

Gowers Review of Intellectual Property

Submission: proposal for an **Office of the Public Interest in Intellectual Property**

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The Proposal:

To restore the policy balance in intellectual property legislation, needed if intellectual property is to retain legitimacy in the new digital environment, a more formalised conduit for the public interest needs to be developed. To this end I suggest the establishment of an **Office of the Public Interest in Intellectual Property**.

The **Office of the Public Interest in Intellectual Property** would be empowered to:

- Represent the social/public interest in all forums deliberating on new or amended legislation in intellectual property;
- Represent parties (individuals or groups) wishing to challenge specific grants of patent, specific copyrights, and other intellectual properties on public interest grounds;
- Identify properties for consideration for compulsory licensing, either in response to representations from individuals and/or interested groups, or on the basis of its own research and analysis of effects of particular intellectual properties;
- Conduct independent research to build up reliable evidence about intellectual property (uses and infringements).

The **Office of the Public Interest in Intellectual Property** would be independent of government, of industry and separate from the UK Patent Office. It should issue annual reports on the health, or otherwise, of the public domain and should work to ensure the widest possible consultation on any further legislative developments in intellectual property law.

Introduction

The Gowers review will no doubt receive many focussed representations regarding the issues raised in the Call for Evidence. This response, however focuses on a more general problem that impacts on most if not all of the specific issues identified by the review. Much of the current debate about the ‘problem’ of intellectual property can be best understood as the manifestation of a broader question: how are legitimate private rights to reward most appropriately balanced, through policy intervention, with the equally legitimate public or social interests surrounding the availability and use of information or knowledge, and their related goods and/or services. It is this broader question that this submission addresses.

Firstly I very briefly lay out some of the historical issues that need to be retained in our contemporary considerations about the regulation of property in knowledge and information. I then distinguish between the interest of specific industries and companies, and the interests of society more generally, which leads me to stress the

balance that must be engineered between these competing (and often not easily resolvable) interests. Recognising that this has been a continuing problem for much of the history of intellectual property, I suggest that what is required is a policy or legislative innovation that I have termed the **Office of the Public Interest in Intellectual Property**.

History and private rights

Here is not the place to set out the long and complex history of intellectual property rights. However as Professor Susan Sell and I have discussed,^{*} the history of intellectual property can be seen as a series of policy developments meant to establish a balance between the public need to expand and develop the knowledge available to society, and the private rewards that might be needed to stimulate and incentivise inventors and creators (and other intellectual ‘producers’). In this sense, although often mentioned in passing, the establishment in 1624 of patent in this country as an *exception* from the general prohibition on monopoly is a founding moment in the history of the logic of intellectual property, and retains great significance.[†]

Likewise the subsequent development of copyright and other forms of intellectual property demonstrated that while policy makers recognised the need to provide a policy intervention that established ownership of information and knowledge (through the recognition of a property right), such a ‘carve out’ from the public or social realm of knowledge and information should be neither rewarded in perpetuity, nor available to all knowledge or information as an unqualified right. Thus, the reason that there have always been time limits and limitations of scope for *all* forms of intellectual property is because legislators have regarded the various forms of policy interventions as being a shift in the normal (or ‘natural’) practices of production and sharing of knowledge and information.

However, one of the key dynamics that can be clearly discerned in the history of the various forms of intellectual property individually and collectively, is the shift from the assumption that any private rights awarded were a special measure linked to clear and defined policy aims, needing to be justified as regards their delivery of wider social benefits, to the contemporary position where property rights in knowledge and information are seen as legitimate rights in themselves that should be privileged. This leaves the public domain, or social realm of knowledge, merely as a residual to be identified once *all* other claimed rights have been exercised.

This position has shifted the policy intervention from one that is supposed to support the construction of a vibrant and useful public domain of knowledge, by rewarding private rights as an incentive, to a situation where the private rewards and incentives have become the key policy outcome while the development of a public domain of knowledge, to be delivered by these rights as incentives, has become almost a by-product.

^{*} Christopher May and Susan Sell, *Intellectual Property Rights: A critical history* (Boulder: Lynne Rienner Publishers, 2005).

[†] Just to be clear, the generic term intellectual property is of course of much more recent vintage.

Public interest not limited to the interests of business

The key element in this shift has been the slippage from a public domain delivered by the operations of business and commercial activity, to a situation where business and commercial activity are valued for themselves with little concern for the subsequent delivery of resources into the public domain. Certainly, in a general sense, the social interest in developing and expanding the range of knowledge available to society may be served by rewarding innovators and creators with intellectual property rights. However, commercial interest, when divorced from any realistic consideration of public domain issues, leads to an emphasis on expanding the scope and period of protection to maximise the control of resources (to maximise profit).

This programme of expansion of scope and lengthening of period of protection is not necessarily in the general interests of society, where issues of access, fair use of knowledge and information resources, and the need to have as unencumbered a flow of information as possible, are paramount. The difficulty has been that there has been a myopia in the development of recent intellectual property legislation; the incentive element of intellectual property has been regarded as sufficient to fulfil the policy outcome central to intellectual property, the expansion of socially available knowledge and information resources.

While it is in the interest of companies to expand the protection of intellectual property rights, this is only in the interest of society more generally when resources, knowledge and information are generated that would *not* have been developed otherwise. Moreover, the incentive to produce knowledge and innovate is exactly that; an incentive to prompt desired activities. It is not, and has never meant to be, a singular support for commercial profit. Profit is certainly acceptable and legitimate, but this should be maintained through business practices and commercial organisation, not dependent on a state sponsored award of controlling rights over otherwise (potentially) freely available resources.

As open-source software, the use of MySpace to develop music careers, the Wikipedia, the development of 'open science', the growing use of creative commons licenses, and many other cases have demonstrated there is little conclusive evidence that intellectual property is the only manner in which intellectual activity can be promoted and encouraged. Indeed, even sectors where intellectual property is regarded as central, there is little conclusive proof that without such rights business would flounder or collapse. Thus, while there may be cases where it is legitimate to reward business, the interest of business in seeking and obtaining intellectual property related rewards is not a sufficient reason for the award of these rights.

Balancing interests: the need for an Office of the Public Interest in Intellectual Property

This problem has to some extent been hidden by the ventriloquism of policy deliberation where public and societal interests have been represented by negotiators, or through rights' holders. However, as the digital environment has emphasised this is hardly the best way of ensuring that these interests are represented. While business groups have a focussed and well organised set of representatives, the interests of

society more generally have not been well represented in policy deliberations. Indeed as the call for evidence for this review has clearly exhibited the interests of business sectors very clearly dominate policy considerations. However, as noted above this fails to recognise the development of intellectual property and the clear social bargain on which it is built: the *balance* between social benefits and private rights.

To restore this policy balance in intellectual property legislation, needed if intellectual property is to retain legitimacy in the new digital environment, a more formalised conduit for the public interest needs to be developed. To this end I hereby suggest the establishment of an **Office of the Public Interest in Intellectual Property**.

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Only by establishing an independent voice to represent the wider social interests in intellectual property law and policy can the making of property from knowledge and information regain the support of British society.