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The Patents Act 1977 (Amendment) Bill

Bill 9 of 2001-02

This Private Members Bill was introduced by Ian Liddell-Grainger on 14 July 2001.

Patents are important as they provide a legal means of protecting ideas and their commercial exploitation.

As the ideas are protected, any infringement of a patent can be taken to court and the transgressor made to cease its actions. This encourages interested companies to come to arrangements with the patent holder to use their technology under license.

Patents are thus important to national economies, as they require the protected technology to be clearly elucidated so that it can be freely exploited after the protected period.

This Bill seeks to improve the deterrent effect of the patents legislation by allowing the Court to award additional damages to the patent holder.

The provisions of this Bill will extend to all parts of the United Kingdom.

Stephen McGinness

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Summary of main points

Intellectual Property (IP) is an important commercial resource. Patents are a contract between governments and creators of IP whereby the government grants a monopoly on the commercial exploitation of the IP for a set period in return for making the property public knowledge.

In the UK, infringing a patent does not attract punitive damages. Various reviews of the law have indicated that small companies find it more difficult to defend their intellectual property either through insufficient knowledge of the law or through a lack of funds.

This Bill seeks to amend the Patents Act 1977 such that courts will be able to award damages to a patent holder in the case of infringement of their patent. Such award will take notice of the flagrancy with which the infringement occurred.

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I Introduction

For any company, ideas (or intellectual property) are an important part of their success. In the absence of protective legislation then the best way to protect those ideas are to keep them secret. Nation states have a vested interest in making sure that technology is widely dispersed to promote the development and competitive interests of the nation state. Patents have developed as a contract between nation states and innovators. The patent provides a time limited monopoly (otherwise seen to be a bad thing) to the innovator in return for making the knowledge public.

The importance of intellectual property was highlighted by a statement from Ian Harvey, chief executive of the British Technology Group (BTG):

Intellectual property is one of the few ways that you can differentiate a product and enforce its uniqueness. Competing on price or first-mover advantage are ephemeral in comparison.¹

The Times article goes on to explain how one of the organisations that was to become BTG was created, in 1949, to patent and commercialise inventions springing from government research and universities. The company was privatised in 1992 and currently its portfolio includes 330 products protected by over 5000 patents. BTG makes money by licensing the rights to those patents.

The problem of protecting intellectual property has become very important as far as scientific research is concerned. The Medical Research Council (MRC) failed to protect its intellectual property with respect to monoclonal antibodies. In response, the MRC has generated a new company that will exploit further breakthroughs made by research programmes it has funded.² Universities have been lax in the past about who owns the rights to intellectual property of work carried out under their auspices. It is now rare to find a university that does not have a policy in place for the exploitation of intellectual property of such research.

The DTI hosts a website on the subject of intellectual property (IP) which introduces the subject:

Intellectual property, often known as IP, allows people to own their creativity and innovation in the same way that they can own physical property. The owner of IP can control and be rewarded for its use and this encourages further innovation and creativity to the benefit of us all.

In some cases, IP gives rise to protection for ideas but in other areas, there will have to be more elaboration of an idea before protection can arise. It will often

¹ “Little-understood BTG aims to harness profit power of ideas”, *The Times*, 23 October 2000

² “MRC pulls it all together”, *Financial Times*, 8 February 2000

not be possible to protect IP and gain IP rights (or IPRs) unless they have been applied for and granted, but some IP protection such as copyright arises automatically, without any registration, as soon as there is a record in some form of what has been created.

The four main types of IP are:

- ***patents for inventions*** - new and improved products and processes that are capable of industrial application
- ***trade marks for brand identity*** - of goods and services allowing distinctions to be made between different traders
- ***designs for shape and appearance*** - either functional or aesthetically pleasing articles or surface decoration, pattern or ornament
- ***copyright for material*** - literary and artistic material, music, films, sound recordings and broadcasts, including software and multimedia

However, IP is much broader than this extending to trade secrets, plant varieties, geographical indications, performers rights and so on. To understand exactly what can be protected by IP, you will need to check the four main areas of copyright, designs, patents and trade marks as well as other IP. Often, more than one type of IP may apply to the same creation.³

II Patents

What is a patent?

A patent gives an inventor the right for a limited period to stop others from making, using or selling an invention without the permission of the inventor.

Patents are generally interested in functional and technical aspects of products and processes, and must fulfil specific conditions to be granted.

Most patents are for incremental improvements in known technology - evolution rather than revolution. The technology does not have to be complex.

Patent rights are territorial; a UK patent does not give rights outside of the UK. Patent rights last for up to 20 years in the UK.⁴

The subject of patents, while easily summarised contains many difficulties in the detail of administering the process. The Patent Office⁵ provides detailed guidance on various aspects of intellectual property, on trade marks,⁶ copyright⁷ and design⁸ as well as comprehensive detail on patents.⁹

³ <http://www.intellectual-property.gov.uk/std/faq/question1.htm>

⁴ <http://www.intellectual-property.gov.uk/std/faq/patents/what.htm>

⁵ <http://www.patent.gov.uk/>

⁶ <http://www.patent.gov.uk/tm/index.htm>

⁷ <http://www.patent.gov.uk/copy/index.htm>

The use of patents is reportedly increasing year on year. Applications were reported to have risen 6% between 1999 and 2000.¹⁰ It has, however, recently been indicated that UK small to medium size enterprises (SMEs) are using patents less than similar companies in other countries:

Bottom of the pile for patent enthusiasm was the UK, where only 23 per cent had used the system. In contrast, more than half the Spanish SMEs were using patents.¹¹

There was a lack of patent use spread across the countries surveyed compared with their US and Japanese counterparts. While the reasons for this could vary there was concern about negative effects on EU businesses.

If we want to improve European innovation and competitiveness, many more SMEs should be using patents and patent information than currently do," said Charles Oppenheim, professor of information science at Loughborough University.¹²

Patent counts may be easy to measure but that does not make them a reliable indicator of competitiveness or innovation.¹³ Moreover, increasing patent numbers could indicate that beneficial competition is being undermined by companies acquiring rafts of patent rights which they use in a defensive and anti-innovative manner against their competitors to block off whole areas of technology.

Unice, the European employers' body, was also reportedly keen on a common standard for patents being agreed in the EU. In September 2000, Unice reportedly accused governments in putting political obstacles in the way of a new patent system.¹⁴

The use to which patents have been put has changed over time. An example of how things could develop was the topic of a *New Scientist* article reporting on concerns about patents being granted on common-sense ways of working.¹⁵

Since a court case in July 1998 ruled in favour of patenting business methods, the US has been allowed such filings - but the move has left the US Patents and Trademarks Office mired in controversy. It now allows patents on anything tangible and useful. Among the controversial patents it has granted is one that embodies the idea of undercutting a competitor by checking their prices on the Internet.

⁸ <http://www.patent.gov.uk/design/index.htm>

⁹ <http://www.patent.gov.uk/patent/index.htm>

¹⁰ "UK is patently inventive", *Daily Telegraph*, 2 October 2000

¹¹ "Smaller companies are patently missing out", *Financial Times*, 11 September 2001

¹² "Smaller companies are patently missing out", *Financial Times*, 11 September 2001

¹³ Section III

¹⁴ "EU delay on patents reform upsets employers", *Financial Times*, 23 October 2000

¹⁵ "Foul play", *New Scientist*, 25 November 2000

[...]

The outlook remains worrying. In San Francisco, Greg Aharonian searches out old documents not found by the USPTO examiners, and uses them to invalidate new patents. But he has now been sued for alleged infringement of a patent on remotely querying a database - a patent he has been trying to bust.¹⁶

The Financial Times reported that

...US companies accounted for 52 per cent of business method applications to the EPO last year, compared with fewer than 20 per cent for companies from the UK, Germany and France. While US companies are taking half the business method cake, over the same period they accounted for fewer than a third - 28 per cent - of all EPO applications.¹⁷

Companies may feel that they have to document their current business methods and so prevent those methods from being patented. Such documentation, if it predates a patent application, could invalidate the patent. A recent press release from the European Patent Office should provide some comfort to such concerns however:

The EPO also wishes to remind applicants that methods of doing business per se are excluded from patentability pursuant to Article 52(2)(c) & (3) EPC. Claims to such methods and their commonplace technological implementation in European patent applications will not be searched because it would not serve any useful purpose to do so.¹⁸

This statement supported the Government's response to a consultation held to investigate whether software and business methods should be patentable:

The Government's conclusion is that those who favour some form of patentability for business methods have not provided the necessary evidence that it would be likely to increase innovation. Unless and until that evidence is available, ways of doing business should remain unpatentable.¹⁹

A. Patents Legislation

Protection of inventions to encourage the development of technology and thus national economy has been in place since Elizabethan times. At this time monopolies were granted to exploit the technology:

¹⁶ "Foul play", *New Scientist*, 25 November 2000

¹⁷ "Using monopolies to protect methodologies", *Financial Times*, 26 October 2000

¹⁸ European Patent Office Press Release, "Business Methods", 13 August 2001
http://www.european-patent-office.org/news/pressrel/2001_08_13_e.htm

¹⁹ *Should Patents be granted for Computer Software or Ways of Doing Business? - The Government's Conclusions* <http://www.patent.gov.uk/about/consultations/conclusions.htm>

Such a grant was a matter of the Sovereign's grace, and was made by the issue of Letters Patent.²⁰

The earliest known English patent for invention was granted by Henry VI to Flemish-born John of Utynam in 1449. The patent gave John a 20-year monopoly for a method of making stained glass, required for the windows of Eton College, that had not been previously known in England.²¹ The granting of monopolies became abused and the Statute of Monopolies was passed in 1623 to regularise the awarding of such benefits. The Statute stated that monopolies were bad unless they existed to protect the inventors of new manufacturing processes. This recognised the importance of providing some incentive to inventors though such monopoly privileges were time-limited to fourteen years.

Britain's patent system served the country well during the dramatic technological changes of the industrial revolution. However, by the mid-19th century it had become extremely inefficient. The Great Exhibition of 1851 accelerated demands for patent reform.

Up to that time, any prospective patentee had to present a petition to no less than seven offices, and at each stage to pay certain fees. The procedure was described in exaggerated form, somewhat derisively, by Charles Dickens in his spoof, "A Poor Man's Tale of a Patent", published in the 19th-century popular journal "Household Words"; Dickens' inventor visits 34 offices (including some abolished years before). To meet public concerns over this state of affairs, the Patent Office was established by the Patent Law Amendment Act of 1852, which completely overhauled the British patent system and laid down a simplified procedure for obtaining patents of invention. Legal fees were substantially reduced and the issuing of separate patents for each nation of the Union was replaced by the publication of a single UK patent. The office of Comptroller General of Patents and a staff of patent examiners were brought into being by a subsequent Act in 1883 to carry out a limited form of examination; mainly to ensure that the specification described the invention properly, but without any investigation into novelty.²²

Four further pieces of legislation usefully punctuate the history of patent legislation:

- i. The *Patent and Designs Act 1907* consolidated legislation with respect to patents, registration of designs and trade marks most especially the first requirements to establish that patents were granted only where novelty could be established.
- ii. The *Patents Act 1949* further refined patents legislation, detailing procedures for the application, investigation and opposition of patents, granting patents, the effect

²⁰ "Patents and Designs", *Halsbury's Statutes*, Volume 33, p1, Fourth Edition, 2001

²¹ <http://www.patent.gov.uk/patent/history/fivehundred/origins.htm>

²² <http://www.patent.gov.uk/patent/history/fivehundred/eighteenth.htm>

and terms of patents including extensions due to war loss and inadequate remuneration and a variety of other provisions. No Patents may now be granted under this, or earlier, legislation as it was reformed through the *Patents Act 1977* under which all patents are now granted.

- iii. The *Patents Act 1977* gave effect to proposals in the White Paper on Patent Law Reform²³ which in turn drew upon the Report of the Banks Committee.²⁴

It repealed the 1949 Act and established a new law on patents and gave effect to a number of international patents agreements. The Act gave effect to the Patent Co-operation Treaty²⁵ which provided for the establishment of an International Patent Co-operation Union; the European Patent Convention²⁶ and the Community Patent Convention²⁷ which led to the establishment of the European Patent Office and European Patents.

A Patents Court was established as part of the High Court and the law with regard to ownership of employees inventions was put on a statutory basis. The Act provided for the making of awards to such employees in certain cases.

- iv. Most recently the *Copyright, Designs and Patents Act 1988* provided legislation that made

...provision with respect to patent agents and trade mark agents; to confer patents and designs jurisdiction on certain county courts; to amend the law of patents...²⁸

Essentially the Act established a register of patent agents and detailed how the designations of patent agent and patent attorney were to be given.

The Patent Office is currently conducting a consultation exercise which

...sets out proposals for radical change in the Patent Office's practice in handling certain aspects of the search and examination of patent applications. The reason for these proposals is to make the search and examination process more efficient, and hence to enable the Office to provide its customers with high quality searches and examinations more promptly.²⁹

²³ *Patent Law Reform*, Cmnd 6000, 1975

²⁴ *The British Patent System: report of the committee to examine the patent system and patent law* [Banks Report], Cmnd 4407, 1970

²⁵ *Patent Co-operation Treaty*, Cmnd 4530, 1970

²⁶ *Convention on the grant of European Patents*, Cmnd 5656, 1974

²⁷ *Convention for the European Patent for the Common Market*, Cmnd 6553, 1976

²⁸ Long title, *Copyright, Designs and Patents Act 1988*

²⁹ <http://www.patent.gov.uk/about/consultations/future/summary.htm>

The consultation paper is available from the Patent Office website.³⁰ The consultation exercise did not consider changes of the kind proposed by Mr Liddell-Grainger's *Patents Act 1977 (Amendment) Bill*.

B. Costs of Patenting

One of the problems with patents most often highlighted by those disenchanted with the process is that the procedures are difficult and costly. The complicated procedures also make the hiring of professionals almost compulsory which adds to the costs.

Ruth Magnus, secretary at the Institute of Patentees and Inventors, admits that patenting a product is not easy. She says that would-be patentees “need to do quite a lot of homework before they even contemplate getting a patent. There are so many pitfalls”.³¹

A New Scientist article pointed out that:

“Some people almost set themselves up to have their ideas stolen by writing their own patents.”

[...]

“It’s very hard to be detached enough to write a wide enough patent on your own invention. For example, you might describe the particular materials you used to make it; that means it would not cover the same device made with different materials.”

Another danger for inventors writing their own patents, he says, is that it is not written in “patent-lawyerese”. According to Weaver, this “shows you’re a bit hard-up, and probably don’t have the money to sue, so any firm might rip the idea off after its published.” For example, what most people call a square, a patent agent would define as a “rectilinear construction of variable side length”.³²

Below, is a table reproduced from the Financial Times³³ comparing the costs of obtaining a patent in the EU, the US and Japan:

Cost of Obtaining a Patent (€)							
	<i>Filing and Search fees</i>	<i>Examination fees</i>	<i>Grant fees</i>	<i>Renewal Fees</i>	<i>Translation costs</i>	<i>Agents Fees</i>	<i>Total</i>
EPC*	810 + 532	1,431	715	16,790	12,600	17,000	49,900
US	690	-	1,210	2,730	n.a.	5,700	10,330
Japan	210	1,100	850	5,840	n.a.	8,450	16,450

Source: *The First Mover Monopoly*, Oswang and Oxford University, October 2000

³⁰ <http://www.patent.gov.uk/about/consultations/future/index.htm>

³¹ http://www.virginbiz.net/bizlifecycle/start_up/start_up7_7a.html

³² “Winners and losers in the invention game”, *New Scientist*, 5 October 1991

³³ “The politics of plagiarism”, *Financial Times*, 17 November 2000

** European Patent Convention*

The higher costs of the European patent reflect the cost of translation, all patents are translated into all 11 official EU languages. There has been pressure to reform the system to work in one language and to have a single court in which they might be defended. Although this could improve efficiency, natural political pressures (much of it independent of patent law) have so far acted against such a resolution: despite the fact that many businesses and countries would be happy with such a system.³⁴

The costs involved in patents do not end once the patent has been established. There are renewal fees necessary to maintain the patent and the potential costs of defending it against those who wish to exploit the technology without recognising the existence of a patent:

Kane Kramer, an entrepreneur who runs Country Secrets, a furniture design business in Hertfordshire, has spent £80,000 registering patents in 114 countries for his invention, Metal Coat, a paint with a real metal finish.

But despite having spent tens of thousands of pounds registering his product, Kramer says that since its launch in 1997, a number of companies have infringed the patent. To stop them, he would have to take legal action but as an independent inventor he can ill afford more costs.

“There is no mechanism in place if somebody infringes your patent. If you are not a big company then tough luck. You could describe a patent as a licence to litigate, because you cannot walk into a police station with a patent saying someone is making this down the road and it is robbery,” he says.³⁵

C. International Patents

One reflection of the supposed ideal of European integration and harmonisation would be a single European patent that would provide patent protection throughout the EU. There are factors however that have stalled the implementation of an EU-patent.

Language - much of the present cost in obtaining a European patent is in the translation required. If it was possible to agree on a single language the costs could be drastically reduced.

Justice systems - the most obvious system is to have a central court that enforced patents, but this might increase present costs which would deter smaller patent holders from contesting infringements. An alternative might be a delegated regional system answerable to a central authority.

³⁴ “The politics of plagiarism”, *Financial Times*, 17 November 2000

³⁵ http://www.virginbiz.net/bizlifecycle/start_up/start_up7_7.html

Existing national patent systems - an EU patent system would compete with national patent systems and potentially threaten nationally based patent offices. This is important as these offices provide advice and support on patent issues for both Government and innovators.³⁶

Currently the European Patent is a centralised patent grant system administered by the European Patent Office (EPO) on behalf of all contracting states. Rather than granting one single European patent, it essentially organises for a series of national patents to be granted - a “one stop shop” rather than a single shop. Obviously, as detailed above, this leads to increased costs.

Already several international conventions exist that should provide some kind of harmonisation among the variety of national patent systems. The World Trade Organisation (WTO) mediated an agreement on intellectual property rights called the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³⁷ The WTO provides the following brief overview of TRIPS:

The agreement covers five broad issues:

- how basic principles of the trading system and other international intellectual property agreements should be applied
- how to give adequate protection to intellectual property rights
- how countries should enforce those rights adequately in their own territories
- how to settle disputes on intellectual property between members of the WTO
- special transitional arrangements during the period when the new system is being introduced.

The WTO website³⁸ contains information on the details of the TRIPS agreement. For further information on this agreement please call the Library specialist.³⁹

The Patent Cooperation Treaty (PCT) as well as other international treaties concerning issues of intellectual property are administered by the World Intellectual Property Organisation (WIPO):⁴⁰ an agency of the United Nations. WIPO provides the following information on the PCT:

The PCT was concluded in 1970, amended in 1979 and modified in 1984. It is open to States party to the Paris Convention for the Protection of Industrial Property. Instruments of ratification or accession must be deposited with the

³⁶ “How many boffins does it take?”, *Financial Times*, 8 October 2001

³⁷ http://www.wto.org/english/docs_e/legal_e/final_e.htm#TRIPs

³⁸ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm

³⁹ Patsy Richards, Economic Policy and Statistics Section

⁴⁰ <http://www.wipo.org/>

Director General of WIPO. The PCT created a Union. The Union has an Assembly. Every State party to the PCT is a member of the Assembly.⁴¹

The PCT may provide the eventual basis for a truly worldwide international patent system:

By filing one international patent application under the PCT you can simultaneously seek protection for an invention in each of a large number of countries (now more than one hundred) throughout the world. If you are a national or resident of a PCT Contracting State, you may file such an application and thereby benefit from:

- extra time (at least 8 months more, but frequently 18 months more, compared with not using the PCT) to investigate the commercial possibilities of your invention;
- the option of obtaining, in addition to an international search report, an international preliminary examination report, providing information about the patentability of your invention, before you incur any costs associated with the patent granting procedure in any of the countries in which you still wish to obtain patents;
- the possibility of complying with a number of formalities in a centralized manner when you prepare your application in accordance with the international standards effective under the PCT; and
- significant fee reductions throughout the international and national phases of the procedure.

Currently the system is useful only if an inventor believes worldwide protection is required. It works in a similar manner to the European Patent whereby you get a one-stop shop.

The most recent WIPO initiative, the Patents Law Treaty is discussed in an article in IPMatters:

Adopted in Geneva, on 2nd June 2000, the Patent Law Treaty (PLT) comes as the result of a World Intellectual Property Organisation (WIPO) initiative. Its aim is to harmonise the formal requirements set by patent offices for granting patents, and to streamline the procedures for obtaining and maintaining a patent.

Initially, PLT will apply to all EU countries, the US, Canada, Japan and Australia. Eventually it will include virtually all countries in the world.

While the PLT is only concerned with patent formalities, many of the provisions will prove extremely useful when the PLT comes into force for a large number of states, providing speedier and less costly procedures.

⁴¹ <http://www.wipo.org/pct/en/index.html>

Specifically, PLT signatories have agreed to a single internationally standardised set of formal requirements for national and regional offices, standardised forms to be accepted by all offices, filing date requirements, and procedures to avoid a loss of the filing date because of a failure to comply with formalities, simplified procedures before the patent office, basic principles for the implementation of electronic filing, and mechanisms to avoid unintentional loss of rights as a result of failure to comply with time limits.⁴²

III *The Patents Act 1977 (Amendment) Bill*

The Bill has only two clauses. The first is the functional clause that inserts provisions into the Patents Act 1977.

In section 61 of the Patents Act 1977, there shall be inserted after subsection (2):

(2a) The court may in an action for infringement of a patent having regard to all the circumstances, and in particular to:

- (a) the flagrancy of the infringement
- (b) any benefit accruing to the defendant by reason of the infringement

award such damages as the justice of the case may require.⁴³

The effect of this clause would mean that those companies which do infringe a patent, and do so in spite of being informed by the patent holder, may face damages in excess of those awarded under the current legislation. There is a degree of concern among inventors that large companies, that have corporate lawyers on retainer have no incentive to abide by patents. Under the current legislation, the damages payable to the holder of an infringed patent are essentially the licence fees that should have been paid initially.

The second clause provides the short title to the Bill.

Mr Liddell-Grainger, the Bill's promoter, introduces the Bill below:

Patents Act 1977 (Amendment) Bill

This is an Amendment to the 1977 Patents Act, which will bring it in line with the 1988 Copyright Designs and Patents Act. The protection the Amendment will give would mean that patent holders in the United Kingdom had the same right as their foreign counterparts. The Amendment seeks to update the existing legislation and the Lord Chancellor's Department has given its approval to the wording of it. The amount of patents held in this country that will benefit from this Amendment will mean all British businessmen will have the ability to deter

⁴² <http://www.derwent.com/ipmatters/features/treaty.html>

⁴³ <http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/009/2002009.htm>

potential patent theft; have recourse to law; and lastly be able to seek proper recompense against infringement. Some of the most high profile cases recently of patent infringement have had to seek redress in foreign courts. Given the support I have received for this Amendment from across the political spectrum and the business community, I would like to think that it would give patent holders the protection they deserve.⁴⁴

The Institute of Patentees and Inventors⁴⁵ was in favour of the Bill:

In particular the Institute is in favour of action such as the present Bill which helps to ensure that its members are not at a disadvantage when dealing with large companies. It is believed that the present Bill would help to ensure that large companies think twice before infringing the patent rights of individual inventors/entrepreneurs and small/medium sized business.⁴⁶

The Institute also pointed out that the wording of the Bill meant that the *Patents Act 1977* would be brought roughly into line with protection given to copyright by the *Copyright, Designs and Patents Act 1988*. That Act however refers to *additional damages* rather than the simple *damages* in the Bill.

The Institute of International Licensing Practitioners provided feedback from a range of members that highlight areas of the Bill. The comments were largely favourable:

[The amendment] has strong echoes of the US "triple damages" for blatant or flagrant infringement, which is certainly a very powerful deterrent in that country.⁴⁷

The reasoning was that with the possibility of additional damages law firms might be more inclined to work on a contingency basis (no win, no fee).

A former chairman of the Institute pointed out that

It is a well-known commercial strategy for a company, particularly a 'brand leader' with standing and substance in the marketplace, knowingly and blatantly to infringe another's patent, in the hope that (a) any action brought against it by the patentee will take a fair amount of time to come to court, (b) the patentee may feel disinclined or be unable to risk funding the considerable legal costs of bringing an action, and (c) that, in the interim, it can quickly generate enough profit to cover legal costs and any damages awarded against it, and still be left with a surplus.

⁴⁴ Personal Communication with Mr Liddell-Grainger, October 2001

⁴⁵ <http://www.invent.org.uk>

⁴⁶ Personal Communication with Graham Jones, Vice Chairman of the Institute of Patentees and Inventors, 30 October 2001.

⁴⁷ Personal Communication via the Institute of International Licensing Practitioners, October 2001

The proposed amendment should have the effect of helping to prevent this type of commercial behaviour.

The value of a patent, from a commercial point of view, turns to a large extent on the ability of the patentee both to police and, if necessary, defend it.

The costs of prosecuting a patent through to grant are not insignificant, especially for small and medium sized enterprises. Any amendment to the present Patents Act which has the effect of increasing the commercial value of a patent should, in my view, also encourage and give greater confidence to patentees to defend their patents against infringement. I welcome the proposal.⁴⁸

The question of flagrancy and how this should be measured by the court was questioned but that 'know-how' gained through infringement should be considered when damages were to be considered. This would be similar to the *Dyson v Hoover* case where Hoover have been banned from benefiting from actions taken that infringed a patent held by Dyson for a year after the patent ceased to provide protection.

There was some question of whether additional damages might increase the abuse of the system by patentees.

Unlike in USA, where failure to disclose known prior art is a criminal offence, there is very little in the UK to stop an applicant applying for patents which are known or are suspected to be invalid, and if these are granted, as they frequently are, from litigation under that patent. The patentee has nothing to lose, other than legal costs, from litigation. This puts the patentee in a position of monopoly which they have not earned. Even if a competitor is brave enough to risk challenging the patent and the patent is found to be invalid, the patentee has still enjoyed an illegal monopoly for several years. This is entirely unfair.

There should be a much more onerous obligation on the patentee to ensure that their patents are valid. Judges should be able to award damages to the defendant if it is believed that the patentee should have had reasonable cause to believe the patent was not valid.

A reform of the act is welcome but you have missed the main issue. In exchange for the extremely valuable monopoly patents give, patentees should owe a duty of care to the public not to stifle competition by incorrect patenting.⁴⁹

The Licensing Executives Society was less welcoming of the amendment. They point out that at a time when European Union member States are working towards a more

⁴⁸ Personal Communication via the Institute of International Licensing Practitioners, October 2001

⁴⁹ Ibid

harmonised patent system and a European patent is hardly the time for the UK to diverge further.

The Private Member's Bill is therefore in direct contradiction to this European initiative. Indeed, if the Private Member's Bill were to succeed there would be a decrease in European harmonisation at the very time when there is a strong initiative to try and produce a more integrated European-wide patent system. We believe this would benefit neither British industry nor the members of the Licensing Executive Society of Great Britain and Ireland.⁵⁰

This view on harmonisation was also raised by the Chartered Institute of Patent Agents. CIPA did not have time to provide a institutional view but did provide a notion of some views of their members. In the time available for consultation, most CIPA member responses to the Bill were in opposition to the proposed amendment. The main concern was that the ability to award damages would lead to increases in the costs of litigation:

Such provisions contribute to the great expense of patent litigation in the US. If we introduce additional damages awards into UK infringement actions, it will inevitably lead to an increase in the disclosure required and consequently to an increase in the overall cost of the litigation. Rather than assisting SMEs, such provisions may deter SMEs from enforcing their patent rights because of the increased costs, which will be more significant for SMEs than for large companies.⁵¹

There was however an acceptance that SMEs might welcome the Bill as

The underlying intention of trying to redress the balance between the rich big company and the SME is a good one.

The ability of the Courts to award additional damages might deter cynical infringers.⁵²

There was some concern that the damages might in some cases favour large companies who could scare off SMEs with the threat of patent litigation and possible damages thus stifling that opposition. It was suggested that it would be better to make litigation cheaper than to provide for increased damages.

There was also some concern about introducing the question of the defendants intention into patent litigation.

[That] will personalise the issues. Experience in the US suggests that this will create or exacerbate bad feelings between the parties and thus reduce the chance

⁵⁰ Personal Communication, Licensing Executives Society, October 2001

⁵¹ Personal Communication, Chartered Institute of Patent Agents, October 2001

⁵² Ibid

of their reaching an amicable settlement. This could be particularly disadvantageous for SMEs because they often rely on alliances with other companies for growth.⁵³

The ability of the court to determine levels of flagrancy was also questioned and

More precise wording such as "Knowing infringement without just cause" might be better

[...]

It may be very difficult (and hence expensive) to determine what is really "flagrant". For example, is infringement "flagrant" if the infringer has obtained a (wrong) opinion from a suitably qualified person that the patent is invalid and/or not infringed? Patent infringement and validity issues tend to be complex and are rarely clear cut in one direction or the other so it is not uncommon for two experienced and qualified patent attorneys to give different opinions on a case.⁵⁴

There was also some concern that the award of damages were unlimited and that they should be limited to double or triple the usual amount.

Otherwise, there is a risk that even quite significant employers could be driven out of business with adverse consequences for employment and the economy.⁵⁵

IV Innovation

The need for innovation is often commented upon and highlighted as necessary for the good of the national economy. It is difficult to pin down exactly where innovation comes from or how it might be best harnessed to the well-being of a national economy. There has been some comment that amateurs and independents are responsible for much of our progress in science and technology and that they deserve more recognition.

The academic establishment - and the funding bodies - will tell you that all the important advances take place through research at universities and institutes. But then they would say that, wouldn't they?

The reality is more surprising. Look at the history of science and you will see that it progresses mostly through accident or rebellion - or as a result of somebody's hobby. Innovators often come from fields outside those in which they make their mark. It seems that a fresh mind, or a viewpoint born of a free spirit, is best placed to offer revolutionary insights - something that the people who fund science consistently fail to take account.⁵⁶

⁵³ Personal Communication, Chartered Institute of Patent Agents, October 2001

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ "Free Spirits", *New Scientist*, 30 September 2000

While there may be some truth in this it is a very difficult to formally fund ‘free spirits’ and Government money tends to be directed towards more recognised research organisations such as universities. The 2000 White Paper entitled *Excellence and Opportunity - a science and innovation policy for the 21st century*⁵⁷ contained proposals that were intended to stimulate innovation. One of these measures was to encourage scientists in the public sector to benefit from commercial exploitation of their work.⁵⁸ It was reported that when the White Paper was unveiled the then Chief Scientific Advisor (Sir Robert May) remarked that the UK needed “to find the David Beckhams of science”.⁵⁹

The need for British inventors was highlighted in 1991 as a Times article pointed out that between 1978 and 1991 the proportion of European Patents granted to UK inventors had almost halved:

...when the European Patent Office opened in 1978, 10 per cent of those granted were to British inventions. In the intervening years our share of the total has actually declined (to 6 per cent) while the French have 11 per cent, and the Germans and Americans 25 per cent apiece. The Japanese, unsurprisingly, have recorded a rise from 2 per cent to 18 per cent.⁶⁰

Andrew Summers, chief executive of the Design Council, puts this information in a different perspective.

According to Japan’s Ministry of Trade and Industry, since the Second World War Britain has been responsible for more than 40% of the inventions which have been significant to Japanese industry.⁶¹

The use of patents as a measure of innovation is long-standing and intuitive. If a great deal of innovation is taking place there should be an increase in patent applications. However, the reverse, i.e., that because a great deal of patents are being applied for that there is innovation in progress, may not be true.

The use of patent counts to indicate competitiveness or innovation can be unreliable for a number of reasons:

- many patented inventions do not prove to be capable of successful commercial exploitation;

⁵⁷ *Excellence and Opportunity - a science and innovation policy for the 21st century*, Cm 4814 (2000) <http://www.dti.gov.uk/ost/aboutost/dtiwhite/>

⁵⁸ “The brain gain package”, *The Telegraph*, 2 August 2000

⁵⁹ “Wanted: boffins with Ferraris”, *The Telegraph*, 2 August 2000

⁶⁰ Saturday Review, “Have the brains of Britain finished their inventory?”, *The Times*, 27 April 1991

⁶¹ “British inventions have been exploited overseas”, *The Engineer*, 12 June 1997

- many new inventions are successfully exploited by firms who for commercial and technical reasons decide that a patent is not necessary. For example, some Japanese firms take out very few patents in Europe because their market penetration is already so high as to render copyists powerless. For other innovations secrecy is considered more important than patent protection which would require publication e.g., Coca-Cola (RTM).
- patents are not all equivalent in terms of the size of innovation they capture - they may cover small improvements or cutting-edge developments
- patent systems are not equivalent as to their legal requirements. The Japanese system tends to generate more patents to cover the same innovation than would be the case in Europe (up to 3 or 4 times).

Moreover increasing patent numbers could indicate that beneficial competition is being undermined by companies acquiring rafts of patent rights which they use in a defensive and anti-innovative manner against their competitors to block off whole areas of technology. An article in the *Economist* questioned whether businesses became more innovative by increasing patenting activity:

Studies of the most patent-conscious business of all--the semiconductor industry--suggest they do not. Rosemarie Ziedonis at Wharton Business School in Pennsylvania and Bronwyn Hall at Haas found that investment in R&D (a reasonable proxy for innovation) did not substantially increase during the industry's most feverish period of patenting. Instead, semiconductor firms simply squeezed more patents out of each dollar they spent on R&D. From 1982 to 1992, the chip makers doubled their output of patents from 0.3 to 0.6 for every million dollars of R&D. That was at a time when the patent yield in other industries had barely budged.

Had the chip makers really become more innovative? Or had they simply spent more of their R&D money on applied development and less on blue-sky research? More to the point, had they just started harvesting patents from their laboratories more systematically? The companies claimed not to have shifted their research strategies to be concentrating on more practical things. For their part, the Wharton and Haas economists found no evidence to suggest that the firms had become more innovative as patent rights became stronger.

Tellingly, the consensus among employees who were questioned by the researchers was that the average "quality" of their firms' patents had declined. Though patent quality is a difficult notion to measure, the number of times a patent is cited in the technical literature is the nearest thing to a yardstick. And it is a fact that citations made per semiconductor patent declined during the 1980s.

On balance, semiconductor patents seemed to have become less useful.⁶²

⁶² "Patently absurd?", *The Economist*, 23 June 2001

What was actually happening was that the defence of patents had increased leading to an increase in patenting activity to stake out territory which actually slowed down the generation of new ideas.

A. Protection

If innovation is to be promoted then innovators need to feel that they will recoup the benefits, monetary and otherwise, that their innovation delivers. In a *New Scientist* article, even when protected the rewards of innovation can be one-sided:

...Ray Bennet cautions that inventors' dreams of success are often unrealistic. "There are two ways to progress," he says. "The first is to have a bottomless pit of finance. Not many people have. The other is to accept that if you're going to make £10,000 from your invention, someone else is going to make ten times as much. That is the cruel but true commercial side of it."⁶³

At least in such cases the innovator is rewarded and incentivised to continue innovating. The greatest concern must be that those capable of innovation are discouraged from continuing in their career as an inventor as they believe others will benefit unfairly from their ideas. The intellectual property legislation in place provides a declaration of intent that the government wants to protect its innovators and work towards them receiving just rewards for their labours.

The perception of insecurity may be just as discouraging as actual insecurity. A greater knowledge of the process by inventors could ensure that such insecurity was less common, thus the call for a Royal Academy of Inventors⁶⁴ to which inventors could turn for information. As can be seen elsewhere, there are numerous information sources for inventors. The Institute of Inventors believes that many inventors concerns about ideas being stolen are misfounded. Their argument is that inventions are only stolen once the ideas have been proven to be commercially viable.

After the Inventor is financially successful and the product is in great demand and in short supply, that is when Invention stealers move in to make cheap copies for quick sale - remember the Rubiks Cube - on sale for 5 years - nobody wanted to know. Then after 2 weeks of free publicity on Noel Edmonds Saturday morning show at peak viewing time, the shops were sold out. That's when the Invention stealers moved in flooding the English market with cheap copies made in Hong Kong.⁶⁵

⁶³ "Winners and losers in the invention game", *New Scientist*, 5 October 1991

⁶⁴ "Bright ideas deserve respect", *New Scientist*, 10 February 1996

⁶⁵ <http://www.newgadgets.freeseve.co.uk/FAQs.htm#Q15>

A less formal approach for protecting new ideas when approaching companies has been written letters guaranteeing confidentiality. The use of confidentiality letters has also been disparaged in certain circumstances. Many companies may feel that they cannot enter into a confidentiality agreement when their own research and development people may already be working on a similar idea. They are more likely to look at a patented idea, which means there is intellectual property already evaluated as novel to study. Because a patent gives better protection than a confidentiality agreement negotiations with companies should begin after a patent is granted rather than before. This of course means that the inventor has to bear the brunt of initial patent costs.

Even if ideas are only stolen after it has proven financially successful, protection is important. The Times reported that counterfeiting cost British industry £9 billion a year, though this is infringements of all kinds of intellectual property not just patents.⁶⁶ This burden was reported to impact more upon small businesses as they were less likely to be financially capable of defending their intellectual property.

Patents themselves can be used against the interests of small businesses:

Firms such as Intel, IBM, Motorola and Sun Microsystems frequently use cross-licensing agreements to swap intellectual property with each other. The problem is that large organisations like these already enjoy powerful patent rights from their existing portfolios, whereas smaller firms and newcomers do not. By raising the bar for entry, cross-licensing can reduce competition. Moreover, powerful companies may coerce smaller ones with desirable technology into entering cross-licensing agreements by brandishing threats of hold-up or litigation.⁶⁷

B. Inventors

An article in the New Scientist magazine, investigating what made an invention successful, highlighted the inventor as one of the most important factors in the success of an invention.

“Probably the most important factor,” says Peter Weaver, a freelance consultant who is also innovations advisor to the London Enterprise Agency, “is the personality of the individual and his determination to succeed. [The overwhelming majority of inventors are male.] His ability to concentrate on making it succeed is important too. The ideal inventor has brilliant ideas and is also an embryonic managing director. But the chances of that are not great.”⁶⁸

⁶⁶ “Taking a stand against fakers”, *The Times*, 22 September 2001

⁶⁷ “Patently absurd?”, *The Economist*, 23 June 2001

⁶⁸ “Winners and losers in the invention game”, *New Scientist*, 5 October 1991

Trevor Baylis, who invented the clockwork radio, stated that the worst thing about being an inventor was “learning to cope with the humiliation.”⁶⁹ He believes that inventors can have their ideas derided before they have a chance to prove themselves and then allow their patents to lapse due to the discouragement. The ideas can then be used without the inventor benefiting from such use.

One of the things he proposes is that the UK needs to promote invention amongst schoolchildren and the rest of the public. He thinks this could be done and:

...that there should be a Royal Academy of Inventors and that the National Curriculum should cover invention.

Students would be taught the history of invention, about intellectual property law, how to patent inventions and copyright designs and how not to lose their rights by premature disclosure. Perhaps, most important of all, they would learn about commercialisation: how to sell a patented idea or license it to other manufacturers and collect royalties, and how to avoid reinventing the wheel.⁷⁰

C. Support

Governments are interested in economic welfare and growth. Although poorly understood, promoting innovation is one factor in achieving this and policies that will support such activity are desirable. The problem is in deciding where to invest money to gain the greatest benefits. The innovation process begins with an idea and ends with an innovative product in the market place, there are many steps in between which incorporate any number of communities and professions. The linear model of scientists making unexpected discoveries, technologists taking them up and applying them and engineers or designers turning them into new products or processes is the simplest available.⁷¹

Now it can be seen that a whole variety of people are involved in the interactions between science and technology. Product planners, designers, marketing experts, consumers, regulators, forecasters and pressure groups all intervene, influencing what innovation theorists call the “selection environment” which produces particular technologies from a spectrum of possibilities. The choices they make penetrate science, fixing the direction of enquiry if not its results. One implication of the decline in linear thinking is that, through the sum of all these choices, we eventually get the technology, and perhaps even the science, we deserve.⁷²

⁶⁹ “Bright Ideas deserve respect”, *New Scientist*, 10 February 1996

⁷⁰ “Bright ideas deserve respect”, *New Scientist*, 10 February 1996

⁷¹ “What drives the engines of innovation?”, *New Scientist*, 16 November 1991

⁷² “What drives the engines of innovation?”, *New Scientist*, 16 November 1991

The National Endowment for Science Technology and the Arts (Nesta) was established in July 1998 under the *National Lottery Act 1998* and officially launched on 30 June 1999. The National Lottery provided £200 million for Britain's first ever national endowment, intended to provide an income of around £10 million a year. This £10 million will be spent on:

- ***fellowships*** – helping exceptional individuals so they can pursue their ideas and fulfil their potential.
- ***invention and innovation*** – helping people develop ideas that can be exploited for commercial and social benefit.
- ***education*** – helping to communicate the importance of creativity in all our lives.⁷³

Lord Puttnam, Nesta's first chairman, said:

My ambition for Nesta is to make it the world's best informed and most competent dating agency, introducing and arranging relationships between people and capital, capital and inventiveness, copyright expertise, and the two cultures.⁷⁴

Much of the support available does seem to be in the form of grants for science and development and then to find industrial partners for exploitation. There is little support in the way of patents. An idea has zero financial cost but a patent has a definite monetary cost. For a government to grant patents on ideas there would be monetary implications, even in evaluating the potential for patenting. Most often the inventor must find the money himself or find an investor willing to risk money in the hope that they will make more when the idea becomes a product with market value.

The perceived need for inventions is demonstrable by the support offered to inventors by the DTI and other organisations. There is a host of useful on-line information providers available to inventors.⁷⁵ The British Library provides a very useful gateway to many on-line services with respect to patents.⁷⁶

The following sites discuss intellectual property issues including patenting and provide links to support groups and electronic discussion lists:

The Patent Office	http://www.patent.gov.uk
European Patent Office	http://www.european-patent-office.org
The Chartered Institute of Patent Agents	http://www.cipa.org.uk
The Institute of International Licensing Practitioners	http://freespace.virgin.net/iilp.web/
The Institute of Patentees and Inventors	http://www.invent.org.uk
The Patent Café	http://www.patentcafe.com

⁷³ <http://www.nesta.org.uk/>

⁷⁴ "Dating agency that introduces people to cash", *Daily Telegraph*, 24 March 1999

⁷⁵ "Help for the inventive", *Financial Times*, 17 August 2000

⁷⁶ <http://www.bl.uk/services/stb/patents/home.html>

IP Matters	http://www.derwent.com/ipmatters
Patent News	http://www.patentnews.com
Patent and License Exchange	http://www.pl-x.com
PricewaterhouseCoopers' Intellectual Property Exchange	http://www.ipex.net
Institute of Inventors	http://www.newgadgets.freemove.co.uk
Greg Aharonian's Bad Patents Site	http://www.bustpatents.com

V Intellectual Property

The following text provides some information on forms of intellectual property other than patents. The sections on trade marks⁷⁷ and copyright⁷⁸ have been provided colleagues in the Library.

A. Copyright

The automatic right of an author, artist or composer to prevent another copying original work is embodied in the *Copyright, Designs and Patents Act 1988*. This restated and amended earlier law, partly in response to challenges set by technological progress. The 1988 Act itself has been subsequently amended, often in response to EC directives aimed at securing uniformity and consistency in the application of copyright law. It furthermore represents the UK's (copyright is a reserved matter) ratification of the Berne Convention for the Protection of Literary and Artistic Work, and of other international agreements such as that covering the European Economic Area.

Halsbury's Laws of England defines copyright as "the exclusive right to do, and to authorise others to do, in the United Kingdom, certain acts in relation to literary, dramatic and musical works, in relation to artistic works and in relation to sound recordings, films, broadcasts, cable programmes and published editions of works. The acts concerned vary according to the subject matter; in general, the existence of copyright protects the maker of a work from the appropriation of his labours by another."

Section 11 of the 1988 Act provides that, subject to exceptions for some employees and for crown and parliamentary publications, the author of a work is the first owner of any copyright in it. Ownership can subsequently be assigned to another, with the author's permission. Depending on the type of work, copyright protection lasts up to 70 years after the death of the author. A copyright owner can also license the exploitation of all or

⁷⁷ Written by Lorraine Conway of the Business and Transport Section

⁷⁸ Written by Grahame Danby of the Home Affairs Section

part of his work, subject to the terms of a contract, be it written, oral or implied.⁷⁹ Licensing bodies, overseen by the Copyright Tribunal, include the Copyright Licensing Agency Ltd, owned by the Authors' Licensing and Collecting Society (ALCS) and the Publishers Licensing Society (PLS).⁸⁰ In addition to licensing users for copying extracts from books and journals on behalf of authors and publishers, the CLA will also institute legal proceedings where copyright is infringed.

Primary infringement of copyright is committed where a person does, or authorises, the following acts in respect of a "whole or any substantial part"⁸¹ of the work:

- copying the work
- issuing copies to the public
- renting or lending copies to the public
- performing, showing or playing the work in public
- broadcasting the work, including by cable
- making an adaptation (e.g. a translation) of the work or performing any of the above in relation to the adaptation

Sections 22-26 cover secondary infringement of copyright, such as importing, possessing or dealing with infringing copies of a work.

In addition to licensed activities, a wide range of exceptions to copyright are permitted:⁸² these include fair dealing, incidental inclusion, public interest and reproducing (directly) speeches - unless the speaker expressly prohibits this. Of these exceptions, "fair dealing" for private study, criticism, review or news reporting is interesting in that it is undefined.⁸³ There can, however, be no infringement unless a substantial part (in terms of quality as much as quantity) of the work is copied.

Chapter IV of the 1988 Act deals with the moral rights designed to protect an author.⁸⁴ Principally these are the right to be identified as the author (or director in the case of films); the right to object to derogatory treatment of a work; the right not to have work falsely attributed to oneself; and a right to privacy of certain photographs and films (this allows one to prevent publication of private photographs, even though the photographer would normally have copyright).

⁷⁹ Peter Carey, *Media Law*, 1999

⁸⁰ <http://www.cla.co.uk/>

⁸¹ section 16, *Copyright, Designs and Patents Act 1988*

⁸² Chapter III, *Copyright, Designs and Patents Act 1988*

⁸³ Graham P. Cornish, *Copyright: Interpreting the law for libraries, archives and information services*, third edition 1999

⁸⁴ *Halsbury's Statutes*, volume 11, 2000

If copyright is infringed, the owner can bring civil proceedings,⁸⁵ as can an exclusive licensee.⁸⁶ Infringement of moral rights is actionable as a breach of statutory duty owed to the person entitled to the right.⁸⁷ Making for sale or hire, importing or dealing with infringing articles is a criminal offence under section 107 of the 1988 Act, enforcement of which will lie with local weights and measures authorities when section 107A, inserted by the *Criminal Justice and Public Order Act 1994*, is brought into force.

In the latter context it is relevant to mention the *Copyright, etc. and Trade Marks (Offences and Enforcement) Bill*, Bill 20 2000-01.⁸⁸ Its purpose summarised in the Explanatory Notes accompanying its publication:

This Bill amends the criminal provisions in intellectual property law, more specifically the law relating to copyright, rights in performances, fraudulent reception of conditional access transmissions by use of unauthorised decoders and trade marks.

A Bill of the same title has been introduced in the present parliamentary session, first reading yielding the following information:

Dr. Vincent Cable, supported by Richard Burden, Bill Cash, Brian Cotter, Ed Davey, Ian Liddell-Grainger, Paul Marsden, Andrew Miller, Austin Mitchell, Lembit Öpik and Nicholas Winterton presented a Bill to amend the Copyright, Designs and Patents Act 1988 in respect of criminal offences, search warrants, powers of seizure and orders for forfeiture; to amend the Trade Marks Act 1994 in respect of search warrants and powers of seizure; and for connected purposes: And the same was read the First time; and ordered to be read a Second time on Friday 23 November, and to be printed [Bill 17].

Finally, it is worth mentioning the challenge to copyright law posed by the internet.⁸⁹ Though there is still rather little case law in this context, the law of copyright will hold for most material on the web. Placing a substantial part of a work on a web site without the express permission of the copyright owner would constitute a primary infringement. Even putting a hypertext link to the copyright owner's page containing the relevant extract could infringe copyright,⁹⁰ though without further case law the situation remains unclear. But the relative complexity of copyright law, and the increasing ease (almost automatic)

⁸⁵ section 96, *Copyright, Designs and Patents Act 1988*

⁸⁶ section 101, CDPA

⁸⁷ section 103, CDPA

⁸⁸ further information is given in library standard note, *Copyright, etc. and Trade Marks (Offences and Enforcement) Bill* (6 March 2001)

⁸⁹ "Protecting copyright on the Internet", *New Law Journal Information Technology Supplement*, 21 September 2001

⁹⁰ *Shetland Times v. Shetland News* 1997 S.L.T. 669, cited in: Peter Carey, *Media Law* (second edition, 1999) p 201

of copying, might argue against an equal footing with trade mark protection. In an article in *Justice of the Peace*, the Barrister Alan Murdie wrote:

Such is the complexity of the field that there is no easy test to distinguish between legitimate and illegitimate forms of copying – each case will depend very much on its facts and its subject matter. With such uncertainty it would be otiose to apply criminal law to this and many similar situations...⁹¹

Writing in the *Financial Times*, in the context of EC's (then) draft Copyright Directive, Professor James Boyle commented:

The conventional wisdom about cyberspace is that it will lower the cost of copying and thus increase piracy. In order to maintain adequate incentives we must increase copyright protection ... cutting back on the "fair use" or "fair dealing" rights of consumers and future creators, allowing media companies to wrap their products in digital barbed wire... This conventional wisdom is wrong, or at least incomplete.⁹²

While acknowledging the internet facilitates illicit copying, he goes on to argue that it provides benefits to the rights holders, such as cheaper distribution and bigger markets. Directive 2001/29/EC on "the harmonisation of certain aspects of copyright and related rights in the information society" was adopted on 22 June 2001, and must be implemented in Member States by 22 December 2002.

B. Trademarks

What is a trade mark?

A trade mark is any sign which can distinguish the goods and services of one trader from those of another.

A sign includes words, logos, colours, slogans, three-dimensional shapes and sometimes sounds and gestures.

A trade mark is therefore a "badge" of trade origin. It is used as a marketing tool so that customers can recognise the product of a particular trader. To be registrable in the UK it must also be capable of being represented graphically, that is, in words and/or pictures.⁹³

1. The registration of trade marks

Trade marks are valuable business rights. The *Trade Marks Act 1994* defines a trade mark as "any sign capable of being represented graphically which is capable of distinguishing

⁹¹ "Intellectual Property Rights and the Criminal Law", *Justice of the Peace*, 29 July 2000 p 601-3

⁹² "Whigs and hackers in cyberspace", *Financial Times*, 12 February 2001

⁹³ http://www.intellectual-property.gov.uk/std/faq/trade_marks/what.htm

goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging”.⁹⁴

The DTI describes the purpose of a trade mark as to “assert and define the origin of goods, and protect the reputation of their producer and their investment in advertising and promoting brand”.⁹⁵

In effect, a trade mark is a sign that distinguishes goods or services. It may be a word, symbol, design, logo or other sign. If properly used, a registered trade mark can last indefinitely. Trade marks are best protected if they are registered. The procedure for registering a trade mark in the UK is defined by the *Trade Marks Act 1994*. Under the Act there is a classification system with 42 different classes, covering all goods and services. A recent PQ⁹⁶ summarised the registration procedure as follows:

Mr. Sayeed: To ask the Secretary of State for Trade and Industry what is the procedure to be followed by a foreign company applying to register a trademark name currently used by a British company.

Dr. Howells: The procedure for registering a trade mark in the UK is defined by the Trade Marks Act 1994. Anyone can apply for registration, but any applicant must be using or intend to use the mark in the United Kingdom. However, a mark is registered only when the Trade Marks Registry has established that there is not a conflict with earlier marks. Where conflicts with earlier marks are identified it may be possible for the application to proceed to registrations by use of the provisions in Article 37 of the *Trade Marks Act 1994*. These provisions include restricting the goods and/or services for the mark applied for, or demonstrating honest concurrent use of the mark applied for with the earlier mark. Further information on the trade mark application process is available from the Trade Mark Registry¹ at the Patent Office.

A registered trade mark may be infringed by use of an identical or similar sign on identical or similar goods or services. A trade mark owner may sue an infringer for injunctions, damages (or an account of profits) and delivery up of offending items. Trade mark infringement also attracts criminal sanctions.

It should also be pointed out that trade marks are national rights and need to be protected in foreign jurisdictions as well as the UK. Since April 1996 it has been possible to apply for a Community trade mark covering the whole EU.

⁹⁴ *Trade Marks Act 1994*, Part 1, 1(1)

⁹⁵ Trade and Industry Committee Eighth Report *Trade Marks, Fakes and Consumers*, 29 June 1999, HC 380, page xii

⁹⁶ HC Deb 19 October 1998 c 1035W

Unregistered trade marks may be protected by the common law action of "passing off". For a passing-off action to succeed it is necessary to show that there is goodwill in the business in which the mark is used, and that the infringer has made a misrepresentation leading to damage to the business. Civil law remedies are available (for example, injunctions and damages). However, delay in taking action against infringers damages a trade mark owner's chance of obtaining injunctive relief.

It should be recognised that it is generally more difficult to enforce unregistered rather than registered trade mark rights.

2. The doctrine of exhaustion

The doctrine of exhaustion provides that once a product has been placed on the market by the trade mark owners, or with their consent, trade mark protection is deemed to have been exhausted and cannot be used to prevent further resale or circulation of that product.

One crucial issue surrounding exhaustion revolves around how narrowly or widely the 'market' is to be defined: whether exhaustion should be applied *geographically within the European Economic Areas [EEA] or internationally*. In the deliberate absence of any accepted rule of international exhaustion under the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs Agreement) concluded on 15 December 1993, countries are free (providing there are no other constraints) to decide how to apply the doctrine of exhaustion. The judgment given in the *Silhouette case* has, however, impacted on this freedom for countries within the EEA.

The other crucial issue is what constitutes 'consent'. It has been concluded that: "in the absence of any internationally agreed norm, the issue of whether actual or implied 'consent' has been given to the placing of a trade marked product on the market has to be decided afresh on the facts of each individual case".⁹⁷

C. Design

What is Design?

A design refers to the features of shape, configuration, pattern or ornament which can be judged by the eye in a finished manufactured article or set of articles.

In the United Kingdom designs are protected by three legal rights:

- registered designs
- unregistered design right
- and artistic copyright

⁹⁷ Trade and Industry Committee Eighth Report on *Trademarks, Fakes and Consumers*, 29 June 1999, HC 380, page xiv

Design registration gives the owner, a monopoly on his or her product, i.e. the right for a limited period to stop others from making, using or selling the product without their permission and is additional to any design right or copyright protection that may exist automatically in the design.⁹⁸

The Patent Office provides the following definition of a design:

A registered design is a monopoly right for the outward appearance of an article or a set of articles of manufacture. It can last for a maximum of 25 years and is a property that, like any other business commodity, may be bought, sold, hired or licensed. A registered design is additional to any design right or copyright protection that may exist automatically in the design.⁹⁹

There is a great deal of overlap between the perception of the various protections of intellectual property and it is likely that design and copyright may be most open to confusion by the layman. The government funds the Design Council¹⁰⁰ to provide a source of information to business, the government and to education on design matters.

The Design Council website contains information on the importance of design:

The Contribution of Design to the UK Economy

The British manufacturing industry spends an estimated £10billion (at 1995 prices) on product development and design, including both in-house design activities and bought-in services. This is 2.6 per cent of manufacturing turnover.

- An estimated 173,000 employees, around 4.5 per cent of the workforce, are involved in design within the manufacturing industry.
- Expenditure on product development and design by British industry exceeds its expenditure on R&D.
- The heaviest investors in design in British industry are the aerospace and motor vehicle industries.
- Design contributes directly to the UK balance of payments, with overseas earnings by design consultancies estimated at over £350million in 1995.
- Engineering, technical and process/systems design are the dominant design disciplines in British industry.¹⁰¹

⁹⁸ <http://www.intellectual-property.gov.uk/std/faq/designs/what.htm>

⁹⁹ <http://www.patent.gov.uk/design/definition.htm>

¹⁰⁰ <http://www.design-council.org.uk>

¹⁰¹ An assessment, carried out by the London Business School, of the contribution of design to the British economy, particularly in the manufacturing industry. June 1997
<http://www.design-council.org.uk/design/content/research.jsp?contentID=09009e0d80022384>

VI Patent Disputes

There have been a number of patent disputes that have resulted in press coverage and Parliamentary comment, three of the more prominent are presented below.

A. AllVoice Computing plc

This case is one where a small British company have become involved in a patent dispute with two American companies, IBM and Dragon. The case is made more complex due to the highly technical nature of the dispute and highlights the difficulties small companies can find in defending their intellectual property.

John Mitchell, the managing director of AllVoice, has produced a briefing that outlines AllVoice's Intellectual Property difficulties.¹⁰² The briefing provides good detail on a small companies perspective on the patent process. The company is a software company introduced in the briefing:

AllVoice Computing plc is a specialist speech recognition software company. Speech recognition has many applications including transcribing dictation onto computers and automating telephone calls. AllVoice has around 10 years of expertise in this exciting though relatively new field. Having noticed major product deficiencies from the US manufacturers, AllVoice invented significant improvements for speech dictation software which generated worldwide interest.

Patrick Nicholls¹⁰³ detailed some of the history in a Westminster Hall debate:

In January 1996, IBM informed AllVoice that it was seriously considering incorporating AllVoice technology into its products under a worldwide agreement. IBM urgently requested AllVoice to submit the software, including unreleased features, to IBM's speech research and development groups in Vienna and Florida. In February 1996, AllVoice were invited to Florida, at IBM's expense, to discuss the arrangements. Of course, promises of confidentiality were made, and IBM insisted that it had no intention of writing similar software. There was an understanding that should the evaluation of the products be satisfactory, some form of partnership would be entered into. Instead, in April 1996, after a satisfactory evaluation, IBM wrote to say that it was now working on the same functions. Over the next few weeks, IBM also tried unsuccessfully to trick AllVoice into signing away its intellectual property rights.

In June 1996, having clearly decided to exploit AllVoice's products for itself, IBM announced to the world that it would be delivering a new product with similar features in the following November. Pre-announcing a product is a well-known tactic of predators, which is designed to undermine competitors who

¹⁰² Personal Communication, John C. Mitchell, Managing Director AllVoice Computing plc, October 2001

¹⁰³ Conservative Member of Parliament for Bridgwater until the 2001 General Election

would otherwise sell competing products in the time between the announcement and the release of the predator's product.

IBM slipped up temporarily in January 1997 by introducing a low-price product that had all AllVoice's features missing, no doubt thinking by then that AllVoice would be dead in the water. AllVoice responded by adding its features back in and then undercutting IBM's more expensive version by nearly 30 per cent. Once again, AllVoice's sales climbed dramatically, so in retaliation IBM resorted to anti-competitive actions against AllVoice. As the anti-competitive actions increased, AllVoice eventually filed a formal complaint with the European Court in December 1997--case No. IV/36 824. AllVoice is waiting on the European Court to take action.¹⁰⁴

The next step was to take court action to defend their patent. Mr Nicholls outlined the reasons that court action was felt necessary:

I understand that it is a feature of American business practices that if a little guy has a patent that he is in all probability not in a position to enforce, all the big guys get in on the act. Therefore, all attempts by AllVoice, short of litigation, to stop the breach of its patent had no effect at all. Reluctantly, AllVoice had to resort to litigation in the United States. As an official complaint is currently outstanding against IBM, a patent infringement suit was filed in Boston on 12 February 1999 in the US District Court of Massachusetts against Dragon Systems. The court case number is CA No.99-CV-10436, and the judge allocated is the honourable Douglas P. Woodlock.¹⁰⁵

The Patent litigation has been stalled in the courts for an extended period of time, partly explained in the AllVoice briefing:

Dragon was subsequently acquired by Lernout & Hauspie (L&H) during the case. L&H subsequently filed for bankruptcy protection following exposure of a massive accounting fraud. AllVoice's patent case was then automatically stayed – as L&H is entitled under bankruptcy court procedures.

The problem for AllVoice is that whilst the litigation is delayed any perceived patent infringement continues. AllVoice are concerned that whilst under US patent law, wilful infringement of patents can bring triple damages, UK patent law only provides for royalties that should have been paid with no penalty.

The case has not yet been decided and Mr Nicholls stated that:

To date, AllVoice has spent more than £275,000 on outside intellectual property costs, including patent filing fees, patent attorneys, legal counsel in the United

¹⁰⁴ HC Deb 19 April 2000 c244WH

¹⁰⁵ HC Deb 19 April 2000 c245WH

Kingdom and the United States and, probably, other US associates. That is more than the current reduced turnover of the entire company. Patent fees continue to mount up, as do the company's legal costs. On top of that, AllVoice's has had to devote daily resources to litigation for lengthy periods, at great additional cost.¹⁰⁶

Patricia Hewitt responded:

In the end, the answer is not simply to seek proper legal protection for the innovation and the intellectual property that resides in it, but to give away as little as possible and then to maintain constant innovation and investment in research and development.

[...]

The problem is how to protect an innovation and secure intellectual property rights, and then how to introduce them and maintain the competitive advantage.

¹⁰⁷

Mr Nicholls raised the case in Parliament again in July 2000¹⁰⁸ when Paddy Tipping gave commitment to write to Minister of Trade and Industry and indicated that the AllVoice case was being attended to.

John Mitchell, the managing director of AllVoice, stated:

A knowledge economy depends upon the adequate protection of Britain's inventions – yet this protection is in reality unavailable to the vast majority of inventors.¹⁰⁹

The perception is that patent protection is no protection at all unless it gives pause to companies considering infringement and risking court action. Such cases occur between large corporations as well as between SMEs and large corporations but SMEs may be less financially able to defend themselves. The quinquennial review of the DTI's Patent Office states

Effective enforcement of rights is crucial to their value. During our review, representatives of small companies in particular told us that effective enforcement was both difficult and costly.¹¹⁰

¹⁰⁶ HC Deb 19 April 2000 c246WH

¹⁰⁷ HC Deb 19 April 2000 c249-50WH

¹⁰⁸ HC Deb 28 July 2000 cc1396-1400; 1454-5

¹⁰⁹ Personal Communication, John C. Mitchell, Managing Director AllVoice Computing plc, October 2001

¹¹⁰ DTI, *Quinquennial Review Of The Patent Office, Stage 2 - REPORT*, Executive Summary para 6, January 2001

B. Mandy Haberman's Anywayup Cup

The following dispute is one that has come to a resolution. It is again a dispute between a small company and a larger one. The dispute does not require a great technical background to understand however which may have been crucial in achieving a resolution.

Lucas and Co, a company of patent lawyers, have produced a briefing that has been used to provide some of the details of the case.

Mrs Mandy Haberman had a degree in graphic design from St Martin's School of art and subsequently worked in the field of adult literacy. In 1982, she had a baby who suffered from severe feeding problems and could not suck from a bottle. She was dissatisfied with the equipment that was available to deal with the problem, and developed a special feeding bottle called the Haberman Feeder which is the subject of UK Patent 2169210 and is now marketed world -wide.¹¹¹

The need for a new feeding bottle was apparent. Existing examples of the technology were inadequate to the task as the products had practical flaws listed as follows:

- Cups that simply leaked.
- Cups with lids that could be rotated between ON and OFF states by the parent, but which could leak when ON and required parental intervention to turn them OFF.
- Cups with snap-on leak-resistant covers, again demanding parental intervention.
- Cups with complicated multi-part mechanical valves that were expensive to make and difficult to clean.¹¹²

Mrs Haberman believed that she had the solution. Her version of the technology would not leak if turned upside down and shaken vigorously for 10 seconds or was left upside down overnight.

Her idea was simply to combine a rubber slit valve that was well known for feeding bottle teats with the spout of a trainer cup. When the child wanted a drink, his or her suction would open the valve, and at other times the valve would close. Mandy built a prototype with a slit valve that worked so well that it could be left upside down for weeks on end without spilling any of its contents. In 1992 she filed a patent application to protect her idea of using a rubber slit valve to control the flow of milk through the spout of a trainer cup, and it was granted as patent GB-B-2266045. Claim 1 of her patent, with bullet points added to make the specified features easier to identify, read as follows:

¹¹¹ UK Briefing, Lucas & Co, 135 Westhall Road, Warlingham, Surrey CR6 9HT
Tel: 01883 626211 Fax: 01883 622997

¹¹² Ibid

“A drinking vessel suitable for use as a trainer cup or the like, comprising:

- a lid for the open mouth of said cup-shaped container, the lid having a mouthpiece associated therewith;
- the vessel being provided with valve means comprising a self-closing slit valve adapted to prevent flow of liquid from the interior of the container through the mouthpiece unless a predetermined level of suction is applied to the mouthpiece, and to enable a user to draw liquid through the mouthpiece by the sole application of suction thereto;
- the configuration of the valve means being such that said slit valve is adapted to open upon no more than a predetermined difference of pressure, greater within the vessel than outside, being present across the said valve.”¹¹³

Initial efforts to licence the technology were difficult but eventually she found a company willing to provide some support.

...a company in Wales called V & A Marketing limited. At the time V & A was a very small company employing only five people. The judgment records the following milestones along the road to commercial development.¹¹⁴

While initial marketing seemed unfavourable, when the product was launched at an exhibition for organisers of nursery schools they found success:

“The evidence was that the response was overwhelming. The plaintiffs' stand was besieged by would-be customers. Advance orders for £10,000 worth of cups were taken. The plaintiffs also found the correct fair to attend, the Baby & Toddler Fair, and took space there. Once again the product was a success. According to Mr Victor Davies, a director of the second plaintiff, the response was very impressive. Although at the time of these two fairs in the Autumn of 1995 the plaintiffs were not in production and therefore had nothing to sell, a total of 8000 advance orders were taken.” UK sales began in March 1996 and by 1998 had reached 2 million cups, achieved on the basis of an advertising expenditure of £2100 and expenditure at exhibitions of £15,000, sales being achieved almost entirely by word of mouth and by recommendation from mother to mother.”¹¹⁵

The patent dispute arose when a company called Jackel:

...decided to market a similar product, taking the view that Mandy's patent was invalid for lack of inventive step.¹¹⁶

¹¹³ UK Briefing, Lucas & Co, 135 Westhall Road, Warlingham, Surrey CR6 9HT
Tel: 01883 626211 Fax: 01883 622997

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

The court would have to make a decision on this basis. Despite the ‘inventive step’ being something any technically capable person might have made, prior to Mrs Haberman none them had done so.

[Mr. Justice Laddie] then went on to produce a systematic list of the matters that were of value in determining whether an invention was obvious or not:

- What was the problem that the patented development addressed?
- How long had that problem existed?
- How significant was the problem seen to be?
- How widely known was the problem and how many were likely to be seeking a solution?
- What prior art would have been likely to be known to all or most of those who would have been expected to be involved in finding a solution?
- What other solutions were put forward in the period leading up to the patentee’s development?
- Were there factors that would have held back the exploitation of the solution, even if it was technically obvious?
- How well has the patentee’s development been received?
- Once the product or process was commercialized was it a commercial success?
- Was all or much of the commercial success due to the technical merit of the development - i.e. because it solves the problem?

...On the evidence before me, I accept that the Anywayup cup has been far more successful than the plaintiffs could reasonably have hoped. I also accept that this was almost entirely due to the inclusion within it of the simple slit valve.

...Mrs. Haberman has taken a very small and simple step, but it appears to me to be a step which any one of the many people in the trade could have taken at any time over at least the preceding ten years or more. In view of the obvious benefits which would flow from it, I have come to the conclusion that had it really been obvious to those in the art it would have been found by others earlier, and possibly much earlier. It was there under their very noses. As it was it fell to a comparative outsider to see it. It is not obvious...”¹¹⁷

The judgement was in favour of Mrs Haberman and while there was an appeal announced, Mrs Haberman’s website reports that this was resolved out of court.¹¹⁸

¹¹⁷ UK Briefing, Lucas & Co, 135 Westhall Road, Warlingham, Surrey CR6 9HT
Tel: 01883 626211 Fax: 01883 622997

¹¹⁸ <http://www.mandyhaberman.com/legal/>

C. Dyson's Cyclonic Bagless Vacuum Cleaner

Dyson were unwilling to provide an overview of the history of their case but pointed out that there are many press reports on the events.¹¹⁹ The following article from Goldsolicitors however provides a useful overview of the events in the dispute:

ROUND ONE

Dyson, famous for its innovative ideas, had registered a European Patent (Patents being based on territorial areas) for its "Vacuum Cleaning Appliance," the bagless vacuum cleaner. By using a combination of cyclones the Dyson Appliance is able to efficiently filter out dirt. This does away with any need for replacement paper bags. Hoover, in the shape of their "Hoover Triple Vortex," had produced a product which also used the cyclone principal. The court was asked by Dyson to find that Hoover had infringed their patent.¹²⁰

Like the case of the Anywayup Cup the argument was about the inventive step.

Hoover sought to show that Dyson's Patent was not innovative. They argued the patent should not have been granted as it lacked novelty and that the bagless vacuum cleaner was an obvious thing to make. The court however, decided there was no evidence such a thing had ever been considered - what is known as "prior art." The court also made the fairly blunt observation that a bagless vacuum cleaner was not in the commercial interests of existing producers who had a good resale market in paper bags for existing models!

The decision was in favour of Dyson and Hoover was held to be infringing the patent.¹²¹

While this might have seemed to be the end of the matter Dyson was still not happy. He believed that Hoover would have an unfair advantage when the time limit ran out on the patent. Having been proved guilty of infringing the patent they would still have benefited as their manufacturing capability was in a state that would not have been achieved had they not infringed the patent.

ROUND TWO

The second hearing...proved to be very interesting and just as important as the earlier win for Dyson. Dyson's Patent was due to run out within the year. When that patent ends, it is open to anyone to use that invention.

Dyson argued that Hoover had benefited from commercial advantage when it was infringing the patent having developed a name in the market by breaking the law.

¹¹⁹ Personal Communication, Press Officer, Dyson, October 2001

¹²⁰ Ewart Baxter, "It's all (not) in the Bag", *Golds Solicitors website*, January 2001
http://www.golds.co.uk/articles/articles_corp_patent_law.htm

¹²¹ Ewart Baxter, "It's all (not) in the Bag", *Golds Solicitors website*, January 2001
http://www.golds.co.uk/articles/articles_corp_patent_law.htm

In other words, Hoover had benefited by infringing the patent above and beyond whatever sales they had generated. Dyson suggested Hoover should be prevented from gaining any advantage from this by banning them from using the technology. Additionally Dyson put forward an argument that Hoover should be prevented from using the trademark " VORTEX" under which they had marketed the infringing product.

[...]

The court was concerned with levelling the playing field after a wrongdoing and extended the ban on Hoover benefiting from its actions.¹²²

This has not been the end of legal wrangling between the two companies but the above decisions are useful in highlighting

...the court considering the realities of the commercial world and taking them into account while, at the same time, protecting the innovator who has gone to the time and trouble of securing a patent. It is also another example of the importance and value of what are known as 'intellectual property rights' of which patents are only one. The publicity given to battles over such rights means more businesses are taking stock of just what it is, exactly, they have that is worth protecting...¹²³

Most recently, Hoover appealed against the ruling that they had infringed Dyson's patent. The Court of Appeal upheld the High Court ruling and refused permission to appeal to the House of Lords. Hoover are reported to be appealing directly to the House of Lords for that right to appeal.¹²⁴

¹²² Ewart Baxter, "It's all (not) in the Bag", *Golds Solicitors website*, January 2001
http://www.golds.co.uk/articles/articles_corp_patent_law.htm

¹²³ Ibid

¹²⁴ "Hoover loses Dyson appeal", *Financial Times*, 5 October 2001