LICENSING EXECUTIVES SOCIETY
BRITAIN AND IRELAND

The Importance of Intellectual Property Rights

Position Paper of the Public Interest Group of LES (Britain & Ireland)

(The Licensing Executives Society (Britain & Ireland) (LES (B&I)) is one of the largest Chapters of the Licensing Executives Society International (LESI). LES members include business people, lawyers, patent attorneys, academics, consultants and others interested in the licensing of intellectual property rights and the transfer of technology).

Involvement of LES

While LES has a general interest in promoting intellectual property rights, it is not primarily a lobbying group, and its diverse membership represents a range of different views and interests. LES's principal functions are: to provide education in relation to intellectual property rights, and the business of intellectual property, particularly licensing and technology transfer; and to bring people together to discuss relevant topics and issues in these areas.

Executive Summary

Intellectual property rights are important.

Society relies heavily for its development and wellbeing on a constant supply of new products and processes, whether in the field of drugs, agricultural aids, improved crops, power and fuel sources, or entertainment and leisure goods.

Intellectual property rights play an important part in facilitating the activities of those involved in devising and making available these products and processes. This is not simply a matter of providing a protective environment. Rights also have other uses and, in particular, can underpin cooperative relationships that enable innovations to be shared, transferred and jointly developed.

Unfortunately, the diverse functions and benefits of intellectual property rights are rarely popularly appreciated. They are more often seen solely in terms of the generation of monopolies that unfairly restrain competition and restrict research. Over-simplified, adverse emotive comment has become common, even fashionable.

It is appropriate regularly to review intellectual property protection to ensure that there are adequate safeguards against the abuse of rights. However, there are pressure groups

that are dedicated to pursuing controls which go beyond safeguards. Their demands are often supported by arguments that emphasize perceived evils, such as restriction of access to life-saving drugs, and which can, therefore, be popularly appealing. There is a danger that these extreme views may unfairly influence public attitudes, or even encourage legislative changes, and so result in damaging over-curtailment of intellectual property rights.

The purpose of the LES Public Interest Group is to draw attention to this danger and to promote balanced and informed discussion of the issues by separating facts from emotive comments and by explaining the functions and wide-ranging benefits of intellectual property rights for consideration alongside the problems and disadvantages.

Conceptual Background

Encouragement of Innovation

Creative activity that gives rise to 'intellectual property' (IP), such as inventions, designs, artistic, literary and musical works, will, in general, tend to take place irrespective of any system of protective 'intellectual property rights' (IPR). It is a matter of human nature.

There are, however, some areas in which investigations that are likely to lead to discoveries or inventions involve great expense and so might not be pursued without the possibility of revenue-generating IPR. IPR can also encourage *innovation* – the practical use of IP to make available new products and processes. Without effective protection, the financial risk of launching a new product might be too great.

Moreover, IPR provides a regulated basis for strategic alliances, licensing agreements, transfer of technology, and other cooperative relationships between disparate parties, which are often responsible for innovations which otherwise might not have arisen so readily, or even at all.

Innovation has progressed from the 19th/20th century model of *ad hoc* directly-funded, in-house creation and manufacture. The innovative process operates now on a more regulated, arms-length basis. Production has been separated from initial creative activity, and the need for compliance and globalization has increased costs involved in development and launch of even modest products. IPR provides security for the necessary contact between unrelated devisers, manufacturers and investors. It would be difficult to operate this 21st century model without IPR.

Accordingly, whilst it is not possible to claim that IPR always directly assists the inspirational creative process, it is the position of LES that IPR helps to provide a regime conducive to creativity and, perhaps most importantly, encourages and facilitates *innovation.*

Other Justifications for IPR

IPR encourages dissemination of IP information. Without effective IPR, secrecy, or at least reluctance to publish, might be more heavily relied on. Indeed, one traditional justification for the patent system is that it obliges the inventor to disclose details of the invention for the general benefit of society and to aid technological progress.

The protection of an individual's creativity is recognized as a basic human right, and most countries are

signatories to international agreements requiring protection through IPR.

For these reasons also, IPR is an important and beneficial feature of 21st century life.

IPR Changes

Regulation

It is important for IPR to be regulated. That has always been the case. The English Statute of Monopolies of 1623, from which the world's patent systems largely derive, qualified the grant of protection by requiring it not to be 'generally inconvenient'. This proviso has been followed by patent laws and has, more recently, been enshrined in competition law.

The fact that regulation is necessary to avoid 'inconvenience' is a consequence of the complex nature of society and the innovative process. It does not mean that IPR is fundamentally flawed or 'evil'.

Progress

IPR needs to adapt to accommodate changes in contemporary life. Innovation itself does not stand still and the law has to be constantly examined and reassessed to ensure that protection is modified, where necessary, to reflect advances in society and to suit new areas of technology.

The fact that constant reassessment and modification is required is again a consequence of the complex nature of society and the innovative process and does not mean that IPR is fundamentally flawed but that it needs to be responsive and dynamic.

A recent example of this, in the UK, is the Gowers Report in December 2006, which reviewed the UK's intellectual property system and suggested changes and improvements that continue to be discussed and implemented.

Unwarranted Extrapolation

Extrapolation from the requirement for regulation and change to a more wide-ranging general criticism of IPR itself is illogical and dangerous. It is also counter-productive because it leads to emphasis on curtailment or cancellation of rights and distracts from the formulation of intelligent controls that are more likely to result in general benefit for both innovators and users of innovations.

Promotion of Views

Blame

IPR is used by some pressure groups as a scapegoat for often unrelated technological issues or problems. Those who fear the spread of GM foods, or who object to cloning and embryo research, or who resent Microsoft's alleged dominance of software operating systems, or who are appalled by limited access in developing countries to costly drugs and improved crop and seed strains, find it convenient to attribute blame to IPR. Cancellation of protective rights is clearly something that would be seen by some as a popular victory on the path to curtailment of undesirable technology and the improvement of conditions of poor communities.

What this approach does not allow for is the fact that if an innovator cannot get a return from his innovation he is unlikely to spend time, effort and most of all, money, in innovating. Without the protection of IPR, innovation is less likely to happen and, in the case of

pharmaceuticals, given the huge costs of bringing a new product to the market, may cease.

This confusion between IPR itself and the technology that it protects is unfortunate and counter-productive. IPR-related problems can be dealt with by regulation. Abuse of protection is something that can be, and is, dealt with by patent law and other legislation, particularly competition law. Unjustified attribution of blame to protective rights can distract from the real problems and can obscure the benefits of IPR.

Emotive Advertising

There are contentious IPR areas which have attracted popular support and have given rise to pressure groups that publish views which can give the impression that IPR is generally oppressive. Through the use of jargon, such as ‘patent thickets’, and ‘Trolls’, by identification of perceived problems as ‘evils’, and by the use of unequivocal slogans, such as ‘no patents on life’ and ‘no software patents’, often accompanied by threatening images, such as ‘skull and crossbones’, and ‘beware mines’ pictures, anti-IPR views readily attract popular attention and can be superficially persuasive. It is not common, and it would be difficult, to put opposite views in a similarly emotive manner. This type of negative activity is responsible for a potential bias that requires recognition in the interests of proper balance.

It has not proved possible to put the arguments in favour of patents into short, pithy phrases. The risk/ reward/ benefit to society argument is not one that lends itself to encapsulation in an emotive, catchy expression. This does not, however, mean that the arguments in favour of IPR do not have great force and have not been seen by nations over the years to be beneficial to society and to advance society’s best interests.

Esoteric Operation

IPR is a complex area much of which in relation to agreements and disputes takes place behind closed doors. There are many cooperative relationships that are not publicised or that are too complex to be readily appreciated by, or to be of interest to, the general public. Moreover many disputes are amicably resolved between the parties without recourse to litigation. The position is made even more complex by the fact that IPR is often used in different ways by different parties in different areas. Competitive battles between large corporations fighting for dominance in emerging technologies may have little in common, in terms of use of IPR, with joint ventures with start-up companies.

Those rare cases that do reach contention in the courts are unfortunately those on which commentators focus, and which tend to influence opinion even though they are not necessarily representative of the main use of IPR. Indeed, the cases that attract most attention are, understandably, often those that are particularly unusual or even bizarre.

For proper balance, it is important to appreciate the diverse functions of IPR.

Conclusion

In view of the foregoing it is the position of LES that, for informed debate on IPR issues, there should be a better understanding that:

IPR performs a range of functions that go beyond restriction of competition, and in particular, include the underpinning of cooperative relationships such as licensing agreements.

IPR works differently for different parties in different areas. It is important to avoid making generalizations from selected high profile activities of large corporations.

The way in which IPR functions overall cannot necessarily be determined from publicized reports of major litigation. Most IPR disputes and agreements are resolved amicably and beneficially without publicity.

IPR has diverse and important benefits to society. These benefits include facilitation of creativity and innovation, encouragement of publication and the dissemination of knowledge, and compliance with human rights and international agreements.

LES (B&I) November 2008 (revised February 2010)