Gowers Review of Intellectual Property in the UK: Shaping the Digital Future

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Debating Digital Rights

The UK is amidst a flurry of debate over the future of its Intellectual Property Rights (IPR) framework. Chancellor Gordon Brown announced an independent review of UK IPR framework that peaked the interest of many industry and policy insiders. Brown asked Andrew Gowers, former editor of the Financial Times, to lead the sweeping inquiry into how the UK might amend its current IP legislation.

This review follows an inquiry of the Culture, Media and Sport Committee of the House of Commons into the impact of digital platforms on the creative industries. The Gowers Review will report to the Chancellor, the Secretary of State for Trade and Industry and the Secretary of State for Culture, Media and Sport in Autumn 2006.

The Review seeks to implement the Labour Party's commitment to “modernise copyright and other forms of intellectual property so that they are appropriate for the digital age”. Gowers is to focus on Intellectual Property legislation, procedural issues, administration and enforcement. The Gowers Review announcement states that the government must evaluate the balance between consumers and rights-holders.

Thus the review must mitigate between three perspectives: the government’s granting of IPR in ways transparent creators and innovators; the IPR holder’s ability to acquire, exploit, and defend those rights; the consumer’s rights in terms of IPR infringement and the adequacy of Fair Use provisions. Finally, the Gowers Review will examine the issue of lengthening the term of protection for sound recordings.

While it is fitting that governments review how IPR frameworks should evolve with new technologies, proposals should balance the concerns of all related stakeholders in the current digital environment. This article argues that IPR regulation in the digital era is increasingly experienced on the transactional rather than the legislative level: individuals and users are increasingly participating as stakeholders and agents in IP transactions. With the ease at which individuals can use personal computers to copy, alter, and distribute content online, the lines between consumer and producer are blurred with inefficiencies on the rise in the existing system.

Thus we propose an ecological approach to IPR regulations, taking into account these new micro level practices. Any policy document might then consider the following factors: reducing the formal procedures and the subsequent costs for awarding of IPRs; simplifying the complex maze of licensing agreements for the exploitation of IPR by standardizing licences all for producers, disseminators and users; clarifying technical and legal IPR enforcement among stakeholders to ensure protection without suppressing innovation and creativity.

Recent IPR Trends

Simplifying the patent application procedure and lowering the costs of obtaining patents in more than one country is an international priority. The ratification of the “London Agreement” in April 2005 of the European Patent Convention and the ratification of the World Intellectual Property Organization (WIPO) patent law treaty in January 2006 aim at the deregulation and harmonization of legal and administrative procedures associated with filing and enforcing patent applications. Both these initiatives clarify the rules and lower the costs an innovator is burdened with when seeking patent protection in more than one jurisdiction.

The UK patent office is using its website to further simplify the application procedure. By allowing innovators to provide feedback in the way the application process is administered, the UK patent office hopes that problems practitioners face will emerge together with suggested solutions by industry itself.
These encouraging efforts of the UK Patent Office attempt to simplify the overtly complex process for those individuals or firms applying for patents. Nevertheless, the application procedure still remains complex enough to require a lawyer or specialist. The research and drafting of claims and litigation remain an expensive barrier for individuals or small and medium sized enterprises (SMEs) wishing to apply for a patent.

The copyright issue is more complex. Debates are mired over the ever increasing number copyright infringements claims by IPR holders directed towards individual users of digital content over peer-to-peer networks. The major global music companies in particular have linked decreasing sales with an inadequate system of IPR. In 1996, the WIPO “Internet Treaties” stipulated that copyright in digital and networked environment falls under the same protection of existing media. The Treaties also implemented new technical measures for global digital networks, such as the right to prevent the circumvention of Digital Rights Management technologies. The intensive lobbying that produced the WIPO treaties have resulted in implementation across Europe through the EU Copyright Directive in 2001, which was implemented in UK law in 2003. The United States implemented the Treaty in the highly contested Digital Millennium Copyright Act in 1998.

Protecting rights are of central importance to any IPR framework. Yet the technical protections in the WIPO treaties essentially give rights-holders a statutory protection of their end user licence agreements (EULAs) and control over technical measures of digital rights management (DRM). In other words, rights holders can write their own rules of how consumers may access or use their IP and could insert software or hardware to prevent IP usage outside those rules. For example, by accepting the conditions of an Agreement, a consumer may be limited to play a music CD but not copy it to a computer.

Furthermore, the manufacturer can build in technology preventing CDs from being copied onto computers at all. The problem is that some EULAs and DRM are at odds with ways creators now operate in digital environments and current Fair Use provisions that allow for limited copying under the law. What if the user is a student who wants to use part of a song for a class project or copy the song to an iPod or mobile device? What if technological controls on computer hardware interfere with playing other content? Clarifying the balance of overly restrictive DRM and EULAs is of crucial importance for the Gordon Review to avoid stifling rather than encouraging creativity.

Considering an ecology of regulations

The complexity of IPR frameworks is further aggravated by the proliferation of new digital creators and innovators navigating through the maze of existing licensing agreements. Sometimes, creators are unsure whether their use of content is infringing on IPR or not. Other times enforcement of IPR of digital content is at a higher cost the actual infringement damages. We argue that IPR in the digital era is experienced more like an ecology of mass-micro regulations rather than a simple set of stated rules.

As Benkler (2001) and Moglen (1997) have explained, the way in which production is organized in an environment of interconnected digital networks defies the existing categories of producer or user or consumer. Yet these positions are crystallized in traditional IPR law. Bloggers, for instance, continually produce and licence their own content while recycling and republishing the material of others.

If the government approaches the IPR issue as legislative reform to “strengthen” the IPR protection for the established creative industries...
instead fostering flexible protections for new categories of "producers", another opportunity to rationalize the IPR system will have been lost (Hugenholtz 2000). On the contrary, if the IPR issue is approached as one of cultivating a complex ecology of competing licences and complex administrative procedures that embrace these new entrants in the creative economy, an opportunity will have been gained.

Cultivating new approaches to IPR

A series of innovations cultivating a more balanced ecology of IPR regulations have already emerged. Stakeholders range from creators and SMEs with limited budgets, to innovation intensive industries that seek alternative R&D structures, to communities of practice of software or creative content producers. The following three examples demonstrate a variety of tools that support new business models and leave their viability up to competition and the free market to evaluate.

(a) The Creative Commons project reduces the need for creators to hire lawyers or specialists to copyright their works. Creators choose from different copyrights available on the creativecommons.org website. Each license is explained to both producers and consumers through three layers of expression: Human Readable, Lawyer Readable and Machine Readable. The Human Readable Layer allows for average users or consumers to understand the extent of the copyright without the legal jargon found in the Lawyer Readable Agreement. “Copymarks” (Bing 2004) are one way to distinguish between different licenses and copyright measures through simple icons. The Creative Commons project has four main icons to signal the different terms of copyright offered for creators to choose from. [see figure right]. The Machine Readable Layer “tags” or adds computer code to digital content so search engines can find the licensing terms over the internet or peer-to-peer networks, which are the primary means for distributing digital content. Such schemes can benefit the consumer and/or producer in the case either wishes to share or use digital content for the creation of new works. Besides Creative Commons, the BBC Creative Archive Licensing Group use copymarks for expressing the basic features of their licensing schemes.

(b) The use of “wizards” simplifies copyright and patent applications. The Creative Commons licences are produced not through a traditional application procedure but rather through a highly interactive and simple computer interface. Similarly a series of sound recording collecting societies use “wizards” for streamlining the application process. The UK patent office should encourage the creation of a similar system for the application for granting patents and thus reduce the transaction costs for the applicants.

(c) The Honey-Bee project on rural innovation networks in India indicate that there are proactive ways to promote innovation compared to the ones traditionally conceived. In the Honey-Bee project a series of innovation “walks” is organized where individuals scout for inventions in rural India and submit those innovations to a network of experts. After a more detailed filtering process, a select number of patent applications are filed in India, the US and EU. The National Innovation Foundation Centre manages the process and examines the marketability of the invention. The patents are then placed on particular web-sites where bidding for the technology transfer agreement can effectively take place.
Examples of copymarks.

- **Attribution.** You let others copy, distribute, display, and perform your copyrighted work — and derivative works based upon it — but only if they give credit the way you request.

- **Noncommercial.** You let others copy, distribute, display, and perform your work — and derivative works based upon it — but for noncommercial purposes only.

- **No Derivative Works.** You let others copy, distribute, display, and perform only verbatim copies of your work, not derivative works based upon it.

- **Share Alike.** You allow others to distribute derivative works only under a license identical to the license that governs your work.

The Digital Future

The Gowers Review has a unique opportunity to propose how IPR can be shaped in the digital era. New legislative instruments will have lasting effects on the creative industries in the UK and internationally. The Gowers Review should account for new stakeholders of digital content as well as established cultural industries. A variety of techniques directed towards these stakeholders already exist, but their actual cultivation is needed in order to ensure a balanced and sustainable ecology of IPR regulations.

Notes


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