

GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation?

There is no doubt that the IP system is complex and expensive with prior public disclosure causing many to miss opportunities. Dealing with Infringements is also a very costly and time consuming exercise, which to most small companies and Innovators is prohibitive.

The Welsh Assembly Government, through the Innovation & Technology Counsellors (ITC's) and the Wales Innovators Network (WIN) programmes, try to avoid prior disclosure and simplify the process by offering free impartial advice to SME's and Innovators alike. The Assembly Government also encourages and supports individuals to access professional advice to address their IP issues.

The Patent Office does offer excellent electronic and hard copied information on the process and costs, but due to the complexity of the subject many still find it difficult to digest. This can be a barrier to obtaining registered IP rights and to knowing about and enforcing unregistered rights. It is suggested this situation can be addressed on two fronts; a) wider dissemination of information about the IP system and b) simplification of the IP system.

Simplification of the IP system is not such an easy task and much of the UK Patent system has been simplified. However, the territorial nature of patents presents difficulties in undertaking a simplification process and therefore to an extent any system will have a high degree of necessary complexity. A suggested way forward could be to simplify the process by introducing a single Community Patent. This would reduce costs and simplify the system, providing the need for translations is reduced and the enforcement is via a single court.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

In the UK generally it is (at least on the surface) relatively straightforward to obtain advice from the Patent Office and Patent Agents. The issue is that the advice you obtain is not necessarily clear and complete. The Welsh Assembly Government's ITC's and WIN will guide a client through the process of carrying out an initial "espacenet" search and provide copies of any prior art to clients. If appropriate, the client is then encouraged to have a patent application drafted and filed by a qualified Patent Agent. The Assembly Government provides a grant of 50% towards the cost of filing UK and overseas patent, trade mark and other IP applications to both SMEs and individual Innovators. This encourages clients to protect their IP where otherwise they might not have done this.

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?

The costs of obtaining IP rights overseas are the main barriers to obtaining IP Protection. In the UK, the Patent office fees are minimal it is the Patent agent costs that are prohibitive. Patent Office fees *per se* are not so critical.

The Assembly Government currently offers an IP credit grant to support patent & other IP filing costs & licencing costs. The grant scheme is **not** available to support areas such as prosecution costs, infringement matters etc.

(d) How do these costs compare internationally in your organisation's experience?

Patent Agent fees do vary. As stated the EU and PCT costs including translation are extremely high for a Business, taking into consideration the time it takes to get an idea to the market place.

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?

Difficult to comment on the current structure other than to say that initial UK protection can be a good cost effective way of short term protection prior to licensing or getting product to market.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects?

The lack of ability to fight a case of infringement is a major cause for concern. The fact that the system can let smaller companies down could be seen as a lack of trust in the system.

(g) Are there specific barriers to obtaining IP rights in your sector?
N/A as business support

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals?

We have found that clients are sometimes not dissuaded by their advisors from pursuing patent applications, for example, even when there is prior art or when there is no possible route to market. We are concerned with helping clients to approach IP rights realistically and not in a naïve way.

Patent costs can be prohibitive when trying to obtain international rights especially when the timing of these costs are analysed. High costs tend to be encountered too early in the product development process. It may take between 3 and 7 years for an individual or an SME to have their product ready for market. Unfortunately high patent costs start to appear earlier than this, e.g. cost of filing PCT within 12 months of UK application and costs of national phases including translations etc. within 30 months of UK filing. These time scales are at odds with the product development process and make it difficult to decide whether international patenting is cost effective, as the product has not had time to be proved in the market place and is not generating enough income to sustain the patent costs being incurred. Also the consequences of not pursuing international cover cannot be assessed and many SMEs and individuals may well make the wrong decision either way, resulting in lost rights or crippling patenting costs which they can ill afford.

If there were some way to delay the various phases of the international patent system to align them more to the product development process, then many technologies that are currently lost due to high patent costs, too early in the process, could be secured in the

future. It is difficult to postulate precisely how this could be achieved, but some effort should be made to determine whether there is a way to achieve a better alignment with the product development process. This would particularly benefit SMEs and individuals who have limited financial resources as opposed to the larger companies who can afford to patent with little consideration of cost.

With the current system timing of patenting is critical. The decisions are difficult, should patent applications be delayed as long as possible with the risk of being beaten by a competitor who files first or should they be filed as soon as possible with the inevitable high patent costs being incurred when they can be least afforded.

Also the term of 20 years for a patent can be detrimental to SMEs and individuals as their development processes tend to be longer than that of large companies with greater resources. Consequently they have less time to exploit their IP rights before they expire and hence do not receive the full commercial value of their technologies and return on the investment they made during the product development process.

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work?

The system performs adequately in its current form, providing businesses have sufficient funds to continue to renew and fight infringements. Evidence does show however that in some cases having an international Patent does not stop companies producing and selling product overseas.

2. How IP is used

(a) What types of IP does your organisation use and why?

N/A commenting from a Government / Business support programme standpoint.

(b) To what extent do you seek multiple overlapping forms of IP protection?

N/A commenting from a Government / Business support programme standpoint.

(c) To what extent are these decisions influenced by sector-specific considerations?

N/A commenting from a Government / Business support programme standpoint.

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

The Assembly Government would suggest this is an area that needs to be addressed urgently at a UK level. Businesses have latent IP that should be valued and placed on the balance sheet. There is always a cost against IP yet few show a value. The valuation of IP should be carried out against a standard quality system and only by qualified professionals.

(e) To what extent does the term of IP rights at the margin affect investment decisions?

N/A

(f) How well does the UK IP system promote innovation?

The UK Patent office is well placed to promote IP and have done well to get out into the marketplace with promotions like the "Key event".

In Wales, there is a far more support available for SMEs, Inventors and Innovators than in the UK generally. This support is delivered under *Wales for Innovation*, the Assembly Government's action plan to promote the importance of innovation. IP is a considered to be a key element of the action areas contained within the plan. It might be appropriate to consider whether this level of support should be UK-wide.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?

N/A

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?

Difficult to be accurate as there are many patents that are dormant and as such could not be attributed or measured against company growth through Innovation.

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?

None

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under whatm circumstances do you consider this acceptable?

Patenting by definition is a negative right, i.e. to stop others from producing. There is little evidence, however, from our client base to demonstrate that a company would patent to prevent others producing without producing themselves.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

There needs to be a more robust structure for licensing of IP with professionals available to act as intermediaries. The Institute of International Licensing Practitioners (IILP) could do more to promote this area.

(b) What mechanisms do you use for finding potential licensing partners?

The IRC Relay network exists to find potential collaborative partners across Europe. For individuals we encourage them to attend technology transfer events, in particular Invention Exhibitions such the Geneva International Exhibition of Inventions and the British Invention Show.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions?

IP is an excellent resource for research purposes and is the first element looked at in the WIN structured development plan. We have not encountered any issues with exemptions.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

Licensing can be very expensive even if you can find the right professional to assist in the negotiations. In Wales, the Assembly Government can provide a grant of up to £2,500 at 50% for licensing in or out.

(f) Are there specific barriers to licensing IP in your sector?

N/A

(g) Does your organisation use methods to facilitate exchange of IP - such as crosslicensing or pooling IP rights with other firms or organisations?

N/A

(h) Are there specific barriers to licensing IP rights for small businesses or individuals – for example barriers to entry to patent pools?

Licensing is a complex and costly process with regard to the legal aspects of a licensing deal. Without the appropriate professional support SMEs and individuals, in particular, can find themselves in agreements where they do not receive fair royalties for their technologies and may even find themselves tied into deals that are severely detrimental to them.

(i) Are there barriers to trade and exchange of IP internationally?

N/A

(j) Does your organisation consider renewing patents using "licence of right" provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

For SMEs and individuals the "license of right" option can be a good strategy particularly towards the later years of a patent when the renewal fees are greater.

(k) What could be done to improve "licence of right" provisions and business awareness of them?

"License of right" appears not to be widely known and would benefit from being promoted more proactively. Perhaps the Patent Office could provide information and the options with annual renewal letters.

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

N/A

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?

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

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation

services, Alternative Dispute Resolution, or the Copyright Tribunal?

The Patent Office opinion service is relatively new and therefore unproven at this time. However, it does appear to be a step in the right direction - only time will tell. Another useful strategy is to try and negotiate a licensing deal which benefits both parties without the need for legal action.

(d) To what extent do you use IP litigation insurance? How effective is it?

IP Wales, run by University of Wales Swansea, carried out a study on IP insurance. An arrangement negotiated by *IP Wales* with HSBC provides up to £10,000 for a £200 premium. The cover will only provide seeking initial legal advice.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed?

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals?

(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation?

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally?

The main problem with enforcing rights internationally is the need to pursue legal action in each country where alleged infringement is taking place.

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?

Current term on sound recordings belongs to another era when nobody realised how valuable in the long term these copyrights would prove to be. They should now be brought into line with other copyright terms. Particular care should be taken to ensure that terms in the UK are not disadvantageous to creators and owners compared to other countries (particularly the USA), as this would be economically disadvantageous to UK.

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

□ Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

(a) What are your views on the current exceptions in copyright law?

The system works reasonably well as it stands. It is, after all, necessary for owners to take legal action to enforce royalty payment. They are extremely unlikely to do this in a frivolous way over single personal usage. The expense involved would be too great and such actions would carry a high risk of alienating their own customers and clients. Owners of copyrights are also normally very flexible about allowing reasonable usage by charitable or academic institutions, if only because they understand they are operating in an industry that depends on public goodwill towards its clients.

(b) Could more be done to clarify the various exceptions?

(c) Are there other areas where copyright exceptions should apply?

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently have a private "fair use" exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for "fair use"?

(e) How would you see content owners being compensated for such use?

(f) To what extent has technological change presented difficulties in use of copyrighted material in the field of education?

(g) Are there issues concerning the archiving of material covered by copyright?

□ Copyright – digital rights management

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer's legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology. They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

Digital rights' management is obviously a relatively new area of interest which is likely to increase in importance as technology develops. Whilst accepting that concerns have been raised relating to the undermining of rights to access digital content, it is felt that these are outweighed by the need to ensure that the creators of content benefit from the exploitation of IP rights in their creation.

The Government's approach to the development of the independent television production sector, as epitomised by the Communications Act 2003, resulted in the retention of IPR by the production companies becoming very much the central issue. The opportunities presented by the ability to exploit that IPR has had a widespread effect at the higher level manifested by a series of mergers and investments to create "super-indies" and at the

lower level by commercialising companies previously dependent upon the major broadcasters.

One of the major outlets for this creative content will be online and unless there exists effective digital rights management systems and associated payment mechanisms many of these opportunities will be undermined.

In the ideal world, digital rights management systems will be developed which will overcome the concerns of both the consumers and the producers.

As the Parliamentary Group must be aware, there is a danger that the overstating of consumer rights might create loopholes through which the economic health of the UK's extremely successful creative industries is undermined. Exceptions are, after all, exceptional and out-of-copyright material is in far less commercial demand than current works. Ofcom would seem best placed to regulate in future in this field, but preferably only in situations where it was evident that market solutions were not going to come about quickly enough or very evidently not be 'fairplay',

Copyright – orphan works

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

We do not believe, based on the considerable experience in the music industry of an advisor to the Assembly Government, that the 'orphan works' issue has been a problem. All works that have been created for commercial gain are almost certainly registered with some collection society all of whom operate very efficient computer databases. This is not a problem of royalty distribution as money can always be held in escro accounts pending claim, but a problem of granting original licence to exploit.

(b) Do you have any suggestions on how this problem could be overcome?

Should not the collection societies themselves be asked to solve the problem, perhaps through some jointly owned investigative function?

Copyright - licensing of public performances

(a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

N/A

(b) Could the system be clarified or simplified, and if so how do you see this working?

The collection agencies appear to function pretty well on the whole, and the system is well understood throughout the industry. PRS/MCPS has engaged in some useful training programmes and should continue to do so.

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?

A second tier "petty patent" or "utility model" system might be helpful for some clients, SMEs and individuals particularly, in relation to lower technology ideas which may only generate small monetary return. The high cost of patenting may not be financially viable with these types of ideas, but the lower cost of a "utility model" could make it a viable option. Unfortunately the main question that arises is with enforcement and how strong this type of protection can be. Another layer of protection would also add to the complexity of the system.

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

N/A

Pharmaceutical Supplementary Protection Certificates (SPCs)

Background: SPCs are a "*sui generis*" IP right available in EU Member States for pharmaceutical products (as well as plant protection products). The standard patent term is 20 years. SPCs aim to compensate rights holders for the time required to obtain regulatory approval for their products. Where regulatory approval is issued more than five years after a patent is granted, SPCs may be granted to extend the term of protection on the active ingredient in the patented product. SPCs last for a term corresponding to the period elapsed between the five-year point and the point at which the product reaches market, up to a maximum term of 5 years.

(a) Does your organisation use SPCs?

(b) How fair and effective are they in delivering an incentive for investment?

(c) How could they be improved?

(d) Should the term of SPCs be more flexible - perhaps relating straightforwardly to the period between patent award and regulatory approval?

Trade Marks – international issues

(a) To what extent does your organisation register its trade marks at the European rather than national level?

(b) Could the UK trade mark system be improved to work better alongside the European system?

Designs – registered designs and unregistered design rights

(a) To what extent does your organisation rely on registered designs? And on unregistered design rights?

(b) To what extent does your organisation register its design at the European rather than national level?

European registered designs represent good value for money for most clients

The main issue with registered designs is the question of validity, as there are no novelty searches carried out, so the design may be registered but could easily be revoked if challenged with prior art. They are cheap but it may turn out to be a waste of money if revoked.

(c) To what extent does your organisation rely on the European unregistered design right rather than the national UK unregistered design right?

(d) Could the UK registered design be improved to work better alongside the European system?

- (e) Could the UK unregistered design right be simplified to work better alongside the European unregistered design right?
- (f) Do you see a useful role for the UK unregistered design right alongside the European design right?

The longer term of the UK right means that it retains its usefulness

Legal sanctions on IP infringement

- (a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances?
- (b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement?

Coherence between competition policy and IP policy

- (a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?
- (b) How did you deal with this problem?
- (c) Was competition law effective at controlling this behaviour?
- (d) Should competition law have a greater role to play in regulating IP?
- (e) How would you see the system working?

Parallel Imports / International Exhaustion

Background: European law does not allow firms to use trade mark or copyright law to prevent their goods sold in one EEA Member State from being imported and resold in another Member State – i.e. they are not able to segment the EU market. However European law does allow the use of trade mark and copyright law to restrict the imports to EU Member States of goods sold outside the EEA. It also specifically inhibits EU Member States from legislating to remove such import restrictions at the national level – so called “international exhaustion” of trade marks or copyright. There has been a good deal of debate, both here in the UK and at EU level, about the costs and benefits of removing restrictions on parallel imports. There is a further issue of firms taking advantage of variations in prices on pharmaceutical products across the EU and repackaging drugs bought cheaply elsewhere within the EEA to resell within the UK.

- (a) Has your company been affected by parallel trade?
- (b) What would be the impact on your organisation of a change in the current rules?
- (c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules?

We are not aware of any companies in the Welsh Creative Industries sector that would be affected by parallel imports. The issue is a wider UK matter. There is no particular Welsh angle to add to the debate, other than to say that Wales benefits from the general success of the UK sector, and if that industry were undermined by cheap imports from countries enjoying advantageous currency exchange rates, then there would eventually be a knock-on effect felt by Welsh supplier companies & individuals.

The creative content is very expensive to develop and exploit and the idea that it is a valuable commodity that should be paid for must become further ingrained in our culture. Many of the consumer issues that get raised in these debates seem very minor compared to the importance of maintaining the financial health of one of the UK's most important sectors. New technologies are about to change the way we consume media & entertainment very dramatically in ways which even those in the industry cannot yet fully

understand. These changes may bring about opportunities for Welsh businesses, but those opportunities will be diminished if the right to secure payment for use of copyright is eroded. We in Wales want a bigger slice of the UK cake, but we also need to help make sure the UK cake remains substantial.

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