

Industrial Strategy: Intellectual Property Call for Views A response from AIPPI United Kingdom

AIPPI United Kingdom (**AIPPI UK**) supports, and is keen to work with, the government in seeking to ensure that the UK remains at the global forefront of IP regimes with a system that is responsive to the needs of innovators, creators and consumers.

AIPPI UK is part of AIPPI internationally, the world's leading international organization dedicated to the development and improvement of laws for the protection of intellectual property. It is a politically neutral and not-for-profit organization, with over 9000 Members representing more than 100 countries. Members do not represent only rights holders or rights users, but clients with interests spanning both areas.

AIPPI UK is the UK national group of AIPPI, drawing its membership of over 400 IP professionals from all areas of the IP professions (barristers, solicitors, patent attorneys, and trade mark attorneys, in-house and in industry, as well as academia). It is focussed on improving the system's overall benefits rather than concentrating on benefitting any particular interest group.

This response has been authorised by and is made solely on behalf of AIPPI UK. AIPPI United Kingdom has not sought the views of AIPPI internationally. Nothing in this response is, or may be taken to imply anything as to, either the views of AIPPI internationally or the views of any particular individual.

AIPPI UK commends the following ideas to UK IPO for consideration in response to *Industrial Strategy: Intellectual Property Call for Views*.

a. confirming that the UK will be continuing with the existing Community unregistered design right regime after Brexit

Community unregistered design right (CUDR) deserves special attention in relation to Brexit because it is of enormous importance to some industries (notably the fashion industry) and, unlike other IP rights, there is no general expectation as to how it will continue post-Brexit.

It is important that the UK should make clear that the effect of the Withdrawal Bill will be to continue protection in the UK. However, by itself, this is insufficient.

Qualification for CUDR apparently depends on territory of first marketing. Continuing the existing protection post-Brexit would appear to require reciprocal recognition between the UK and EU. This is clearly in the interests of both and would be easy to achieve.

Companies dependent on CUDR, not knowing whether it will continue post-Brexit, are having to make decisions now that affect their business and the UK economy. For instance, they must decide whether to introduce their 2019 collections at London Fashion Week or Milan Fashion Week, both in September 2019. Plans and bookings

start over a year ahead. A failure to provide clarity very soon could seriously affect London Fashion Week and the UK fashion industry and, to a lesser extent, the European fashion industry and other UK and European industries which benefit from these events. This is, of course, not an issue that UK can determine alone, as it requires mutual recognition. But any assurances that can be provided should be provided, and this is not an issue that can wait.

b. updating and extending the SPC regime post-Brexit

The SPC regime has been overly complex and has not provided the pharmaceutical industry with the degree of clarity that it should. This is problematic not only for the originators, which need clear incentives for innovation, but also for generic entrants, which need clarity as to the date of the end of exclusivity so that they too can make sensible investment decisions.

With both medicine regulation and patent extension reverting to UK control, the UK should consider how best it can ensure that the UK maintains its strong position as a centre for the pharmaceutical industry.

An important part of this is incentivizing innovation. Many new treatments are brought to market through research into known pharmaceuticals. This is not just to the benefit of large pharmaceutical companies: research on known products (which has lower financial barriers to entry than new molecule research) is a particularly important entry route for smaller companies and for generic entrants considering how to expand their offerings into original works; it also brings direct benefits to patients because new uses for pharmaceuticals with known profiles are inherently better characterised than wholly new products.

The UK should therefore consider extending SPC protection by extending the definition of product to cover any product for which a marketing authorisation has been granted, and permitting an SPC to be granted in respect of each such product.

The UK should also recognise the increasingly blurred line between medical devices and pharmaceuticals. The medical device industry does not benefit from the same incentives as those available in the pharmaceutical industry. As the medical device and pharmaceutical sectors converge, active pharmaceutical ingredients are an increasingly frequent component of medical devices. Like pharmaceuticals, these devices face a complex regulatory hurdle including clinical investigations before they can be approved.

Given the UK's outstanding record in the pharmaceutical industry, in small-scale precision engineering, and in cutting-edge scientific software, there is good reason to create incentives to attract development in this area to the UK. Serious consideration should be given to making the UK an attractive place for medical device development by extending the SPC regime to cover medical devices in general, or at least medical devices comprising active pharmaceutical ingredients.

c. better transparency of the IP system by making the full files available for all registered rights, making assignment searchable, and making the court files in litigation genuinely open.

Effective justice is an important part of the operation of an effective IP system. Market confidence in the justice system relies on information about its operation. Where systems do not make judgments easily available, it does little to foster confidence in their operation.

The new Unified Patent Court will operate a wholly electronic, wholly open register. This will be an important step in generating confidence in the system, and reflects the system that has been operating in the United States for many years.

In Europe, many countries do not operate open systems at all. Judgments are hard to obtain and often heavily redacted, and other court papers are completely unavailable. The UK operates a system that is in principle open, but in practice it is difficult and expensive to obtain papers, and many are entirely unobtainable.

The IP court system is largely self-contained and generally technologically fluent. It is a sector that will compete with an international court (the UPC) which will be completely open. There is an opportunity to demonstrate a specific benefit of the UK system, and to showcase its potential, by ensuring that the UK operates an open registry. This might also prove a useful test-bed for more accessible justice for the UK justice system as a whole.

Some effects that could arise from a more accessible court system are (a) the availability of precedents lowering court costs, speeding up cases, and improving quality (b) more open-sourced material becoming available as third parties are better able to intervene with the parties to identify errors or omissions and (c) better reporting and awareness of IP issues as they can be more accurately monitored in the market.

These issues may be particularly important in relation to licensing disputes, and disputes concerning standards-essential patents, where access to information is a critical factor in ensuring fair, reasonable and non-discriminatory treatment.

d. *encouraging the development of arbitration in intellectual property matters*

Improving access to arbitration of IP disputes so that international disputes can be resolved in a single setting, for instance by having lower renewal fees for patentees who agree that they will take disputes (as claimant or defendant) to arbitration, and encouraging SSOs to write arbitration into their rules

Recent high-profile disputes in the technology sector, including but not limited to *Unwired Planet v Huawei*, have demonstrated that it can be problematic to resolve patent licensing disputes where there are many patents and many jurisdictions involved. Arbitration is by its nature well suited to dealing with multifactorial, multijurisdictional disputes but can only apply where the parties have voluntarily submitted to arbitration.

There is an opportunity for the UK to incentivize arbitration of IP disputes, through the renewals system. The proposal would be to discount renewal cost for patentees who agree to submit any IP dispute (not just one involving that patent) to arbitration through one of a small group of recognized means, for instance through WIPO arbitration.

A scheme like this is voluntary but if it is the subject of significant take-up, it would generate a network of companies committed to submitting to arbitration. It is unlikely to be subject to significant take-up at the outset, and particularly if only the UK offers it, but even so the existence of the system helps to demonstrate innovation in IP policy and a commitment to the arbitration of complex disputes.

If other countries follow the lead, it might readily generate a sufficient incentive to bring companies into the system.

The UK might also encourage standards-setting organisations to write a requirement to agree to arbitration into their rules, for similar reasons.

- e. ***encouraging universities to include basic tuition on IP, at least in all applied science, management and marketing courses, and possibly in copyright-dependent areas as well***

It is worth noting that there is no shortage of IP practitioners who are willing to donate a proportionate amount of their time to education. This need not be a high-cost item.

- f. ***encouraging the senior management of the IPO to increase their public visibility***

The UK IPO is effectively looked to for leadership of the UK IP agenda. It would be helpful to see more made of that role particularly post-Brexit.

- g. ***commissioning basic research on the contribution of IP***, analyzing its impact on society and the economy and comparatively between economies, and analyzing the return on investment obtainable from IP investment

There is an increasingly vocal contingent arguing against the value of IP. There is however little basic research looking at the contribution of IP, analyzing its impact on society and the economy and comparatively between economies, analyzing the return on investment obtainable from IP investment, entrenching accounting practices in relation to intangible assets, and establishing standardized, trusted and useful valuation methodologies – or if such research is being done, its results are not being widely promulgated. It would help inform the debate if these areas were the subject of further research and debate. It would also help establish an asset class more useful to UK industry in raising finance based on security over intangible assets.

AIPPI UK would welcome additional investment in research projects, probably through a leading UK academic institution such as IBIL, to investigate and report on the facts.

- h. ***encouraging a “rotating door” between government and private/in-house practice in the area of IP management and policy*** to enrich the understanding of IP policy matters within the profession and to enrich the focus of government on successful policy making

It is common in the US system for former heads of the patent office, solicitors general and counsel at the FTC and DOJ to come from and return to inhouse/private practice.

The result is a rich mix of policy awareness in practitioners (and therefore available to industry) and business awareness in government.

There is a very limited interplay in the IP profession between policy and practice. It would be a welcome move to see a greater mix. It might be possible to start on this by encouraging more secondments from private practice into government, and vice versa.

- i. ***restating copyright law***

For an economy that looks to creative and software industries as intently as does the UK, the state of our copyright law is something of an aberration. The legislation is a mess. The law introduced in 1988, the Copyright, Designs and Patents Act, was a mammoth work (though still incomplete, as some issues remain to be determined under the 1956 and 1911 Acts).

The 1988 Act has since been amended on many occasions, principally by European directives, but more recently and arguably more fundamentally, by judgments of the Court of Justice of the European Union. The 1988 Act was written before the world wide web existed, before digitization became ubiquitous, and in the context of a far less global economy. Revisions have made the Act unwieldy and even ugly – a small but telling example being the existence of section “296ZA” et seq, inserted between section 296 and section 296A.

It is time that the system was reviewed, and at least consolidated and restated. But better still, the UK should take the opportunity to overhaul its copyright law to render this bastion of the creative and software sectors fit for purpose. We do not propose any specific reforms. That would be a matter for a substantial exercise in its own right. The process, however, needs to get underway because the current world in which copyright operates would have been unrecognizable 30 years ago, when this exercise was last undertaken.

j. Introducing primary legislation in connection with computer implemented inventions

The approach of the UKIPO to computer implemented inventions, mandated as this is by longstanding Court of Appeal case law having its origins back in the last century, has left the UK out of step with the established practice of the EPO, its Boards of Appeal, and other EPC Member States. This situation has now persisted for too long, and the absence of action on the part of the Courts would suggest that the time is now ripe for a legislative solution.

AIPPI United Kingdom