Introduction
The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This paper is intended to inform of our comments on the proposed bill. If you would like to discuss the paper further, or if you would like more information on points we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

Background
The Intellectual Property Bill (the bill) was introduced in the House of Lords on 5 May 2013. The bill received its First Reading in the House of Commons on the 29 August 2013. The Second Reading is scheduled for the 9 December 2013.

The bill follows, and is a result of, the Hargreaves Review of Intellectual Property and Growth, published in 2011\(^1\) and the related consultations published by the Intellectual Property Office in 2012\(^2\).

\(^1\) http://www.ipo.gov.uk/ipreview-finalreport.pdf
\(^2\) http://www.ipo.gov.uk/types/hargreaves.htm
Summary of bill

The bill seeks to update and modernise the law relating to intellectual property. In particular, the bill introduces changes to legislation which covers designs and patents, including the creation of a criminal offence for unauthorised copying of UK registered designs. It also makes provision for automatic extensions of copyright protection, for Freedom of Information research exemptions and places a reporting duty on the Secretary of State in relation to various intellectual property matters. Significantly, it also makes provision for the implementation of the Agreement on a Unified Patent Court, which creates a new unitary patent with potentially Europe wide effect capable of being enforced and litigated in one court.

Part 1 (Clauses 1-14) of the bill introduces changes to current design legislation, including the Copyright and Designs and Patents Act 1949 (as amended) and the Registered Designs Act 1949 (as amended). These are designed to simplify design law and the intellectual property framework. Part 1 introduces a new Design Opinion Service, which will provide a low cost non-binding dispute service. The rights of enforcement of design rights are also strengthened, introducing criminal penalties for breaches. Part 1 also provides that the owners of a design, subject to any other contract, will be the designer and not the person(s) who have commissioned the design and introduces new exemptions to allow third parties to use unregistered designs for private or experimental purposes.

Part 2 (Clauses 15 – 19) amends and relates to the Patents Act 1977. It allows the Intellectual Property Service to share patent information with other international patent offices, with the aim of speeding up the patent application process. Part 2 also seeks to make it easier for patent owners to provide public notice of their rights by allowing them to provide a web address on their product(s). This part of the bill also gives effect to the intergovernmental Agreement to provide a Unified Patent Court.
Part 3 (Clauses 20 – 24) provides a number of miscellaneous provisions. It places a duty on the Secretary of State to report to Parliament each year on how the Intellectual Property Office have supported innovation and growth in the past 12 months and introduces a new freedom of information exemption if it relates to information obtained in the course of a continuing research programme.

The Society's position

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The Society welcomes the bill and supports its policy intent and objectives. The Society responded to the Intellectual Property Office's consultation on proposed changes to the Patents Act 1977 and actively engaged with the Grand Committee of the House of Lords, expressing our concerns and suggestions in relation to Clause 17 (Unified Patent Court).

Specific comments

Clause 17 ‘Unified Patent Court

The bill makes provision to confer, remove or vary the jurisdiction of a court in relation to dealing with the new unitary patents and existing European patents not opted out of the new regime. From a Scottish perspective this could mean that the Court of Session in Edinburgh may not have jurisdiction to deal with unitary patent disputes, if such jurisdiction is not conferred on it. This may result eventually in the Court no longer having such jurisdiction in patent disputes (whether these are Unitary or EU patents) at all. Whilst it would still be able to deal with disputes relating to national registered patents these are likely to form the minority of patents. One result could be an erosion of local patent law expertise within the judiciary and the legal profession reducing Scotland's attractiveness as a place to adjudicate patent disputes.

Clause 17 gives effect to the European Unified Patent Court Agreement and introduces a new Unitary Patent Court (UPC) system. The UPC will have the jurisdiction over 25 signatory member's states to hear Unitary Patent and existing European Patent disputes.

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3 http://www.lawscot.org.uk/media/586199/ip-ipo_consultation_on_changes_to_the_patents_act.pdf
This will avoid the current need to raise separate legal actions in each of the member states. The UP Court of First Instance will comprise a Central Division as well as local and regional divisions. The Central Division will be split between London, Paris and Munich. Under Article 7 of the European Agreement, each contracting member state may request one local division of the Court of First Instance (of the UPC) on its own or one regional division in partnership with one or more other member states. Additional local divisions can be requested in a member state for every one hundred patent cases in each calendar year during 3 successive years prior to or subsequent to the date of entry into force of the Agreement. This is subject to a maximum number of 4 local divisions in each member state.

The Society has suggested that the Court of Session should be designated as a local divisional court within the UK, to ensure fair access to IP litigants based or carrying on business in Scotland, without the need to raise actions in London or potentially further afield in Europe. Currently jurisdiction in patent infringement disputes is allocated on a territorial basis (domicile of the infringer or place of the harm) both intra EU and intra UK. The Court of Session is the court within Scotland with jurisdiction to deal with UK and European (UK) patent infringement disputes where the alleged infringer is domiciled in Scotland and/or the actual infringement or damage is taking place or threatens to take place in Scotland.

This matter was raised and debated at the Second Reading in the House of Lords and the Society welcomed Viscount Younger’s assurance that "the Government are working very closely with the devolved Administrations to ensure that the needs of users throughout the United Kingdom are considered. Ensuring local access to justice is a key element of the unified patent court and that is why the agreement makes provisions for setting up local divisions of the court…" and further assurance during Committee stage that “…Given this close engagement across government departments and with the devolved Administrations, I trust that noble Lords will agree that the views of all concerned will be taken into account when implementing the unified patent court agreement…”

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5 Lords Hansard 22 May 2013 Column 887
6 Lords Hansard 13 June 2013 Column GC426
Distinctively Scottish IP enforcement regime

UK patent law applies UK wide but Scotland has a separate legal jurisdiction and its own Courts and procedures for dealing with IP disputes, including patent related disputes. It is important that inventors and businesses in Scotland whose patents are infringed have local access to justice in patent matters. The Court of Session has built up expertise and experience in dealing with patent related disputes and it is in the interests of the Scottish patent owning community that the local option continues to be available.

Impact on Scottish business and economy

Scotland punches above its weight as a centre for excellence for innovation and is home to a large and diverse array of high technology IP rich businesses operating in many sectors including life sciences, oil, gas and renewables, optoelectronics and aviation and defence. Many such businesses, including many SMEs, will rely upon patents to protect their valuable technology and innovation. If Scotland does not secure a Scottish based local division then Scottish based businesses will likely to be forced to litigate and defend themselves elsewhere in the UK (possibly much further afield within Europe) with added costs, business burdens and uncertainty. In addition, having a local division in Scotland will provide a real opportunity for Scotland to be recognised as a hub within Europe to resolve patent disputes.

Adverse effect on skills retention.

Whilst the new UPC system will offer choices of location of where to litigate over patents there is a concern that the practical impact of there being no local division in Scotland will be that all litigation relating to new unitary patents and/or existing European patents will have to be dealt with outside of Scotland. This is particularly the case since the intention behind the new system is that it will in around 7 years’ time replace the current national and European patent systems. This means that the specialised skills of Scottish based IP/patent lawyers and judges are likely to become underutilised and eroded, compounding the impact on inventors who will have to go elsewhere for advice and representation.
The Society acknowledges that Clause 17 and the Agreement on the UPC avoid being overly prescriptive by allowing a degree of flexibility in the setting up and disbanding of divisional courts of the UPC. Nevertheless, for the reasons as set out above, the Society would welcome further assurances by the Government that should there be sufficient cases to allow a divisional court to be set up, then stakeholders, including the Scottish Court Service the Scottish judges, the legal profession, and most importantly the inventing community, will be consulted and consideration given to the Court of Session being given UPC Divisional Court status.
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