

The Role of Government in Protecting and Promoting Intellectual Property

Response to All Party IP Group inquiry

INTRODUCTION

The Anti-Counterfeiting Group and British Brands Group welcome the opportunity to respond jointly to the All-Party Intellectual Property Group's invitation for submissions on its questions on intellectual property policy in the UK.

Both organisations represent brand manufacturers in the UK. Both are cross-sectoral and work closely with similar national organisations in other Member States, at European level and internationally.

The Anti-Counterfeiting Group (ACG) campaigns on behalf of consumers and legitimate businesses for recognition of the economic and social cost of counterfeiting.

The British Brands Group champions the benefits of branding and the potential for brands to deliver choice and value to consumers in an environment of vigorous but fair competition.

A list of members of each organisation is available on request.

This joint submission addresses the questions posed from a branding perspective. Branding relies on intellectual property rights to operate:

Trade marks, designs and copyright protect the distinctive character of individual products and services, allowing consumers to distinguish one offer from another and make informed choices;

Trade marks provide the basis for taking action against counterfeits;

Patents protect the investments in R&D and innovation that sustain brand quality and superior performance and deliver better products and services to consumers and business;

The law of passing off helps protect the distinctive character of products and services, helps prevent consumers being confused between different offers and supports investment in distinctive reputations;

Trade secrets support collaborative working on new products and services and the bringing of these to market.

Branding is a powerful, yet largely unrecognised and unacknowledged, force in the UK economy:

branding gives consumers confidence in markets, whether traditional or digital, as they understand, and have confidence in, what they are buying;

branding enables competition on the basis of quality, price and reputation, as opposed to commodities where competition is purely price-led. This distinction is crucial to a high cost economy such as the UK where competitiveness relies on adding value;

to sustain a reputation, companies must continually innovate. Branding acts as a catalyst for innovation and, through communication, helps commercialise R&D and innovation faster than would otherwise be possible, leading to better ways for people to live and work;

branding is closely associated with economic growth, with consumer insights and investments in innovation and reputation creating new and growing existing markets;

branding delivers export performance, with brands such as Rolls Royce, Burberry, Mulberry and Johnnie Walker performing strongly abroad and creating a halo effect for other UK products;

branding and trade marks are closely correlated with higher levels of employment and higher salaries. Over 1 million people are employed in the UK in creating and managing brands;

Companies with reputations are concerned about *how* they do business, investing behind responsible ways of doing business that reflect the needs of, and contribute to, society;

The UK's brand-building creative industries (advertising, design and branding agencies) are world class and generate around £1billion annually in Gross Value Added through exports alone;

Companies invest some £33 billion annually in creating and building brands (as much as they invest in scientific R&D and computer software combined), with brands accounting for a significant portion of their market value, over 50% in many consumer markets.

Branding is therefore a crucial driver of the UK's economic competitiveness and success and is wholly dependent on the IP regime in order to exist and thrive.

THE ROLE OF GOVERNMENT IN PROTECTING AND PROMOTING INTELLECTUAL PROPERTY

What should the objective of IP policy be?

The objectives of IP policy should be:

- to allow consumers to distinguish between products and services, both tangible and digital, assisting their ability to make well-informed, accurate purchasing decisions;
- to encourage confident investment in R&D, innovation, quality and reputation;
- to encourage economic growth and international competitiveness, being fully integrated into, and fully aligned with, the national strategy for growth;
- to support the effective working of competitive markets.

How well co-ordinated is the development of IP policy across Government? Is IP policy functioning effectively on a cross departmental basis? What changes to the machinery of government do you believe would deliver better IP policy outcomes?

(1) How well co-ordinated is the development of IP policy across Government?

We believe the importance of IP to the UK to be not widely or well understood within Government. More specifically, IPR enforcement policy is currently fragmented across a number of different departments.

Two examples potentially illustrate the lack of co-ordination of IP policy. In 2008, the Department of Health's exploration of plain packaging as a means to regulate tobacco products did not appear to have taken into account, and certainly did not declare, the significant expropriation of IPRs that such a policy would involve and the implications this would have on the UK's wider reputation in relation to its approach to IP.

Separately, there has been (until recently) a lack of leadership on the problem of parasitic copying by competitors of the packaging of familiar brands. Such copying misleads consumers, damages investment in brands and allows competitors to free ride off brand reputations, a problem first identified in the UK in 1994. The Government has perceived this as, separately, a competition issue and an IP issue while being reluctant to see it as a consumer issue (despite it being a banned practice under the Unfair Commercial Practices Directive). There is no evidence of a co-ordinated assessment across these three dimensions, despite the Gowers Review highlighting the problem. The IPO has begun to take a lead on the subject but with no evidence yet of a co-ordinated approach with BIS, the OFT or Trading Standards.

(2) Is IP policy functioning effectively on a cross departmental basis?

The example of parasitic copying (above) suggests that IP policy is not functioning effectively across departments, placing UK branded companies at a disadvantage against similar companies in other countries where better remedies are available.

In the area of IPR enforcement, an important achievement of a previous IP Minister, David Lammy MP, was the introduction of cross-departmental IP meetings, though we believe there is scope to go further. Meanwhile, the IPO's IP Crime Strategy 'Prevention & Cure' published last August, offers a positive vision for cross-departmental cooperation.

We fully support the need for an IP Minister to raise awareness of IP crime within government, agencies and industry and to promote the core goals of the IP Crime Strategy, but strongly believe this should be a cabinet position, reflecting the importance of IP to the UK economy.

(3) *What changes to the machinery of government do you believe would deliver better IP policy outcomes?*

If IP is to be a key contributor to economic growth and international competitiveness as we believe it to be, IP policy covering registered and unregistered rights and their enforcement needs to be integrated more centrally into Government economic policy, international trade policy and also international aid policy (to countries where IP regimes may still be weak).

IP is a specialist area and expertise is required to formulate policy, suggesting that implementation should continue to rest with the IPO. However, as an executive agency its influence within Government may be insufficient, a potential shortcoming that needs to be addressed.

Furthermore, policy formulation needs to be demonstrably more collaborative between all the government departments with an interest, involving BIS and the Treasury in the context of the UK's growth strategy and the Home Office, Customs, the Police and local government in the context of IPR enforcement.

As branding relies on the wide range of IPRs to operate, we see no merit in responsibility for different IPRs resting in different places. This would amount to fragmentation and unnecessary complexity.

IP policy needs to be led by a Minister with the ability to operate authoritatively across the key Government departments, with the importance of IP to the UK communicated and championed more widely and more forcefully than is currently the case, both inside and outside Government.

Increasingly, IP policy is set at EU level or through international treaties, rather than at national level. The UK therefore needs strong and effective representation at supranational level, with a clear commitment to support UK business and promote IP as a driver of growth and societal welfare. We explore this further below.

There have been numerous attempts to update the IP framework in the light of changes brought about by the digital environment. How successful have these been and what lessons can be learnt from these for policy developments?

In the context of branding, the existing IP framework is well-placed to accommodate the implications of the digital environment. More challenging is refining the IPR enforcement regime which needs to become smarter and internationally more coherent to address online threats.

Unfortunately, the recent Hargreaves review missed an important opportunity to address the enforcement question. Additionally it failed to recognise the role of branding and trade marks in encouraging consumer confidence in and use of digital services, and the challenges posed by online criminality. Instead, the review was overly focused on the UK's copyright regime. It therefore failed to scrutinise the online threats to branding and to reflect on how markets work and how consumers make decisions;

We have seen no commitment from successive Governments to follow through on recommendations of earlier reviews, making the process unduly political. For example, the Gowers review (which reported in 2006) recognised that brands were not well protected from misappropriation. A recommendation was made and accepted by Government but was then dropped by the incoming Coalition Government. The process needs to be de-politicised as much as possible and formal assessments undertaken when accepted recommendations from

IP reviews remain outstanding (as remains the case for the protection of brands against misappropriation).

How effective is the Intellectual Property Office and what should its priorities be?

The IPO is extremely effective in managing the UK's trade marks and patents registries, setting a high standard for best practice which we would like to see replicated in other countries. It is crucial to sustain this high level of performance.

As examples, the IPO has in recent years improved significantly the time between application and registration of trade marks, introduced free access to registry data with a user-friendly web-site, conducted regular seminars to increase awareness of IP and has an established consultation process in place to liaise with users to improve systems and processes.

The priorities of the IPO should be:

- (1) effective and efficient management of the IP registries;
- (2) developing IP policy (for both registered and unregistered rights), but in much closer conjunction with BIS, the Treasury and other relevant Government departments;
- (3) continuously reviewing and improving the UK enforcement regime in conjunction with all the other relevant agencies and departments;
- (4) ensuring sound governance of the Office of Harmonisation in the Internal Market (OHIM) via its role on the Management Board and Budget Committee;
- (5) ensuring EU and international IP regimes are conducive to British business and growth.

UK IP policy sits within European and supranational agreements. How should the UK government co-ordinate its policy at an international level and what should it do to promote IP abroad to encourage economic growth? Do you have examples of good and poor practice in this area?

With IP policy increasingly set at EU and international level, it is essential that the UK Government is influential abroad and that IP policy is developed in the optimum forum, whether nationally or internationally. There are many bodies in the EU and internationally where the UK needs to be active.

An increasing amount of the development of the law is taking place at the CJEU. The UK has the right to be heard in references from national courts but it is unclear how the Government chooses when to exercise it and the basis on which such decisions are made. The IPO has a process for notifying interested parties of pending references and inviting comments. However the Government's process for taking these comments into account and deciding whether the UK should take an active part is not transparent or well understood.

Leadership and influence is also required in the UK's engagement with OHIM, in terms of promoting strong governance and financial management (to avoid excessive surpluses arising from fees that are too high, for example, imposing costs on business). In addition, the IPO should actively promote and encourage consistency of practice and the raising of standards of other national offices to those enjoyed in the UK. As an example, some national offices operate to time frames measured in years compared to months in the IPO.

The UK also needs to play an active role in the fast-moving development of IP for the internet, with an example of recent good practice being the UK's intervention with ICANN to safeguard the interests of trade mark owners prior to the introduction of new gTLDs.

In difficult economic times, when there is a focus on short-term constraints, the IPO needs to have sufficient resource and authority to maintain its International role and commitment to long-term improvements in the IP system.

Protecting, and enforcement of, the IP framework often sits in very different departments to those that develop IP policy and those that have responsibility for the industries most affected. What impact does this have and how can it be improved?

IPR enforcement falls into two categories in relation to brands:

- enforcing the criminal provisions of the Trade Marks Act 1994; and
- civil enforcement of individual IP rights, which also has a European dimension with the Enforcement Directive.

We limit our comments here to the criminal aspect.

Counterfeiting is a serious organised crime recognised as such by the Home Office and the Serious Organised Crime Agency (SOCA), with links to other such crimes on a global scale.

The UK is one of the largest consumer markets for fakes per capita in the world (the largest producers of counterfeits being in the Far East and other developing countries).

Counterfeiting has three main areas of impact in the UK:

- economic loss to industry, the national economy and the Exchequer;
- consumer harm;
- links to other serious organised crime.

It follows that failure effectively to enforce the criminal provisions of the Trade Marks Act, and indeed to pursue available remedies for confiscation of criminal assets under the Proceeds of Crime Act (counterfeiting being a lifestyle offence), leave not only industry but also the consumer at risk.

Counterfeiting is an economic threat both to industry and to national economies. Increasing use is made of the Proceeds of Crime Act in counterfeiting cases, but more awareness of IP crime being a lifestyle offence is needed to encourage more prosecutions, so that POCA can come into play. Regarding counterfeiting as an economic crime will raise its profile and affirm its important place in any national serious organised crime strategy, but particularly, in this context, its usefulness as a trigger for POCA confiscation proceedings.

Integrating IP crime into the overall national organised crime strategy is needed, requiring a concerted effort by the Home Office, HMRC, trading standards and the new National Crime Agency, which has, we understand, already acknowledged its role in this area.

A working group with these departments represented would help to coordinate the necessary work streams.

The IPO is charged with creating and implementing IPR enforcement policy but has no enforcement powers, and we suggest that the above departments need to play a far greater part in both areas in order to achieve practical results on the ground. The IPO could play a valuable part here in helping to integrate policy and enforcement, were its influence stronger.

Awareness across government of the significance of IP crime is poor - even the judiciary needs to be encouraged to recognise the seriousness of IP crime offences so that appropriate sanctions are applied, and this brings in the Ministry of Justice, which has been difficult to engage in the past.

If policy and enforcement were centrally managed by a Minister in cabinet as recommended, this would in our view solve the twin problems of fragmentation and inadequate protection.