



Independent Review of IP and Growth

- response from BT

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Introduction

BT is a significant originator of IP, with an inevitable interest in protecting this asset to safeguard its commercial interests. BT is also a heavy user of third party IP. BT supports a balanced IP system that provides appropriate reward for investment in innovation but does not excessively inhibit commercial freedom, damage the general economic interest, or interfere with the legitimate interests of consumers. We believe that the UK IP system is generally well balanced. We comment below on key issues in patents, copyright, enforcement and competition.

1. Patents

BT believes that the UK patent system works well. But it must be a high quality system. The examination of applications must be reliable and rigorous. This is in the interests of all users of the system, large and small.

(a) UK IPO should be in step with the EPO.

The uncertainty over UK Intellectual Property Office practice on patentability of computer implemented inventions and inventions rejected as mental acts is undesirable. Innovation in telecoms is increasingly implemented through software-based technologies. The ability to protect heavy investment in this innovation is of vital importance. Patent law and practice should accommodate advances in this field, just as has happened in other areas of technology. Much political debate on the patentability of computer-implemented inventions is ill-informed and based on myth. The UKIPO should abandon its more restrictive approach to the interpretation of Article 52(2) EPC and take more heed of decisions of the EPO Boards of Appeal.

(b) Deploy patent fee income to promote innovation

Overseas patent filing practices mean many patents are more cost effectively obtained through the EPO rather than the UK Intellectual Property Office. We support the use of renewal fees from commercially successful patents to subsidise early patent costs as a sensible approach that is attractive to all users of the system, particularly SMEs. Greater transparency of the UKIPO accounts will give users confidence that fee income is being properly deployed to promote innovation.

(c) Cull dubious patents by rigorous searching and examination

Dubious patents can hinder the development of competing products and damage the interest of all companies large and small. We support efforts by patent offices to improve their examination of patent applications, to ensure a strong system that precludes users from obtaining patents of dubious validity.

(d) Eschew utility models (“petty patents”)

Low quality utility models would undermine efforts to ensure a strong patent system. Any sort of second tier patent would simply introduce further complexity and unquantifiable exposure to risk from a flood of poor quality rights that would hinder innovation rather than promote it. We believe SMEs would find the consequential costs hardest to bear.

(e) Avoid ill considered action over unexploited inventions

Electronics, telecommunications, and computing are characterised by incremental invention and overlapping patents. A number of patents, nearing the end of their term, cover inventions that are only just becoming commercially valuable. These patents have not

prevented others from undertaking research and development in similar areas. Unless a patent is protecting an existing or future market, it is not in the patentee's interest to prevent all commercial activity within the patent's scope. Compulsory licensing provisions exist in the UK as a means to "unlock" patents.

2. Copyright

All players, large and small, must be able to innovate and be rewarded for doing so. But rights must be proportionate. There is no rational basis for placing greater weight on the rights given to the creative industries producing digital content than industries investing in innovative infrastructures, agile devices and new services.

Care must be taken in formulating new powers since it is clear that rather than being used to support genuinely useful innovation, rights could also be used to support aggressive or abusive behaviours such as those of so-called 'copyright trolls'.

In addition, care is needed to avoid creating a marked imbalance in the system as a result of both increasing copyright terms and stronger enforcement.

Innovation and growth would also be promoted by facilitating more timely licensing and by addressing the exercise of rights in ways which are likely to consistently incentivise static competition (by incumbent rights-holders), compared with dynamic competition (arising from other sources). The former is characteristically focused on maintaining the status quo, whereas the latter is characterised by development of new business models seeking to exploit developments in technology and consumer behaviour which are not confined to "copyright" activities as such.

(a) Improve the licensing system

BT would support any initiative that facilitates more timely and effective procurement of licences to use copyright material. Equally, we should not allow the collecting societies to establish disproportionate power that could be abused. A smooth running and cost effective content licensing system will allow many small players to enter the market.

(b) Do not burden ISPs with policing copyright infringement

The investment of ISPs in infrastructure and innovation, in their principal role as delivery conduit for material, is one of the principal growth drivers in today's economy. ISPs cannot afford the costly burden and distraction of policing myriad allegations of copyright infringement. Furthermore, their actions must always be consistent with respect for customer confidentiality, privacy, and internet users' freedom of expression. The hasty creation of a regulatory regime to attempt to assuage one part of the economy can only have deleterious effect on the UK's competitiveness. Our experience of the Digital Economy Act 2010 has borne this out since the development of new business models has been hampered by the Act itself and by uncertainty about its compatibility with EU law.

(c) Avoid precipitous action on fair use

Arguments over fair use/ fair dealing issues over many years have been detailed and protracted. BT does not think we should upset the delicate balance by making substantial changes in these areas. Copyright covers much more than just artistic, musical and literary content and changes to the fair dealing regime could have wide impact beyond the entertainment industry. The pragmatic regime in the UK seems to work reasonably well.

(d) No Levies

BT opposes any move to a levies regime. User costs would outweigh user benefits. Experience from other EU Member States indicates the increase in the price of the services and devices could be very significant. This will clearly constrain market development. The administration of levies is characterised by arbitrary decisions regarding the level of payment and distribution of revenues. This will also have market distorting effects.

(e) Resetting the balance

In recent years there have been demands to increase the length of copyrights and for stronger enforcement. The cumulative effect may have shifted the balance of the IP system in a way that is less conducive to innovation and growth than in the past.

3. Enforcement

Rapid changes in technology open up new possibilities for service and product provision, IP rights must not unwittingly act as a barrier to entrepreneurial development of innovative services. Competition authorities should be taking a rigorous look at analysing barriers to new entry and potentially abusive behaviour by major rights-holders. The internet with its low cost, ease of innovating and dynamic communication with potential customers provides many opportunities. Excessively stringent enforcement of IP rights can stifle developments and their exploitation. Policy makers should also be aware of the dangers of rights being used for business models which have nothing to do with creativity, innovation or growth.

(a) Reduce legal costs generally

BT considers the cost of IP enforcement in the UK to be excessive by international standards. However, we view this problem as systemic relating to the costs of securing legal redress in the UK generally. It is not peculiar to IP and, in our view, cannot be resolved simply by tinkering with the IP framework in the UK.

(b) Do not criminalise patent infringement

The IP framework in the UK already provides a wide range of effective sanctions for IP infringement. BT is a large holder of IP rights and supports appropriate and proportionate remedies. But we urge caution in excessive demands for criminal penalties. The threat of criminal proceedings impacts on businesses of all sizes but has a disproportionately large effect on small businesses and individual start-ups. Criminalisation of ordinary citizens in the domestic context puts at risk the dynamic impact of the Internet as an engine of growth. We oppose any proposals for criminal penalties for patent infringement. Criminalisation of ordinary technicians in the lab or software developers in small enterprises will simply stifle innovation without providing significant benefits to the IP owner. The detailed technical arguments associated with patent infringement, their huge reliance on expert evidence and arguments over invalidity and entitlement are not suited to the forum of the criminal trial.

(c) Deter copyright troll activities

The activities of certain law firms in relation to copyright infringement have raised considerable disquiet. Their use of speculative invoicing demonstrates that copyright enforcement is not always exercised in a proportionate way. The value of judicial due process when infringement claims are made has been highlighted, since recent cases have called into question their approach. We hope civil procedures can be tightened to prevent these abuses.

4. Competition

The policy goals of IP and competition law as expressed in the call for evidence indicate a tension between the two. In theory the goals are aligned to the extent that both systems aim to promote consumer and economic welfare. Achieving this in practice can only be successful though if policy makers focus on the way rights are exercised - whether in terms of the duration of rights or in the exercise terms applied. These should always be proportionate and therefore appropriate checks and balances are required between the IP and competition frameworks.

Competition authorities should be alive to barriers to new entry and potentially abusive behaviour by established rights holders. This has been a significant issue in the premium pay TV market which has come under scrutiny by Ofcom and the Competition Commission. Hoarding of rights by incumbent right-holder companies and their power to make the grant of licences conditional on securing other benefits (tying behaviour) can significantly impede and distort market growth and development opportunities for non-incumbents.

BT

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