INDEPENDENT REVIEW ON ADMINISTRATIVE LAW
RESPONSE OF THE INTELLECTUAL PROPERTY BAR ASSOCIATION

Introduction

1. The Intellectual Property Bar Association ("IPBA") is the professional association of barristers practising in intellectual property law. Judicial review (as opposed to statutory appeals) is relatively rare in intellectual property cases. However, IPBA makes this submission to highlight three points.

2. First, there is no justification, based on the limited use of judicial review in intellectual property cases, for limiting rights of review in this area. Although statutory appeals are frequent, no significant problems have arisen with these. Pure judicial review cases are rare and, when brought, have raised fundamental points of law or approach meriting determination by the courts[1]

3. Second, regular judicial scrutiny by way of relatively frequent statutory appeals of decisions of the Comptroller General (the formal authority trading as UK Intellectual Property Office or UKIPO) has contributed positively to the quality and legitimacy of decision-making in the area. That is so despite the fact that decisions are often technical, are taken by well-qualified individuals, have significant safeguards against error by the primary decision-maker and are not susceptible to political pressure or resource constraint.

4. Third, it is therefore likely to be the case that in areas of Government activity where primary decision-making may be more prone to error, it is still more important that effective judicial oversight is not limited. Accordingly, the approach to judicial oversight in intellectual property law provides some support for ensuring that it is no less available in other areas.

Background

5. Most decisions taken by UK authorities in the field of intellectual property are take by a single statutory agency, the UKIPO, pursuant to statutory powers under various acts. They primarily affect individual rights although some my

[1] Examples, of which there is only a handful in the last 20 years, include cases relating to the relationship between an adverse decision of the EPO and the UK (*Lenzing*) and the consequences of a positive decision by the UKIPO taken on grounds which a person subject to it does not like but which, because not adverse, is not itself appealable (*Ash & Lacy).* The few others in the area of IP have focused on regulatory issues or procedural questions.

have wider public importance. They can have an effect on competition.

6. Examples of these are decisions concerning grant of patents and the registration of trade marks and designs. These decisions are taken on specified, purely statutory, grounds and the various Acts provide for mechanisms largely of statutory appeals in some of these cases or other means of post-grant challenge to the rights.[2] In general, these rights provide for repeated scrutiny.

Quality of decision making by public authorities in intellectual property law

7. Intellectual property law is a technical area. That is not only so in patents, where the subject matter is technical. It is also true in trade marks where the legal principles are complex.

8. Individuals employed by the UKIPO who take decisions in these areas are highly qualified and experienced. They are either primary examiners or hearing officers who determine cases, where there is a challenge.

9. The UKIPO is well-resourced and the process of taking decisions builds in multiple internal checks. There is a transparent process and the UKIPO publishes extensive guidance as to the principles by which it will act, including detailed practice manuals. Decisions in this area are highly rule governed and attract almost no political attention or pressure.[3] There is no identifiable "target culture" or institutional bias towards any given approach. Decision-making in this area is therefore among the more optimal approaches to Government decision-making and the UKIPO is among the most respected in the world in this area.

The value of judicial scrutiny

10. Despite all these advantages, real mistakes happen in (i) the application of law, (ii) evaluation of evidence, (iii) procedural issues and occasionally, (iv) the extent of and exercise of UKIPO's powers. These errors are not frequent

.[2] These are provided for under the Patents Act 1977, the Copyright Designs and Patents Act 1988 and the Trade Marks Act 1994 (as amended from time to time).

[3] The idea of a government, for example creating an institutionally "hostile environment" for determining whether a trade mark should be registered so as to affect a decision of the UKIPO would be nonsensical.

but they are sometimes significant. The existence of mechanisms for challenging these decisions is important.

11. As in judicial review, appellate tribunals in statutory appeals in intellectual property adopt an approach of great deference to the primary decision-maker, especially on multifactorial evaluations[4]. Appeals are by way of review only. Decisions on facts will only be overturned if they are out-with the range of reasonable responses of a reasonable decision-maker. Partly because of this, the majority of challenges are unsuccessful.

12. However, the availability of judicial (or quasi judicial[5]) oversight makes a significant contribution to ensuring that the public authorities in this area give effect to the statutory provisions, improves the quality of decision-making and increases the legitimacy of the individual decisions.

Lessons from intellectual property for IRAL

13. First, the system of statutory appeals (and to the extent used, judicial review) in intellectual property enables errors of law, approach, clear errors in evaluation of evidence and procedural fairness to be identified and, where appropriate, cases sent back to be re-considered. As well as operating to correct individual decisions, these operate as a check on the correct operation of the system itself. The process involves regular inspection of the functioning of the agency in delivering that which the law requires.

14. The experience from intellectual property decision-making may suggest that regular scrutiny of agency action is likely to be even more important where decisions are taken by other Government agencies which do not have the advantages enjoyed by the UKIPO in this field.

15. Second, judicial oversight in intellectual property tribunals operates as a kind of peer review. Most disciplines for which the correctness of decision-making is important build in multiple mechanisms for error-avoidance and error-

[4] See *Reef Trade Mark* [2003] RPC 5 and *Actavis Group PTC v. ICOS Corporation* [2019] UKSC 1671 at [78] to [81].

[5] Challenges to registration of trade marks and designs may be made both to the High Court and to the Appointed Person, a statutory tribunal under the Trade Marks Act 1994. Decisions tend to focus on whether rights which may be of broad effect should have ben granted or whether they remain validly registered in the light of subsequent events.

correction.[6] Those help ensure that decisions are likely to be right as originally taken. However, most areas where decision-making matters to those concerned also build in an element of independent review to ensure that errors, individual and systematic, are picked up and corrected independently[7].

16. There is an obvious public benefit in ensuring that decisions are taken in accordance with prescribed standards and that where they are important, they are susceptible of being cross-checked and questioned. That happens in intellectual property decisions of the UK authorities. To that extent, judicial oversight actively increases the quality and legitimacy of the decisions of public authorities. Apart from its role in correcting error in individual cases, it should be regarded as a means for improving primary decision-making and increasing the legitimacy of decisions taken[8].

Codification and reform

17. The IPBA does not make specific submissions on the desirability or otherwise of codifying the bases upon which judicial review should be permissible. It is, however, suggested that consideration of judicial review should not take place without regard to the availability statutory appeals which enable challenges to be made to the decisions of public authorities in specific areas.

18. A case has not been made that limitation of the potentially available grounds are necessary especially where that is of bodies which may not have the decision-making advantages of the UKIPO. The grounds upon which

[6] These take different forms and are well known. Some involve the appointment of those with a particular expertise, experience or ability. Some involve training (including repeated re-training) to ensure that evaluative skills are kept up to date. Some involve ensuring that multiple perspectives are brought to bear on the same decision to ensure that it is not affected by a specific individuals' or institutional bias.

[7] Some such errors may arise because there is a risk of systematic bias or "group think", some arise because decision makers may be influenced by illegitimate external pressures, some arise because agencies may be under-resourced or take illegitimate short cuts.

[8] That is true of even the two *Miller* cases in the Supreme Court which have caused controversy in some quarters. In the first case, the effect of the court's decision was only to require modest enabling legislation to be rapidly enacted giving the express power to give notice of withdrawal from the EU. In the latter, the practical effect was that it required the recall of Parliament a few weeks earlier than would otherwise have happened. In neither case was there any significant impact on either Parliament's or the Government's functions. Similarly, in the recent *Heathrow Airport* decision of the Court of Appeal, the effect was to enable the Government to take account of matters which it had expressly bound itself to take into account

decisions should be open to challenge provided by the existing law are broadly justified. They are those which many civilized systems of law would regard as appropriate standards to which public authorities should be held in deciding the rights and obligations of citizens..

19. Any reform should take into account the practical effect of any changes on the quality of decision-making overall. If limiting the right to make challenges to decisions may result in important primary decisions being more prone to uncorrected error or un-fairness or may increase the risk of institutional biases being unexamined, that should not be done.

Conclusion

20. There is no evidence that the availability of judicial challenges or the current scope of judicial review in the field of intellectual property law is causing problems, either where such review takes place by way of statutory appeals or by the infrequent judicial review procedure.

21. The availability of independent judicial scrutiny of decision-making makes a valuable contribution to the quality and legitimacy of decision-making by the UK authorities in this area as it does in many others. There is no reason to consider that limiting the grounds upon which judicial review is available is likely to improve the quality of decision-making in this area or others. One lesson from the experience of judicial oversight in intellectual property is that such may be even more important in other areas where the quality of primary decision-making may be patchier, where errors may be less easily corrected internally and where decisions may have longer-lasting or more fundamental effects. This suggests that limitation of judicial review in this or other areas is unlikely to be sound policy.

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