



Innovating for Success

**The intellectual property review and
economic competitiveness**

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About the author

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Lord Sainsbury was chairman of the Governing Body of the London Business School from 1991 to 1998. He received the Award for Distinguished Leadership in Business from Columbia Business School in 1990. From 1975 to 1977 he was a member of the Committee of Review of the Post Office (Carter Committee); from 1978 to 1981 a member of the Dockland Joint Committee; and from 1995 to 1997 a member of the ippr Commission on Public Policy and British Business.

After reading History and Psychology at King's College, Cambridge, Lord Sainsbury went on to receive an MBA from the Columbia Graduate School of Business in New York. He is author of a Fabian Society pamphlet, *Government and Industry: A New Partnership* and co-author with Christopher Smallwood of *Wealth Creation and Jobs*, published by the Public Policy Centre.

Innovating for Success: The IP review and economic competitiveness

In the UK we are today enjoying the longest ever sustained growth in GDP, the longest period of sustained low inflation for 40 years and the highest employment levels in our history. But the economic landscape is changing fast.

At no time since the industrial revolution has the restructuring of global economic activity been so great. Asia is moving from the fringes of the new world economic order to the centre. Barriers to world trade are coming down and the international division of labour is being redrawn. Today the UK has to compete head to head with countries like China, which have wage costs that are five per cent of ours. In this new world, innovation has to be central to our economic success.

The role of Intellectual Property Rights in the new world

The good news is that the UK is restructuring its economy rapidly and effectively. We lead Europe in knowledge-based and high-tech businesses such as aerospace and pharmaceuticals. Knowledge-based business services have accounted for over half of our job growth in the past two decades. And we have a very strong position in the creative industries.

Intellectual Property Rights (IPR) have a key role to play in this new world. They underpin innovation by providing a tool for small and large businesses to make a return on their investment. For many innovators who are just starting out, access to finance is impossible without IP protection. Furthermore, the patent regime helps to spread technological knowledge because applicants have to disclose information about their invention.

In each of the UK's leading sectors, it is the ideas, creations and inventions that are giving the UK the competitive edge, just as they are in competitors' economies. Therefore in the global knowledge economy, knowledge itself is becoming an increasingly important tradable commodity. Without an effective IP regime, in the UK and internationally, UK growth and prosperity could be put at risk.

The allocation of IP is both democratic and fair. Rights are not based on the size of the company or the popularity of an individual but on the quality of the invention or in the case of copyright, the creative input without prejudice to the perceived quality. So IP rewards an inventor in his garage or the composer in his bedroom as much as a big pharmaceutical company or a pop superstar. They are awarded the same rights and the same conditions and privileges.

Perhaps that is why IP has moved from being considered an obscure branch of law, to becoming the focus of intense debate among users and – perhaps more surprisingly, but equally welcome – consumers.

Unfortunately, much of that debate focuses either on the relative merits of one type of IP over another, or sets 'IP' against 'free access'.

But this misunderstands the current situation as it assumes a regime in which government not only upholds the rights but dictates how they should be exploited.

The true strength of the UK's IP system actually lies in the flexibility it provides to creators to exploit their ideas and their creativity as they see fit, whether it is within the realm of science, technology or the arts. Many of our global leaders have successfully used various forms of IP to build their companies. For example, EMI tends to be associated with music and copyright. But it was founded by the inventor of the gramophone, Emile Berliner, in 1897 and has a diverse history of innovation based on patents, including the development of the first system of television in the world, which was used by the BBC from 1936 and formed the basis of UK TV broadcasting until the 1960s. EMI also held patents for H2S (Home Sweet Home) radar, used by the RAF during World War II to help bomber crews to identify their targets. More recently EMI has brought both the Beatles and the CAT scanner to market (Pandit 1996). So, a company generally regarded as a major part of the music industry, built itself on technical patents whose proceeds it was able to invest in developing and promoting musical artists.

But if a flexible system is to be an asset, it must also remain robust. That robustness should not only come from a system able to cope with the development of innovative new technologies, but also be able to promote innovation in the widest sense. And it will fail to do that if it becomes prescriptive, reacting to each novel development with a new dictum.

So what is government's role? Government must ensure that there is a proper balance between the reward and incentive for the creator and the consumer. It needs to recognise that different sectors have distinctive business models so IP must be flexible enough to be applied in different ways. It must also recognise that almost every industry uses a mix of patents, copyright, trade marks and designs, so the rights must be able to work alongside each other in a complementary but distinctive way.

Above all, government must resist calls to dictate to creators how they should exploit their rights.

Copyright

Out of the formal IP rights, copyright protection, unusually, does not require its creator to go through any registration process. It simply arises when the creator produces a painting, or writes a new programming code. It gives creators the confidence to share and disseminate their work, safe in the knowledge that they are protected should someone try to copy or steal their work without their consent. How a creator chooses to share their IP is up to them, but what IP does is provide options for them to exploit their work to their own advantage.

The choices the band the Arctic Monkeys made are a case in point. They successfully built up their fan base by giving away gig CDs via the internet. Having built the customer demand, they have now been signed by an independent record label and their debut album has become the fastest selling in UK chart history, selling 360,000 copies in a week. This is a very novel use of IP – giving away music at the start, in order to create customer demand for greater things later on. The Arctic Monkeys could only do this because of the flexibility and robustness within the copyright system.

The digital age means that new business models are available to be exploited by anyone with the will to do so. Home computing is sophisticated enough to enable production studios to be set up at home; the Internet provides a superb medium for distribution, as the singer, Sandi Thom, found when she used the internet to broadcast live performances from her living room over 21 consecutive nights. She built up a significant audience of more than 40,000 people around the world and as a result, having been approached by several record labels, has now been signed to RCA/SonyBMG.

Other artists are also finding novel ways of making their works available, for example, by using Creative Commons licences. These licences can be attached to all kinds of creative works and enable the creator to allow copying of her or his work, under specified terms. This form of copyright licensing has been hotly debated, but has also proved very popular, with tens of millions of works available on the internet, all of which are searchable as a specific category within search engines such as Google. Nevertheless, many are uneasy about the extent to which users are fully appraised of how – and whether – they can use such licences, and how enforceable is their use. It is interesting to note that in the Netherlands a court has upheld a Creative Commons licence applied to four photographs on a website, which were then published in a magazine without the permission of the owner (Creative Commons, 2006). This case also serves as a reminder that any limitations or restrictions that the creator wishes to put on their idea need to be fully understood by the consumer.

New business models mean new approaches, but ultimately, many creators will want the backing of a copyright regime to give them some sort of protection, whether they are seeking appropriate payment, or recognition from a company that wants to use one of their works.

At the same time, it is important not to forget that copyright seeks to reward creativity, not to stifle it. It does this by granting exclusive rights to the creator for a limited period of time, but what that period of monopoly should be is an area of heated debate. The period for copyright protection should be fair and proportionate and based on economic evidence: it should not disadvantage creators or the creative industries. At the same time it should not unreasonably prevent others from building on that creativity by re-using and adding value to works that become available. This is a difficult balance to maintain, requiring fine judgments, but it is important that it is done correctly.

Digital Rights Management

Having the ability to track and oversee the use of works is vitally important for any rights owner. Digital rights management (DRM) offers a way of managing those works. It enables content to be controlled while offering it in a variety of fresh and attractive ways. This is especially true of the internet, where legitimate downloads are becoming an increasingly important part of music distribution: earlier this year, the song 'Crazy' by Gnarls Barkley made pop history by becoming the first track to reach No. 1 in the charts purely on the basis of online sales.

At the same time, it is very important that consumers are aware of what they are buying, including the limits on the use they can make of their new acquisition. It is up to industry to work together to find solutions that do not alienate the very consumers they are seeking to attract. One aspect of those solutions, which is critical to both consumers and business, is to ensure the interoperability of new delivery systems as they are developed. Although there may be a role here for government to bring parties together and facilitate discussion, an imposed solution will not be the answer: it is for industry to work through any problems to find the necessary responses.

Patents

While copyright provides protection for some aspects of creativity – such as music, films and games software – patents are important in providing protection for industrial and scientific creativity. Unlike copyright protection, which arises automatically, patent protection requires an application and an examination process. But just like copyright, patents do not come with instructions for use. It is up to the rights owner to decide how to exploit a patent. That might be by producing the invention themselves or perhaps licensing others to produce it. Shire, the UK's third largest pharmaceutical company, recently reached agreement that effectively does both in a dispute over its patents with a US competitor: Shire will continue to sell its patented product, as well as receiving royalties for a generic version of the product produced by the US company.

Patents can also be used as a means of encouraging collaborative ventures to assist potential partners to build their businesses faster, as Microsoft is doing with its IP Ventures licensing program. Other companies and individuals choose a different business model altogether and actually make their inventions freely available, as IBM have done with some of their software patents. So IP provides the options and the rights owner then has to balance the different costs and rewards, and decide which route is most appropriate in any particular circumstances.

How to handle the IP generated by a research project funded by industry is another difficult issue. To help smooth this process, a range of stakeholders from government, industry, and higher education worked together to develop the Lambert Model Agreements Toolkit (Department of Trade and Industry 2005), which are designed for partnerships between business and universities. The Toolkit was launched in February 2005 and has been used successfully by a number of organisations, and even by businesses and universities experienced in negotiating contracts with one another. The Model Agreements have helped save time and money. Successful negotiations were recently concluded in just two days between GlaxoSmithKline and the University of Hertfordshire, which is a relative newcomer to this area. GlaxoSmithKline has put 27 agreements in place in the first year since the launch, and has found that the Agreements allow it to resolve any problems in negotiations to get a project in place, which has been particularly helpful where time constraints have been an issue.

The Agreements have also resulted in collaborations that might otherwise have been difficult to achieve. One of the underlying principles is that if the sponsor pays roughly the full economic cost of the project, it should receive in return a non-exclusive, royalty-free licence. This has proved attractive to at least some US-based sponsors, who believe this is more beneficial than the current system in the US in establishing true collaborations. It has allowed the University of Oxford to receive two significant six-figure grants from US pharmaceutical companies.

Large organisations are not the only ones to have benefited from this work. The component parts of the Toolkit are useful to SMEs too. For example, the Outline helps them identify what they need to think about; the Decision Guide helps them assess the relative importance of each issue, and the Model Agreements themselves show what the end result might look like. In particular, the plain language in which the Toolkit is written can improve understanding of the way collaborations work. In doing so it can reduce barriers to

working with others by removing the fear of being taken advantage of, and if legal advice is needed, it enables discussions to be more focused and effective because they start from a position of knowledge.

Finally, it is important to make sure that the patent system only supports genuine innovation. This includes ensuring that protection is given only to those inventions that warrant it – granting patents inappropriately is not helpful either to the owner, would-be users or competitors, as recognised by pharmaceutical companies in particular. An attack against a granted patent, if successful, can have a real effect on a company's share price. That is why the Patent Office is currently considering whether the level of inventive step (Patent Office, 2006) in the UK is appropriate; its consultation is now closed. This process of review is indicative of a willingness on the part of the Government to ensure appropriate measures are in place to support innovation. The recent patent dispute between Research in Motion (RIM), the maker of the BlackBerry email device, and the Network Time Protocol (NTP) in the US shows that what the system should favour above all is the innovative use of IP – and not allow it to become a defensive tool to prevent innovation.

IP databases

Another aspect of patents that has to some extent been neglected is the leveraging of patent databases as innovation tools. A recent report by the Council on Competitiveness, *Innovate America*, said:

“There is enormous potential to leverage intellectual property to uncover new intersections between invention and insight, and thereby, to turbo-charge innovation by more effectively using information that already exists in patent databases throughout the world. The database of patents represents a detailed record of the discovery process and a map of the rapidly evolving landscape of ideas across sectors and disciplines. But the database is not easily searchable. Providing improved search-ability on new patent applications will help. PTO [the US Patent and Trademark Office] should invest in optimizing the legacy database for searches on key patents and establish reciprocal rights to access and search foreign databases.’ (Council on Competitiveness 2006: 8)

This underlines the versatility and potential of patent databases: finding out what has already been done can prevent duplication of research effort; can identify solutions from one area that might be applicable in another; can help identify potential collaborators working in similar areas; and can identify where competitors are working. While patent databases are prime candidates for finding out such information, it should not be forgotten, that other IP databases, such as for trade marks, can also provide useful indications of activity. Recent reports that Apple Computers has applied for a trade mark for ‘Mobile Me’ have encouraged speculation that Apple is now finalising long expected plans to move into the mobile phones market itself.

Trade marks

The global knowledge economy is not just a UK or even an EU phenomenon. The world is increasingly interconnected, not just because better transport links enable physical connection, but because improved telecommunications give greater virtual connection and because the global reach of organisations influencing everyone's lives gives greater cultural connections. Offering appropriate goods and services is part of this picture, but businesses also need to develop brands that can be recognised outside their original locality, and that provide instant recognition and affinity to the customer. Trade marks provide a valuable means of doing just that. There are many companies, such as Virgin, Dyson and JCB whose trade marks are capable of spanning the globe. They give entrepreneurs the tools to ensure that their brands – and in some cases their likenesses – cannot be exploited by those they do not want to be associated with. In one high-profile case, the racing driver Eddie Irvine was successful in acting against a radio station which had – without his permission – manipulated his image, to show him carrying a radio advertising the radio station. In this case the flexibility within the IP system was mirrored by the ability of the courts in the UK to take account of the realities of public recognition of famous personalities, and to develop the law.

Designs

The UK has a deserved reputation for creating exciting product designs. Just think of the classic Mini, or the Dyson vacuum cleaner. Designs such as these may be protected by special design rights, which give product designers the freedom to produce creative designs with the security that their ideas and the time, effort and expense that have gone into creating them cannot simply be taken by their rivals for free.

The two types of design protection that are available – registered and unregistered – allow businesses to make the right choices about how to protect their designs in a way that is appropriate to the investment that has been made in them. Unregistered rights exist in designs as soon as the design has been created, in a similar way to copyright. They are convenient and have no costs associated with registration, but the scope of protection that they provide is more limited when compared to registered design rights. Registered designs are monopoly rights, which require an application process similar to that for a patent. A company is free to make the decision whether or not to pay a small fee to register a design – and thus acquire a right with added breadth and security – or to rely on the more limited, but initially more convenient, unregistered right.

It is up to the manufacturer how it makes this choice, and how it then chooses to use its design rights. A manufacturer of clothes, for example, where the industry is constantly producing new designs from one season to the next, may feel that it is not worthwhile to register all of its designs, but it will still have some protection if it later finds that one of its unregistered designs has been directly copied. So for good reasons, a manufacturer may choose not to register a design, but it still has the choice of pursuing those who seek to make direct copies.

Enforcement

An IP regime will only be effective if a society respects and values the creations of others. To back this up, the Government must have a rigorous enforcement and education strategy.

The National IP Crime Strategy (Patent Office, 2004), lead by the Patent Office, has brought together all enforcement bodies, relevant government departments and industry to tackle IP theft strategically. The objective is to produce a coherent package aimed at awareness, training, prevention and disruption. It includes improved training of enforcement officers, such as Trading Standards and the police, enforcement training for industry, and the development of an investigator's notebook. Collating accurate information is also a major priority: the second annual enforcement report has recently been published, with information from a wider range of stakeholders than last year. IP theft is not just a problem for the content industries and luxury brands, for example, but also impacts on a broad range of consumer products and other areas.

Other forms of information gathering are equally important, and have the potential to have a more immediate effect. The Patent Office has taken the lead in setting up an intelligence database to provide problem profiles, areas of threat and tactical assessments.

The IP Crime Strategy has had some early wins: a series of raids at the end of 2005 seized more than £1.5 million-worth of counterfeit goods at Wembley market in London. Regional IP crime groups are also being set up to further the sharing of information and encourage joint working between various agencies where appropriate. In Wales, for example, the regional group includes not just trading standards officers, but police and industry representatives. Although the strategy has had some notable early successes, it obviously has long-term aims, which the Government is committed to supporting.

Other efforts to tackle piracy

Activities around the Strategy are just one manifestation of that commitment from the Government. In recent years it has supported a number of legislative changes, such as stronger penalties for copyright crime (Great Britain, 2002) and new offences relevant to the most damaging online distribution of copyright material (Great Britain, 2003). In addition, from 1 April 2006 all asset recovery agencies have been able to recoup 50 per cent of the assets they recover under the Proceeds of Crime Act. This includes actions taken by the Trading Standards Service relating to the confiscation of pirated goods. The new Serious Organised Crime Agency includes piracy and counterfeiting within its remit, and it will continue to build on the successful relationships with the Patent Office, which it inherits from its predecessor organisations like the National Criminal Intelligence Service.

Piracy is not just a domestic issue: it is a growing international problem. The Patent Office plays an active role with international institutions such as the United Nations and Interpol to help transition countries vulnerable to criminals involved in IP crime. Under the UK's presidency last year, the G8 agreed a statement on 'Reducing IPR piracy and counterfeiting through more effective enforcement' (G8, 2005), with various steps for G8 countries to take to address the substantial global trade in pirated and counterfeit goods. The statement also promised a meeting of experts to lay out a work plan to implement these steps

and review progress under future G8 presidencies. Experts subsequently met and drafted proposals for five projects, presented as a joint UK/Russian paper, which have now been agreed. These projects will now be taken forward in cooperation with the G8 Lyon/Roma Anticrime and Terrorism Group, OECD, World Trade Organization, World Intellectual Property Organization and World Customs Organization, and will be reviewed at a further meeting of experts in October 2006.

As well as working through international organisations, the Patent Office directly assists many international partners to deal with problems in their own countries. Most recently it has been working with China, training police in the use of intelligence, and promoting the use of best practice – developed in the UK – to prevent and disrupt IP crime. Taken together with the changes that China has been working on internally, such as lowering the thresholds of the value of counterfeit goods for IP offences, and the increase in the number of criminal cases in its courts, it seems that China has been making progress. Recent news reports have highlighted successes in the Chinese courts for various high profile and international brands, such as Ferrero Rocher, Starbucks, Burberry and Louis Vuitton. Supporting partners to develop their own systems is an important aspect of improving the situation globally – and although progress is always difficult, and can be slow, it is equally important to recognise the improvements being made.

Education

Every consumer comes into contact with intellectual property all the time without thinking or even knowing it. A mobile phone, for example, has all types of IP associated with it: the technology may be protected by dozens of patents covering such things as the screen, keypad, and internal electronics; the appearance may be protected by designs; the name and logo of the manufacturer and perhaps the model identifier may be protected by trade marks; and the content on the webpage shown on the screen, or the content of the users' manual, may be protected by copyright. The same variety of IP is associated with hundreds of consumer products and yet few consumers are aware of the way they are literally surrounded by IP.

Raising awareness of consumers at large is an extremely difficult task, and has to be targeted appropriately. It is crucial that young people are educated about IP so they respect the time, energy and resources that have gone into their latest purchase. The Patent Office Think Kit takes young people through familiar products such as running shoes and the TV programme Pop Idol and identifies where patents, designs, trade marks and copyright are applied to products they can readily identify with. It also included a competition focused on the commercial value of IPR under the generic heading of 'music' and provided entrants with the opportunity to design a CD cover for a band and to provide a business model to promote a new band. The format has proved both relevant and popular: the Think Kit has already been requested by over 80 per cent of secondary schools. The Patent Office is now working with the Department of Education and Skills as well as stakeholders from industry to adapt the material for appropriate use at university and college level as well as simplifying it for a primary school audience.

That particular project was originally aimed at 14- to 16-year-old design and technology and business studies students, and is now being developed to appeal to a wider audience. It is a good example of how IP wherever possible should be embedded within the educational framework – not by creating an extra burden for teachers, but through an integrated strategy that is complementary, not additional to, the curriculum. Following on from the recommendations of the Education and Communications Group of the Creative Industries Intellectual Property Forum, the Government is working with a wide range of stakeholders to ensure that its principles for fairness and shared understanding in IP, the CREATE principles, are disseminated widely in education and broadened to recognise the ubiquity of IP across all industry sectors.

While educating young consumers – and the innovators of tomorrow – to recognise and respect IP is of prime importance, it is equally necessary to ensure that businesses themselves – particularly SMEs that may not have the resources to investigate or appreciate IP matters – are equally informed. After all, their livelihoods may depend on the choices they make about protecting their innovations. After a recent ruling by the European Court of Justice, Elizabeth Emmanuel, the designer of the wedding dress for Diana, Princess of Wales, may no longer be able to use her name as a trade mark, because it was legally assigned by her to another company – and therefore became that company's property to use or sell on to others as it wishes. This illustrates the need for business to appreciate both IP and the longer term consequences of decisions made about it.

Over the last couple of years the Patent Office has successfully joined forces with numerous stakeholders in order to raise the level of IP awareness among SMEs. This has included collaborations with IP professionals on the 'What is the key?' programme, joining forces with HM Revenue and Customs for the free Business Advice Open Days and working within government to train business advisors, and ensure business advice is able to guide enquirers appropriately on IP issues. The Patent Office and its partners will continue to build on these successes to develop future programmes.

Flexibility within the system

Flexibility within the IP system is important – and it applies to those with responsibility for the system too. The Patent Office recognises the need to meet the challenges presented to it by increasing globalisation and technological advances, and is now developing a new business model: 'A Patent Office for the 21st Century'. This will enable it to ensure that activities relevant to the changing environment are properly focused and resourced. The model includes: raising business awareness and understanding of IP; improving the enforcement environment; and creating a policy framework fit for the increasingly global challenges of the 21st century.

The flexibilities in the system are a good thing, but should not be confused with uncertainty as to what can or cannot be protected. Businesses and consumers need to be sure about what they can and cannot lawfully do. This has to be contrasted with the current consumer confusion over the copying of their own CDs onto their PCs or MP3 players. Advances in technology need not always be seen as threats. The economy has always benefited from new technologies – look at trains, audio tapes, and VHS – that were initially seen as a cataclysmic threat to the old world order.

Gowers Review of Intellectual Property

The IP system offers us a way of exploiting our creativity and our ideas, but it can only do so if it is in good shape itself. That is why the Government has commissioned a review (HM Treasury, 2006), to check that the IP regime is appropriate for the digital knowledge-based economy of the 21st century. This is not about a wholesale re-writing of IP law. The Government believes the balance between consumers and inventors is broadly right, but that improvements can be made, and the UK regime, it must be remembered, is part of an international framework.

The review, led by Andrew Gowers, is not about increasing or reducing IP protection, but about enabling innovation. It is about reducing the costs of getting, transacting and protecting intellectual capital – both domestically and for UK firms operating abroad. This government wants to ensure that we consolidate the UK's comparative advantage as a place for patent-intensive and creative industries. It is hoped that the review will help the Government achieve its objectives for the IP system more effectively amidst the challenges of technological change and globalisation. In particular, the Government has asked Andrew Gowers to look at four specific issues:

- The way in which government administers the awarding of IP and support to consumers through operations and policy
- How well businesses are able to negotiate the complexity and expense of the copyright and patent system, including copyright and patent licensing arrangements, litigation and enforcement
- Whether the current 50-year term of copyright protection on sound recordings and performers' rights is appropriate
- Whether the current technical and legal infringement framework reflects the digital environment, and whether provisions for fair use by citizens are reasonable.

Conclusion

Rather than arguing 'all or nothing', 'black or white', we need a more sophisticated debate about IP that recognises the complexity of the system. It is not the Government's job to dictate to creators how to exploit the protection they have, but to ensure that they have the opportunity to do so in a way that helps and encourages them to continue to be innovative. We need to have a real conversation about how we ensure that the UK – with our strengths in ideas and creativity – provides a robust IP system that allows us to

flourish in the global knowledge economy. The Gowers Review will help ensure that we have such a system as we move forward, with any changes supported by robust economic data.

In the new global economy, innovation has a central role to play in economic success, and we need to make certain that we have a system of intellectual property rights that is fit for the 21st century.

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