



GOWERS REVIEW OF INTELLECTUAL PROPERTY

CALL FOR EVIDENCE

INTRODUCTION

The UK's Intellectual Property framework, both in legal provisions, and in the operations of Government, is a critical component of our present and future success in the global knowledge economy. Our economic competitiveness is increasingly driven by knowledge-based industries, especially in manufacturing, science, and the creative industries. The creative industries alone accounted for 7.8 per cent of Gross Value Added (GVA) in the UK in 2003 and grew by an average of 6 per cent per annum between 1997 and 2003.¹

Intellectual Property protects the value of the knowledge that resides within goods and services. IP is one way of giving incentives to people and firms to invest resources in creative or inventive activities ranging from Pharmaceutical R&D to television documentaries. The IP system is made up of a small number of flexible instruments (copyrights, patents etc.) that are broadly adapted for creations, inventions, designs and product identifications. Whilst these statutory monopolies provide the incentive to invest, they are strictly limited to balance their costs: principally limited competition, high prices, and limited 'spill-over' benefits of that knowledge. The state must ensure that this balance is appropriate. Equally important is the state's role to award IP efficiently, and enable the market to use, licence and exchange that intellectual capital. Finally, it must ensure that IP owners can enforce their rights through both technical and legal means.

Globalisation & technological change have both raised tensions in the existing IP system. UK firms have greater opportunities to maximise the value of their IP abroad, and are simultaneously subject to foreign competition in domestic markets. Digitisation has radically lowered the cost of duplication as well as distribution, and the process of innovation has become ever more 'networked', particularly in high-tech sectors: a new invention typically involves more IP, and more firms collaborating, than 30 years ago. Indeed, in many areas it is no longer just firms who are responsible for innovation - consumers themselves increasingly play a part in developing innovative goods and services.

While it has been suggested that the present UK system strikes broadly the right balance between consumers and rights-holders, it also appears that there are a variety of practical issues with the existing framework. For example:

- Past legislative reform has resulted in a highly complex IP system. While a degree of complexity is inevitable in a system covering a wide range of products and innovations, aspects of the system appear to have become increasingly opaque. There may be options to improve the transparency of the system and increase business awareness of IP, making the system easier to navigate.

¹ *DCMS Creative Industries Economic Estimates*, DCMS (2005)

- Obtaining IP rights can impose significant costs on businesses and innovators. For example, evidence suggests that securing patent protection in a selection of European countries and in the USA typically costs around £75,000 over the first seven years, including legal fees and renewal fees.² Moreover, it appears to be considerably more expensive to obtain patent protection across Europe than it is in the US, largely due to translation fees and other costs at the national level. These figures do not include the costs of enforcing IP and challenging infringement through litigation, which also appear to be very high, often prohibitively so, especially for small and medium enterprises. This may be acting as a barrier to efficient enforcement of IP rights and equally as a deterrent to innocent parties being able to challenge dubious rights. Efforts to agree a European Community Patent, aimed in part at reducing these costs, have repeatedly foundered.
- While patents provide a vital incentive for innovation, the granting of overly broad patent protection, together with restrictive or restricted licensing of IP, can impede the development of the next generation of products and reduce competition. The practice of obtaining patents defensively also appears to be widespread in some industries, where rights holders have no intention to develop marketable products or to license the IP to others, but wish to prevent others from undertaking research and development in similar areas. Others may hold defensive patents and seek to generate revenue not by commercialising them, but by seeking out potential infringers and proposing licensing agreements to them under threat of litigation. While such practices are legal, they may hinder innovation if the original patent was dubious or too broad in scope, and impose barriers to market entry for those who have legitimate innovations but are unable to risk litigation. Use of a patent in a way that places a burden on innovation rather than stimulating it will not be achieving the objective of the patent system.
- The increasing complexity of high-tech products and of scientific research may also be leading to problems. Firms often need to use large numbers of existing patents to develop a new product. They may find themselves having to negotiate complex licensing agreements, often with multiple rights-holders holding overlapping patents, in order to emerge from so-called “patent thickets”. Delays in patents being granted can also lead to new products inadvertently infringing on patents issued after these products were brought to market. These problems are at their most extreme in high-tech industries such as computing and telecoms because of the complex and fast moving nature of the innovations concerned and the need to set formal technological standards and ensure interoperability.
- Increasingly firms appear to be innovating collaboratively, and using cross-licensing agreements and “patent pools” to share their IP with other firms and reduce the need for costly and time consuming negotiations. However, while this may enable innovation among the firms involved, it may also increase barriers to market entry for others.
- The widespread use of the Internet and the advent of high-speed digital networks has made it increasingly easy to copy and share digital information quickly, easily and without appreciable loss of quality. This has enabled widespread copyright infringement, most notably the use of file sharing

² *The Financial Realities of Patent Protection*, Frank B. Dehn and Co., Patent and Trade Mark Attorneys (2003)

technologies to download unlicensed music. It has been suggested that copyright exceptions lack clarity and are ill equipped to deal with these technological challenges. Furthermore public awareness of the boundaries of lawful use is low, and legal sanctions on infringement appear to lack clarity and consistency across different forms of IP.

- There may also be a number of barriers to efficient markets for copyright licensing. A significant proportion of copyrighted works are presently unavailable because they have little private value to the existing rightsholder – they do not merit the cost of being re-issued. Such works are therefore inaccessible to consumers and to other firms wishing to license or purchase the rights, and it often becomes difficult to trace the authors and rightsholders of such works.

The Review will provide an analysis of these issues, seek to identify others, and report with targeted and practical policy recommendations as appropriate. The Review will also fulfil the Government's existing commitment to examine whether the current term of protection on sound recordings and performers' rights in sound recordings is appropriate.

In many cases the Review's recommendations will focus on how the Government might address these issues domestically. However, much of IP policy is agreed in an international context, and is often subject to EU legislation or international treaties and conventions. The Review may therefore also make policy recommendations at the international level, considering how best the Government can continue to take a lead internationally. It will bear in mind the need to balance the Government's aims of promoting innovation, openness to trade and investment, and international development concerns. It will also consider how best to influence the European Commission's agenda on intellectual property policy in the EU, including its review of legislation on copyright and related rights.

Moreover, with the increasing pace of technological change, in particular the spread of digital technology and growing use of the Internet, the Review will seek to provide a solid foundation for the Government's long term strategic vision for IP policy, based on sound economic principles. Its key aim is to ensure IP systems remain appropriate in the face of global economic and technological change and the increased importance of the knowledge economy worldwide.

SCOPE OF THE REVIEW:

The Review will examine all elements of the IP system, to ensure that it delivers incentives while minimising inefficiency. Specifically:

1. The way in which Government administers the **awarding** of IP and provides support to consumers and business. The award and observance of IP should be predictable, and transparent, with minimal information costs and transaction costs for firms and citizens.
2. The way in which businesses and other organisations **use** IP. The structure of the IP framework should reflect the impact of economic and technological change on the nature of intellectual assets and their importance to businesses across different sectors.
3. How well businesses, other organisations and individuals are able to **exchange** and trade IP – in particular negotiating the complexity and expense of the copyright and patent systems, including copyright and patent licensing arrangements. Exchange of IP should be facilitated by accurate valuation, with no barriers in access to finance, and liquid markets.
4. How well businesses and others are able to **challenge and enforce** IP. Litigation and enforcement should be swift, efficient and judicious with the optimal mix of technical and legal measures. Businesses should be aware of the range of alternative methods to challenge and enforce IP such as mediation and alternative dispute resolution. These methods should be relatively inexpensive, swift, efficient and transparent.

CALL FOR EVIDENCE

This call for evidence will form a key part of the evidence base that the Review team can use to develop its analysis. It will be used alongside a range of other evidence sources, including quantitative data; surveys and views of representative groups; visits; seminars; and interviews. **We encourage stakeholders to submit evidence in three areas:**

- First, we invite evidence on a series of **General Questions** for each of these elements of the IP system identified. These are set out below.
- Second, there are also a number of **Specific Issues** on which we would particularly welcome evidence. These are also set out below.
- Finally, we also invite respondents to **highlight other issues** on which the Review should focus its attention that are within our scope, but not listed below.

NB: We welcome responses that only cover one or a few of the areas described, as well as responses relating to questions on IP that have not been explicitly set out below.

LIMITATIONS OF REVIEW SCOPE

The Government conducted a Review of Government Information in 2000³, as part of the Cross-cutting Review of the Knowledge Economy, and has since implemented the EU Directive on the Re-use of Public Sector Information⁴ through the Re-use of Public Sector Information Regulations 2005⁵. We wish to make clear that Crown Copyright, Parliamentary Copyright, and the regulations governing Public Sector Information are therefore specifically **outside the scope** of the Gowers Review. However, it is likely that the Review will have relevance to public sector organisations, for example through its examination of copyright more generally, and of how IP is licensed and exchanged.

The Patent Office is currently consulting on two specific intellectual property issues: the inventive step requirement in UK patent law and practice; and the way UK trade mark applications are examined on the basis of their potential conflict with earlier trade marks. While we would encourage interested parties to participate in these consultations via the Patent Office website - www.patent.gov.uk - we wish to make clear that issues related to the inventive step and the registration of Trade Marks are **not outside the scope** of the Review.

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?
- (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?
- (c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs?
- (d) How do these costs compare internationally in your organisation's experience?
- (e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection?
- (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?
- (g) Are there specific barriers to obtaining IP rights in your sector?
- (h) Are there specific barriers to obtaining IP rights for small businesses or individuals?
- (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?

2. How IP is used

- (a) What types of IP does your organisation use and why?
- (b) To what extent do you seek multiple overlapping forms of IP protection?
- (c) To what extent are these decisions influenced by sector-specific considerations?
- (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?
- (e) To what extent does the term of IP rights at the margin affect investment decisions?

³ Cross Cutting Review of the Knowledge Economy - Review of Government Information, July 2000:

http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/

⁴ EU Directive 2003/98/EC on the Re-use of Public Sector Information, 17 November 2003:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_345/l_34520031231en00900096.pdf

⁵ The Re-use of Public Sector Information Regulations 2005: <http://www.opsi.gov.uk/si/si2005/20051515.htm>

- (f) How well does the UK IP system promote innovation?
- (g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding?
- (h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation?
- (i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy?
- (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 what circumstances do you consider this acceptable?

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?
- (b) What mechanisms do you use for finding potential licensing partners?
- (c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research 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?
- (f) Are there specific barriers to licensing IP in your sector?
- (g) Does your organisation use methods to facilitate exchange of IP - such as cross-licensing or pooling IP rights with other firms or organisations?
- (h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?
- (i) Are there barriers to trade and exchange of IP internationally?
- (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)?
- (k) What could be done to improve "licence of right" provisions and business awareness of them?
- (l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

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

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?
 - (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?
 - (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?

- **Copyright – orphan works**
 - (a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?
 - (b) Do you have any suggestions on how this problem could be overcome?

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

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

- **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?
 - (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?

- **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?

HOW TO SUBMIT YOUR RESPONSE

The Review team welcomes responses to the issues and questions raised in this paper. **Submissions should be sent to the Gowers Review of Intellectual Property, by Friday 21 April 2006.**

We would prefer electronic submissions where possible, but we will accept responses in hard copy format. Contact details are below:

Gowers Review of Intellectual Property
Zone 4/E1
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Email: gowers.review@hm-treasury.gov.uk

The Review team is particularly interested to receive **submissions of supporting evidence** that can shed light on the issues outlined in this document.

Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

A **coversheet** for responses has been included for your convenience at the end of this document. Please include the name and contact details of the person to contact for any follow-up discussions. In order to ensure that your submission is given appropriate consideration, please use the coversheet to indicate clearly on which issues you are responding.

Please state clearly on the covering note, by ticking the box provided, if you **do not want your response to be posted on the Review website** www.hm-treasury.gov.uk/gowers. If you wish part but not all of your response to be posted on the website, please supply two versions – one for publication on the website and another for the Review team only.

General enquiries about the Review should be sent to the email address above. Alternatively you can contact the Review team on +44 (0)20 7270 4902.

COVER SHEET FOR RESPONSES

Contact details of respondent	
Name	
Job Title (if applicable)	
Organisation (if applicable)	
Postal address	
Telephone number	
Email address	

Please indicate below which issues are covered by your response. Not all issues will be relevant to all respondents – please feel free to skip questions that are not relevant to you.

General Questions covered:	
How IP is awarded	
How IP is used	
How IP is licensed and exchanged	
How IP is challenged and enforced	

Specific Issues covered:	
Current term of protection on sound recordings and performers' rights	
Copyright exceptions – fair use and fair dealing	
Copyright – digital rights management	
Copyright – orphan works	
Copyright – licensing of public performances	
Copyright – designated archive status	
Patents – utility patents	
Pharmaceutical Supplementary Protection Certificates (SPCs)	
Trade Marks – international issues	
Designs – registered designs and unregistered design rights	
Legal sanctions on IP infringement	
Parallel Imports / International Exhaustion	
Coherence between competition policy and IP policy	

Have you raised any other issues in your response?

Y / N

Details of accompanying documents (Please continue on additional sheet if necessary)

Please **TICK BOX** if you **DO NOT** want your response posted on the **Gowers Review website.**