

Submission to the Gowers Review of Intellectual Property from Dr Mark Scott

Thank you for the opportunity to offer a submission to your Review. I feel strongly about many of the issues but (you will be relieved to know) time will only permit a response to some.

Award of patents internationally; Patents – utility patents; and Coherence between competition policy and IP policy

There is significant opposition to utility patents and much is well-founded. There is however a critical need for protection that is much cheaper than that of conventional patents.

The patent system works well for high-value inventions such as pharmaceuticals, process improvements on large volume, high added value chemicals, and engineering inventions with wide application. The value at stake can support the costs of acquiring and defending patents and the inefficiencies in the system can be accommodated. The costs are nevertheless a barrier to innovation – small, innovative companies cannot compete. Since it is rare for SMEs to be able to compete at the value end of this arena, the fact that they cannot compete is rarely apparent; but more might do so if they could afford to protect their work beyond a first filing.

There are many useful inventions that cannot bear the costs of the current system but do not deserve the disadvantages of utility models. Many medical devices, for example, fall into this category. They can have high costs of making sterile prototypes and carrying out clinical trials, and development can take several years. They are often subject to intense competition and can lead to high costs of damages if they fail. To achieve patient benefit and to recover costs, they must be sold – and protected – in several large jurisdictions. With pressure on healthcare costs, sales prices can be low and so sales of just £1m pa may deliver many instruments creating great patient benefit. Yet a royalty may give the owner of the IP, perhaps an NHS Trust, just £20,000 pa. It can take years to recover the patenting costs of even a successful product, and since success is the exception rather than the rule, many potentially useful, innovative projects are abandoned, and society is the loser.

Utility models reduce cost (at least of obtaining them) by measures such as neglecting examination. They often have a lower requirement for inventive step and, almost as if to ensure that applicants don't achieve good value from the reduced costs, often only give protection for ten years. They can do great harm by giving inventors a false sense of security; they should not have the confidence to invest on the basis of a flimsy right. They can do great harm to society by discouraging competitors, and being a hazard to competitors, who are given little guidance as to their validity. Exclusivity should not be given, for any length of time, where the inventive contribution has been low; and a high price is paid, in uncertainty and litigation, if thorough examination is not carried out. Utility models miss the point.

For inventors in the UK, the cost of filing a patent application is high (because of the high standard of drafting that is required) but it is not excessive. Thorough searches and rigorous examination are necessary and need to be paid for. Annual fees after grant are reasonable. The major costs that arise are translation costs and filing in other countries: these are the ones that should be addressed.

The current international patent system is inconsistent with free trade. The requirements of efficacy, safety, cost-effectiveness etc are similar (where affordable) around the world for inventions such as medical devices; and the IPR requirement for novelty is a world-wide requirement, not merely a national one. It is absurd, therefore, that a separate patent is needed in every State where protection is necessary.

The main barriers to a single world-wide patent, which would cost little more than that for a single country are legion, including: distrust of ceding the power to grant or refuse applications to another body; concerns about litigation; interests of those who benefit from the work provided by the current system; concerns about accessibility if a nation's language is not included; and so on.

It was for reasons such as these that the Community Patent failed, but the situation is not irretrievable. Many countries could agree a reliable, credible centre for examination and grant (such as Munich).

It is easy for States where English is an official language to suggest that English should be a key language; but in the continuum between (a very cheap system based on a single language for patents, causing difficulties for many) and (an impossibly expensive system where patents were required to be provided in all languages), it is sensible to restrict the number of languages required.

Patents normally need to be written in an official language of the State that grants the patent. There is some merit in this, making the information accessible to the States' citizens. However, to establish novelty and indeed inventiveness, or to form a view on validity, one needs to be able to access the world's relevant literature in all languages; so the requirement that a patent should be in a State's language lacks intellectual rigour.

The vast majority of the people needing to know the patent literature (e.g. so that they can avoid infringing) can read at least one of a small, defined group of languages. These include English, French and German; Spanish, Japanese and (one or more forms of) Chinese. In reality a patent could be granted world-wide if it was available in just these six languages. Cheaper options would also be credible, such as grant in many States with a restricted number of these languages. In reality grant could be appropriate in States that provided most of the large markets with the use of the single language English.

The argument can be taken further because the requirement for patents to be written in the language of the State in which they are granted is based on an outdated understanding of how business operates. It is not necessary to make available to people, in their own language, what they may not do. People do not manufacture for their land alone – they would consider international markets and so would search for patents of other States, in other languages. Since, for example, in the West, they would need to search for patents in English and French, if the markets in English- and French-speaking States would be significant, it would be satisfactory for patents to be written in either of those languages.

Thus, from the points of view of filing patents (or other IPRs) or ensuring that one would not infringe the rights of others, the global economy means that there is no necessity that the documents be filed in the language of the granting country. Thus an obstacle to a single world-wide patent is, in principle, removed.

The negotiations on the Community Patent have illustrated the dominance of sectional interest over logic, and significant difficulties would be encountered if an approach such as this were to be advocated by the UK. But we will only achieve efficiency and progress if we limit the administrative costs of patents in major markets, rather than the rigour with which they are examined or their lifetime. Unanimity is not required for progress; a quorum of States could institute such a process. The number would grow as others saw the stimulation of innovation, and the rate of uptake could be enhanced by an incentive system.

4. How IP is challenged and enforced

A problem of equal magnitude to the cost of obtaining patent coverage in numerous jurisdictions, is the difficulty that small companies have in asserting their rights when challenged or ignored by companies with more money than moral or legal rights. Mandatory, quick (thus cheap) dispute resolution is of paramount importance.