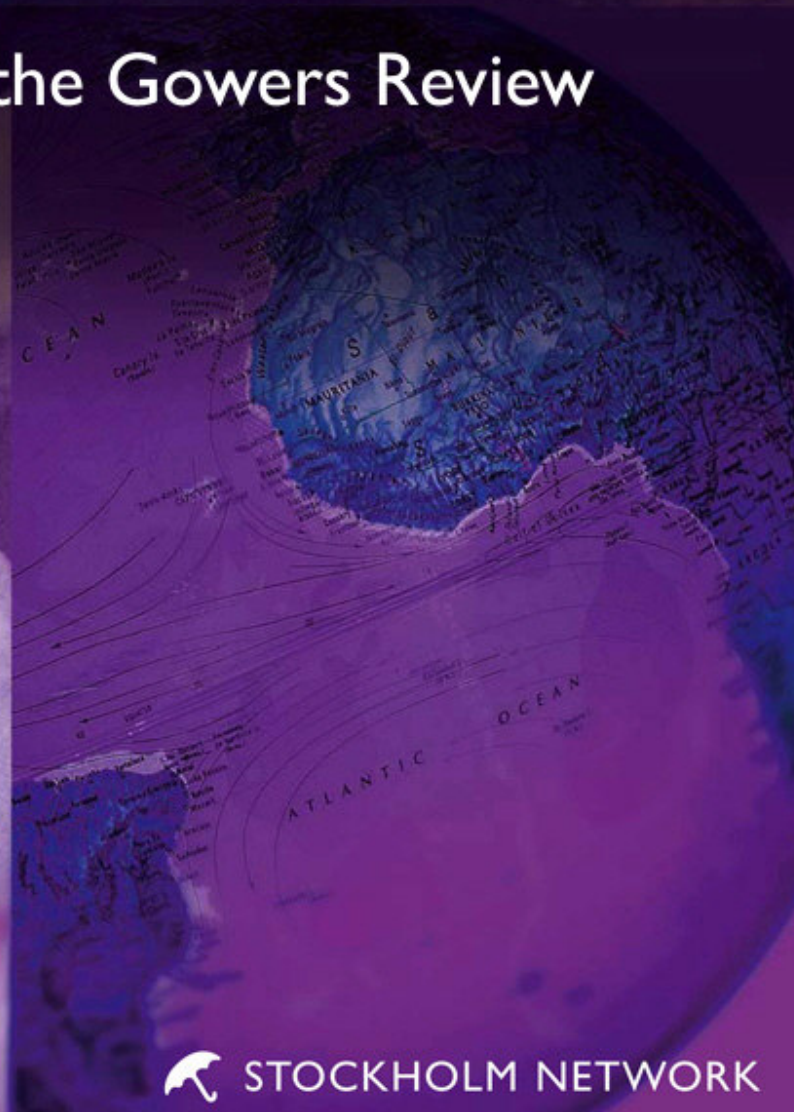




The Stockholm Network Experts' Series on Intellectual Property and Competition

A Statistical Analysis of the Gowers Review



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STOCKHOLM NETWORK

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Introduction

In December 2005, the then UK chancellor of the exchequer, Gordon Brown, commissioned an independent review of the UK's intellectual property framework. In December of 2006, the former editor of the *Financial Times*, Andrew Gowers published his findings.¹ In the seven months since the report was published, its recommendations have begun to be implemented by the British government.

The UK Patent Office has, on Gowers' advice, changed its name to the UK Intellectual Property Office. Investigations into copyright term extensions for sound recordings have been shelved. The IP Office has in turn pledged to follow recommendations for:

- “The provision of advice for UK firms seeking to register rights at home or abroad
- Greater parity between fees levied and services provided
- Improvements in public awareness of the effects of IP crime
- Improvements in patent quality
- A fast-track processing system for trademarks”²

Other recommendations, such as provisions for orphan works, accelerated application processes for patents and trademarks, or allowing libraries the freedom to ‘format shift’ their archives, remain to be enacted, but with Gowers recommending in many cases a timescale of two years for implementation, this does not mean they have been ignored.

Between February and April of 2006, the review process initiated a call for evidence, to which over 500 total responses, and over 250 organisational responses were received. It is these organisational responses which form the basis of our study.

In the call for evidence, Gowers stated that submitted evidence would “form a key part of the **evidence base** [our emphasis] that the Review team can use to develop its analysis... alongside a range of other evidence sources, including quantitative data; surveys and views of representative groups; visits; seminars; and interviews”.³ The question is, how much attention did Gowers pay to the evidence he requested? Did his findings address the concerns of the UK IP community? Or was the call simply for show, with the results already set in stone?

This is not a new response to Gowers. Its purpose is not to comment on the merits of the IP framework. Rather, it is an attempt to understand how the Gowers process reflects the IP climate in the UK, and whether Gowers made the best use of the nation's IP expertise.

¹ Gowers review homepage; http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

² Packer, Matthew; ‘Reviewing Gowers’ in *IP Review* (Issue 17, February 2007); http://www.cpaglobal.com/ip-review-online/widgets/news_story/more/2333

³ Gowers review call for evidence; http://www.hm-treasury.gov.uk/media/978/9B/gowers_callforevidence230206.pdf

Methodology

The degree of variation in the length, style, and content of the array of submissions to Gowers makes a completely objective analysis impossible. Does one count a solitary passing remark as a response to that problem, or should only substantive issues be considered? In our analysis, short remarks or comments on particular issues have been disregarded. Only those which have given a degree of attention commensurate with a paragraph or more's text, or serious policy recommendations or querying, have been counted.

Does quoting a percentage make a dozen-page submission based on statistics? We have only counted those where statistics make up the basis of the case being made, or provide a detailed insight into the arguments being made. Others may have quoted statistics sporadically, but these were not considered to be sufficient to be relevant to Gowers self-proclaimed 'evidence-based' approach.

How can organisations be categorised? In theory, this was easier, and many of the submissions came from organisations which could be readily distinguished as corporations, charities, SMEs or government bodies. However, a few examples made this taxonomy more difficult. How does one categorise the BBC, a government-backed but independently operated organisation which also has a commercial arm? In the end, we assigned to where we felt most appropriate, and made judicious use of the 'Others' category for organisations which defied our attempts at categorisation, or formed a grouping of their own (for example, the BBC and the British Library).

How does one whittle down the infinite number of subjects discussed into a selection which is informative and instructive? This was particularly subjective. Many of the categories were suggested by Gowers' original line of questioning. The remainder, from studying what topics were particularly prevalent in responses. I have no doubt one could find additional topics within some of the submissions, or could make a valid case for the unbundling of one of our topics into two discrete entities. Again, we have sought to organise these in the way that is most informative about the content of the submissions.

We have sought, so far as is possible, to represent the submissions fairly and accurately. However, as always in such exercises, a degree of subjectivity must be involved. It should also be remembered that this survey does not claim to be representative of public opinion in the UK as a whole, or even of the UK business community. The sample, being self-selecting, is evidently flawed in this regard. Nevertheless, we feel this analysis to be a useful assessment of the Gowers process, the problems it has raised, and the successes and failures of Gowers' conclusion in addressing these problems.

The Gowers Review

The commissioning of the Gowers review recognised "the growing importance of IP and... the challenges brought by the changing economic environment".⁴ Its aim: to determine "whether the system was fit for purpose", providing "incentives for innovation, without unduly limiting access for consumers and follow-on innovators".⁵ The fundamental findings of Gowers were largely supportive of the present intellectual property regime. "In many

⁴ Gowers Review of Intellectual Property; http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf; p. 1

⁵ *Ibid*; p. 1

regards,” the Review found, “the UK IP system works well”.⁶ However, it did find three areas of particular concern, on which the Review’s recommendations concentrate. These are:

- Strengthening enforcement of IP rights, whether through clamping down on piracy or trade in counterfeit goods.
- Reducing costs of registering and litigating IP rights for businesses large and small.
- Improving the balance and flexibility of IP rights to allow individuals, businesses and institutions to use content in ways consistent with the digital age.

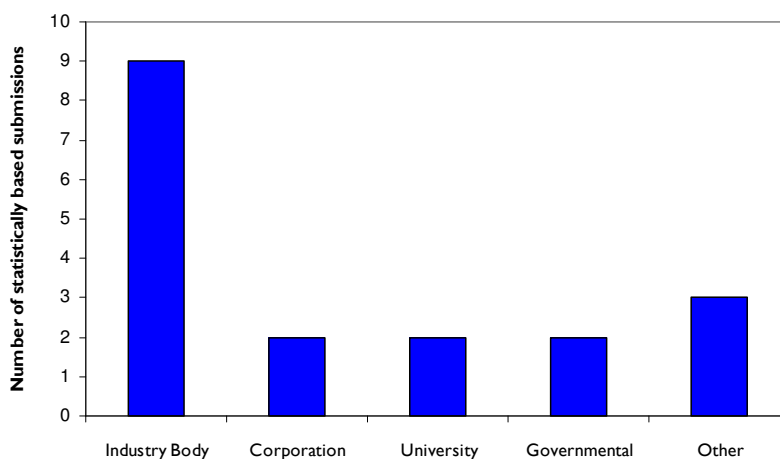
There have been a number of studies and critiques of the Gowers system, including a couple issued by the Stockholm Network. This analysis is not the place for a protracted discussion of the many facets of the Gowers process. Further reading can be found in Matthew Packer’s ‘Gowers Reviewed’ article in *IP Review*, Michael Blakeney’s *The Process of National IP Policymaking* and in John Mitchell’s *Know-IP* article ‘For SMEs but Without Consulting Them’⁷

The submissions

Submissions were sent from a wide array of different organisations, including large corporations, small and medium sized enterprises (SMEs), and sole traders, universities, trade bodies, governmental bodies, think tanks and charities, and even a Womble.⁸

Lengths varied just as dramatically, ranging from a couple of lines to hundreds of pages. Contained within were pleas to moral, legal, logical, and economic virtues in styles ranging from the conversational to the rigidly academic. Some stuck specifically to the questions in the call for evidence; others introduced their own problems and concerns.⁹

Figure 1. Statistically based submissions to the Gowers Review



Perhaps more pertinently, while some took the Review’s aspirations to being an ‘evidence-based’ approach to heart, providing reams of supporting graphs, statistics, and case studies, others adopted a more casual approach, with conjecture prevailing over more in-depth analysis.

Indeed, only 6.7% of submissions were accompanied by significant statistical evidence (full data tables can be found in the appendix). Of

⁶ *Ibid*; p. 119

⁷ Packer; *op. cit.*; Blakeney, Michael; *The Process of National IP Policymaking*; <http://www.stockholm-network.org/downloads/publications/d41d8cd9-Blakeney%20Paper.pdf>
 Mitchell, John; ‘For SMEs but without consulting them’ in Stockholm Network; *Know-IP Vol. 3 Issue 2* (February 2007); <http://www.stockholm-network.org/downloads/publications/d41d8cd9-Know%20IP%203.2%20February%2007.pdf>

⁸ Submission from Dramatico Entertainment; http://www.hm-treasury.gov.uk/media/4D7/FD/dramatico_entertainment_ltd_342_14kb.pdf

⁹ Gowers Review call for evidence; *op. cit.*

those organisations which did supply statistical data, half were industry representative bodies. Corporations, universities, and government departments made up the remainder (see figure 1).

In total, various industry and trade associations made up the most conspicuous group of submitters, accounting for 40% of the total number. SMEs had the second biggest quantity of submissions, with universities and large corporations also making significant numbers of contributions (see table 1).

Table 1. Types of organisation that submitted to the Gowers Review

Type of organisation	Total number of submissions (number of submissions as a percentage of total)
Industry and trade bodies	107 (40.4%)
SMEs	52 (19.6%)
Universities	27 (10.2%)
Corporations	23 (8.7%)
Government bodies	9 (3.4%)
Charities	9 (3.4%)
Societies	6 (2.2%)
Think tanks	4 (1.5%)
Trade unions	4 (1.5%)
Academic bodies	3 (1.1%)
Other	20 (7.5%)
TOTAL	264 (100%)

Content

Who said what, however, is not nearly as interesting as what they said.

First and foremost, there was very little dispute as to the need for some kind of IP system. Indeed, only six submissions were categorised as being anti-IP, and five of these concentrated principally or solely on the issues of digital rights management (DRM) and open-source software.¹⁰ In these cases, the views of the authors in issues beyond IP protections of software are scarcely touched upon. Indeed the most damning complaints about the existence of IP at all, appear in the submission of Ascent Software, an SME. The author expresses concerns at an “ethical level... that intellectual concepts can be the property of an individual or corporate entity to the diminution of the rights of 'other citizens'.”¹¹ It is hardly philippic in tone. It seems safe to conclude that the essential existence of an IP system of some kind is not significantly disputed.

¹⁰ See appendix

¹¹ Submission to the Gowers Review by Ascent Software; http://www.hm-treasury.gov.uk/media/190/C7/accent_software_085_220kb.pdf (sic)

The most discussed topic, appearing in 40% of all submissions, was the topic of fair dealing and exceptions to IP rights. Those areas are, the submissions suggest, the least clearly defined areas of IP policy. The next most covered topic was the process(es) by which IP rights are applied for (33%), DRM (32%), and the legal sanctions to be enacted against infringers (31%) – see table 2.

Table 2. The topics of submissions to the Gowers Review

Topic of submission	Number of submissions referring to this topic (number of submissions as a percentage of total number of submissions)
Fair dealing/'exceptions'	107 (40%)
Application processes	89 (33%)
DRM	85 (32%)
Legal sanctions	84 (31%)
Term length	70 (26%)
Orphan works	57 (21%)
The economic importance of intellectual property	46 (17%)
Co-ordination between different IP regimes	38 (14%)
The innovative step requirement for patent applications	34 (13%)
The relationship between IP and competition policy	30 (11%)
Parallel trade	27 (10%)
Research and development	27 (10%)
Consumer protection	20 (7.5%)
Open source/'open access'/'creative commons'	17 (6.4%)
Associations between IP infringement and other criminal activity	16 (6%)
Royalties	10 (3.7%)
Technology transfer	8 (3%)
Data protection	7 (2.6%)
The 'ethics' of IP	5 (1.9%)

These numbers may indicate where debate is still open or broadly resolved – for instance, few submissions dispute the ethical grounds for having intellectual property, or even think it worthy of discussion, whereas many clearly feel that the topic of 'fair dealing' is less well defined, and that inputs into this debate are valuable, irrespective of whether they argue for a more liberal or more restrictive interpretation of fair dealing rights and IPR exceptions. DRM and legal sanctions against infringers have been contentious topics of discussion in the media, in industry and among IP professionals, so it is no surprise to see them featured extensively here. Application processes, meanwhile, are a universal constant that anyone working in the IP field will have either been through a formal procedural process (in the cases of patents, trademarks, and other registered forms of IP) or automatically (as with copyright). And,

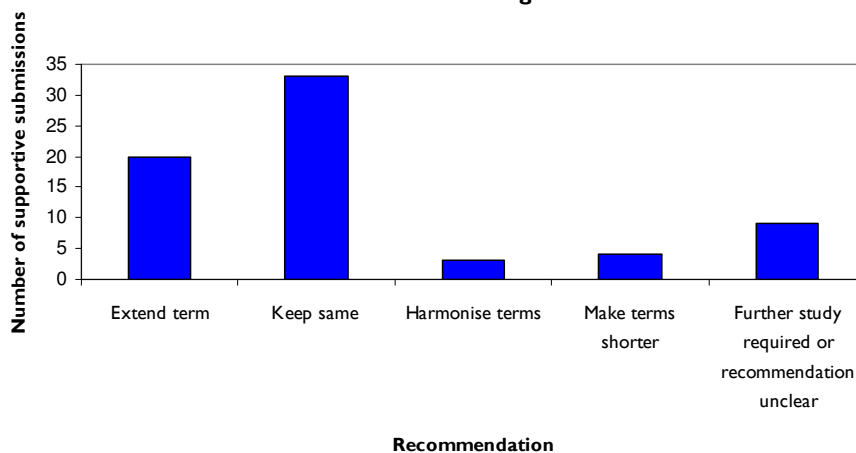
furthermore, with several submissions questioning the automatic granting of copyright, even this ‘absence of a process’ becomes a topic of discussion.

The quantity of submissions of particular topics was also influenced to a large extent, unsurprisingly, by the questions Gowers asked in the Call for Evidence. Subjects topping the list of responses also made for most of Gowers’ requests, either in the ‘General Questions’, or the ‘Specific Issues’ on which he called for more in-depth analyses.

Term lengths

Before, during, and after the Gowers process, one of the most contentious issues has been that of the length of the term for copyrighted materials. Gowers made the “term of protection on sound recordings and performers’ rights” top of the list of specific issues to be studied in detail. Currently, the length of copyright protection on recorded music stands at 50 years for performers, and the recording, while composers and lyricists benefit from protection extending to 70 years after the death of the author.

Figure 2. Recommendations regarding term length of copyright on sound recordings



The involvement of many well-known musicians has made publicity easy to come by, especially for those advocating an extension of term length. But a coalition of consumers’ groups, enthusiasts, and small companies involved in re-issuing out-of-copyright music have responded with similar gusto. As table 3 shows, of the 70 responses on term length, the largest group of respondents (33 of the 70)

recommended maintaining the *status quo*. 20 replied with recommendations to extend the term, with the amount varying from an increase of just 5 years, to those advocating the 95 year term, as exists in the USA. Only 4 favoured reducing the current terms. 3 favoured ‘harmonisation’ of the two different copyright terms – often a conduit by which to achieve term extensions, by ‘harmonising’ to the longest pre-existing term. However, where they did not state the term to which they favoured harmonising, they have been recorded separately. Of the 69 submissions which commented on term lengths, only four among them were from the set found to have been based on significant statistical analysis. Of these, two favoured term extension, one favoured further study, and one made no clear recommendation.¹²

¹² The Periodical Publishers Association and Phonographic Performance Ltd and Video Performance Ltd. PACT requested further study. The submission from Own It made no clear recommendation.

Table 3. Recommendations on term length for sound recordings

Recommendation for term length policy	Total number of submissions (number of submissions as a percentage of all who wrote about term lengths)
Extend term	20 (29%)
Keep term length the same	33 (47%)
Make terms shorter	4 (6%)
‘Harmonise’ terms	3 (4%)
Recommended further study or made no clear recommendation	9 (13%)
TOTAL	69 (100%)

Gowers’ third recommendation, that “the European Commission should retain the length of protection on sound recordings and performers’ rights at 50 years” does, therefore, follow the plurality of submissions made.¹³

Criticism of Gowers on this aspect of the report has been vociferous.¹⁴ A report from the House of Commons Select Committee on Culture Media and Sport found that Gowers had given insufficient (or perhaps even no) consideration to the “moral right of a creator to choose to retain ownership and control of their own intellectual property”, having instead focused solely on economic analysis (which the committee conceded “may be correct”).¹⁵

Reading the section of the Review focusing on term lengths would tend to support the suggestion that Gowers has indeed prioritised economics over ‘morals’ or any other factor.¹⁶ Almost all the arguments presented are from an economic perspective. Yet, in aligning his decision with the recommendation of the plurality of submissions, a plurality composed largely of moral, not economic arguments (as shown on page 6), it could be argued that Gowers has considered and incorporated ‘moral’-based thinking into his final recommendations.

Submissions in Comparison with the Review

After studying the submissions, we moved on to investigate the extent to which the Gowers’ review addressed the concerns raised in the submissions.

In order to do so, we have analysed the correlation between our selected topic areas made in the submissions to the Review and their appearances in the Review itself. The results of this can be seen in Table 4.

¹³ Gowers Review of Intellectual Property; *op. cit.*; p. 6

¹⁴ ‘Copyright extension urged for UK sound recordings’; *International Herald Tribune*; <http://www.iht.com/articles/2007/05/16/business/copy.php>

¹⁵ House of Commons Culture Media and Sport Committee; ‘New Media and the Creative Industries’; <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/509/509i.pdf>; p. 78

¹⁶ Gowers Review of Intellectual Property; *op. cit.*; pp 48-57

Table 4. Comparison of topics between submissions and the Gowers Review

Topic	Number of submissions referring to this topic (number of submissions as a percentage of total number of submissions)	Topic	Number of paragraphs of Gowers Review the topic appeared in (percentage)
Fair dealing/'exceptions'	107 (40%)	Legal sanctions	71 (17%)
Application processes	89 (33%)	Application processes	63 (15%)
DRM	85 (32%)	Co-ordination between different IP regimes	49 (11%)
Legal sanctions	84 (31%)	Fair dealing/'exceptions'	42 (9.8%)
Term length	70 (26%)	Term length	32 (7.5%)
Orphan works	57 (21%)	The economic importance of intellectual property	19 (4.4%)
The economic importance of intellectual property	46 (17%)	Research and development	13 (3%)
Co-ordination between different IP regimes	38 (14%)	Orphan works	12 (2.8%)
The innovative step requirement for patent applications	34 (13%)	The 'ethics' of IP	11 (2.6%)
The relationship between IP and competition policy	30 (11%)	DRM	8 (1.9%)
Parallel trade	27 (10%)	Technology transfer	8 (1.9%)
Research and development	27 (10%)	The relationship between IP and competition policy	4 (0.9%)
Consumer protection	20 (7.5%)	Consumer protection	3 (0.7%)
Open source/'open access'/'creative commons'	17 (6.4%)	Associations between IP infringement and other criminal activity	3 (0.7%)
Associations between IP infringement and other criminal activity	16 (6%)	Open source/'open access'/'creative commons'	2 (0.5%)
Royalties	10 (3.7%)	The innovative step requirement for patent applications	2 (0.5%)

Technology transfer	8 (3%)	Royalties	N/A
Data protection	7 (2.6%)	Parallel trade	N/A
The 'ethics' of IP	5 (1.9%)	Consumer protection	N/A

While there is not an exact correlation between topic areas, largely the topics given greatest attention by Gowers and by the organisations that made submissions coincide (4 of the top 5 topic areas in the submissions were also in the top 5 of the final Review). However, one can also observe certain areas being given less attention than might seem proportionate with the level of concern in the submissions. The issue of DRM was the third most commented-upon of all subject areas in the submissions. Yet in the final Review, Gowers scarcely mentions it, with nine other topic areas being given more consideration. On the other hand, the 'ethical' underpinnings of IP are barely mentioned in the submissions, with correspondents preferring to concentrate on practical details. Gowers, however, refers to it more extensively (albeit largely in providing the 'background' to the Review).

Gowers also completely avoids comment on three of the topic areas raised in the submissions. Indeed, the topic of parallel trade/importation of IP-protected goods was raised as one of Gowers' 'specific issues' in the Call for Evidence.¹⁷ Yet despite this, parallel trade is given no coverage in the final document. Whether this omission is by design or neglect is open for debate. However, the "good deal of debate" on parallel trade Gowers mentions in the Call for Evidence has not been augmented by the Gowers process. Likewise, issues of consumer protection and of royalties were omitted – again, whether they were deemed beyond the remit of the report, or simply ignored will remain unknown.

Technology

Submissions to the Review came from a variety of different industries and sectors. This, as we shall see, is in marked contrast to the final document, which chose to concentrate heavily on just one industry in terms of practical measures, leaving the remainder to be discussed in abstract and hypothetical terms.

Table 5 shows the range of focus of the submissions. Audio recordings (predominantly music) were featured in the largest number of submissions, with just under a third of all submission commenting on them. Patentable activities of various kinds (pharmaceuticals, biotech, and various other inventive processes) ranked second, followed by copyright issues pertaining to writing, and video. Software (pertaining to both copyright and patentability questions) came next.

¹⁷ Gowers Review call for evidence; *op. cit.*

Table 5. Industrial Sectors in the Gowers Review Submissions

Industry Sector	Number of submissions referring to this sector (number of submissions as a percentage of total number of submissions)
Audio	79 (30%)
Patenting industries	45 (17%)
Writing	32 (12%)
Video	31 (12%)
Software	29 (11%)
Design/'Goods'	24 (9%)
Static Images	22 (8%)
Broadcast	16 (6%)
Data	15 (6%)
Streaming	5 (2%)

As can be seen, there was certainly a tilt towards the 'creative', or entertainment industries, but patentable industrial activity also received a large degree of coverage. However, the final Review shifts its attention markedly.

Table 6. Industrial Sectors in the Gowers Review

Industry Sector	Number of paragraphs in Gowers Review discussing sector
Audio	33
Patenting industries.	10
<i>Includes:</i>	
<i>biotech</i>	5
<i>pharmaceuticals</i>	4
<i>other</i>	1
Video	7
Software	6
Writing	3
Design/'Goods'	1

As Table 6 indicates, the sound recording industry receives more coverage than every other industry combined. Partly, this is down to style. As mentioned earlier, patents are discussed, and extensively so in Section 5 of the

Review.¹⁸ However, discussion of patents is largely removed from considerations of any one particular industry. The same cannot be said for discussions of copyrighting.

Then again, the topic of sound recordings was one of the specific questions Gowers asked after in the Call for Evidence, and it would be highly illogical to discuss it in any manner other than the practical.

Conclusions

Our analysis has shown that, by and large, the viewpoint of the Gowers Review is aligned with the submissions that were made to it. While some divergence of interest is to be expected, on almost all the significant matters, Gowers' decision equates with the prevailing opinion among the submissions.

Nevertheless, this finding will not dissipate criticisms about the paucity of evidence behind Gowers' conclusions. As we have seen, a meagre 6.7% of submissions provided significant statistical data. Bearing this in mind, is agreeing with a majority viewpoint sufficient justification for adopting a recommendation, when that majority viewpoint lacks the evidence to back it up? In the end, this quandary, more than any other, may be the most significant indictment of Gowers.

It is apparent from the need Gowers felt to commission dedicated research for the Review, that he perceived there to be limitations on the available pre-existing data. These same limitations may go some way to explaining the shortage of submissions containing statistical analysis or data. The resources, in terms of monetary expense, and in terms of time, required to conduct research that would be of value to a process such as the Review, would be beyond the means of many organisations. Such commitments would also be hard to justify by impacts on profitability, and even not-for-profit organisations may find research of this kind of limited utility. These factors are all contributory to the weakness of the Gowers process.

This question of quality control is tempered by the observation that Gowers did not rely solely on the submissions for evidence. In addition to the two studies commissioned specifically for the review,¹⁹ Gowers references a wide range of academic literature throughout the final report. As a result, Gowers' team has in all likelihood done its best to combat the flaws inherent in the call for evidence process.

With any investigation, the evidence is the largest determinant of success. However, when the quality of the evidence varies to the degree it has in the Gowers submissions, assessing the balance of quality and quantity is a highly precarious task. Ultimately, it comes down to what one feels the priorities of a project like the Gowers Review should be, and, if one is of a particularly grand outlook, to the priorities of democracy. Ought it to be a plebiscite, to determine the prevailing opinion among the largest possible grouping of the population. Or should the decision be deferred to representatives with the greatest expertise? Gowers, as we have seen earlier on term lengths, has tended to align his findings with those of the majority of submissions, but not necessarily the weight of submissions backed up by specialist economic or statistical analysis. Whether this approach is reasonable or rational is a matter of

¹⁸ Gowers Review of Intellectual Property; *op. cit.*; pp 77-109

¹⁹ 'A Review of the Economic Evidence Relating to an Extension of Copyright in Sound Recordings' and 'Copyright and Orphan Works: A paper prepared for the Gowers Review by the British Screen Advisory Council'
http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm

personal preference. But without recognising the discrepancy between quantity and quality, any future policy reviews are likely to suffer the same problems.