Does Intellectual Property law strengthen and reward innovation?

Without wanting to sound biased, at A. A. Thornton & Co. we firmly believe the answer is yes… But don't take our word for it.

Read on below to understand why we believe this so vehemently, and as a result, why we constantly strive to secure the best possible protection for our clients' intellectual creations.

What is intellectual property?

Intellectual property exists in many different forms. It essentially refers to a 'creation of the mind', for example anything from an inventor's widget to an artist's painting, and can be protected by copyright, trade marks, patents, designs and trade secrets.

Copyright requires no registration – it is a natural right given to authors. Creative expression is encouraged by such a natural right because authors are more likely to make their works public if they are able to retain control over them.

A trade mark, for example, allows consumers to identify the source of goods or services being provided. The consumer will have their own opinion on these goods or services based on the reputation of the provider and so the trade mark should enable the consumer to distinguish between goods and services from different producers and to select products by manufacturers whose reputations they trust. The presence of a trade mark provides an indication of quality and enables a consumer to shop with confidence.

A patent is a monopoly right effectively offered in reward for a clear and detailed explanation of an innovation.

But does the grant of a monopoly always reward the innovator?

We would like to say yes, but, in the case of patents for example, there is definitely no guarantee that a patent equals commercial success. There are many examples where the innovator is not able to gain any significant monetary reward for their patented invention.

A particularly famous example is Sir Frank Whittle, who invented the jet engine and subsequently applied for a patent in 1930. Whittle could not afford the then-significant £5 renewal fee in 1935 due to a lack of investment. His patent lapsed and thus the technology became freely available to his competitors.

Whittle eventually gained investment and developed a working engine, but so did many of his competitors, who developed and improved on the basic engine described in the patent. In this case, Whittle did not gain financial reward from what was debatably one of the most important innovations of the 20th century.

This example of intellectual property not rewarding the *innovator* may be used as an argument then that intellectual property does not reward *innovation*.

However, had Whittle not had the incentive of gaining a monopoly he may never have applied for the patent originally and, in keeping his idea to himself and not

providing the clear teaching to others, history could have looked very different.

With modern patent advice and more astute investors, perhaps Whittle would have maintained his monopoly over the jet engine for the full 20 year patent term. Nevertheless, it remains an outstanding example of a single patent which drove forward developments and strengthened engine innovation worldwide.

How could a trade mark reward innovation?

Trade marks protect the identity of a brand and provide assurances to the consumer. The protection of the brand lies in the registration of its distinguishing marks to prevent other using the same or similar marks in relation to identical or similar goods and services. For registered trade marks with particular distinctive character or repute, such protection could apply to dissimilar goods or services too.

If it weren't for this, anyone, for example, could set up a company called Rolls-Royce® and sell cars with a silver lady on the bonnet. The buyer would have no way of discerning whether the car they are purchasing was genuine or counterfeit.

Trade marks, therefore, prevent third parties from taking advantage of the established reputation of a trader and provide assurances to the customer about the origin of their purchases.

A trade mark rewards the innovator with a means for building a brand which makes their products or services recognisable to the consumer, thus enabling reputation and a customer base to be established, grown, developed and expanded.

Ok, but how about medicines? Shouldn't some pharmaceutical developments be made publicly available for the good of everyone?

It is true that this area of intellectual property can be highly emotive.

Millions of pounds are invested into Research and Development to produce drugs that are effective and safe for human consumption.

Once this large initial investment has been made, the drug itself is often relatively inexpensive to reproduce. Competitors would be able to make simple copies and sell them more cheaply because they would not have to cover the initial expense.

By providing a temporary monopoly, pharmaceutical companies can recover their initial expense and create profit, a significant proportion of which will fund the next research and development project.

If the initial expense couldn't be recovered in this way due to cheap competitors' products, pioneering pharmaceutical developers would operate at a huge deficit and their work would not be sustainable without a great deal of benevolent investment.

Nearly all of the 300 products on the World Health Organisation's Essential Drug List came from the R&D intensive pharmaceutical industry[1]. The industry depends on patent protection in order to sustain such a level of growth and development.

It is also important to bear in mind that the UK Patents Act, for example, provides that, in cases of extreme emergency, the government can make use of any patented invention. Therefore, if a pandemic occurred and the cure was patented, no patent right would prevent drugs from being available to all.

But what about Open Source? Isn't that a better system?

Open source generally refers to software that is free to download and use, but the concept of the open source movement can be applied to all areas of industry.

Open source developers choose to make their innovations publicly available for the good of the community and not in exchange for a monopoly of use. Well-known examples include Wikipedia, Mozilla Firefox and Android, and the

[1] http://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/

idea is that users are effectively co-developers who can fix bugs and suggest improvements.

The big advantages of open source, aside from it generally being free, is that an open source development will continually evolve and is very adaptable to specific business requirements. Perhaps counterintuitively, open source developments also tend to be less prone to bugs than proprietary systems because when a critical mass of users is reached, the many users of such systems identify and fix problems as they occur. This is in contrast to proprietary systems which offer periodic version upgrades, patches and bug fixes.

A disadvantage of open source developments is that they tend to be less user-friendly. This is because they have not been developed with the end use in mind; rather they have evolved and may have many different end users.

The reliance on a community of users for support when things go wrong is inherently risky and although an open source system enables many users to identify and fix bugs, it also enables malicious users to create and/ or exploit vulnerabilities.

Open source has its place and can be very valuable and advantageous in certain circumstances, but it must operate alongside Intellectual Property Law so the benefits of both can be realised.

I've heard of Patent Trolls – don't they stifle innovation rather than encourage it?

A Patent Troll is a derogatory term for a person or company that misuses patents as a business strategy.[2] Typically, the Patent Troll obtains patents when a company is liquidated. Their strategy is to buy patents and either use them to attempt to keep other companies' productivity at a standstill or to make money by initiating infringement litigation in jurisdictions with reputations for being patentee-friendly.

Patent Troll activity is prevalent in the US and not prevalent in the UK. This is because certain aspects of UK patent litigation make patent troll activity considerably more challenging and less fruitful than it may be in the US.

For example, a UK court determines the validity of a patent based on fresh evidence presented before the court. In contrast, US courts presume that a granted patent is valid. This can mean alleged infringers are less likely to challenge the validity of a patent and they are less likely to succeed if they do so.

Furthermore, UK patent litigation is determined by judges, whereas a jury of lay people with no patent expertise determines the outcome in the US. There have been examples in the US where considerable damages have been awarded to the patent holder. These factors can encourage alleged infringers to settle when court proceedings are initiated, even though they may have a strong case. This clearly motivates the Patent Troll further.

Costs in the UK are paid by the loser of the trial. In the US, patent holders can rely on the rule that generally a party to litigation is responsible for its own attorney's fees, irrespective of the outcome. There is also no mechanism in the US to encourage that the proceedings are resolved before going to trial. In the UK, parties must detail the steps taken to reach a resolution out of court. A failure, without good reason, to take such steps will be considered when apportioning costs at the end of the trial.

For these reasons, Patent Trolls are not prevalent in the UK. The US is also taking great steps to combat Patent Trolls, specifically with the introduction of the America Invents Act which came into effect on 16 March 2013. If you are concerned with Patent Law in the US or have any questions on the above, then please do not hesitate to contact one of our Attorneys.

Conclusion

In conclusion, we consider that intellectual property rights ***strengthen*** innovation by facilitating the free flow of information. In the case of a patent for example, there are rules on the clarity and workability of any disclosure. This enables the skilled reader of a patent to understand how to work the invention and how to learn from the teaching to develop it further.

Intellectual property rights ***reward*** innovation by offering exclusive use to the creator for a limited period.

[2] **http://www.investopedia.com/terms/p/patent-troll.asp**

Published patent applications, for example, are thus a rich source of technical and scientific information accessible to all. Such a pool of knowledge, with a coherent, ordered, and searchable structure, would not exist without the concept of intellectual property. Further research and development is stimulated which in turn creates a virtuous circle of innovation.

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