

Gowers Review of Intellectual Property

Introduction

- ***Cost of obtaining patent protection***

£75K over the first 7 years for a potential 20 year monopoly right. An investment of £10K p.a. for such a potential economic advantage over such a market spread seems a pretty modest investment when compared with the cost of comparable investment opportunities.

- ***Defensive patents / barriers to market entry***

This refers to the prevalent "Patent Troll" categorisation of research based / non-manufacturing patent proprietors, whose revenue is derived from licensing the technology as opposed to making product from the patented technology. Regrettably, this often totally misplaced prejudice against the patentee / licensor is detectable in judicial comment. The research-based non-manufacturing entity should not be unfairly stigmatized in this way.

When patents are characterized as of dubious validity and/or being over broadly claimed, this should be understood in the following context. First, patentee manufacturers and non-manufacturing patent proprietors alike try to claim their inventions as broadly as possible. For example, take the researched based pharma industry that is highly skilled in creating so-called improvement patents on a successful original compound patent with a view to extending its market dominance for a successful product. Second, inventions are not uniform. Some are more ingenious, more successful and generally perceived as being more valuable than others. However, lesser developments may still satisfy the requirements of patentability. Third, accusations of dubious validity and overbroad claiming are *ex post facto* assessments and should be seen for what they are. It is often the product of a very detailed forensic review by the Courts *after the event*. Such an investigation is also often totally impractical for the Examining Patent Office, which has its own quite detailed and rigorous requirements for patentability [see, for example, the USPTO: the EPO and the JPO]. Were the Examining Office to subject patent applications to the same minute examination as the Patents Court it would likely give rise to prohibitive cost with a consequent *chill* on the system and would still not prevent further dissection by a Court at the enforcement stage.

So, the so-called "practices" should be seen for what they are. The playing field is a level one for all applicants. In a free market economy, any perceived burden on innovation will be dealt with in the market place. There is no *problem* supported by real data which requires solution by legislation or regulation. This is, in reality, a *non-issue* with which this Review should not allow itself to be side-tracked.

- ***Cross-Licensing and Patent Pools***

Pools are not generally *closed*. So, entry is available for those who have technology / patents of value. Where is the barrier to entry? Perhaps a more worthwhile area to study is the role patents play in International Standards with the potentially cumulative cost of multiple patent licenses to those who must operate within the Standard.

Scope of the Review

Copyright (in its many forms) is not **awarded**. See, in this respect, the comments (below) in relation to the term of protection for sound recordings and performer's rights.

How is IP Used

As a law firm we protect our name by obtaining trademarks / service marks where appropriate and by securing relevant domain name registrations.

How IP is licensed and exchanged

(h) Yes, I have experience. Effective for who? Presumably, applicants. As to effectiveness, there is so little case law it is impossible / difficult to say. TRIPs contains an adequate mechanism in Art. 31 (as amended), which is designed to provide an appropriate balance between the respective positions of the public and the rights owner.

How is IP Challenged and Enforced

(a)(1) *Patents*

In the United Kingdom, there is an overly forensic re-review of validity by the Patents Court, too often taking on an adversarial role, rather than its function of judging between the parties. This typically involves the Court paying lip service only to the expertise of the EPO and its Opposition Divisions and Boards of Appeal and then carrying out their own re-examination of validity to reach a contrary conclusion

(a)(2) *Trademarks*

Again, there is an imbalance at the judicial level, particularly in the United Kingdom but probably less so at Court of Justice level. This seems to stem from a somewhat outdated approach to trademarks, the result of which tends to stack the cards against the trademark owner, who is thereby prejudiced by being denied sufficient protection against those trading (wrongly) off the reputation of the registered right. Trademarks are characterised as being lesser IPRs than patents, copyright and designs. This results

from evaluating trademarks by comparison to inventions (patents) and new and original works (copyright), concluding that they are of less value and, accordingly, deserving of less protection than those other registered rights. But trademarks should, instead, be viewed for what they are designed to protect and it is wrong that proprietors' attempts to stop those piggy backing on the reputation of a brand leader should be subjected to overly narrow construction of the coverage due the registered mark. This tends to provide the copyist with unfair and unearned economic benefit. The attitude of the courts to 3 dimensional trademarks is a particular example of this judicial prejudice.

(b) What drives cost. There are a number of factors, including

(1) the front-loading resulting from Woolf:

(2) refusal, or inability through lack of real preparation time, of judges thoroughly to read the written material before them both at interlocutory hearings and pre-trial;

(3) for patents in particular the increasing value of the market at stake which drives a *no holes barred approach* to litigation. The failure in (2) leads to unnecessarily lengthy court hearings and trials peppered with judicial interruptions, unnecessary if proper reading-in time has been used.

A fourth (4) driver is the outdated procedures perpetuated as a result of the *de facto* advocacy monopoly of the bar, from which the majority of the judiciary is still drawn. This produces over formalistic procedures and costly over manning at every hearing, no matter how trivial – as to which, see (6) below.

A fifth (5) is the hopeless under funding of the system by failing to provide High Court judges with law clerks as is, for example, done in the US and in the Court of Justice in Luxembourg. It is ludicrous to expect overburdened judges to spend time writing judgments in, for example, complex and lengthy patent trials where the groundwork of a judgment should properly be left to Law Clerks. This should produce as a by-product, some excellently qualified lawyers having experience of such clerking. By speeding up time to judgment, judges would be freed to hear cases more quickly and thereby inevitably reduce the potential for high cost litigation.

A sixth (6) is the necessity under the present system for Court appearances on many procedural issues which could and should quite adequately be dealt with either on the papers alone or with the addition of a telephone conference with the Judge. This is accomplished quite satisfactorily in other jurisdictions and for long has been the norm with international arbitrations, many of which qualify as very *heavy* disputes.

(c) *Non-binding Patent Office Opinions*

This was endorsed by IPAC, wrongly in the view of this former IPAC Member. Having seen the few Opinions so far rendered, on issues of obviousness / inventive

step they are totally without value. This is because the Court calls for state of the art evidence for evaluating both construction and obviousness and the Opinion of a Patent Office Examiner in that respect is no more relevant than the opinion of any patent attorney.

The sensible proprietor will probably not bother to respond to a third party request for a UKPO Opinion. Why, after spending (quite possibly, significant) resources on obtaining an EP and (perhaps) defending the EP against EPO Opposition and Appeal, should the patentee publicly restate its position in the 4 weeks allowed for response, or at all? If there is a *serious* dispute, it will be taken to Court in one or more of the Contracting States.

The new procedure may have value for small entities and individual inventors by steering the parties towards settlement but my feeling is that, within a few years, the practice will cease to be used to any extent.

- (d) The usefulness of IP insurance. More real data is needed before this can be objectively assessed. IPAC's work in this area was unconvincing.

(c) and (e) ***Mediation***

Where one party asks the Court to order mediation but the other resists, currently the Court can only warn the refusing party of an ultimate potential sanction in costs. This is useless.

The Court should be empowered to mandate / order mediation – as is the practice in many other jurisdictions. What possible harm could this do? Typically, judgment in a patent action is not *the end* of the matter. Negotiated settlement follows in very many cases. Why so late? Usually, only because the decision makers have not been *obliged* to focus properly on the business issues at the outset and have been content to leave it to the lawyers.

Mandatory mediation should reduce cost overall and alleviate the burden on the Court to try cases readily suited to ADR techniques, such as mediation.

- (h) The barriers vary country-by-country within the European Union and internationally. Within the EU it is ridiculous that harmonised IP laws (e.g. patent) have no harmonised procedures and/or European Court system at least at the appellate level - see, for example, the Court of Appeals for the Federal Circuit in the US.

Current Term of Protection on Sound Recording and Performers Rights

The present term is totally disproportionate (i.e. too long) for rights which are automatic and not subject to any qualitative examination (e.g. as for patents and trademarks).

Fair Use / Fair Dealing of Copyright Works

- (d) It is Canute-like for the United Kingdom to continue to resist having such an exception.
- (e) A one-off levy on the enabling hardware and software.

DRM : Copyright

As to regulation, it should be left – at least in the first place – to the Courts. There is no proven need for legislation / regulation at this stage.

Utility Models

Despite the positive reception in Denmark and Ireland, the main beneficiaries are *not* SMEs but the major patent savvy corporations who can cheaply obtain potentially technology chilling monopoly positions.

Also, with an unexamined right, there will be increased uncertainty, particularly for the SME.

SPCs

- (c) By abolishing the *sui generis* solution forced on the Commission by the inability to obtain a timely revision of the European Patent Convention and in its place legislating for a Patent Term Restoration period, not necessarily confined to the pharma and veterinary industries

Legal Sanctions on IP Infringement

- (b) Yes

Competition Policy vs IP Policy

- (d) No. In a free market economy, there should be less intervention from the Competition Authorities. Those Authorities are typically dominated by economists with no, or insufficient, understanding of IPRs and IP laws.

Parallel Imports

It is an anomaly that there is no Euro price regime for medicinal products. So, particularly in the pharma industry the present system operates unfairly against the product originators. The lack of Euro policy in this area totally fails to meet the public's needs. It is a fallacy that parallel traders do.

International Exhaustion

We may have a global economy but it is not comprised of equal or nearly equal traders. While there are differing costs of manufacture, purchasing power etc – as will inevitably

continue to be the case – legislation to provide for international exhaustion will operate unfairly against the IP rightholder. International exhaustion is a theory propounded by trade lawyers with an imperfect understanding of IPRs, international IP laws and an imbalance in favour of antitrust / competition laws. In a free market economy, abuse of the system will be resolved in the market place. Consumers will *not* pay too much or be tied to one product for too long before they find alternative sources and/or creatively devise new replacement products.

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