Submission to the Gowers Review of Intellectual Property

Introduction: the Professional Contractors Group and its members

PCG is the cross-sector representative body for freelance contractors and consultants in the UK. Its members provide their services to a range of clients using their own one or two-person companies. They work in IT, engineering, project management, oil and gas extraction, marketing and many other sectors.

The UK's freelance contractors and consultants are a highly skilled, highly flexible and highly mobile workforce. The UK's model of freelancing is uniquely sophisticated and, by affording companies the ability to acquire specialist skills on a flexible basis, offers the UK a meaningful competitive advantage, particularly in the knowledge-based industries on which its future growth depends.

As the smallest of small businesses, and also a significant part of the growing number of people choosing to work for themselves, freelancers are a group that sit outside the traditional divide of employer and employee. They also have specific needs and concerns, not always within the scope of other small business issues.

PCG has campaigned for consistency, clarity and common sense in intellectual property rights and, owing to a significant number of members working in IT, has a particular interest in the issue of software patents.

This response will set out the general principles of PCG's approach to IPR before addressing the questions posed in the consultation document. Overall PCG is greatly encouraged by the consultation document and feels that it shows a sound understanding of many of the key issues faced by small businesses when contending with the Intellectual Property Rights regime.

How freelance contractors and small businesses use IPR

Freelance consultants and contractors typically supply their services to a succession of larger clients. Any IPR generated during the course of this work will generally remain with the client and the contractor is not able to access it to develop a revenue stream.

While developing new and innovative products for clients, however, the risk of infringing other people's IPR usually rests with the contractor: if such an infringement occurs, it is the contractor who would face legal action, not the client.

Freelance contractors therefore do not generally have an interest in securing IPR for themselves; but they do have an interest in the IPR regime being fair, transparent and accessible. They mainly use and encounter patents and copyright during the course of their work; this response will therefore focus primarily on these two forms of IP protection.

Freelance small businesses and other SMEs also use other means of protecting their IPR: they might exploit a market niche, first mover advantage or simple secrecy. Their main concern is developing the product swiftly and effectively.

General considerations regarding IPR

Systems for protecting intellectual property should exist in order to serve the public good by fostering economic growth. Any IPR regime must therefore put the needs of the society and the economy it is created to serve before the interest of IPR holders.

A multiplicity of motivations for innovation exists, for instance in the field of software, where many developers make their products freely available. Any IPR system must acknowledge this fact and take full account of it.

A key question when assessing any system for protecting intellectual property must be: would the innovations protected by this system have been developed if it did not exist? Very often the answer is yes. The most restrictive forms of IPR, such as patents, must therefore only be deployed when it can be proved that they are necessary in order to secure innovation. If the innovation would happen without them, they should not be available.

Intellectual property rights represent a *quid pro quo* between the holder and society: they grant the exclusive right to use an invention or creation for a fixed length of time, which is granted in return for the holder having developed the innovation in the first place. But this *quid pro quo* must be fair: nobody should be granted an exclusive right to use something if developing it was a trivial task that anybody could have accomplished.

Before any reform of an IPR system is undertaken, full consideration must be given to the risks presented by an unsuccessful IPR system. Any IPR system that reduced innovation or competition would be a disaster for the UK. At a time when the challenges posed by the emerging economies of China and India are becoming ever-more clear, the UK's IPR system must be extremely carefully balanced to avoid harming the UK's competitiveness.

Copyright

Copyright offers free, automatic and powerful protection. The copying of as little as 1.7% of a computer program's code has been sufficient to substantiate claims of copyright infringement.

It cannot credibly be claimed that copyright stifles innovation. Computer software and the internet have developed in a copyright-controlled environment, and their rate of development has been phenomenal.

The charge that copyright hinders innovation by preventing the dissemination of information regarding the accomplishment if the innovation is also open to doubt. It is obvious that anyone without access to information will complain about not having it, but the great virtue of copyright is that if someone wishes to emulate an existing achievement such as a computer program to perform a particular function, or a song or book in a particular idiom, they are perfectly able to do so. They must, however, work out how to do so for themselves, without plagiarising an existing work.

In short, copyright protects the hard work behind an innovation or creation, but does not make the basic ideas inaccessible to others, so long as they are able to implement them. It is powerful, flexible and affordable.

Patents - in theory and practice

When patents were originally developed, the rationale was that the holder would be obliged to share their knowledge and so serve the public good. This idea was made redundant many years ago by the advent of learned technical and scientific journals: details of almost all innovations are now published in these. A clear

rationale is therefore needed for the patent system which does not rely on the supposed benefits of sharing knowledge.

Patents should be awarded for technical inventions using controllable forces of nature. Inventions of this type require significant investment that is worthy of protection by patents. Patents should not be afforded to other "high tech" innovations that look technical but do not meet this criterion for patentability. Other forms of innovation are better suited to other forms of IP protection.

It is often said that more patents can be seen as the effect of more innovation: the more patents are issued, the more innovative and therefore competitive the economy is deemed to be. This is not necessarily the case.

So-called "patent inflation" negates the first of these points: if more and more patents are issued, this does not necessarily mean that more and more innovation is taking place. Instead, it could simply indicate that the patents being issued are for more trivial products and processes.

To take an example, the number of patent applications filed at the European Patent Office has risen from 110,000 in 1998 to 180,000 in 2005: an increase of 60%. It cannot be claimed with any credibility that Europe has increased its innovation by 60% in seven years, so if a similar rise can be seen in patents granted, the phenomenon will clearly be due to changing standards in the awarding of patents.

The first country or trading bloc to reduce patent inflation and issue only high-quality patents will gain an immediate competitive advantage by becoming a highly attractive location for innovation.

Patents and small firms

It is a myth that SMEs would make greater use of patents if they were cheaper and more information about them was available. While it is true that in a small number of cases one or two really good patents might be very profitable for a business, in practice this is hardly ever the case.

No small company can ever amass a portfolio of patents that would allow them to trade access with large corporations: SMEs will always be excluded from patent thickets.

Moreover, even if a small company did have a patent, it would lack the resources to defend that patent against infringement by a larger competitor. Under the UK's patent system, claims for infringement involve the re-examination of the patent: it is possible that the patent could be revoked and the business that registered it could be left without its patent but saddled with the costs of both parties. For smaller firms, therefore, patents are generally worthless: however little they cost, their cost is greater than their actual value.

Patents can, therefore, create an uneven playing field: a small firm cannot use patents to protect its innovations against infringements by a larger firm. At the same time, it cannot defend itself against a claim of infringement from a larger firm, even if that claim is spurious. Patents can therefore be used as a weapon against small firms by their larger competitors.

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Software patents

The prospect of software becoming patentable, which would be a reversal of long-standing practice as enshrined in the European Patent Convention and TRIPs, has been raised at EU level and is likely to be a significant part of debate around proposals for a future Community Patent. PCG urges the Government to oppose such a move and sets out below why software patents would be highly damaging to innovation, and therefore to the economy.

i) Software is not patentable and should not be made patentable

There are hundreds of thousands of software developers working all over the world. With such a large amount of work being done, it is inevitable that independent rediscovery will be a regular phenomenon in software development: one developer devises a new way of doing something without being aware that someone else has already done the same thing. If software were to be made patentable, developers would be handed a disincentive to innovate: the possibility of being penalised for such independent rediscovery would represent an uncontrollable business risk.

Software development is in no way capital-intensive. Software can be, and regularly is, developed by one person working alone on an ordinary computer. It therefore does not need or deserve to be given the protection awarded to capital-intensive innovation.

The effort required to develop a new piece of software is involved in the coding and testing. It is not the initial idea that takes the effort and therefore not the idea that should be protected. This is why copyright is the ideal means for protecting software: it protects the code, not the idea. Patents would protect the idea itself, which is a wholly inappropriate protection.

Software is not patentable in principle. As nothing more than a set of instructions, albeit to a computer and in a language that most people do not understand, software should be no more patentable than the rules of chess.

Where freelance businesses develop software, they rely on copyright to protect it. This protection is free and automatic. The copying of as little as 1.7% of a program's code has been found to be infringement of copyright in the past. This is excellent protection.

ii) Consequences of making software patentable

If software were to be made patentable, independent developers would be handed a disincentive to innovate: the possibility of being penalised for such independent rediscovery would represent an uncontrollable business risk. Hundreds of thousands of small businesses would be forced to cease trading.

Two-thirds of the European Patent Office's software patents have been granted to American and Japanese companies. These patents are not currently enforceable, as member states' case law generally respects the principle that software is not patentable. Suddenly making these patents enforceable against British or other European companies would be disastrous.

The experience of the USA, where software is patentable, has shown that companies divert resources away from innovation and into using their existing patent portfolios to extract licensing fees from other developers; small developers who cannot use their own portfolios to bargain with are often forced out of business. They cannot afford to defend themselves against claims by larger companies and so are forced to

concede, irrespective of whether or not the claim is justified or accurate.

Many businesses develop or commission bespoke software systems for their own internal use. It is unrealistic to expect these companies, who might embark on creating a new piece of software only once a decade, to have to contend with the intricacies of patent law.

Moreover, if software were to be made patentable, small and independent developers who are not able to use large patent portfolios to bargain with other patent-holders would be forced from the market. With less competition, the cost of bespoke software for all businesses would rise.

This dramatic decline in competition and innovation would come at exactly the time when the UK is attempting to respond to the rise of Asian competitors by enhancing its competitiveness in areas of high technology. These efforts would be undone by this alone.

Answers to questions in the consultation document

PCG offers no specific comment on questions not addressed below, although some points raised may be relevant to other questions. In such instances they have not been repeated, to avoid duplication.

General Questions

2 (a) What types of IP does your organisation use and why?

Freelance contractors and consultants frequently use copyright, for instance when designing software and computer systems. It is free, flexible and powerful protection. In other sectors, members may occasionally use patents in order to assess the prior art. They are obliged to consider both forms of IPR when assessing prior art.

2 (d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area?

It is unusual for a freelance contractor to be able to profit from IP: the rights to any innovations they produce usually rest with their clients.

3 (a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes?

Negotiating licences is usually straightforward where software – that is, development tools – are concerned. There is often a lack of consistency, or clarity, however, regarding exactly what each licence provides: whether it can only be installed on one computer, for instance.

3 (d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks and designs? and **3 (e) Are these barriers to licensing on grounds of cost? What drives these costs?**

Licensing patents is usually prohibitively expensive, especially if they are held by a company that specialises in using patent licensing as a revenue stream as opposed to focusing its business activities on innovation.

3 (h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools?

It is impossible to access patent pools or thickets without already having a large portfolio of patents with which to negotiate. Small businesses and freelance contractors can never amass such portfolios.

4 (a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks and designs? and **4 (b) Are there barriers to challenging infringement and enforcing your IP rights on grounds of cost? What drives these costs?**

Enforcement of any IP can entail protracted litigation, which is often unaffordable, in terms of both time and money, for small firms. This is, on balance, more or a problem with patents than with copyright: as patentable subject matter can include ideas, ascertaining whether an idea has been used in a given instance can require considerable deliberation. With copyright, ascertaining whether part of an existing work has been copied is usually more clear-cut: it is either present in the work under scrutiny, or it is not.

4 (d) To what extent do you use IP litigation insurance? How effective is it?

Such insurance is not generally available in the major sectors represented within PCG's membership: it has proved not to be a profitable offering for insurers to make.

4 (f) Are there specific barriers to challenging and enforcing of IP rights for small businesses or individuals?

Yes – they simply do not have the resources, both financial and in terms of their time, to do so. Their time is taken up with running their business.

Specific Questions

Coherence between competition policy and IP policy

(a) **Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition?**

The ability of large companies to use large patent portfolios against smaller competitors is clearly a form of unfair competition: whether a claim of infringement against a smaller company is justified or not, the company will not have the financial resources with which to contest it. Similarly, large companies can oblige smaller competitors to pay licensing fees for patents and are able to dictate the prices.

(b) **How did you deal with this problem?**

Very often there is no solution to such a challenge: the company must either pay up or cease working in that area.

(c) **Was competition law effective at controlling this behaviour?**

PCG is not aware of any such behaviour ever having been curbed using competition law.

(d) **Should competition law have a greater role to play in regulating IP?**

Unquestionably yes. Large companies are able to exploit the system not on the basis that their IP claims are correct in law – which may or may not be the case – but on the basis that their smaller competitors do not have the resources with which to resist such a challenge.

(e) **How would you see the system working?**

Competition authorities should be obliged to investigate an IP challenge if it can be demonstrated that it may be motivated by an effort to obtain an unfair competitive advantage, for instance if the

challenge would result in a competitor to the challenger being obliged to withdraw from the marketplace or make significant payments to the challenger. If the challenge is found to be based on a spurious IP claim for reasons of unfair competition, the challenger should be obliged to pay all costs incurred. In this way, smaller companies will have a safety net: they will not simply be obliged to concede any challenge because they cannot afford to contest it, as happens at present.