

Review of the Internal Market: Free Movement of Goods; including the EU Customs Union and Intellectual Property Rights - Call for Evidence

Response on Behalf of the Chartered Institute of Patent Attorneys (CIPA)

Background

The Chartered Institute of Patent Attorneys (CIPA) is the professional and examining body for patent attorneys in the UK.

CIPA was founded in 1882 and was incorporated by Royal Charter in 1891. It represents virtually all the registered patent attorneys in the UK both in industry and in private practice. Patent attorneys are qualified to advise on trade marks, designs and copyright as well as patents. Most UK qualified patent attorneys are also qualified as European patent attorneys and practice before the European Patent Office as well as before the UK Intellectual Property Office. Total membership of CIPA is over 3,300 and includes trainee patent attorneys and other professionals with an interest in intellectual property (IP).

CIPA members represent clients in all sectors of industry, in the UK and worldwide, including UK PLCs and multinationals, SMEs, Universities and public sector bodies and individuals, and in all areas of technology.

In relation to some of the questions being asked in this review, the opinions of CIPA members or their clients may differ, or CIPA may otherwise consider it inappropriate to comment, in which case this has been indicated.

Key questions

- 1. What do you see as the advantages and disadvantages of EU action on the free movement of goods? How might the national interest be served by action being taken in this field at a different level (for example, at the WTO), either in addition to or as an alternative to EU action?**

This question addressed whether exhaustion of IP rights should be looked at at a level beyond the EU, i.e. whether international exhaustion of rights should apply to different IP rights. This is likely to be something on which the views of our members would differ. The EU's approach to freedom of movement has significant effects on some sectors in which our members and their clients operate, such as in relation to parallel imports of pharmaceutical products.

- 2. To what extent do you think EU action on the free movement of goods helps UK businesses?**

This is a complex question and would entail different answers from the point of view of different clients, so we do not think it appropriate to comment.

- 3. To what extent has EU action on the free movement of goods brought additional costs and /or benefits to you when trading with countries inside and outside the EU? To what extent has EU action on the free movement of goods brought additional costs and /or benefits to you as a consumer of goods?**

We feel these are questions for our clients and not for us.

- 4. What types of EU action would be helpful or unhelpful for your activities as a business and/or as a consumer in the Internal Market?**

This is a very far ranging question and one on which we do not feel it would be appropriate to offer any comment.

- 5. To what extent do you think the harmonisation of national laws through EU legislation (as opposed to international treaties) is helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market? In your experience do Member States take a consistent approach to implementing and enforcing EU rules? Please give examples.**

This is another question best addressed to our clients although we note that the present structure of the legal systems for enforcement of patents, being dealt with at national level by EU member states, has the potential to lead to inconsistent decisions. This is best illustrated in by the *Improver v. Remington* case in which patents for the same invention were held infringed in some EU countries and not infringed in others. This is being addressed by the proposals for a Unified Patents Court (UPC), and it will be very important that under the UPC there is seen to be greater consistency of view and approach and the new system does not result in local or regional divisions adopting their own national approaches.

- 6. Do you think that the EU strikes the right balance between regulating imports and exports and facilitating international trade?**

Again this question might entail different answers from the point of view of different clients, so we do not think it appropriate to comment.

- 7. Do you think the UK's ability to effectively regulate cross-border movements of goods would be better, worse or broadly the same as the result of more or less EU action? Please provide evidence or examples to illustrate your point.**

Likewise we would not be able to express a view or provide examples.

Intellectual Property Rights

- 8. To what extent are specific national rights provided through EU legislation (e.g. Supplementary Protection Certificates) helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market?**

Supplementary Protection Certificates (SPCs) are essential, and thus helpful, to originator pharmaceutical companies although generics companies would no doubt take a different view. In certain recent cases the English High Court Judge Mr Justice Arnold has been critical of the role of the CJEU in the interpretation of some of the basic provisions of the SPC Regulation, noting that the court has not given clear answers to the questions referred to it and indicating that he is "disappointed by this", and commenting on the need for the court to give "clear

guidance". In his view, not only had the Court not answered the questions put to it, "but the guidance it had provided was also not sufficiently clear to enable future disputes to be resolved".

9. To what extent are specific Community-wide rights provided through EU legislation (e.g. Community Trade Mark, Community Design, Geographic Indicators and Community Plant Variety Rights) helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market?

The role of the Court of Justice (CJEU) in formulating the law in relation to Community-wide rights may have the effect of making those rights hard for businesses to understand and hard to enforce. An example of this is in relation to the SPC Regulation (mentioned above) and the Community Trade Mark (CTM) system. CIPA recently supported a "test case" (*IP Translator*) with the objective of clarifying the law in relation to one aspect of trade mark law. The way the system operates by national courts referring questions to the CJEU which are then answered some years later in ways which sometimes reveal the need to reformulate the question or ask supplementary questions (cf. the comments of Mr Justice Arnold quoted above) means that the law develops slowly and the burden of attempts at clarification are largely borne by businesses which are the users of the system.

10. To what extent do wider EU rules (e.g. on free movement of goods or services) impact helpfully or unhelpfully on the conduct of your business or your experiences as a consumer in relation to intellectual property rights?

This is a far reaching question and one for our clients to answer.

Future Challenges

11. What future challenges/opportunities do you think will affect the free movement of goods and what impact do you think these might have?

The field of copyright and the digitisation of rights is an example of a rapidly developing area of law, and one in which the law is to some extent struggling to keep pace with technology. As has been mentioned above, it will be important to ensure that the UPC takes an appropriate and consistent approach to freedom of movement and exhaustion of rights in the context of patents.

General

12. Do you have any other general comments that have not been addressed above?

None at present, but we would be happy to be of further assistance to the review if you have any other questions you would like us to address.

Submitted on behalf of the Chartered Institute of Patent Attorneys

95 Chancery Lane

London WC2A 1DT

tel: 020 7405 9450

e-mail: mail@cipa.org.uk

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