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Editorial

The Gowers Review of Intellectual Property – A Valuable Affair

An Independent Review of UK's Intellectual Property Framework was announced by the Chancellor of the Exchequer at the Enterprise Conference in December last year, and launched with a formal call for evidence last month. Chaired by Andrew Gowers, former Editor of the Financial Times and now a consultant and writer for the Sunday Times, the review will report to the Chancellor, the Secretary of State for Trade and Industry, and the Secretary of State for Culture, Media and Sport later this year.

Earlier this month, I attended a launch of the Call for Evidence at the Department of Trade and Industry Conference Centre. At the launch, Mr Gowers introduced the broad rationale and motivation for the review, after which diverse concerns in patents and then copyright were considered by two panels and open discussion.

Gowers emphasised the concept of knowledge as a public good, as something which "enriches the lives of creators and users." He explained that the review would undertake a timely consideration of the balance, fundamental to the system, between industry, users, and right-holders. Importantly, his introduction demonstrated the increasingly tripartite nature of the debate, and indeed questions from the floor confirmed this. Gowers stated that the balance necessarily must be reached in the context of the role of intellectual property laws – that is, to protect the commercial

value of knowledge, not to create it. But one might ask whether this is a diversion from the possible role of intellectual property in creating that commercial value. While the discussion during the launch maintained a distinction between creation and protection, the very enthusiasm with which industry has maintained its position in the debate suggests that this distinction is perhaps unclear if not specious. Re-examination of copyright term in sound recordings, something which Gower has maintained will be a priority for the review, indicates the role of the law in creating the market in that the commercial market itself directly impacts upon policy and legal developments. How might extending term address the balance in terms of the question of access for users?

Of particular interest was the discussion of the way in which the dissemination and thus commercialisation of knowledge has changed with developments in technology. It was suggested that this has led to considerable changes from the traditional modes of operation, production, and access, and that the review is likely to reveal strategies for addressing these very changes in the way knowledge is transacted. The intellectual property framework, as a commercial legal system, is not necessarily keeping pace with the transactions it seeks to regulate. Indeed, Gowers himself suggested that users are increasingly operating as innovators. It is likely that the evidence submitted will characterise some of this use quite clearly, particularly from civil society organisations and academia.

The first panel considered issues around patents, but consumer representation was certainly lacking. Representatives were: Chris Parker, Senior Director, Law and Corporate Affairs, Microsoft (sponsors of the event); David Rosenberg, Industry Affairs Manager, GlaxoSmithKline; Samantha Funnell, Chief Patent Counsel, ARM Ltd; and Danny Quah, Professor of Economics, LSE. Almost uniformly the panel considered uncritically that patents were fundamental to the competitiveness of Europe and were incentives to innovation. Indeed, it was suggested that the knowledge economy would in itself be supported and strengthened by encouraging and promoting wider use of intellectual property. In this context, Chris Parker described patents as "enablers". Importantly, the panel and discussion from the floor identified the lack of access on the part of small and medium enterprises to the patent system itself. It was suggested that the expense of patents was such a burden that smaller enterprises chose not to patent – identifying it as a cost rather than an asset. This is an interesting point in that innovation is registered and calculated by the production of intellectual property. Thus, innovation in Europe is seemingly unaccounted for where the system is prohibitively priced for smaller innovators. In this area then, the review is likely to consider evidence that will suggest ways in which to harness this innovation within the intellectual property system and ways in which to encourage the use of intellectual property. It was thus argued, that the intellectual property system is not merely an incentive to innovate. Rather, the system must find and provide incentives to patent. It must self-incentivise.

The second panel addressed issues raised by copyright and again the question of balance and the need for evidence was emphasised by all representatives. Arguably, this panel was perhaps in itself more "balanced." Representatives were: Jill Johnstone, Head of Policy, National Consumer Council; Anthony Lilley, Chief Executive, Magic Lantern Productions; Emma Pike, Chief Executive, British Music Rights; and Jonathan Cornthwaite, Head of Intellectual Property Law, Wedlake Bell Solicitors.

Anthony Lilley raised a very significant point on this panel, particularly in the context of earlier discussions in the day, that the idea of "protection" was problematic in the context of ubiquitous content. Lilley was particularly engaging in his discussion of active audiences and the false dichotomy of users and creators, and noted the way in which copyright is not coming to terms with changes in audience use and networks of creators. Indeed, he argued that the whole problem with the copyright debate was that "one aspect of one industry has plagued the whole system" – the music industry. Lilley argued strongly against applying this to all users, all industries, in a problematic unifying sweep. His argument was especially striking in the context of earlier comments by Gowers with respect to the need of the system to reflect more appropriately the changes in the industries and their transactions. But in this respect, it is also necessary for industry to respond to the changes in its "audiences". As Lilley argued, piracy is "the incapacity of industry to provide legitimate alternatives." At this time, he (as did Jill Johnstone) endorsed the Adelphi Charter which calls for the burden of proof for change to be on the advocates of change. This was supported by individuals in the audience. This also points to the role of industry as a player in the "balance" of intellectual property systems and, indeed, Lilley raised concerns that the copyright system was designed for the professional world – in other words, it is a commercial framework.

Emma Pike of British Music Rights acknowledged that the debate was much more sophisticated than copyright and anti-copyright and she suggested that we have "moved on" from the question "is copyright good or bad." However, in contrast to Lilley, while Pike identified that the law was indeed not in line with the activities of consumers, this was in the context of calling for greater regulation of that use. While endorsing the use of copy control she suggested it could be introduced with minimum codes of practice, better labelling, and other forms of protection for consumers, while also arguing for extension of term in sound recordings. This protection perspective was taken to a greater extreme in the presentation by Jonathan Cornthwaite who called for criminal enforcement of anti-piracy legislation, criminal enforcement of anti-circumvention measures and on-line copyright infringement. Finally, he called for copyright or *sui generis* protection of television formats.

Against extension of term in sound recordings, one member of the audience argued strongly that any concerns of industry in this area could be resolved by other changes in policy or commercial practice, including contractual mechanisms. He argued that these perceived problems have nothing to do with changes to the law (and changes to term), stating that this was just a diversion. Similarly, the argument for harmonisation upwards with the United States was rejected as completed unsupported by historical evidence – the United States did not accede to the Berne Convention until 1989.

Term was also an issue for representatives of performers in the audience. Several individuals in the open discussion, including representatives from EMI and Phonographic Performance Limited (a collecting society for performers) argued for an extension of term (and revival, that is, including past performances) for performers' rights. This argument was made on the basis that these rights are incentives to the creative process. I found this to be an intriguing argument in that performers' economic rights, at least in their modern form, did not exist until their introduction in 1996 (Copyright and Related Rights Regulations 1996). Therefore, to argue that the rights had anything to do with the creative process is somewhat unconvincing. Nevertheless this was not raised, performers' rights attracting much less attention in the open discussion than the call for harmonisation of term in sound recordings. It

may well be that the "personality" of the individual performer is more difficult to resist than the demonised music industry. However, Anthony Lilley made a valiant attempt.

Fundamentally throughout the day the need for evidence-based policy-making was emphasised. It was suggested that the ideological debates have progressed but the need for evidence was critical at this time. The Gowers Review is being promoted as the means by which this evidence-based policy-making will be possible.

Intellectual property is just one aspect of the culture and industry of innovation and must be developed and applied in this context. It is hoped that in this wide call for evidence, the breadth of policy implications will stimulate the recognition that intellectual industries necessarily introduce questions of changes in policy across a much broader and diverse base. Indeed, the competitiveness and success of Europe is built upon this diversity. The Call for Evidence closes 21 April 2006. For more information on the Review visit the Treasury Site.

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