



## Response form

# Response by Filemot Technology Law Ltd to the Consultation on the Patent Office Strategy for Supporting Innovation

Introduction .....	2
Acknowledgement of other contributors .....	2
What happens now .....	2
Open Source campaigners .....	2
State Aid .....	3
Sources of Public Investment and Rejection .....	3
Paid Advisers.....	4
The Missing Link .....	4
Advice and Information is not Enough.....	5
Annex A.: “Understanding IPR” activities.....	5
Delivery methods.....	5
A4 IP clinics .....	6
A5 Women and underrepresented groups .....	6
A6 Innovation Related Awards Schemes .....	6
Annex B.: Educational Activities .....	7
University Technology Transfer Offices.....	7
Annex C. Core Activities .....	8
B Specifications.....	8
Trademark databases .....	8
Annex D: New Innovation Support Services .....	8
IP brokering.....	8
Fast-Track Trademark Services.....	9
The Consultation Questions .....	9
Is the strategy supportive of and complementary to other innovation support activities being pursued by other organisations? .....	9
Which activities in the programme of activities appended to the strategy would you say should be the priorities for the Patent Office?.....	9
Do you consider any of the proposed activities inappropriate for the Patent Office? .....	9
Are there any other activities you think the Patent Office should pursue? .....	10
Are there any activities in which you would like to partner the Office in delivering?....	10
Conclusion.....	10

## Introduction

This is a personal response based on my personal experience in a career supporting innovation and more specifically over the last 12 months considering the question:

*Does the offering of UK lawyers and patent agents provide a fast growth entrepreneurial company with the best possible support in their endeavours?*

During this period I have studied for and secured a Certificate in Enterprise from the Centre for Entrepreneurial Learning, part of the Judge Business School of Cambridge University and also worked on several entrepreneurial projects and experimented with some different ways of becoming involved with clients who require IP advice including taking a shareholding in one new business, deferred and contingent fee arrangements and conditional fee agreements as well as a good deal of pro bono work.

## Acknowledgement of other contributors

I acknowledge contributions and comments from Carl Franklin, Author and Journalist and David Spiegall, Business Consultant who have been kind enough to read this document in draft and make suggestions.

The contribution also reflects experiences of would-be innovators who have experienced varying degrees of success and prefer to remain anonymous.

Also many of the ideas developed here reflect those of the speakers and other attendees at various lectures, events and conferences relating to entrepreneurship that I have attended over the past year, many of which are described in my [diary](#) at filemot.com.

## What happens now

Having spent many years in a career as a patent agent and as a solicitor, it is sadly clear that the members of those professions are following the money as a primary objective. There is therefore little motivation for such advisers to exercise selection and judgment in relation to the projects on which they advise. Unless a paid adviser shares the risk or has a potential long term interest in the business, fees remain his primary interest. It is rare for the success of the client to be a significant factor in judging the performance of the adviser and the existing regulatory environment provides no protection for a naïve inventor. These concerns apply to any paid adviser that an entrepreneur may consult, whether an accountant, business consultant, designer, lawyer or patent attorney. Due to the small number of IP professionals it is not easy to find approachable advisors.

By contrast, investors are only interested in projects that have a high likelihood of market success and growth. A great deal of effort and expense is therefore put into developing projects through the early stages which have no real prospect of gaining investment. Therefore, while the patent and legal professions support innovation they do so for profit and indiscriminately<sup>1</sup>. Venture capitalists and other investors also support innovation for profit but focus on the substance of the business.

## Open Source campaigners

Innovators in the UK are subjected to many high profile influences advocating open access to the results of research. The success and undoubted benefit of open source software gives

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<sup>1</sup> “Above all don't forget that any decent patent attorney will tell you they can patent anything” quote from Francis Hobbs Business Creation Development Director 1 Aug 06 in a contribution to a 3Cs forum on how useful are patents?

credibility to these voices. The Times ran an [article](#) next to its Leader page on 14 August 2006 perpetrating the message that “patents are a menace except for the pharmaceutical industry”. They later published one [letter](#) in defence of the patent system. This type of journalism leads English entrepreneurs to believe that patents are either good or bad, not that they should evaluate how using patent legislation or not might have an impact on their business. The Perkin story of aniline purple and its lessons are more thoroughly analysed by Johan Peter Murmann in his book *Knowledge and Competitive Advantage : The Coevolution of Firms, Technology, and National Institutions*<sup>2</sup> .

It is common for businesses to rely on misrepresentations such as “It costs £100k to take out patents” or we can put off making decisions about IP until later.

### State Aid

State aid to inventors who would be entrepreneurs is largely confined to making advice available. Much more could be done and still remain within the *de minimis* levels of the European State Aid rules.

The basic information offered by the Patent Office remains an essential resource for businesses of all sizes. This is complemented by the information on offer from [Espacenet](#), the [British Library](#) and other [PatLibs](#) where research can be carried out into a patent information and market research material. In my experience most entrepreneurial projects make some use of these resources.

The advice offered by [Business Links](#) which in some areas subcontract to quasi-independent [Enterprise Agencies](#) seems to be very variable. Their focus seems to be more appropriate to the basic skills needed to set up a business rather than testing innovative business models. In short, they are great for shopkeepers, but inappropriate for the specialist needs of inventors.

The Higher Education sector appears to provide a considerable range of courses for prospective business owners. Other government departments are also amazingly efficient in supporting young businesses. I would particularly commend HM Revenue & Customs.

Entrepreneurs and Inventors clubs such as [Ideas 21](#), the [3Cs community](#), CU Entrepreneurs and numerous others around the regions provide moral support, contacts and networks.

Very modest support is specifically directed at the innovation process within existing businesses. The IET sponsored by QinetiQ support an [annual conference](#) on stimulating innovation within organisation. Larger enterprises can still stagnate and ultimately fail if they are not able to innovate. Some attention should therefore be directed at managing innovation within larger organisations.

### Sources of Public Investment and Rejection

It is difficult to find grants in the early stage of an entrepreneurial career. Before a business is in a position to apply for any public grant funding the business, it will usually need to have created a team, incorporated itself and developed a detailed business plan. There is little material help in getting to that stage. Most entrepreneurs rely on personal funds, credit cards and gifts and undocumented loans from friends and family.

Programs are forever coming and going making it difficult for the businesses to get current advice. See for example the complex array of schemes mentioned by [Nesta](#) – the organization most likely to be addressed by the sole inventor. The DTI support in the form of Grants for Research & Development is now managed regionally and seems to have transformed from grants to investments.

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<sup>2</sup> [Cambridge University Press](#) first published November 2003 ISBN-13: 9780521813297 | ISBN-10: 0521813298 and ISBN-13: 9780511189050 | ISBN-10: 0511189052

Since patent attorneys and lawyers are not necessarily operating with in- region clients it becomes difficult to support clients in their quest for funding. In London I need to make links with the [London Technology Fund](#) but they do not address construction projects and my clients do. Alternatively there is another very generous [scheme](#) if the company has not established a base yet and is prepared to go to certain undesirable areas in the Thames Gateway. Any adviser is in much the same position as an entrepreneur in terms of looking for and finding opportunities in this unstable environment. It is very much a lottery whether your local support is right for your business. The best advice is to stay virtual as long as possible and settle where the best grants or funding are available. This at least one client has done.

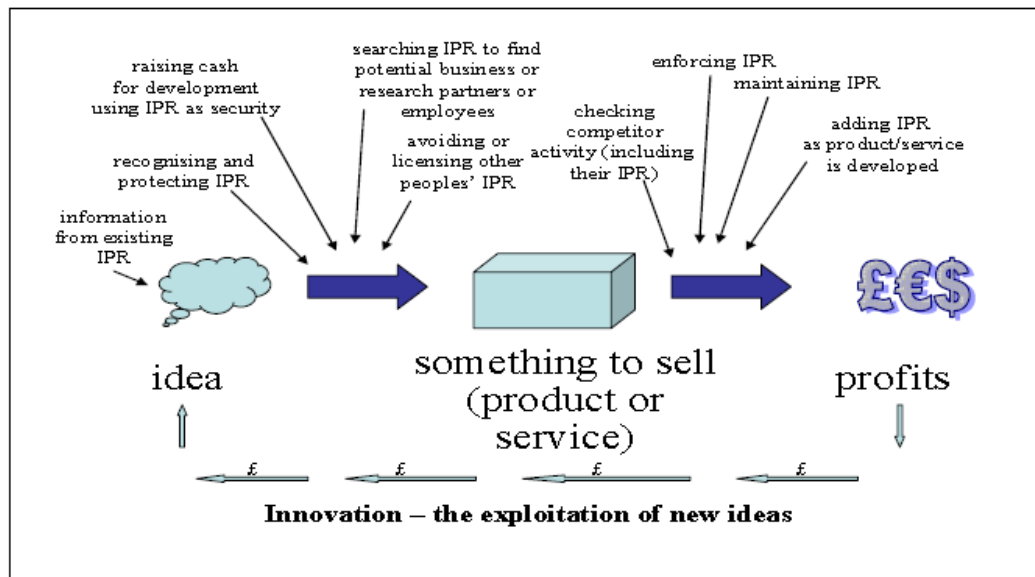
A candidate seeking investment faces a typical chance of success of less than 5% when seeking funding from Business Angels or VCS and is unlikely to have any greater chance of success with government funds. This high late attrition rate could be reduced if some modest support were made to assist early stage appraisal.

### Paid Advisers

For many prospective technology entrepreneurs, the first paid adviser they will consult is a patent agent. The young business will then need to reconcile the advice they receive from the patent agent with completely independent advice it ends up with from other paid advisers, such as accountants and lawyers. Frequently the streams of advice will be at odds or at least incoherent.

However good the business understanding of IPR that the entrepreneur has, there is always an issue of how to transpose that understanding onto the facts of his case. A sounding board is necessary for the development of an appropriate IPR strategy. However, it appears that in most cases young businesses end up being directed by their patent agents into a specific strategy. This seldom contains any element of evaluation or judgment as to whether the technology is marketable and capable of sustaining a business, but merely whether it is patentable.

### The Missing Link



The innovation process as described at paragraph 17 of the consultation document does not include any element of testing the idea and the market for it, which should probably occur at or about the stage of “recognising and protecting IPR”. The information/awareness/understanding activities of the Patent Office can put an entrepreneur into a position of being able to make that assessment. As already pointed [out](#), a paid adviser has a conflict of interest in rejecting any business idea. Of course, it is one of the necessary attributes of an entrepreneur

that he has faith and conviction in his own business model, which, in itself, may blind him to its defects<sup>3</sup>. He therefore needs advisers and team members who can introduce objectivity.

It is also necessary to find some initial funding before you can use the IPR as security.

Therefore, the most valuable addition to the support for the innovation process, would be support for the creation of teams and evaluation and access to early stage grants and loans.

### Advice and Information is not Enough

Existing support is limited to "talk" and includes no "action". There are many people who will tell an entrepreneur that he must bring together a team, develop a prototype and derisk his proposition, but there is little or no assistance in achieving this. The hands-on workshop services described by the [Foundation for Finnish Inventions](#) offered an interesting example of how state assistance might be provided in this area. This would seem to bridge the gulf between the initial business idea and establishment of a company that is in a position to apply for funding. University Technology Transfer Offices fulfill elements of this role within the University environment. Inevitably, some selectivity must be applied to any project being given financial support however modest and this would have the effect of forcing the entrepreneur to assess the market at the earliest possible stage.

Having reviewed numerous patent specifications prepared in respect of entrepreneurial projects, it is almost inevitable that the initial claims are found to be significantly off target once further development has taken place. This happens so often that due diligence for VCs reveals a significant number of 2 PCT businesses. The first PCT application relates to the off target first filed application and the second is a rescue attempt relating to the real solutions to the technical problems discovered in bringing the innovation to reality. Frequently this means that the IPR position is not as strong as the investor would like.

## Annex A.: "Understanding IPR" activities

An issue for any entrepreneur looking for support is finding the right signposts. The Patent Office is in a good position for technology entrepreneurs as they are a natural starting point and can take advantage of this to act as a signpost to other public and private sector sources.

Clearly the basic information activities must continue to be supported. Usefully, they could be expanded to include guidance on the selection process of paid advisers.

Coordinating this effort with Business Links and other information sources is clearly going to be necessary. However this type of activity appears to have little lasting impact on existing businesses as the Scottish experience has shown with the [IA Centre](#) reporting that the message had become lost or there was a distinct time lag in converting this initial interest into action<sup>4</sup>. The feedback from the 2005 WHAT IS THE KEY program as reported in the CIPA Journal July 2006 seems to confirm these lessons.

### Delivery methods

Delivery of the information via a web site and publications is a basic necessity. However, live events add an extra dimension. This [workshop](#) being offered by EpiDOS appears to be an interesting format and proposal that might be adopted.

My own personal experience confirms that businesses are mistrustful of IP Audits – even and perhaps especially when they offered free they are seen as simple sales pitches for paid advisers. The poor take up for WHAT IS THE KEY audits confirms this. Linking the discussion

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<sup>3</sup> This issue was well illustrated by Carl Franklin, technology journalist and author of 'Why Innovation Fails', Spiro Press 5 Jan 2003 ISBN: 1904298087 in his presentation at the CUTEC Tech Venture [Conference](#) 13 Jun 2006

<sup>4</sup> Intangible lessons from Scotland, Fiona Jackson and Jane Watters, Intellectual Asset Management April/May 2006

with the option of being able to secure a grant/loan to cover all or part of the cost of subsequent IP acquisition would, I suspect, have a significant impact on take up. Progression to the grant stage could require the business and its allocated adviser to prepare an assessment of the impact the IP could have on the business and how the grantee would take advantage of that benefit. This would give the Patent Office the ability to assess whether the awareness program was resulting in real understanding in context as well as a way of monitoring adviser performance.

#### A4 IP clinics

The existing clinics suffer from having no access to action. Restructuring these schemes to enable some selection and positive assistance with further development of ideas by small grants and links with appropriate university resources for the developments of prototypes and/or carrying out feasibility studies would be a worthwhile investment.

While I can and do make introductions for clients to others within my network, it is only if I have an interest in the business beyond being its patent agent, that I can expect to influence how those relationships are established or develop or even receive feedback. Payment by the hour is a wonderful disincentive to communication!

It would seem logical to work with Business Links and Enterprise Agencies to offer IP clinics as a consistent nationwide element of the regional support on offer.

#### A5 Women and underrepresented groups

There seems little point in diverging resources into worrying about the origins of entrepreneurs. Much research is being done on the nature of the entrepreneur. In my opinion, it would be better for the Patent Office to concentrate on developing the entrepreneurs who present not worrying about academic issues.

#### A6 Innovation Related Awards Schemes

Having participated in various events associated with Cambridge University Entrepreneurs business creation competitions, Filemot will be contributing towards the prize fund for the 2006/7 competition, which the Patent Office has also been invited to sponsor. The key benefit in sponsoring such a competition is that the participants are going through the process of team building and developing business ideas in a structured and supported way.

The Patent Office has a significant role to play in supporting the training events. However, the benefit to the business that takes part in such a competition is not just recognition. Man cannot live on pride alone. There needs to be a prize.

In order for a business to be in a proper position to exercise choice amongst its paid advisers, it needs resources. The inducement to enter and take part in a competition process must be the ability to receive funds that can be used to invest in early-stage manufacture, advice, patent fees or whatever the business decides is best for its own development.

Awards schemes and prizes that simply provide publicity are of less benefit in supporting the innovation process. However, one benefit of the humiliating Dragons Den program is that it makes viewers appreciate the need for business ideas to be evaluated and tested.

The Patent Office should seriously consider support for long-term schemes that can launch real businesses. Schemes linked with universities also allow fulfillment of the support activities identified in Annex B.

Note that private enterprise such as [PDD Group Ltd](#) with its [Carbonate competition](#) has used the competition model in selecting new innovations for its own benefit.

Another competition model called [Running the Gauntlet](#) (without prizes) is promoted by the East of England Enterprise Agency. It is merely a mechanic for allowing the Enterprise Fund to improve the quality of pitches.

The Sunday Times one minute pitch [competition](#) run in 2005 for a cash prize of £100k produced a poor field but a large one. In my opinion it did not succeed on a wide scale in being innovation support because its short time scale meant that those competing did not gain anything by taking part. A well designed competition such as the Cambridge University Entrepreneurs event -by balancing prizes with investment opportunities- acts as an incentive for participation in a development program and provides interest for the investment community without giving them total control as in the Running the Gauntlet model.

## Annex B.: Educational Activities

Elements of IP understanding and exploitation need to be included in all science and engineering degree courses. Freestanding modules for students studying other more academic disciplines or intending to follow a business career should be encouraged. The role of IP as an incentive to investment needs to be re-emphasised.

Cambridge University's Certificate in Enterprise Programme raised awareness of the requirements for creating a business and even though many students would not immediately utilise the skills learned in creating businesses of their own, they would provide useful references in their future careers. The role of IP information sources in assessing the market and pre-existing solutions was not particularly well emphasized, but then the course was addressed to those in an academic environment who are perceived as knowing it all in any event.

A balance needs to be reached between teaching very basic level principles of what is patentable and telling success stories as in the ThinkKit programme. Stories designed to sell IP as the sole key to success should not be encouraged. In order to provide effective support for innovation, IP has to be seen within the context of the entire business model.

## University Technology Transfer Offices

The Patent Office may have something to contribute in assisting Universities make best use of their funding when investing in patent protection.

The Patent profession benefits from the large number<sup>5</sup> of inventions taken through to international filing by university applicants. However it is unlikely that they are ever asked to contribute anything at all in assessing the market viability of the technology. The large number of centres managing University IP protection makes it extremely unlikely that a consistently high level of judgment can be maintained. In smaller universities with a lower throughput of innovative technology, the high mobility, poor pay and relative inexperience of staff make it impractical to expect consistent and informed levels of judgment and selection criteria to be applied. Centres of excellence with a high throughput are better positioned to make these appraisals. Accordingly the gap ever widens. The skills issue within such organisations was recognised by the government in earlier reviews and [Praxis](#) was founded to provide professional development courses in this area.

Non-university innovators could reasonably feel that they are at an unfair advantage relative to their academic brethren in securing IP support for their innovations. Ederyn Williams, University of Warwick has even suggested that it might be a breach of the State Aid rules for Universities to use HEIF funds to support their exploitation when public organisations have no similar benefit<sup>6</sup>.

These comments are based on carrying out due diligence for potential investors in university spin out companies. I am also working with a small entrepreneur who finds himself in competition with a University using public funds to pay its patent bills whereas he has no public contribution.

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<sup>5</sup> To 7 Aug 2006, 244 PCT applications have been published in the names of British Universities.

<sup>6</sup> 27 July 2006 AURIL State Aid Event, London

## Annex C. Core Activities

The progress made by the Patent Office on delivering high-quality IP rights in a modern e-environment is much appreciated.

In particular we look forward to e-access to files since the opening up of the European Patent Office files has enhanced efficiency within my office. Although the EPO itself does not seem to have taken advantage of these efficiency improvements because it continues to dispatch paper correspondence and must therefore be duplicating effort.

The ability of PatentScope to offer RSS feeds to deliver recent PCT publications is a valuable innovation in terms of being able to review recent publications in a technical field in a quick and efficient manner. It would be worth collaborating with other offices and offering this for UK and EP publications.

### B Specifications

The availability of B specifications from before 2002 would be a valuable addition to the documents available on the GB Espacenet portal. This would assist businesses in appreciating the distinction between monopolies sought and those granted. There is a common misapprehension that published applications are patents and since these frequently contain unrealistic claims, many businesses are misled and end up paying for unnecessary advice.

### Trademark databases

Many businesses currently use the UK Patent Office website search to check proposed trademarks. They are frequently misled because of its limited functionality in finding search terms contained within a trademark phrase. Since there are commercial providers of unified search interfaces, I have always assumed that the limited functionality was deliberate in order not to depress the market for data.

However, now that the Patent Office has determined that it is no longer viable to carry out relative grounds examination, it becomes even more necessary to deliver something to trademark owners by publicising the existence of their rights in order to minimise the likelihood that competitors will adopt similar marks in innocence.

## Annex D: New Innovation Support Services

### IP brokering

There is little evidence that publicising inventions for sale delivers results. Many lone inventors have high expectations of being able to find a licensee who will carry out the further development and market research needed to transform their invention into an innovation. They find it difficult to understand why third parties are unwilling to pay a fee to take such risks. In my opinion, it is better for innovation support to focus on creating and developing businesses.

There will always be inventions that are no more than a single product and insufficient to found a business. A very small proportion of these may be appropriate for licensing strategies. Inventors in this position are in even greater need of assistance, even at a fairly modest scale in order to produce prototypes and demonstrations that make the business proposition they are trying to offer to a licensee realistic. Providing and financing a limited number of centres that would assist carefully selected projects to promote would at least be good for public morale.

Some University Technology Transfer offices working with appropriate technologies have achieved some success acting as IP brokers but there are two distinct markets – sophisticated scientific technology and applied research. In the case of sophisticated science, business/university links may already exist and the inventions arise from research best carried

out in the university atmosphere and facilities – pharmaceutical work for example. In applied research the researcher is effectively looking to use the knowledge commercially, in which case his status as an academic within the university may not be material. Coventry University’s work on sustainable drainage and Loughborough University’s licensing of [THE DECK](#) to Reebok are examples.

There is also an argument that by offering those inventors who currently pay to use IP brokers a judgment on their contributions, you allow them to move on from doomed projects and spend time and energy in something more likely to succeed. Therefore, it supports innovation to make objective and commercial decisions rather than simply praising an inventor to the skies because he has produced an original idea that has no commercial potential whatever. Consultants and advisers while limiting themselves to merely offering advice, are particularly prone to the latter course. Journalists and PR consultants are particularly enamoured of any interesting invention as they make good copy regardless of whether they have commercial potential.

### Fast-Track Trademark Services

The proposal to do your core activity of registering trademarks quicker for a premium fee smacks of following the money and also discriminates against the poorly resourced (the usual condition of early stage entrepreneurs).

## The Consultation Questions

Is the strategy supportive of and complementary to other innovation support activities being pursued by other organisations?

The answer to this has to be No because you don’t discuss or relate your activities to any of the other innovation support activities mentioned in this document. I have been unable to detect any logical or coherent connection between the activities of innovation support bodies. A gateway and some control are badly needed.

Which activities in the programme of activities appended to the strategy would you say should be the priorities for the Patent Office?

The Patent Office is best positioned to undertake the understanding and awareness activities outlined in annex A.

More creative ways of providing basic information and understanding of IP are needed. Case studies are easier to relate to than bald facts. Short videos and audio programmes would add interest and capture the imagination - see for example immediacy of the Dragons Den programme video clips available on the [BBC website](#). Consider using an entrepreneurial English company such as the [Internet Video Company](#).

We very much hope that the Patent Office will be funded to a sufficient extent to be able to participate in business creation competitions and sponsor cash prizes that can be used by the winners to develop their business.

Do you consider any of the proposed activities inappropriate for the Patent Office?

Because the Patent Offices core function is to examine patent applications for novelty and inventive step, its position is compromised when judging commercial potential. Therefore, the delivery of support in these areas is better carried out at arms length. Nevertheless seconding Patent Office staff to such an organisation on a regular basis would be useful.

Are there any other activities you think the Patent Office should pursue?

There is clearly a need for a public Technology Transfer Office for the benefit of those who do not work within a university environment. Existing University Technology Transfer Offices could be encouraged to take on this role. Inventors would need to be prepared to put themselves in a similar position to university academics but of course could benefit from the proportion of income that is normally fed back to the academics department also returning to the inventor.

There is a need for a larger supply of competent IP advisors as the existing patent agents see little need to advertise or promote themselves in the entrepreneurial sector. The Patent Office could usefully run a short course to accredit business consultants with expertise in other relevant fields to give them the added ability to promote appropriate use of IP.

Are there any activities in which you would like to partner the Office in delivering?

See the competition sponsorship mentioned [above](#).

I would also be very interested in being involved in the creation of a Public Technology Transfer Office.

## Conclusion

A Patent Office that supports innovation can only be good for British entrepreneurs. While maintaining and increasing its IPR understanding role, I believe that it is important to consider support that helps build teams and appraise ideas for their potential to create successful businesses that make a contribution to society.

Support should not be limited to or even focused on sole inventors, it is also necessary to provide resources in an environment which will enable existing and larger organisations to bring forward innovations and continue to thrive.

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