

Gowers Review of Intellectual Property

CBI Response

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Introduction

The CBI welcomes the Gowers' review of intellectual property (IP) in the UK as a potentially major contribution to ensuring UK institutions are able to adapt to a networked, knowledge economy and keep the UK in a lead position in international IP markets. Intellectual property is a major component of modern economic growth, productivity and competitiveness. As the overall representative organisation of British business, the CBI appreciates the opportunity to respond to the strategic issues raised by the Review, as well as some of the particular questions posed in the Review document.

Economic prosperity in modern economies depends upon creative industries - broadly defined to include all businesses with a heavy reliance on patents, copyrights, design, trade secrets and trademarks - and the distribution of their outputs on a broad variety of electronic platforms. As the knowledge economy becomes the main driver for growth and employment, it will be the ability to securely leverage intangible IP assets onto emerging broadband platforms that will determine economic success and the international competitiveness of UK companies. Competition from lower cost overseas rivals can only be successfully met through the creation and diffusion of new, higher value goods and services incorporating significant amounts of IP that enable businesses to develop closer, interactive and more customised engagement with their online customers.

As a creative, networked hub, the UK is well-placed globally, with one of the highest levels of broadband availability in the world. But emerging economies are showing increasing interest in creative industries and the networked distribution of their own assets to build value-added services.

The current system for IP protection and promotion in the UK is in general very good. Over time, it has incorporated many checks and balances for balancing the relationship between owners of IP, their competitors, consumers and the wider public interest. We don't believe that it is necessary at this time to consider any a shift in the current balance of UK IP law or further harmonization of EU law. A move in either direction carries the danger of suffering from the law of unintended consequences. But we do believe there are a number of practical ways in which the Government can encourage UK businesses to use IP more broadly, in particular through developing a more coordinated and strategic framework within government overall, in awareness and education programmes and in providing incentives for the use of IP amongst smaller UK businesses.

As a matter of principle it is essential that the UK Government supports continued improvement in the quality of patents granted in Europe and worldwide; the efficiency of obtaining and enforcing patents; remedies for copyright and trademark infringement; and the promotion and protection of IP. The CBI would be pleased to provide any further information the Gowers Review may request.

Intellectual property and the knowledge economy

IP grants ownership that, in turn, creates value. Intellectual property has always been central to UK economic and commercial performance. But its value relative to other factors of production and exchange is increasing exponentially with the growth of the knowledge economy. In a knowledge economy, the way in which IP rights are administered - technologically and institutionally - determines the efficiency and efficacy of the electronic value chains that increasingly lie at the heart of firms' competitiveness.¹ The correlation between the overall effectiveness of a country's IP regime and its success as a global producer of high-value goods and services is growing.

The UK is well endowed with IP assets and well placed internationally to take advantage of the growth of the knowledge economy. Traditional patenting, copyright, use of trade secret and design are strong, creating and underpinning solid global trademarks in manufacturing, pharmaceuticals, retailing and services. But major challenges exist. The prime challenge is how to leverage the UK's existing IP assets suppliers in domestic and international markets as manufacturing, retailing, services and entertainment sectors develop online engagement with suppliers, distributors and customers within a networked environment. Globalisation also means that, however good the UK system, international arrangements and those in place in other countries are increasingly important for UK companies' export and investment decisions.

Supports for UK IP in the networked economy – patents, copyright and trademarks

Different sectors of the UK economy have always relied upon different forms of intellectual property in order to remain competitive. Different companies and individuals also use different 'mixes' of IP rights - patents, copyrights, trademarks, trade secrets protection and other types of IP protection - as their business needs dictate. The particular forms of support and their combinations are sometimes mutating for firms with the growth of the networked, knowledge economy.

While the policy considerations for different types of IP are usually quite distinct, different IP rights are often inter-linked to one degree or another for companies in different sectors. Patents have traditionally been an essential underpinning of manufacturing, and are becoming even more so in value-adding manufacturing and services' research and development. Copyright remains critical for the protection of UK entertainment and information works, though in the new media industries the use of patents to protect the software underlying much of the work is growing in importance. Good patenting and copyrights in turn underpin strong trademarks, the protection of which is the essence of successful branding and global business leadership.

The use of the Internet by UK firms to add value to processes and services through integrating IT systems within and between companies for product planning, research and development, marketing and delivery, and after sales services takes this inter-linkage a stage further. The Internet has a number of inter-linked but autonomously developing "layers" of technology standards that determine how different network, service, and content functions work and inter-operate.

The inter-linked structure of the Internet lies at the heart of the value-adding process,

¹ See e-Value Matters – Transforming Business Online, CBI: London, 2003; Reality Bites – the second annual report on e-business in the UK, CBI: London, 2002.

reducing the costs of both reproduction and distribution of IP: this complicates the management of IP as a discrete entity but at the same time raises its value through increasing market reach. A comprehensive and strategically coherent IP regime for patents, copyrights, designs and trademarks can thus play a vital role in the smooth functioning of complex supply chains, as it allows firms to participate in the knowledge that their property will be secure. While legal modifications have or are being introduced in the UK and EU to deal with these issues, the evolution of institutional frameworks for handling them is slower. The Gowers Review is a welcome opening engagement with the issues involved.

In the longer term, Government needs a better understanding of the role that IP plays within the economy and in relation to the development of domestic and international markets, as well as the policies needed to support the leveraging of the UK's IP assets within an online environment. The CBI believes that IP has not been given the prominence in Government that it needs, given its importance for the future of the UK economy. This has both political and budgetary implications. The Patent Office does a good job but should be encouraged to do more and Lord Sainsbury as the Minister for Science & Innovation which includes IP has been notable in his enthusiasm for this issue. However, IP is too important an issue to be just one of a number of responsibilities for a Minister. We would like to see a dedicated IP Minister responsible for IP and the co-ordination of policy discussion and action around Government, including an evangelist role to talk to UK and international audiences about the importance of IP. We would like to explore in greater depth with the Review team the exact budgetary and policy responsibilities, and departmental supports, for ensuring the optimum effectiveness of such a Minister.

Promoting innovation and entrepreneurship

A good IP system in terms of cost efficiency, quality and legal certainty is a necessary condition for an environment conducive to innovation, as IP provides the legal framework for an entrepreneur who decides to market an invention. This is particularly important for SMEs, given that within a networked digital economy, the relations *between* firms can be as much if not more important in determining a country's economic success as conditions at a purely company level. There are a number of dimensions in which the IP regime can make a strategic contribution to a country's innovative and entrepreneurial environment and that the Gowers Review needs to take account of in the UK.

Market entry and sustainability for small and medium-sized enterprises (SMEs)

IP can assist SMEs in many aspects of their business development and competitive strategy: from protection of their inventions and product development to product design, from service delivery to marketing, and from raising financial resources (ex: venture capital) to exporting or expanding their business abroad through licensing or franchising.

The fee structure of the Patent Office does provide some accessibility benefits to small and medium-sized enterprises SMEs. A particular advantage is that filing a UK Patent Application allows a relatively high-quality and low-cost search report to be issued by the UK Patent Office relatively rapidly - application, search and examination fees are currently subsidised by renewal income. However, by their very nature - the need to provide a full technical description of how to implement an invention together with a carefully determined claim to monopoly rights - patents are more expensive to obtain

than other forms of intellectual property. So accessibility by individuals or SMEs to the patent system continues to be an issue. Further dialogue is needed on how to make the patent system more accessible to SMEs, including the possibility of the Government providing incentives by using the tax system to help cover the broader costs associated with applying for a patent, including legal fees.

SMEs encounter a wide range of other difficulties in access to the IP:

- Knowledge about the importance of IP to their business;
- Appropriate expert advice on IP solutions suited to their needs;
- Too complex and costly procedures to protect their IP

It must be noted, for example, that patents granted by the European Patent Office are roughly three times more expensive than in Japan and even five times more costly than in the US. For a European patent, translation costs account for about one third of its total cost. Translation costs for European patents could be greatly reduced if the 'London Agreement' were ratified. This would enable a patent to be granted anywhere in the EU on the basis of an application filed in one of the official EPO languages (English, French or German). We urge the Government to do all it can to push for this agreement to be ratified.

Market support and dynamics

Like any other owners, creators and creative businesses rely on basic legal measures to protect their ownership title. The value and continued growth of the UK's creative industries are dependent on copyright. The copyright system, with its lack of statutory registration requirements, imposes no barriers of entry for creators, however large or small, as anyone can create a copyright and enjoy automatic ownership rights for their creative work. Now that illegal forms of distribution on the Internet have been successfully challenged, market competition is providing a strong basis for the development of online offerings of music and audiovisual entertainment, with multiple forms of provision being tried by the world's leading entertainment media companies.

Digital rights management (DRM)

With key measures of liability, criminal sanction and the protection of technical applications in place, it is possible to construct a range of services. Recent technological developments are, however, revealing some gaps in effective enforcement measures within the networked environment. In particular, a variety of DRM applications need to be deployed to ensure that the consumer gets what they pay for and, that they pay for what they get. Copyright legislation must provide clear and comprehensive ownership rights as well as effective liability and enforcement provisions, including technical measures to support DRM applications. Digital rights management is the way of moving beyond yesterday's one-size-fits-all, unlimited usage option for music, film and published material, and allowing a wide variety of authorised usage options never before available to consumers, at different price points set by the market depending on the usage options offered.

DRMs, like other technological developments, should be left to the market to develop, to experiment with different options and to see what the public will buy. It is essential the Government does not look to pick winners by mandating one particular DRM technology over another. Any Government mandated solution carries the danger that it will quickly

become out-dated and therefore deprive consumers of new features and functionality. If done properly, content licensing systems can be cost effective and complementary to DRMs, through allowing many small players to enter the market at tariffs levels that maximise usage and generate a return to the rights' holders.

The threat of impairing consumers digital content legal rights is thus somewhat illusory, given how much copyrighted material has been made available in different forms and formats in the 12 years since the adoption of the WIPO Copyright Treaties.² Most if not all of the concerns raised about DRM, which often seem overlaid, can be solved by ensuring that consumers are fully informed about the scope of their rights when they buy. It is equally important to recognise that the consumer has a lot of choice when buying.

It is also important to note that interoperability is relatively greater in the networked knowledge economy than the physical world of 20 years or so ago. A guarantee of full interoperability has never proved necessary for a wide range of music and video to be digitised and made available in various formats. Ultimately, consumer demand will dictate how these issues are addressed, and for this to occur, the industry must be allowed to develop market driven solutions and industry led international standards.

Valuation in a digital era - a missing link?

The importance of proper and appropriate valuation of IP assets in a networked knowledge economy is underlined by three problematic issues: unexploited software, open source software and the sharing the proceeds of business-academic links, and copyright term. In each of these areas valuations are complicated by proposals or conditions that fail to take into account market realities. If the value of the UK's IP assets are to be maintained and leveraged onto online platforms, the government needs to ensure that it retains competitiveness as the prime consideration in determining policy options in these areas, and not more tenuous concepts of national interest.

Unexploited technology

Government regulation, lack of sufficient funds, undeveloped markets, etc. often provide the greatest disincentives to exploitation than do patents. Patents on unexploited technology do not represent an important barrier to market entry and do not significantly inhibit research and development. After all, unless a patent is protecting an existing or future market (possibly of an alternative product) it is unlikely to be 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 on un-commercialised inventions.

In addition, the following specific institutional improvements could be made:

- Contracting States to the European Patent Convention ratifying the London Agreement so that companies, including SMEs, can benefit from the subsequent reduction in translations costs as mentioned earlier;³

² WIPO Copyright Treaty, http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; WIPO Performances and Phonograms Treaty, http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf.

³ The [London Agreement](#) is an agreement on the application of [Art. 65 of the European Patent Convention](#) designed to decrease translation costs and make European patents more competitive. Signatory states declare to dispense with translation requirements on a large scale. It will only enter into force after

- The EU institutions adopting a Community Patent that meets users' needs in terms of quality, affordability. In terms of cost and legal certainty, having applications for the Community Patent filed in one of the official EPO languages (English, French or German) and the claims translated into all three post-grant – as originally proposed by the Commission. (The Common Political Approach which has been agreed is completely inadequate.).

Open source and communities of interest

The Review Issues paper raises the question of open source code, one of the most significant developments within the knowledge economy. But it is useful to understand that the issue is in fact a wider one of the growth of business practices based upon or related to open source models.

The practice of giving away something for virtually 'free' is becoming an increasingly common business practice with companies looking to sell their ability to service this product and sell other products on the back of the original 'free' product. But it is important to keep in mind *how* open source type products and innovation can fit into the wider IP infrastructure and can be used by businesses making products that depend on IP protection. Some open source licenses cannot be used if a company wishes to take an innovation protected under one of these licenses and add on to it to create an IP protected product to take to market. And it is also questionable whether open source development is viable outside the software sector. In this context, it is the industry rather than government that is best placed to work out the best licensing agreements for enabling this interaction to take place most effectively.

This is particularly important in regard to the sharing of the proceeds of business-academic links. The private sector will only be able to invest in joint R&D projects with universities if the licensing of software products is subsequently done on a commercially-viable basis.

Copyright terms

Another issue is the currently large disparity between the copyright term given to sound recordings in the UK when compared with other major territories, notably the USA. This should be equalised to give performers and record companies equivalent copyright protection to that enjoyed by other creators – composers, authors, directors, visual artists and photographers. The shorter copyright term in the UK directly impacts the asset value of recordings, record companies, musicians' pension funds and the music industry itself. Even for new releases, the differential has a negative impact in terms of capital valuation. For independent and major record companies that have built up a catalogue over many years, the effect on the value of the companies in the UK is significant.

Over time, the disparity will affect UK competitiveness. At the moment, the UK has a vibrant music industry. However, the shorter copyright term makes the UK less favourable as a location for operations and recording, as a result of both the lower A&R (Artists & Repertoire, the music industry equivalent of R&D) investment from

ratification by eight Contracting States, including the United Kingdom, France and Germany. See http://www.european-patent-office.org/news/info/2001_12_07_e.htm

catalogue revenues and the shorter copyright term afforded to artists in the UK. Typically, record companies invest around 18% – 20% of turnover in A&R. A reduction in revenue from catalogue recordings would produce a significant reduction in the revenue available for A&R for new artists.

With tracks in copyright in one major territory and out of copyright in another, piracy will be more difficult to control and police, undermining valuations. Online, the piracy effect will be even greater as grey imports further erode the revenues of the creators of the sound recordings. Large amounts of popular recordings for which there is a small ongoing demand, the so-called 'long tail', are unlikely to be made available if no copyright exists to make a small return for the investment in digitisation, distribution, and maintenance of masters and marketing. Old recordings that have never been released are also unlikely to be made available if they have no copyright.

Administration, enforcement and promotion

Within the knowledge economy, there is generally no coherent reason for distinguishing between physical and Internet copyright infringement. Online infringement can be every bit as serious for UK economic interests as the worst physical piracy cases, given the low cost of reproducing and distributing content. Civil and criminal sanctions for copyright and trademark infringements should be the same for physical and online activities.

In defending patents, however, criminal sanctions are unhelpful, though they warrant the full range of civil remedies. But reasonable, good faith business judgements as to the validity or possible infringement of particular patents are necessary in many cases when developing a new product or service. If product development is not to be overly inhibited, any challenges need to be open to negotiation between the parties involved.

Domestic

Government and Patents: The record of the UK Patent Office as regards consultation on IP matters has, with one or two exceptions, been very good and the UK Office is one of the best in the world in this respect. In particular, it has a good record in consultation on policy issues under UK control. However, its record in consultation with UK stakeholders is less good when it is representing the UK position in international negotiations, where consultation is very important. There could also be more consultation on matters of practice and implementation when policy has been agreed. The Office could also do considerably more to ensure that the staff involved with policy work become fully aware of the ways in which companies use patents and are affected by it, and are able to assess the economic impact of proposed changes.

Policy regarding the funding of the Patent Office, and the costs of registration activities for the different fields of patents, trade marks and designs, needs to be more clearly set out by government. The Patent Office should break even, one year with another, on its fee income and no significant transfers of resources should occur between the different registration fields. Transparency in the accounts of the UK Patent Office is essential.

The fee structures for registered rights should not be relatively loaded in favour of pre-grant fees, with the bulk of income derived from progressively increasing renewal fees. In this way, successful innovations pay for the system. Proposals to substantially increase the pre-grant fees and to lower renewal fees would negatively impact on small enterprises, though all innovative companies would suffer an additional, unnecessary, strains.

Improving copyright enforcement: Several specific changes to IP procedures and remedies in the UK would improve copyright enforcement markedly:

Workable presumptions as to copyright ownership and validity. Detailed and expensive proof of basic and obvious matters is sometimes still required in civil copyright cases, despite the presumptions on the statute books. These presumptions need improvement, and should also be available in criminal cases.

Hearsay evidence. Although hearsay evidence of an investigating policeman is adequate to get a search order in a criminal case, this is not allowed as the basis for securing civil search orders, which dissuades individuals from reporting piracy violations if they may be subjected to reprisal or professional damage for doing so.

Sampling as means of proof. Particularly in large-scale internet or counterfeiting actions, reasonable presumptions about the scale of infringement should be available on the basis of statistically valid samples of discs or files distributed.

Claim of licence. Apparent infringers who claim that their activities were licensed should be required to produce and serve on the intellectual-property right owner a copy of any purported licence in order to be able to raise such a defence in enforcement proceedings.

Damages. Damage awards must deter infringement, according to the WTO TRIPS Agreement. Infringers should not be able to keep any profits from infringement, nor to pay any less in compensation than they would have paid if they had purchased or licensed the material legitimately. Current damages rules – including the rarely-used additional-damages provision – can result in affirmative incentives to infringe, if damages awards do not meet these thresholds. Pre-determined damages or other similar mechanisms should be considered as a civil copyright remedy.

Supervising solicitors. The requirement that not only solicitors and barristers but also *supervising solicitors* be present at civil searches puts the cost of such procedures beyond reach for many, particularly small, rights owners. This is an unnecessary duplication of roles and costs, given that any lawyer involved already has a duty of care as an officer of the court, and should be eliminated. Alternatively, another less expensive option – such as the use of bailiffs – needs to be developed.

Governance: The Government's copyright policy making has been in a state of malaise for the past few years. It is handled as a subset of patents by officials who are remote from the copyright industries, with little ministerial input. The Patent Office has even recently dispensed with the post of Director of Copyright and downgraded the role. Yet copyright generates over 8% of GDP. The Government needs a better understanding of the dynamics of the copyright system and how it is driving value added and growth in the economy. Only then can the UK ensure that it can remain a global creative hub. The UK should follow the lead of the USA and take a pro-active approach to copyright as this becomes a key factor in international competitiveness and global success. Copyright must be given greater prominence within the Patent Office, with a dedicated Copyright Office created within its structure. As discussed, this should be overseen by a dedicated Minister for IP who can co-ordinate the political response and policy work across government and with ongoing strong links within the DTI.

There is also a general need for properly funded independent research into IP issues. This would be the best way to produce evidence when considering the desirability of any change. The Treasury and/or ONS should monitor the value added, growth, employment and export revenues of the IP sectors and provide the new cross-departmental organisation with an annual economic analysis of values generated in order for it to identify the drivers of growth, anticipate any trends and inform fiscal policy and legislative changes.

Public Awareness: Creativity and intellectual property should be basic tools for young people as they prepare their place in the world. Producing creative work and understanding how it is owned should therefore be a core part of the curriculum from Key Stage 1 right through to Higher Education. Perhaps the easiest way for children to learn this concept of ownership is for them to apply it to their own creative work. Schoolchildren should put copyright notices on their school work, from pictures to short stories, poems to essays. This would have consequent benefits of engendering pride in their work, respect for the work of others and a clear message that a plagiarised essay should not be passed off as their own work.

Many people in responsible positions are also not literate with IP in a networked knowledge economy. Every degree and diploma level course concerned with technology, commerce and law, and other subjects such as media studies and English, should contain an IP module where the basic principles behind the grant of rights in the various IP fields are covered. The Patent Office's IP awareness campaign is exemplary in this regard, and we urge the government to continue to provide funds to allow this to continue.

Promoting growth: Public sector bodies from the BBC to the British Library are increasingly becoming a part of the creative sector with a consequential impact on the commercial environment and the ability for creators to be paid. In the physical world, public spaces are clearly delineated and different rules can apply to libraries and schools. In the online world, it is no longer possible to maintain that geographical segregation. The public and private sectors intermingle and consumers are less clear whether they are in a commercial or a subsidised space. Government should ensure that, as a condition of public funding, public sector bodies, play a distinctive role in relation to the private sector in promoting the growth of online intellectual property assets, acting as a resource for rather than a competitor to the private sector.

EU

European harmonization on many substantive IP issues has been achieved after years of painstaking negotiation, covering not only copyright and neighbouring rights, trademarks and registered designs, but also patents. Substantive law throughout Europe has been heavily influenced by the European Patent Convention, of which all EU states are members, and by adjustment of national patent laws agreed at the time of the 1975 conference on the Community patent. The CBI does not believe that the time is right for any further attempts to harmonise EU IP law, but we do believe that some practices can be reformed. For example, greater alignment of UK Patent Office (UKPO) practice with that of the European Patent Office (EPO) is needed on issues such as inventions rejected as mental acts.

Within Europe, the principal barrier to efficient enforcement is the lack of a truly unitary patent court system or a common patent court of appeal between EU member states. In some matters this has produced inconsistent judgements as to the validity or infringement of EPO-granted patents in different EU member states' courts. Discussion of the proposal for the European Patent Litigation Agreement⁴ to implement a unitary European patent court and appeal system, should be progressed.

The average cost of a European patent ranges from between 30,000 and 50,000 Euros, compared to approximately 10,000 Euros for a US patent and 20,000 Euros for a Japanese patent, according to the European Commission's figures.⁵ Translations of patents into each country's national language account for the biggest part of European patent costs. These could be greatly reduced if the so-called 'London Agreement'⁶ were ratified.

An additional problem is in the governance of the EPO, in that a number of national representatives (though by no means all) on the EPO Administrative Council are heads of national patent offices. This is the case for the UK and makes difficult decisions that may have an adverse effect on their own organizations, such as can arise when contributions are set for the running of the EPO. It is essential for the UK Patent Office to participate in the UK delegation to the Council and to lead delegations to some EPO committees, to supply necessary expertise and to contribute to cooperative projects. But it would be better if the delegation was led by someone less directly involved (though properly familiar with those matters that go before the Council), who could discuss EPO affairs with representatives of UK users.

Global

Significant achievements in creating the framework that can effectively protect IP have also occurred at the international level in WIPO⁷ and the WTO.⁸ But some outstanding issues need careful attention. The ongoing debate at WIPO illustrates the difficulties of forging a consensus on this key issue for business.

⁴ http://www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf

⁵ <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/00/714&format=HTML&aged=1&language=EN&guiLanguage=fr>

⁶ http://www.european-patent-office.org/news/info/2001_12_07_e.htm.

⁷ World Intellectual Property Organisation

⁸ World Trade Organisation

The idea of a grace period for patents needs particular vigilance, as it could inhibit development work as companies wait to find out whether what appears to be a public disclosure will actually be the subject of a patent. The UK, along with the rest of the EU, currently has no grace period for filing of a patent application after making a public disclosure, unlike the US (which has a one year grace period). It may be worth considering changing this position as part of a comprehensive international reform of patent law in the major economies, provided that this included the adoption by the US of a "first inventor to file" system as opposed to their current "first to invent" system - the difference between US and EU practice being a further contribution to the cost burden to UK industry in seeking to protect and use its intellectual property. However, harmonisation with the US is not worth pursuing at any price, and the UK {and the rest of Europe} should ensure that a harmonised regime is accepted only if it provides overall improvement on the un-harmonised position for UK industry.

Compulsory licensing is another issue. In December 2005, WTO members agreed to amend Article 31(f) of the TRIPS agreement, which permits poorer countries to compulsorily license generic (unbranded) drugs for use during public health emergencies. The amendment allows countries to provide such drugs for export as well as for domestic purposes. CBI welcomed this agreement as it provided not only clear benefits for countries unable to manufacture critical drugs, but also clarity for pharmaceutical companies. A WTO statement clarified that member countries understood that the exemption would only be used in good faith and not for commercial objectives. Careful monitoring is needed to ensure that WTO members remain committed to these objectives and that the scope of the amendment is not extended.

In terms of copyright exceptions, different countries have implemented exception regimes suited to their own legal systems. The UK's own regime – a list of specific exceptions, that carefully balance copyright owner and user interests consistent with the UK's international obligations under the WTO TRIPS Agreement, the Berne Convention⁹ and other copyright-related treaties as well as EU law – has worked well for many years. The latest amendments to the UK copyright exceptions resulting from the EU Copyright Directive of 2001,¹⁰ enacted specifically to take account of the Internet and other technological developments affecting copyrighted works were the result of a hard-fought directive that took account of every conceivable interest group and argument. There is no reason to re-open this debate and to adopt the US 'fair use' regime – which has been taken up by very few other countries.

In countries where copyright and trademark counterfeiting and piracy are rife, the principal problems are inadequate legislation, inadequate enforcement procedures and remedies, and inadequate government commitment to dealing with the problem. We appreciate the efforts of the UK Government and the European Commission in encouraging countries with emerging markets to address such problems.

⁹ Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf.

¹⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, at 0010 – 0019 (22 June 2001),

Whereas large firms may have the resources to try to protect their IP, this is often very difficult in practice. It becomes a virtual impossibility for SMEs. Investment by SMEs is often held back by their perception that their IP may be at risk. IP enforcement remains CBI's top policy priority in China and the need for improved compliance is frequently highlighted in high-level contacts with Chinese authorities. However, enforcement remains extremely patchy. This issue affects a variety of sectors from motor manufacturers battling the effects of lower cost, lesser-quality copies imported to concerns relating to the level of detail required for project approval procedures.

Many companies are resisting investment in China for fear of having their technology copied. More needs to be done to improve intellectual property protection in China. The law needs to be enforced more actively and high penalties imposed on transgressors. This covers a wide range of sectors from component manufacturing to publishing. We know that the government is doing much to try to stamp out such activity. Companies entering markets such as China need to be aware of the need to adequately protect their IP and incorporate this as a key element of their due diligence in so doing. In the long run, enforcement of IPR will also benefit Chinese companies as they look to overseas markets and begin to understand the importance of concepts such as branding.

International business groups continue to work together to highlight the critical importance of IP protection globally. In February 2005, UNICE, the US Chamber of Commerce and Nippon Keidanren agreed to enhance communication about IP-related activities in key markets. However, governments remain primarily responsible for upholding intellectual property rights and concerted action can yield results. For example, in November 2005, the US-China Joint Commission on Commerce and Trade (JCCT) yielded commitments by China to improve its IP environment.

Accounting for an estimated 54% of counterfeit goods arriving at EU borders,¹¹ China is responsible for more IP abuses than any other country. However, there are other culprits, including India, Russia and Taiwan. It is a rapidly growing problem and the EU Commission's action plan, announced in October 2005, to improve customs vigilance at the border is a welcome development.

¹¹ EU Commission, 'Counterfeiting & Piracy', Memo/05/364, 11 October 2005