



The Law Society of Scotland

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Andrew Gowers, Esq.,
Gowers Review of Intellectual Property,
Room 4/E1, HM Treasury,
1 Horse Guards Road,
LONDON SW1A 2HQ

By e-mail: gowers.review@hm-treasury.gov.uk

Dear Mr. Gowers,

GOWERS REVIEW OF INTELLECTUAL PROPERTY – CALL FOR EVIDENCE

I refer to your letter of 23rd February in relation to the above.

The Intellectual Property Sub-Committee of the Law Society of Scotland has considered the paper enclosed with your letter and has the following comments to make.

The Sub-Committee accepts that the UK's intellectual property framework is a critical component of our present and future success in the global knowledge economy. The UK's economic competitiveness is increasingly given by knowledge-based industries especially in manufacturing, science and the creative industries. The Sub-Committee welcomes the Gowers Review of Intellectual Property as there are issues about the impact of both globalisation and technological change and how these impact on the IP system. In addition, the Sub-Committee perceives that there is an emerging issue of whether the public are aware of and consent to the restrictions which IP law imposes upon them.

The Sub-Committee is also of the view that fundamental change to the intellectual property regime may only be possible if the change is effected at WIPO level and that the UK should be prepared to take the opportunity to promote change on an international plane if domestic change takes place.

The Sub-Committee agrees that the present UK system strikes broadly the right balance between consumers and rights holders. However it is also of the view that there are a number of practical issues with the existing framework.

The multiplicity of IP legislative statements, whether they are Acts of Parliament or subordinate legislation is an issue which goes to accessibility, comprehensiveness and comprehensibility of the law. It is noted that, for example, the Registered Designs Act 1949 still remains the principal piece of legislation in this area even though it is 55 years old. There are other issues about lack of clarity and usability where the law and technology have developed in different ways. There are also questions about the extent to which the system lacks transparency and is not user-friendly, especially for small and medium-sized enterprises.

The Sub-Committee agrees that obtaining IP rights can impose significant costs on businesses and innovators. However in the Sub-Committee's experience the cost of securing patent protection in a selection of European countries and the USA is more likely to cost in the region of £50,000 over the first 7 years rather than the £75,000 quoted in the introduction. The Sub-Committee notes that translation fees constitute a large proportion of obtaining patent protection across Europe. The Sub-Committee would endorse the creation of a workable and enforceable European Community Patent but it recognises that linguistic policy questions, which have caused the European Patent to flounder are difficult ones. These issues and others which could be resolved by practical solutions being applied are being avoided because of the linguistic issue. The Sub-Committee is certainly of the view that some form of EU-based option for protection is necessary. This could be either a utility model or a Community Patent.

The Sub-Committee is in agreement with the statement that patents can provide a "vital incentive for innovation" but it is not convinced about the argument against defensive patents. In the Sub-Committee's view it is perfectly permissible for legitimate enterprises to register defensive patents and it is invariably possible for those who wish to exploit those patents to seek a licence of right. Indeed, the Sub-Committee takes the view that an unexploited patent does not place a burden on innovation but rather can encourage it.

The complexity of high-tech products and scientific research may lead to difficult interfaces between these developments and the development of the law and there is a need to meet the objectives of high-tech companies and scientific research institutes in the production of their products.

In terms of patents pools, the Sub-Committee is of the view that there is no difficulty with the existing law and that it is perfectly in order for patent pools to be utilised to share IP between firms and reduce the need for further time-consuming or costly negotiations.

The Sub-Committee agrees that widespread use of the Internet and the advent of high-speed digital networks make it increasingly easy to copy and share digital information without appreciable loss of quality. The Sub-Committee also agrees that the copyright exceptions lack clarity and may not be best suited to deal with these technological changes. This could be because industry has failed to keep up with technological developments. There appears to be a legitimisation of technological development at the expense of the copyright exceptions and that there needs to be further work done in this area to ensure that copyright keeps up with technology.

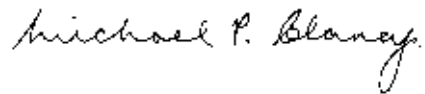
In the Sub-Committee's view it has always been the case that technological developments will result in some companies contracting and going out of business. Those companies that would be affected in such a way should not be entitled to seek amendments to intellectual property matters to sustain or protect themselves where they have not moved with the times. Legislative approaches to IP must be based on principle.

The Sub-Committee agrees that there were issues relating to competition law and how it affects the development of efficient markets for copyright licensing and that this should be properly examined within the context of the Review.

I attach some specific answers to some of the questions in the consultation.

I trust the foregoing is of assistance. If you have any queries, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in cursive script that reads "Michael P. Clancy". The signature is written in black ink and is positioned above the typed name and title.

Michael P. Clancy
Director

Annex

GENERAL QUESTIONS

1. How IP is awarded

(f) Is lack of trust in the system a barrier?

What could be done to improve this situation?

There is a greater barrier in patents than in Trade Marks or Designs, simply because a patent application requires careful drafting to serve any useful purpose, and patent drafting costs money. Government funding in the form of grants has helped in this area in the past, but is not readily available at present.

(i) How well does the national system for awarding IP, administered by the Patent Office perform?

Fairly well, although greater harmonization of practice with European bodies (EPO, OHIM) would be welcome.

How well do the international and European systems work?

They have achieved a lot of their aims. In general, they have worked very well. The next step is to have a European system of enforcement for all IP rights.

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs?

Clients have to make difficult commercial decisions when it comes to enforcement. The decision on how to enforce will depend on the financial position of the client company, the availability of management resources, the actual damage suffered by infringement, the perceived financial muscle of the infringer and other factors.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?

Cost is always an issue for clients. However most IP disputes do not have to go to court. In fact it is our experience that, in cases where the rights of our clients are infringed, the vast majority (probably over 80%) are settled to some degree of satisfaction by letters before action.

A huge barrier is the need to take action separately in different European countries, which is an anachronism when our clients are doing business in a single European market. We believe that agreement in this area should be a priority.

SPECIFIC ISSUES

Current term of protection on sound recordings and performers' rights

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

50 years for a free right seems generous compared to a maximum of 20 years for a patent right or 25 years for a registered design right. There is no need to extend the term.

Patents – utility models

Background: Some countries, notably Germany, have a “utility model” system offering protection for simple inventions, usually subject to less examination and shorter terms than standard patents.

(a) Do you have a view on some sort of second tier patent system?

We believe that a second tier system would be useful. Having a lower cost “utility model” system has encouraged the German “Mittelstand” businesses to be active in IP protection. It presents a lesser hurdle to entry into the IP world. This system should be Europe wide.

(b) Has your organisation encountered problems in protecting its IP internationally where such systems exist?

On the contrary, clients have often found it useful to get quick IP protection in Germany, in addition to patent rights elsewhere.