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Response to HMG Green Paper ‘Building our Industrial Strategy’

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The Chartered Institute of Patent Attorneys
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Introduction

The Chartered Institute of Patent Attorneys ("CIPA") is the representative body for Chartered Patent Attorneys in the UK. Most CIPA fellows (around 2240 people) are Registered Patent Attorneys regulated by IPReg (a national Regulatory Authority supervised by the Legal Services Board under the Legal Services Act 2007) and are also qualified European Patent Attorneys (although the three groups do not completely overlap).

CIPA welcomes HM Government's initiative in carrying out a holistic consultation into what the United Kingdom's future industrial strategy should be. If the nation and its citizens are to continue to enjoy the benefits of an affluent, tolerant and equal society, then having a strategy which recognises and confronts the associated industrial challenges in a targeted and realistic way is, we believe, a key enabler of long-term success. Indeed, it is becoming the more so as our international competitors continue to industrialise and provide ever-fiercer competition based on the thoughtful deployment of knowledge assets and intellectual property rights.

In this respect, we would like to begin by making a general point. The green paper at the outset refers to the decision made on 23rd June 2016 to leave the European Union. Whilst this is an important background consideration and clearly a complicating factor, we believe that most of the issues which are identified in the paper are particular to the United Kingdom and existed before this decision was made. And we think they would have continued to exist today irrespective of the outcome of that event. At the same time, it is clear that this decision has proven to be politically divisive and will continue to remain so for the foreseeable future. Consequently, we believe there is a real risk that short-term progress on addressing any conclusions reached by this consultation will be impeded and at worst become subject to political stasis. As evidence in the paper shows, many of the United Kingdom's industrial shortcomings have been long in the making and will only be solved by an approach predicated on a world-class education system; continued access to an international skills-base and economic incentives underpinned by long-lasting political consensus.

Submissions

As a representative body of regulated individuals practising intellectual property law and having significant day-to-day contact with inventors and technology entrepreneurs from all levels of society, CIPA welcomes the Government's desire to further maximise the incentives created by the Intellectual Property system as part of this strategy. In this respect, we believe that the Government is starting from a position grounded in a track-record of significant achievements including:

- A world-class national Intellectual Property Office (IPO) which is attuned to the needs of inventors, designers and content creators;
- Tax-incentives for those developing technology-based offerings to the market in the form of R&D credits and Corporation Tax relief (Patent Box);

- The provision of a user-friendly and coherent body of on-line pedagogic material targeted at all ages and levels of understanding;
- Significant and continuing outreach work at both the national and international level explaining how the system functions and training the trainers;
- The creation of the IP Minister role driving joined-up thinking within Government and the Civil Service;
- A highly influential position on the Administrative Council of the European Patent Office; a rights-granting organisation separate from the European Union;
- A network of IP Attachés providing IP support to UK businesses around the world and
- A leading role in the fight against national and international IP Crime.

We believe that this success has in part come about because of systematic commissioning of evidence-based research and open-minded consultations with stakeholders. Consequently, we are pleased to see that the Government will continue this approach and commission a survey on approaches to the commercialisation of technology by licensing and the funding of equity-based ventures. However, we believe that such a survey should have a broader remit as these represent only part of a spectrum of business approaches. One additional area we think important is around understanding the business dynamics between small and big companies. This is especially so for many start-ups as (1) their paths-forward frequently involve significant partnering with large companies and (2) for many entrepreneurs, buy-out by way of a trade sale is the only realistic way to build the necessary degree of critical mass. Another area which should be investigated is understanding how these relationships compare with the situation in other countries having a more successful track-record. Finally, such a study must recognise national and international supply-chain issues if it is to be meaningful.

The green paper suggests various IP-related topics for consideration. First, an intent is stated to revisit the IP barriers in business-to-business interactions including the desirability of (1) model agreements and (2) IP registries and market places. These, we believe, are two separate matters. Model agreements have continued to show efficacy in University-Business relationships so this is clearly an area which is ripe for investigation. One way forward could be to modify and re-brand the recently-updated Lambert Agreements since much of their content is applicable in a simple B2B context. For more complex agreements, care needs to be taken and the Government should recognise that small businesses' needs do not always automatically equate to simple agreements. In fact, frequently the opposite is true. We therefore prefer a term-sheet approach where the key issues are identified and negotiated out on an 'in principle' basis before being passed to experienced legal advisers for reduction to bespoke contract language. The IPO has in the past produced a check-list of such issues and we would support updating it and developing teaching material off it. We recognise that this approach will not necessarily lead to a minimisation of cost for SMEs, but it will lead to them developing contractual relationships which have the best chance of being fit-for-purpose. Given the business-critical nature of many of these relationships,

we are not convinced by those who take the position that the net effect of this approach is to make the best the enemy of the good.

In this respect, we believe that there is scope for the IPO to articulate to users that the proper way to look at Intellectual Property rights is as an investment (asset) rather than simply a cost (legal right). We would not deny that accessing legal services can be expensive but if an entity is serious about the development and protection of its trade secrets, there needs to be a fundamental recognition that, if the IP system is to be of use in a business sense, these knowledge-based assets need to be of high quality and aligned with realistic business opportunities. In today's world, the romantic notion that if you have a great idea the world will beat a path to your door is a gross oversimplification and highly misleading. Today's entrepreneurs need to know what 'intellectual assets' they own and how they map onto their sources of competitive advantage; be clear about how they will be managed and transact them based on realistic cost-benefit analyses. To do otherwise, risks reducing the whole activity to one more akin to speculation; an outcome which we believe works to nobody's economic benefit be it rights-holders, service providers or Intellectual Property Offices.

This issue is of course complicated by fact that such assets are highly individual and as a consequence have a valuation which is extremely fact- or situation-dependent. The IPO has already commissioned useful work in this area but we believe there is considerable scope for the IPO to do more through international dialogues and the creation of support materials which have a practical bias.

IP registries and on-line marketplaces are a good idea in principle. However our experience is that the unique nature of IP has tended to mean that they have generated little tangible benefit. To our knowledge, a number of such approaches have been tried and failed in the past meaning that for the time being we remain uncertain as to how this market-failure is best addressed. Certainly, our bias is towards approaches where the driver is to build relationships and communities of interest rather than simply catalyse one-off transactions. However we acknowledge the difficulties in establishing line of sight between such activities and beneficial economic outcomes.

Having IPO representatives based in key cities to help build local IP commercialisation capability through interactions with intermediaries is a good idea but having a clear view as to their roles would be helpful. In our experience, the IPO has in the past tended to offer systems-based, neutral advice which although helpful can leave the recipient uncertain as to how to apply it in a specific business setting. CIPA has sought to fill this gap with weekly clinics offering business-focused IP advice but the reality is that providing such support takes time and is expensive. Often, a client's problems are complex and multi-faceted requiring the thoughtful application of both IP and business experience. So, if the Government wishes to increase its impact in this area, we believe it will need to go beyond acting as an intermediary towards stronger partnerships with those in the IP ecosystem having relevant experience in the 'business of IP'. At the same time, we believe further funding should be made available to support an activity which has traditionally been a low-level 'pro-bono' activity. If this funding is not available, we believe it will be hard to systematically

address the ‘chicken and egg’ issue that, whilst funding often only follows the creation of a credible business-focused IP strategy, developing such a strategy in the first place can be a major set-up cost for SMEs.

If practical support for entrepreneurs and inventors is being considered, one idea would be for the IPO to develop a simple tool, linked to the European Patent Office’s (EPO) Espacenet database, where innovators could do simple searching on an idea at a formative stage and receive realistic feedback on an intelligible scale showing how hard or easy it will be to obtain useful patent protection. The format and elements of such a tool would need to be carefully worked through with potential stakeholders and the limitations made clear, but we think the upside may outweigh the downside. At the moment the IPO simply leaves users to follow links from its website to places where they are essentially left on their own to retrieve relevant information. This is not ideal; especially if the technology concerned is complex or cross-cutting.

More generally, however, if the IPO is to become more proactive in business-life around IP then it needs to be recognised that this will inevitably affect its longer-term status in the community. Traditionally, the IPO’s principal role has been as a rights-granting and IP policy-developing authority; something which is not only important but has a high degree of internal consistency. Put another way, good policy tends to lead over time to optimum organisational efficiency and high-quality outcomes for users. Once the IPO does more than dip its toes into the waters of Business IP, it risks creating tensions which may have unforeseen political and operational consequences. One could be around the issue of impartiality. Another could be the need to take a more active role in regulating an ecosystem which is diverse and where standards are not always consistent. This role would be quite separate from the type of legal services regulation overseen by bodies like IPReg or the Law Society. And it prompts many questions; for example, would the IPO be prepared to keep white-lists and black-lists of service providers and be prepared to be transparent about it? Would it be prepared to provide teeth for the sorts of best practice it has in the past sought to promulgate? If not, then how will users get assurance? It is not the purpose of this response to advocate for any particular outcome; rather to note that if the IPO goes down this route significant debate and consensus-building will be required.

The green paper makes reference to a challenge prize programme as a way to reward innovators and technological success. We agree that these outcome-linked schemes can be powerful motivators but we also feel there is scope for recognising rank-and-file inventors and entrepreneurs who are either associated with less-attractive high-profile projects or who have tried and failed in multiple knowledge-intensive commercial ventures. To an extent, these unsung heroes, many of whom exhibit the commitment and determination needed to succeed in an unforgiving environment, represent the true entrepreneurial spirit of innovation which we should be seeking to foster in our national culture. Perhaps there is scope to recognise these human and cultural qualities systematically through the Honours System; possibly through the establishment of an ‘National Innovation Medal’ and/or a ‘UK Innovation of the Year’ award along the lines of the annual EPO ‘Inventor of the Year’ event; the student inventor prize the EPO ran as part of its recent 40-year celebrations, or even the Royal Society Innovation Awards. We have in mind something more broadly-based to reflect

the achievements of entrepreneurs in all fields of creative endeavour and an approach which seeks to unify existing awards within a coherent framework. Such an approach might well attract significant sponsorship from the legal services and investment communities if it became high-profile and were to be endorsed by ministers or Royalty.

We are generally in favour of establishing technical centres of excellence in certain sectors. This is predicated on the view that, where resources are scarce, it makes sense for the Government to focus on those sectors where the United Kingdom has a distinctive offering and/or is likely to enjoy a disproportionate contribution to its long-term GDP. This is akin, for example, to the successful model used to disseminate Olympic funding. The Centre for Battery Technology/Energy Storage/Grid Technology proposed in the paper certainly seems to be one option although there may be others. What is not so clear is how this proposal was arrived and whether it was done on the basis of a forecast of the likely impact on the UK economy. If not, we think it should be as there are likely other areas where targeted expenditure could also have a significant political and economic impact; e.g. around healthcare and other issues related to an aging population. Otherwise, the risk is that funding is simply being provided on the basis of a hope that particular sector funding of the science base will, automatically lead to UK benefit. It is likely that the UK can learn lessons here from the EU's approach to its Framework Programmes. It may also be possible to obtain input from a technical perspective from our members as many are working closely on the ground with cutting-edge start-ups.

It is possible that there may be overlap between the proposed centre and the remit of the Energy Technologies Institute (ETI) in Loughborough. Further institutes like the ETI, which are based on a mixture of publican and private funding, could become more attractive in a post-Brexit world where EU State Aid rules may no longer be applicable or are somewhat circumscribed. In our view, the best outcome will be achieved if the creation of this sort of centre is underpinned by a clear statement of what is trying to be achieved. A good example here is the original remit of NASA.

Government schemes which sponsor early stage research and development will clearly play an important role in delivering a future industrial strategy. Often however these are carried out in consortia where the IP access and reporting rules can be very complex. We believe there is scope for identifying international best practices with a view to working towards contracts which provide more IP flexibility.

Finally, a point on IP law harmonisation. Since EU law, especially in the field of patents, is relatively harmonised we believe that, all things being equal, the impact of United Kingdom leaving the European Union should be at most second-order although we acknowledge there might be cost implications for users in the area of rights procurement. However, since competition and markets are becoming increasingly global, entrepreneurs still need a global system based on completely harmonised principles. This is a long-term project and the delay and difficulties in reaching a harmonised EU patent and associated enforcement regime does not fill us with optimism that global harmonisation will be resolved in anything other than the long term. Significant progress has been made in the area of procedural harmonisation through the joint efforts of the Industrial Trilateral and the IP5 patent offices.

Nevertheless, it needs to remain a significant item on the Government's agenda as there remain contentious issues in the area of substantive law harmonisation. We urge the Government not to let this take a back seat to or become a casualty of the inevitable bi- and multi-lateral trade agreements which will need to be negotiated in a post-Brexit world.

If we can provide further assistance, then please let us know.

For CIPA
11 April 2017