

**AURIL**  
**(Association for University Research and Industry Links)**

**GOWERS REVIEW OF INTELLECTUAL PROPERTY**

**Response to Call for Evidence**

AURIL is the professional association that represents all practitioners involved in knowledge creation, development and exchange in the UK and Ireland who work to ensure that new ideas, technologies and innovations flow from their institution into the market place. It is the largest Knowledge Transfer (KT) association in Europe, with more than 1600 members from universities (HEIs), NHS Trusts and public sector research establishments (PSREs).

The Association enjoys widespread international recognition through its success in influencing UK government policy. It has strong working relations with the Confederation of British Industry, Universities UK, the UK Patent Office, the Office of Science and Innovation, HM Treasury and the Higher Education Funding Council for England (HEFCE), in partnership with whom it has produced many publications.

The Knowledge Transfer Sector (particularly HEIs and PSREs) have specific requirements relating to IP management in that they must balance the requirement for their staff to publish research with the protection of IP. They contribute heavily towards creativity and innovation using all forms of IP protection and management.

## **GENERAL QUESTIONS**

### **1. How IP is awarded**

For the KT sector, the complexity of the IP system represents a significant barrier to obtaining IP rights. The UK government has invested heavily in technology transfer related activities through the Office of Science and Technology (OST) in combination with UK funding councils to increase the level of professionalism in this area, however due to the complexity of IP procedures and legislation there can be a high degree of reliance on patent agents and other professionals. Much of the complexity in this area derives from the interplay of European and UK law and the wider issue of patenting in the US and other jurisdictions, therefore alignment of the legal processes across Europe will help in reducing complexity. Increased access to IP training for technology transfer office staff would increase the possibility for staff awareness of the system. Training provision for research staff and undergraduates would be recommended to increase over all awareness.

As a means to find out about IP rights there are multiple short (1-3 day) courses and several longer programmes (e.g. to Master's level) available in the UK. Access to such courses is generally available for full-time business

development staff. Raising awareness more generally could be done by making short courses available at graduate/undergraduate level.

The costs of having to appoint a patent agent to act in another jurisdiction, as well as the associated translation costs are prohibitive. The agreement on the identification of a core number of languages would be beneficial.

A specific barrier to obtaining IP protection for inventions from public research organisations is the high possibility of disclosure of research results before new inventions are patented. This can be managed by education and training of staff in IP matters, however there is also a considerable body of opinion that a grace period would be of benefit to this sector. Although this does add some additional complexity to the system, it does provide alignment to the US patent system. In practice, this could only be reasonably achieved through EU-wide legislation.

We would certainly welcome a review and overhaul of the European patent system. At present it is costly and bureaucratic.

It could be argued that the US patenting process arguably encourages their universities to file and manage larger portfolios of patents, and therefore allows them to take a more strategic approach overall. Very often, applications are filed only in the USA as this in itself can provide a sufficiently strong IP "foothold" to dissuade others from commercialising elsewhere.

In contrast, a UK -based institution will almost certainly need to file in multiple territories (perhaps via the PCT route, deferring some cost initially) in order to obtain sufficient market coverage. This ultimately leads to higher costs and can therefore limit the scope for more strategic patent portfolio management - particularly for smaller institutions operating with modest IP budgets.

It could be argued that a model that permitted first filing in countries other than the UK might in some instances, serve these institutions better

In most cases, as we are operating in a global market, UK filing is usually just a first step to more international filing. It also gives us a breathing space to assess commercial value in the first year.

Much of the IP commercialised from UK public research is through the creation of spin-out companies, generally comprising less than 3 employees in the early stages and having limited seed capital available. Here again, understanding of the system and costs create barriers to obtaining IP rights.

Licensing is the other potential route but is difficult within the UK due to constraints like the size of the market and the difficulty and time involved in linking with industrial partners. Listing services which try to "marry" institutions IP and potential licensees had proved unsuccessful in the past. AURIL partnered with the Patent Office to develop a scheme called ACINDUS which tried to list current university IP which was available to licence but the scheme failed as universities were unwilling to list their IP in a public site,

some of their IP already had a “first option” clause to an existing company, or the IP listed was “tired” and listing on the site was a last resort.

There are specific barriers in the cultural and creative industries, where many of the organisations involved have global markets despite being micro businesses. The cost of patenting is too costly and therefore they operate vicariously.

There is a concern within the wider sector that the processes and perceived costs of acquiring IP protection is too complex and high. Within the entrepreneurial community business service providers report that individuals are reluctant to approach lawyers or patent agents at an early stage as they believe that costs will immediately start to ramp up. VCs also report that potential clients are more concerned about early stage funding than even having a basic understanding of the worth of their IP, nor do they think about protection at this stage.

The business service providers believe that an entrepreneurial culture and funding for innovation does already exist; where there seems to be a problem is the link between the two in the protection and understanding of IP.

Those involved in IP management in Northern Ireland have recently set up the Northern Ireland Intellectual Property Association (NIPPA). The association is a voluntary grouping of lawyers, patent agents, managers of IP in HEIs and the NHS, VCs, government and city development agencies. The association has 2 basic aims:

- a. To raise the awareness of IP generally throughout the wider entrepreneurial community
- b. To provide a quality business service for entrepreneurs

This is not a marketing exercise for services. Each company and organisation has agreed to give free time for initial consultations for individuals; giving advice on protection, business planning, due diligence, funding, business models, etc. so as individuals can have a more rounded understanding of their business package. A register of service providers will be produced and it is hoped that the Association will share a platform with the patent Office at their road shows and provide free clinics. Similar Associations exist in other regions and seem to deliver.

## **2. How is IP used?**

Public Research Officers mostly use copyright, designs and patents for IP protection, with little significant use of trademarks.

Multiple, overlapping forms of IP protection is rarely seen within the sector however Patent bundling is common

The sector is especially broad, encompassing large multi-disciplinary and small specialist institutions.

Generally, the sector does not use patents defensively and we do not have knowledge of this having happened. Although a legitimate business practice, this has the inevitable result of stifling innovation.

### **3. How is IP licensed and exchanged?**

License to IP for non-commercial purposes does not generally pose a problem as in the context of KT sector research this is often considered to fall under "research exemption". IP licensed for research purposes in the context of Public Sector Research Organisations is often done in the context of a material transfer agreement or similar. This generally excludes commercialisation of any inventions resulting from the research without explicit agreement from the licensor

Mechanisms include marketing through internet, direct mailing, conferences etc. IP is also marketed indirectly through spin out companies.

Difficulty can be encountered in agreeing license terms for research use of IP particularly from jurisdictions outside the UK. This can often occur in the licensing of IP from another research institution, particularly those in the US.

### **4. How is IP challenged or enforced?**

IP rights are rarely enforced by the sector through court action on the grounds of costs. Universities and Public Sector Research Organisations, other than very large institutions where management may be through a subsidiary company, generally do not have budget to initiate infringement actions in all but exceptional circumstances.

The main deterrent is the reliance on external IP advice and other legal advice with the likelihood of high cost.

The Preference is to use arbitration in the first instance and then the courts as a last resort.

## **SPECIFIC ISSUES**

- Copyright

Active protection and monitoring of IP through copyright was not common in the sector until recently. The development of research within Cultural and Creative Industries and within computer science departments (mostly copyright) and its applications in conjunction with engineering or bio chemical departments has led to more patents being filled in this area. Closer attention is being made to IP protection in this area than had been in the past.

Academics are keen to publish; it is key to their reputation via the RAE. They are therefore willing to accept assignment of copyright to academic publishers. This is hard to monitor, can lead to difficulties down-line in the

protection of IP and may lead to impediments to the free flow of academic information. We support the position taken by Nature.

Academic publishers could seek either assignment of the copyright or a licence to publish the works of academics. Most academics are so keen to be published that IPR is often seen as a barrier.

The publishing sector was slow to recognise the impact of Internet Publishing and there are instances of academics who have published directly through the internet, supported by their institution, being able to share a higher amount of the income.

In the fashion and textiles sector, copying of others' innovations is still an unacceptable feature of the industry. Students' work is plagiarised regularly and small design companies do not have the resources or time to use existing legal routes to protect their interests. A change in the protection for these vulnerable groups would be helpful.

In the music sector in the UK, the term for sound recordings falls behind that enjoyed by musical composers and lyricists, which was increased to life plus 70 years in the Nineties.

Some argue that this disparity in copyright terms has a direct impact on the asset value of recordings and also makes the UK a less favourable location for operations and recordings. With the growth of online revenues, the UK is also likely to be disadvantaged because shorter copyright term will result in lower revenues.

PPL estimates that over the next decade some 7,000 musicians will lose airplay royalties from recordings they made in the late Fifties and early Sixties. The biggest losers are likely not to be big-name artists, but session musicians who backed many famous recordings and who rely on royalty income for their pensions.

- **Open Source Software**

Increasing use of Open Source Software is raising potential liability issues where universities and PSREs may want to commercially exploit such code or provide services based on them. At our recent AURIL conference we exposed the conflicting legal inconsistencies of Open Source guidance. It is currently a minefield for anyone involved.

Uncertainty about which OS licensing regime to adopt within models based on US law, and lack of clarification on this within UK government policy adds to the confusion. This means that HEIs and PROs hesitate to commercially exploit OSS within a range of possible business models, particularly when this may involve proprietary third party software.

Debates around the extension of patent protection into the area of software need to be considered very carefully so as to ensure that innovation in the digital economy is not stifled (specifically amongst new start-ups).

- **Patents – utility models**

Although utility models could potentially provide a lower-cost means to protect inventions, there is some concern that this also introduces another layer of complexity to the system. The introduction of this more easily awarded protection could result in the proliferation of IP which is not necessarily of a high standard of inventiveness. Nevertheless such IP may be used just as effectively as a patent and could thus favour those organisations most able to benefit from blocking IP and those most able to litigate.

- **Pharmaceutical Supplementary Protection Certificates**

For reasons relating to disclosure through publication, IP emerging from the KT sector generally requires patenting at an earlier stage than would be the case for inventions which created within private organisations. Particularly pharmaceutical development, where the drug development process within the institution can be relatively slow and this is coupled with long regulatory stages, the SPC is of considerable importance in maintaining the value of such IP. A more consistent approach internationally, and a defined period protection would be of great benefit to institutions working in this area.

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