Government's thinking on IPR issues across departments.... There is currently no real focus or capability in Government even for the assessment or understanding of current research into IPRs. Evidence to IPAC indicates that thinking on IP issues is fragmented, duplicative, incomplete and probably inconsistent across the DTI and other ministries including DFID, Education and Health. We believe that this assessment would be supported by views from elsewhere in government, business, academia, the legal profession and the judiciary.'

Comment (2): Equally important is that when evidence is produced, the Government should act on it. The European Commission's review of its Database Directive last year provided an egregious example of IP policy-making being an 'evidence free-zone'. The EU is alone in issuing database rights (the US and the rest of the world believe them to be anti-competitive). Therefore, the EC review offered a rare opportunity for a fact-based comparison between the EU database industry, which has exclusive rights, and the American and other industries which do not. The EC concluded the evidence was mixed, the economic benefits were 'unproven' and since the Directive was implemented the EU industry had declined relative to the US industry. Nonetheless, it decided to keep the Directive in force. It is important not only that research be carried out but that the results be acted upon. Again, this is normal practice in other areas. Why should IP be different?

- *Throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.*

Comment (1): Unless there is consultation and research, how can it be shown that a law is appropriate and its benefits outweigh the detriments? The touchstone should be the public, not only rights-holders and/or consumers.

Comment (2): In recent years the Government has reduced the regular oversight of the IP framework, partly to save money. This is a false economy.

The DTI and DCMS held a Creative Industries Intellectual Property Forum 2004-05 and sponsored The Creative Economy Conference as part the UK Presidency of the EU in October 2005. Both were rightly welcomed. However, such ad hoc initiatives cannot answer the need for a permanent, sustained, active overview of IP across all Government sectors.

We regret, in particular, the decision to close two mechanisms that were providing oversight:

(a) The Government abandoned the practice of a Quinquennium Review of the Patent Office in 2002, replacing it with a much narrower ‘business review’. Parliament and public thus lost their chief opportunity to see if the Patent Office was meeting its overall public policy objectives. We believe this decision significantly downgraded the level of oversight.

(b) The DTI also terminated its Intellectual Property Advisory Committee (IPAC). This Committee had been set up in 2001 by the Secretary of State for Industry to review the IP system and ‘to identify weaknesses, problems, and possible improvements to it.’ Over the years the Committee identified several important issues and made some useful recommendations but it had some difficulty in fulfilling its mandate effectively and saw few results. In 2004 the DTI reviewed the IPAC and said it had not met expectations due to uncertainty over its role, a lack of resources and its members’ failure to work together. However, when presented with this report, the Government decided to do nothing.

We propose, as an urgent priority, that the Government establish a permanent body to review and monitor IP policy in all areas on UK policy-making. Its remit should include fundamental policy principles (which IPAC was prevented from addressing) as well as detailed concerns about implementation and enforcement.

This body should be

- a. independent of the Patent Office
- b. have an independent chairman (ie, not representing rights-holders)
- c. have independent public and user representatives
- d. be able to comment on government strategy across Whitehall.

Comment (3): We propose the Cabinet Office should investigate the administration of IP policy through its Regulation Unit. It could work with the new Better Regulation Commission. We note that a strict application of the EU Better Regulations principles would point towards a withdrawal of the EU database right.

Comment (4): We hope the UK will urge the EC and European Parliament to hold wider public consultations, to carry out independent research and to act upon the results. The EC, like the UK government, has tended to excuse its IP Directives and polices from the requirements of good regulation. It is not clear why this is the case. We believe the UK should take the lead in reforming this weakness

4. Conclusion

These issues may seem diverse and fragmented. However, we believe they all caught by our basic recommendation about the need for a clear statement of IP's public policy objectives and a public interest test.

We believe that any successful economy in the 21st century must bring these issues together into a coherent national policy.

We therefore urge the Review to fulfil its commitment to a long-term vision by ensuring that all government departments explicitly recognise IP's role in their responsibilities, and take full account of the public interest.

We urge the Review to ask each government department to conduct an IP audit.

In summary, we need

- A national policy for creativity, innovation and intellectual property
- Based on cultural, social and economic goals
- Recognising the public interest
- Incorporating public oversight

Notes

1. We gratefully acknowledge the support of the Joseph Rowntree Reform Trust.
2. John Howkins was Director of the RSA Adelphi Charter on Creativity, Innovation and Intellectual Property. He devised the London Intellectual Property Advisory Service which the London Development Agency launched as 'Own It'. He is a Director of HandMade Films plc. He is the author of 'The Creative Economy'. He is a Governor of the London Film School and a Visiting Professor at Lincoln University and Shanghai School of Creativity.
3. With thanks to Dr Jaime Stapleton who was Research Coordinator of the RSA Adelphi Charter.

Appendix: Members of the Adelphi Commission (2004-05)

James Boyle

William Neal Reynolds Professor of Law, Duke Law School, and Faculty Co-Director, Centre for the Study of the Public Domain, Duke University, USA

Lynne Brindley

Chief Executive, British Library, UK

Professor William Cornish

Herchel Smith Professor of Intellectual Property and Head, Intellectual Property Unit, University of Cambridge, UK

Carlos Correa

Centre for Interdisciplinary Studies on Industrial Property and Economics, Argentina

Darius Cuplinskas

Director, Information Programme, Open Society Institute, Hungary

Cory Doctorow

European Affairs Coordinator, Electronic Frontier Foundation (EFF); novelist

Carolyn Deere

Chair, IP Watch, Switzerland

Peter Drahos

Head of RegNet, Australia National University (ANU), Australia

Bronac Ferran

Director of Interdisciplinary Arts, Arts Council England, UK

Michael Jubb

Director, Research Libraries Network, UK

Gilberto Gil

Minister of Culture, Brazil; musician

Professor Lawrence Lessig

Professor of Law and John A. Wilson Distinguished Faculty Scholar, Stanford Law School, USA; Chair, Creative Commons

James Love

Executive Director, Consumer Project on Technology; Co-Chair, Transatlantic Consumer Dialogue (TACD) Committee on Intellectual Property, USA.

Hector MacQueen
Director, AHRB Research Centre for Studies in Intellectual Property and Technology
Law, University of Edinburgh

John Naughton
Professor of the Public Understanding of Technology, Open University; Fellow of
Wolfson College, Cambridge; and columnist, 'The Observer', UK

Vandana Shiva
Director, Research Foundation for Science Technology and Ecology, India

Sir John Sulston
Nobel Laureate; former Director, Wellcome Trust Sanger Institute, UK

Louise Sylvan
Deputy Chair, Australian Competition and Consumer Commission (ACCC), Australia

Note:

*Members' titles and affiliations are given as correct during their membership of the
Commission.*