

## **intellectual property – why it matters**

Intellectual property (IP) rights are designed to strike a balance between rewarding inventors/creators for their innovative efforts, while ensuring that society at large benefits appropriately

For example, patents allow inventors to control the use and exploitation of their inventions for a certain period of time (20 years at the most). In return, they must allow the public and their competitors full access to the details of their inventions, so that new technology is not kept secret and further developments are facilitated.

Trademarks lend distinctiveness and, often, value to products which may give trademark owners a significant competitive edge in the market place. However, trademarks are also used by customers as quality assurance devices, allowing a degree of certainty over a product's quality, effectiveness, taste, purity etc. Again, there is a balance between benefits for the trademark owner and benefits for the customer and wider community.

For creative industries copyright protection is vital to ensure that commercial benefits accrue to creators and those that have invested in nurturing, publishing and promoting creative talent. This is always balanced by the need to ensure that the public has appropriate access to information, and that copyright enforcement is not such that it inhibits creativity and communication unnecessarily.

IP rights have become increasingly important to the UK economy and, indeed, to most economies. The UK has always been a leader in inventiveness and creativity in many industry sectors (for example, music, design, pharmaceuticals, biotechnology and publishing). We have a "knowledge-based" economy which relies heavily on effective IP protection, for the benefit of IP users and owners alike.

Recently, the UK government carried out a Treasury, major review of IP led by Andrew Gowers. This review concludes that:

"The increasing importance of knowledge capital is seen in its contribution to the value of firms. In 1984 the top ten firms listed on the London Stock Exchange had a combined market value of £40 billion and net assets of the same value. Advance twenty years and the asset stock of the largest firms has doubled while their market value has increased nearly ten times."

The effective use and exploitation of IP increasingly underpins our economic success and the well-being of our society.

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### **suggested links for further reading:**

- **Gowers review: [HM Treasury press release \(dec 2006\)](#)**
- **intellectual Property: a power tool for economic growth : [WIPO \(2003\)](#)**

## *IPAN issue brief - no. 2*

# intellectual property and cheap imports

### Current Situation

If a trade mark owner puts its goods on the market within the EEA (European Economic Area) then those goods can circulate freely in the EEA. On the other hand, if the goods are put on the market outside the EEA, then they can only be imported into the EEA if the trade mark owner has consented to such import. But it may be that the trade mark owner does not consent to the marketing.

### Benefits and disadvantages for Society

- Benefits: Traders import goods when there is a price differential between the EEA and another market. This can lead to lower prices for consumers.
- Disadvantages: The overall return for the trade mark owner is less. (Note that consumers are always free to buy competing branded or unbranded goods.)

The trade mark owner loses control of how the goods are sold. This can have a detrimental effect on brand image e.g. position in the marketplace.

When the products imported are of different quality from those normally sold in the UK under the trade mark, consumers can be deceived in what they purchase. Always this lowers the reputation of the product and in some cases there can be real dangers because of safety issues, for example with pharmaceuticals.

These factors can lead to companies being less likely to invest in the development of branded products. This will have an effect on the quality and variety of products available. It will also affect jobs.

In addition, the price differential may not always be large. The importer will want to maximise his profit.

*But at the end of the day, the policy issue - rather than the interesting legal issue of what constitutes "consent" - is whether the possibility of cheap imports compensates for a reduction in the incentives to invest in development of branded goods.*

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## suggested links for further reading:

parallel or grey imports:

- [UKIPO overview](#)

parallel trade in medicines:

- [ESRC overview](#) - Sep 2003 (Professor S Hall)
- [ABPI discussion paper](#): March 2006
- [EAEPC briefing paper](#): 2004

## *IPAN issue brief - no. 3*

### **issue: can copyright survive the threat from the Internet?**

The internet provides marvellous opportunities for consumers, creators and producers. For example music, television and computer software can be downloaded globally at a click of a mouse.

Some would argue that such downloading should be "free". But most would accept that the flow of creative products will be greater if producers, individuals or companies, can achieve a market reward. Copyright remains the best legal mechanism for managing a fair system.

So the answer to our question is that, if we care about the quality of the products, and fairness to those who provide them, we have to ensure that copyright does survive in an internet-connected world.

To do this we need:

- enforceable rights against infringers worldwide
- consensus as to what amounts to wrongful infringement (as opposed to, for example, legitimate private use, research, criticism and review or news reporting)
- technical measures to assist in preventing unlawful activities and in tracking infringers
- co-operation from intermediaries, such as internet service providers and
- most important, understanding from consumers that this is in their interests and not just in the interest of the big producers.

Even large jurisdictions such as the United States are unable to solve the problems to which the Internet gives rise themselves, and support must be given to the initiatives of the World Intellectual Property Organisation and World Trade Organisation to solve these problems globally.

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### **some suggested links for further reading:**

- [Gowers Review of Intellectual Property](#)

## *IPAN issue brief - no. 4*

### **counterfeiting – society is the loser**

Industry world-wide loses large amounts to counterfeiters and piracy. These losses not only affect the producers of genuine items, but they also involve social costs. Ultimately, it is the consumer who pays the cost of unfair competition. Although many consumers believe they are getting a bargain when they buy counterfeits, the actual value of the product is normally much lower. Hence, they end up paying an excessive price for an inferior product.

A survey by members of the Alliance Against Intellectual Property Theft found that the UK market in counterfeit and pirated goods was worth over £9 billion in 2004. This resulted in a loss of just under £2 billion to The Exchequer. This money could have been spent by the Government on the NHS or on schools.

These losses may result in a chilling effect on the creative industries of the UK. A point will be reached where there be little incentive to come up with new ideas, as they are copied, including by other businesses.

There is also an increasing concern that counterfeiting is related to other criminal activities, such as trade in narcotics, money laundering and terrorism. The link between counterfeiting and organised crime has been highlighted in the most recent Threat Assessment from the National Criminal Intelligence Service. The report states that organised criminals are increasingly involved in counterfeiting and other forms of intellectual property theft.

It is estimated that trade in counterfeit goods is now worth more than 5 per cent of world trade. This high level can be attributed to a number of factors, particularly advances in technology and increased international trade.

The cost to countries which do not take action against counterfeiting can also be high. If many products from such countries, including genuine ones, gain a reputation of being of poor quality, this will cause export losses which in turn implies both job losses and loss of foreign exchange.

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#### **suggested links for further reading:**

- [Anti-copying in Design \(ACID\)](#)
- [Anti-counterfeiting Group \(ACG\)](#)
- [Federation against Software Theft \(FAST\)](#)

## *IPAN issue brief - no. 5*

### **issue: European patent reform – a "European" Patent?**

The 27 member states of the European Union have different, albeit "harmonized", Patent Laws, but all are members of the European Patent Convention (EPC), so enabling Patents to be obtained in each member state via the national Patent Office or via the European Patent Office (EPO). The European Patent Organisation (which runs the EPO) is not an EU body, so the Commission does not govern its operations, unlike the case for Trademarks and Designs, where the "Office for Harmonisation in the Internal Market (Trade Marks and Designs)" is an EU institution.

Patent protection in some EU member states but not others could have a distorting effect on interstate trade, and The European Commission has wanted to set up a "Community Patent" for several decades. A convention was signed in 1973, but has never come into force. It proposed that the EPO grant a single Patent (not a bundle of national patents as currently) which would be effective throughout the EU.

Since 1983 there have been many attempts to agree a Community Patent System, but these failed as member states were not able to agree a language regime. The EPO operates in English, French and German, but if the bundle of Patents it grants is to be effective, translations into local languages were needed under the National Laws of most member states. The cost was substantial, and though in May 2008 the London Agreement (which has the effect of reducing the number of translations needed) came into force, the cost of translation still induces many patentees to proceed with patent protection in only a subset of the EU states.

A separate issue, but of importance to certain industries, is that although a substantial level of harmonization of national Patent laws has occurred, there are still differences of approach between member states, particularly in the biotech and computer implemented inventions areas. The Commission wishes to have a common approach throughout the EU, but this is unlikely absent a Community Patent.

The EPO, even if it becomes the granting authority for a Community Patent, has no jurisdiction with respect to enforcement, which must still be dealt with via national courts. Differences in approach could undermine the unitary effect intended for the Community Patent. Since unification of the judicial systems of the EU member states is not an early prospect, there are moves to unify the

approach adopted by courts dealing with Patents by way of a European Patent Litigation Agreement (EPLA). Under the system currently envisaged there would be first instance courts based in particular states or with regional responsibility for several states, which could issue an injunction effective throughout all the states party to the EPLA. Appeals from the first instance courts would be heard by a central appeal Court.

The EPLA is not dependent on there being a Community Patent, as if the EU countries (preferably but not necessarily all of them) agreed, it could come into force, and there is no reason why non-EU countries which belong to the EPC could not join.

The present costs associated with securing a patent position in Europe and possibly enforcing it are substantial and deter smaller industry from using the system, but even large users wish for a simpler, speedier and less expensive system, and one less patchy in its effects.

Work on the Community Patent and EPLA has been vigorous in 2008, but until it is crowned with success, there is a hidden cost to all in innovation, and the achievement of a common market in the IP area is frustrated.

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### **suggested links for further reading:**

- [\*EC patents web-page\*](#)

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## *IPAN issue brief - no. 6*

# **issue: AIDS, developing countries and pharmaceuticals**

### **the AIDS epidemic**

The AIDS epidemic is a humanitarian crisis. Even an optimum response from governments and society world-wide will not prevent tremendous suffering and a high death toll, but it can help alleviate them. Such a response should include the provision of appropriate medicines and financial and educational support to develop basic healthcare infrastructure and to ensure that transmission of the disease is minimised.

### **rationale for patents on pharmaceuticals**

Patents are granted to stimulate new, useful and non-obvious inventions, to ensure publication of such inventions, so promoting scientific advancement, and to enable the costs of invention and development to be recouped. Governments grant patents usually with a life of twenty years. But in some developed countries the life of pharmaceutical patents can be extended, to compensate for the length of time (usually ten years or more) it takes to prove new medicines are effective and safe.

Without the patent system pharmaceutical companies would not be able to undertake the very expensive and risky research and development, clinical evaluation and continual clinical monitoring which are all necessary for a successful medicine. A major part of the profits from the relatively few successes is ploughed back into further research to invent and bring to the market the next generation of medicines. Without patents the major source of new drugs would be cut off to the detriment of both developing and developed countries.

### **comment**

It is appropriate that the pharmaceutical companies, which have developed and are continuing to develop medicines for AIDS, should co-operate with governments to help provide medicines to counter this epidemic. But such co-operation is a two way process and governments and citizens of developing and developed countries must also support the patent system and respect the patents granted for new medicines. A major issue is the need to stop medicines provided to developing countries at subsidised prices being resold in countries where the unsubsidised price is current. This will require support for appropriate legal provisions and action by governments to prevent breach of such laws.

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## suggested links for further reading:

### industry:

- joining forces for change: the pharmaceutical industry in the the fight against HIV/AIDS: [\*International Federation of Pharmaceutical Manufacturers & Associations \(IFPMA\) paper \(2004\)\*](#)

### government:

- integrating intellectual property rights and development policy: [\*UK Commission on Intellectual Property Rights: final report \(2002\)\*](#)

### NGOs:

- patents versus patients: five years after the Doha declaration: [\*Oxfam \(nov 2006\)\*](#)
- commentary on Oxfam report: [\*IFPMA \(nov 2006\)\*](#)

## *IPAN issue brief - no. 7*

### **issue: Patents and software in Europe**

#### *background*

Patents provide much stronger protection than copyright. This is because the scope is wider and copying is not a requirement for infringement of a patent but is for infringement of copyright. However, patents are not available to protect all types of subject-matter and in the UK and Europe protecting computer software and related subject-matter with patents is not clear-cut. In 2002 the European Commission proposed a Directive aimed at clarifying practice on the patentability of computer-implemented inventions within the EU. Unfortunately, this proposed Directive was comprehensively rejected by the European Parliament in 2005.

Patents protect novel and inventive (i.e. non-obvious) developments of a technical nature. Increasingly, products and processes themselves long recognised to be patentable - from washing machines to telecommunications systems - owe their novel characteristics to a controlling program in a microprocessor or computer. The European Patent Office (the EPO) has established the firm position that when an invention has the necessary technical character it is patentable even if it involves a computer program in its implementation. The EPO and national courts have recognised that such patents are not for "programs for computers ..... as such", which are specifically excluded from patentability under Art 52 of the European Patent Convention.

In the USA the patent statute can and has been interpreted to allow patenting in fields excluded by European law. For instance patents can be obtained for software even when there is no technical contribution. This has led to patents for pure business methods, with no technical attributes, for example where computer systems control the flow of investments between different funds and all the novelty lies in the business steps.

A number of concerns have been raised about patents and, in particular, about patents on software: a) that patents are often granted on trivialities and b) that in any event patents tend to favour big business.

#### *comment*

The collapse of the European Directive does not alter the legal position on patenting of computer-implemented inventions. The EPO cannot treat such inventions any differently from other inventions. Similarly it is highly unlikely that the EPO will change its position on business methods. A Directive would have

harmonised the law across the EU. The current position is unsatisfactory in that national courts can come to conflicting decisions. But differences of approach by national courts are far less important than the concerns expressed widely by MEPs and the public.

Everyone agrees that the quality of patent examination has to remain high and that the issue of patents on seemingly trivial features has now become a significant issue. Opposition of the grant of such patents may not be possible or indeed successful. It is clear that patent examiners need better access to what is publicly known in the software community and there are current initiatives to help achieve this.

Patents do not in general favour big business. Enforcing patents can certainly be expensive but without a patent (or at least an application for one) any business has far less commercial security and bargaining power. European patents continue to be granted for computer-implemented inventions (the EC has stated<sup>1</sup> that at least 30,000 such patents have been granted since 1978 ), but how such patents can be obtained and the limitations involved need to be better publicised. Small businesses in particular need to be made better aware of the opportunities which appropriate use of patents may provide them.

[1]

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/02/32&format=HTML&aged=1&language=EN&guiLanguage=en>

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**suggested links for further reading:**

## *IPAN issue brief - no. 8*

### **genetic resources and traditional knowledge - the key IP issues**

Intellectual property law is largely a creature of the industrial west. Patents and trade secrets can protect new inventions; trade marks protect the reputation of traders; copyright protects the creative output of authors, artists and musicians (and their publishers). But not all valuable intellectual creations can be protected. One class of creation which is (in general) not capable of such protection is the indigenous knowledge of traditional societies, frequently referred to as "traditional knowledge" ("TK").

Western science tends to be disdainful of such knowledge: as at best unsystematic and unproven, at worst mere superstition ("old wives' tales"). Nevertheless such knowledge has formed the basis of numerous advances that have been of value to the world as a whole. Many drugs are based on TK - starting with aspirin (originally a derivative of the willow tree): and more recently the new antimalarial, artemisinin, is based on a traditional Chinese medicinal herb.

There is no general system for recognising the contribution of TK to modern developments, or rewarding the communities who have preserved and handed on such the knowledge on which they are based. Similarly, artistic works based on traditional folk-tunes, or stories, or traditional styles of ornamentation, are exploited without reward or even reference to the originating communities: and sometimes in ways which scandalise them (example: misuse for commercial purposes of sacred emblems of Australian aborigines) . This is seen as unjust, particularly where those communities are poor, and those who exploit the developments make substantial profits from them. The exploiters, however, see the knowledge they have used as part of "the public domain" (like a large proportion of published Western science and technology). For them, public knowledge not specifically protected is (and should remain) free for all to use.

A special grievance for indigenous peoples is the patenting of indigenous knowledge. This is termed "biopiracy", and a number of examples are notorious: neem, turmeric, Basmati rice: as well as the widespread practice of patenting genes found in indigenous and other natural resources. Indigenous people say that these patents are an unconscionable attempt to monopolise knowledge freely provided by them. The patents enrich the patentees at the expense of the indigenous people: who are at the same time deprived of the right to continue age-old practices.

In reply, patentees defend the principles of patenting, even if the practice is sometimes deficient. The patents on neem and turmeric were both revoked after

being challenged by the Indian government (after much time and expense). Neither patent claimed the indigenous material as such: in both cases particular uses were claimed (which were eventually shown not to be new, and hence unpatentable). Similarly, the Basmati rice case, upon challenge, was reduced to claiming three specific new varieties of rice of the Basmati type: but it never claimed traditional Basmati rice as such, only an allegedly new form of it. Patentees say that in principle public traditional knowledge is not patentable. No patent can legally take out of the public domain what is already known. Whatever has been done traditionally cannot be impeded by a subsequent patent. Patents such as those cited arise only because searches carried out by Patent Offices are inherently fallible. They say, however, that inventive improvements to traditional knowledge are and must remain patentable, to encourage further development for the benefit of all (e.g. artemisinin could be crucially important in combating malaria, especially in poor countries).

### **Two proposals arise out of these concerns:**

- a general scheme for IP-like protection of indigenous knowledge; and
- a specific proposal to require patent applicants to disclose the origin of biological resources used in their inventions.

Both of these are under discussion in Geneva at the World Intellectual Property Organisation (WIPO). The Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Folklore was set up in 2000, and has held its 10th session in December 2006. Progress is slow, as fundamental questions are not agreed. The specific proposal is also discussed in WTO; and both are debated in the Convention on Biodiversity (CBD).

- **The general scheme**

Developing countries seek an international treaty to control access and use of traditional knowledge. Their objectives are: to eliminate biopiracy; to control use of TK and to obtain a fair return for its use. Developed countries see no need for a treaty, and are concerned about extending exclusive rights to cover subject-matter (TK) which is very difficult to define, and may mean paying royalties on, or ceasing to use, materials and methods which are well-known (in the 'public domain'). Matters are complicated by the presence at the negotiations of numerous observer representatives of indigenous peoples. They also seek control over their TK, but not necessarily in order to recover royalties from its use: some reject the idea of an IP right on TK as inconsistent with their worldview. Also they have many issues with their own governments over ownership of their TK, human rights, access to tribal lands, etc.

- **The specific proposal**

This is put forward for two reasons: to inhibit biopiracy and to promote observance of the CBD. This international treaty (with over 180 country

members, but excluding USA) has three objectives: to conserve biodiversity; to promote its sustainable use; and to share equitably the benefits of such use. To promote the third objective, Article 15 provides that each party may access genetic resources from others, but only with the prior informed consent (PIC) of the party providing the resources. To conform to Article 15, it is proposed that any mention of genetic (or perhaps biological) resources in patent applications should require disclosure of the origin of the resource, and (in some versions) to provide evidence of PIC. Similar requirements are suggested for TK (which is mentioned in Article 8j of the CBD).

Proponents say that such proposals would discourage illegal access to genetic resources, and inhibit the grant of patents improperly claiming TK already known. Patent applicants say that genetic resources are widely distributed, and in large part legally accessible without formality. The proposed requirements are unclear, burdensome and disproportionate. They would discourage use of genetic resources, and do little to promote sharing of benefits from such use. However an increasing number of countries are putting such requirements into their laws (India, Philippines, South Africa, the Andean Pact and Norway have such requirements: Brazil, China and Switzerland are introducing them: the European Union is open to discuss the question). If the WTO "Doha round" succeeds, it might introduce a provision of this type.

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### **suggested links for further reading:**

#### **General background to TRIPs and the CBD:**

- [\*World Trade Organisation \(WTO\)\*](#)
- [\*paper by the International Chamber of Commerce \(ICC\)\*](#)

#### **Disclosure of origin or source in patent specifications**

- [\*difficulties and problems\*](#): Chartered Institute of Patent Attorneys (CIPA)
- [\*options and perspectives of users and providers\*](#): Chatham House report: May 2006

#### **Traditional knowledge and disclosure of origin:**

- [\*disclosure of origin: time for a reality check?\*](#)  
*WTO Public Symposium, Geneva, April 21 2005* - Prof. Graham Dutfield  
observations from a well respected academic expert,
- [\*IP and genetic resources, traditional knowledge and folklore\*](#)  
WIPO background discussion paper
- [\*various WTO discussion papers from the different parties to the controversy\*](#)
- [\*Biodiversity and ownership of research results:\*](#)  
booklet from the IPR Helpdesk summarising the basic points clearly  
[note the [IPR-Helpdesk](#) is a Project funded by the European Commission, DG Enterprise and Industry, under the 6th RTD Framework Programme of the European Union - the guide is made available free of charge]

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