

Independent Review of IP and Growth – call for evidence

Introduction

The Federation represents IP intensive companies in the United Kingdom - a list of members is attached. Our member companies are extensively involved with IP in the UK, the rest of Europe and internationally. Not only do our companies own considerable numbers of IP rights, both in the UK and elsewhere, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions, here and elsewhere. While copyright rights are important to our member companies, this response focuses more on patent issues than on copyright.

Response to the call for evidence

The review calls, correctly, for hard statistical evidence on which to base recommendations, but adequate evidence may be difficult to obtain or collate. Each industry and company will have different experience of the value of IP and its possible problems. In many circumstances, that experience will be commercially sensitive. Our companies will respond directly to the review as far as they feel able.

In the encouragement of growth, support for R & D, the encouragement of investment and the development of markets should perhaps take precedence over the adjustment of IP laws. IP systems have developed over many years in response to the needs of users (both owners and interested competitors) and have been the subject of many reviews.

We have the following general points:

1. Contrary to the sceptical opinions held by some, the IP systems in the UK, in the rest of Europe, and elsewhere when in compliance with international agreements, are generally sound. They are not broken and do not need major adjustment. The first need is to improve quality and efficiency within the existing systems.
2. Our members' businesses, like the majority of businesses throughout the world, are dependent for their operations on licences for copyright software and internet content. The fact that, for the most part, this operates smoothly and without major disruption is further testament to the fact that the IP system is far from broken and that the delicate balance of rights and opportunities it represents should not be tinkered with unless absolutely necessary.
3. In the main, present IP systems cope with new technology - after all, that's what the patent system at least exists to protect.

4. The idea that “deregulation” or “looser” systems are required in the UK is misconceived. Weakening the existing systems would open the doors to counterfeits, pirate copies and rip-offs. Moreover, it would be in defiance of European and international obligations if the UK did not provide a trustworthy IP environment.
5. As regards both enforcement and defence against allegations of infringement, court actions, particularly in the UK and the USA, are time consuming and expensive. See for example the report of the European Patent Office (acting as secretariat of the Working Party on Litigation), *Assessment of the impact of the European patent litigation agreement (EPLA) on litigation of European patents*, February 2006, available at:
<http://www.epo.org/patents/law/legislative-initiatives/epla/assessment.html>
6. Court actions usually involve the detailed examination of complex evidence by skilled practitioners and are inherently expensive, particularly when rights of appeal are taken into account. In appropriate circumstances, some alleviation of the cost burden can be achieved in the UK through use of the Patents County Court. Also, alternative dispute resolution procedures (ADR) may sometimes be helpful. However, we do not accept the view that only the most blatant cases should be permitted to proceed in court. This would open the doors to copyists.
7. IP related growth involves increasing the export or licensing of protected high technology to foreign markets. Thus the IP systems and enforcement arrangements in other countries are of major importance to us. Even where basic IP laws are satisfactory, it can be difficult for UK companies to enforce successfully their IP in the courts of countries as widely different as China and the USA. No adjustment of UK law will deal with this problem.
8. It is important that within the EU, there should be close harmonisation of IP laws and the approach and understanding of courts, so that similar situations are treated similarly throughout the single market. Much progress has been achieved, but more needs to be done, particularly in some parts of the copyright and design fields (e.g., as regards levies - which the Federation opposes - or spare parts). These issues need to be dealt with at the European level, not by unilateral adjustment of UK law.
9. As regards the uncertainty of pending patents, at least the effect of these can be assessed when the applications are published. Much greater uncertainty would be caused by the publication of possibly inventive subject matter which could subsequently be the basis for a patent application. Thus we are not in favour of proposals for a “grace period” (though we accept that one may be necessary in the furtherance of international harmonisation).
10. The speed and cost of patent examination do not cause great concern, particularly where arrangements for requesting accelerated examination when necessary are in place. However, the quality of examination can be a cause for concern and we have made recommendations to the European Patent Office on this subject.

11. While the existing European patent - which effectively transforms to a bundle of national patents - serves us well, the proposed EU patent will no doubt be of help in some circumstances with some inventions. It should certainly help to reduce duplication of post grant procedures and litigation.
12. Nevertheless, it would be highly undesirable to adopt the EU patent without providing a corresponding EU enforcement system. Thus agreement on an EU Patent court must be achieved in tandem. We note with approval that this already seems to be the UK official position, and would urge that any requests to de-link the two dossiers should be resisted. The new Court might help to address our comments above on the high cost of litigation in the UK, as it may well be a less expensive route for litigation.

Patent trolls

Our members have had some encounters with “patent trolls”, persons or companies that seek to enforce their patents against alleged infringers in an unduly aggressive and opportunistic manner, often with no intention to manufacture or market the patented invention.

A core criticism of patent trolls is that the entities initiating them are in a position to negotiate licensing fees that are grossly out of alignment with their contribution to the alleged infringer’s product or service. The risk of having to pay high prices for licensing of patents that are revealed following launch, and the costs for extra vigilance for competing patents that might have been issued, in turn increases the costs and risks of manufacturing.

Such actions are thought to be prevalent in the USA. However, out of a sample of nine of our members, when dealing with non-practising entities (i.e. patent holding entities that do not have any research or manufacturing):

- 6 members have been on the receiving end of such litigations;
- 106 separate patent troll litigations were involved, including:
 - 19 in the USA
 - 59 in Germany (16 infringement cases and 43 nullity cases)
 - 12 in the UK (revocation cases with 4 infringement counterclaims)
 - 13 in Italy (6 infringement / revocation civil claims, 1 infringement only claim, 6 criminal infringement complaints; and
- 1 further member has been involved in a US patent marking troll litigation.

According to one press article, a single set of lawsuits of this nature against one of our members in the EU in 2008 by a single non-practising entity was valued at nearly US \$18 billion.

If we include cases with entities that technically have had some limited manufacturing or research, at least another 7 cases in Europe can be added.

Thus high value actions of this nature do occur in Europe and are by no means restricted to the USA.

Further points

1. We are anxious to learn the results of the Experimental Use consultation carried out following the Gowers Report. It is fundamental for innovation and growth for companies and universities to know what experiments they may conduct.
2. Liberalisation of the 'Bolar' provision in S.60(5)(i) of the Patents Act would be desirable, so that all clinical trials would be exempt from patent infringement, rather than just clinical trials aimed at producing a generic medicine.
3. The review appears to have been motivated in part by the so-called 'Google™ Question', that is to say, whether the EU/UK copyright framework is a barrier to growth and whether it would have prevented a company like Google starting here. We are not persuaded that the EU framework is a barrier to growth - it is after all firmly based on the Berne and other international agreements - but there may be a need for a review of how well it deals with the digital economy. In our response to the Gowers review, for example, we expressed the view that the digital environment should offer more flexible solutions to the licensing of users. We commented on the need to allow limited exceptions to copyright to permit "format shifting" in appropriate circumstances and to phase out the levies applied in some EU member states (not UK) to digital recording equipment. We supported the deployment of digital rights management technology.
4. Finally, the difficulties and costs of getting the most suitable professional help to draft a strong and appropriate patent can act as a serious constraint to innovative businesses. Although this is not so much an issue to most of our members, who generally have their own in-house patent staff, it is a serious issue for small businesses. Opportunities for licensing in products are often limited by the poor patent protection the prospective licensor has obtained before making his idea public.

IP Federation
4 March 2011

IP Federation members 2011

The IP Federation (formerly TMPDF), represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. It is listed on the European Commission's register of interest representatives with identity no: 83549331760-12.

ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Delphi Corp.
Dyson Technology Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Merck Sharp & Dohme Ltd
Nokia UK Ltd
Nucletron Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
QinetiQ Ltd
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Sony Europe Limited
Syngenta Ltd
The Linde Group
UCB Pharma plc
Unilever plc
Xerox Ltd