



JUDICIARY OF
ENGLAND AND WALES

THE RIGHT HON. LORD JUSTICE COLIN BIRSS
DEPUTY HEAD OF CIVIL JUSTICE

**KEYNOTE SPEECH: CAN THE IP SYSTEM SERVE SMALL BUSINESSES
BETTER?**

UCL IPAN EVENT

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Introduction

1. It is a pleasure to be here and I would like to start by thanking UCL and Professor Sir Robin Jacob for hosting this event, and also thanking Stephen Jones for inviting me. Stephen is a director of the Intellectual Property Awareness Network (IPAN) runs IP Pro Bono for the Chartered institute of Patent Attorneys (CIPA).
2. The question this evening is “Can the IP System Serve Small Businesses Better”?
3. Now you might think there is an easy answer to that question but before jumping to conclusions, I would like to just reflect on a couple of things.

Why am I here?

4. Like many people who have stayed in IP law for a good while, once my legal career got going, I settled into a practice fighting multi-zillion dollar patent cases for global multinational corporations. Unlike some cases, that kind of litigation more closely resembled a Cecil B De Mille movie production like the Ten Commandments with Charlton Heston (or Robin Jacob?) as Moses.
5. As a young lawyer you start out as the second spear carrier, mostly off camera. Then you move on to a speaking part in which you get killed in the first half hour of the film. Some years after that you may get to lead a B-movie all of your own, until finally as a QC you might get top billing.
6. The point, of course, is that that part of the IP dispute resolution system has very little to do with small businesses. Now I believe there is a discussion to be had about that sort of IP career trajectory, and how it relates to the topic for discussion, but I will come back to that in a minute.
7. The other bit of scene setting which ought to be done is to focus on small businesses in relation to intellectual property. Do they matter? Well I believe small businesses matter a very great deal and IP matters a very great deal to them.
8. In its broadest sense intellectual property is doing its job most acutely when it is in a David and Goliath situation. After all, if an innovator or a creator had the economic strength to prevent others from pinching their ideas, you would not need intellectual *property* at all. The key is the word property. The point of a property right is that others do not get to trespass on your property whoever you are. It is still a trespass whether the owner of the property is a prince or a pauper.
9. So, what we are discussing here is something of real importance – it is access to justice. You can write down all the laws you like but the law is a sham if it pretends to give people rights which they have no practical way of enforcing.
10. Also- and just as important – the law is also a sham if it sets boundaries and gives people defences to claims by others, if those people with the defences are unable to protect themselves from spurious claims by the people with the power and the money.

11. So – if we want to pat ourselves on the back and tell ourselves that we work in the most interesting and worthwhile area of law - we need to remember that we cannot call each other fine fellows (gender neutral fellows) unless we all do our bit to make the system work for everyone.
12. That is the moral issue – but there is also a utilitarian point. All the big businesses around today were small businesses once. What is more – small business represents a huge piece of our economy and society. So if we want to live in a vibrant place – we need to make sure the environment is right for them too.
13. Now in fact I think there is a lot to celebrate in this respect in this jurisdiction. The Intellectual Property Enterprise Court (IPEC) is firmly established as a forum in which SMEs can bring and defend IP claims without breaking the bank. HHJ Richard Hacon has done more than anyone else to drive home the message that cost-effective IP litigation really is possible (and desirable). I can't believe anyone today does doubt that that is so, but if they do, then they only have to be referred to Richard's work in IPEC.
14. In addition, the IPEC small claims track has achieved something no-one thought was possible. Access to justice for IP rights holders in cases with the very smallest value. District Judge Charlotte Hart has been at the heart of that work since its start in 2013. At the start Charlotte had two colleagues - DJ Janet Lambert – now retired, and DJ Melissa Clarke – now HHJ Melissa Clarke. However, Charlotte has stayed the course. I want to take this opportunity to say a public thank to all three judges who took it on at the start of the small claims track, but particularly Charlotte who has remained dedicated to this project throughout. Thank you.
15. In fact, as Charlotte will be well aware, there is real pressure on the District Bench in civil justice generally. We do not have enough full-time DJs. I arranged for civil justice to work with family on a joint project to try as hard as we can to encourage people to apply to become salaried District Judges. Mary Stacey J, a civil High Court judge is working closely with Lucy Theis J, a family judge on that project.
16. Now I know the court system calls on part-time deputies District Judges too – although they are also very stretched in places – but civil justice in general and IP in particular cannot be a purely part-time affair.

17. Incidentally – smaller cases does not mean easier cases. The legal problems are just the same and can be every bit as challenging as in the higher courts, sometimes more so. DJs do really hard and challenging cases. Don't assume the hardest cases are the ones higher up the tree.
18. Now I want to say something about the value of the IP cases on the small claims track. They are of very low value. But that is a relative statement. In a legal system in which one can have cases with costs running to the tens of millions of pounds, the idea of an IP claim for £400 seems remarkable. However as everyone who works with small claims in civil justice knows, and every one involved in civil justice as a whole ought to know – to the people who bring such a small claim of any sort (IP or otherwise) that amount of money is very important to them.
19. So, we need to have an IP system and a court system which makes it possible for businesses of all sizes (and individuals) to bring and defend their claims. AND we need to have a system for getting access to good legal advice, which tries as hard as it can to cater for that too.
20. And that brings me back to the 1950s movies like the Ten Commandments.
21. At the start of my legal career I did have a few well-paid bit-parts in some big productions. But I was lucky enough also to get some work in small cases – in the original incarnation of the Patents County Court. As two/three/four year experience barristers people like Iain Purvis and me were running cases, handling trials, cross-examining witnesses, getting it right (Iain) or wrong (me) and generally learning a huge amount. But at the same time clients who could never have afforded to litigate in the traditional High Court at the time were getting access to justice.
22. There is a *win win* situation here and it applies in spades to working *pro bono*. Every lawyer – no matter how senior or how junior - has expertise and skill which someone who can't afford it, could use. And every lawyer has something to learn from helping such a person – whether it involves working *pro bono* or at least *pro not very mucho*. A litigant will always benefit from help. In the Business and Property Courts in the Rolls Building there is a scheme called CLIPS. It is a *pro bono* dock brief system. The IP barristers say to me that they do not want to do it because they do not feel comfortable with the sort of general Chancery

cases this would involve and they think they would not be able to help. They are profoundly mistaken. Even if all the lawyer does is listen to the litigant's story and asks questions to straighten it out and work out what happened, that turns it into a coherent case. All barristers regardless of their legal skill would then be able to stand up and explain the – now clarified story – to the court. The objectivity of a narrator telling someone else's story has enormous power to clarify the matter. Everyone can do that.

23. And in IP – we just cannot fairly expect small businesses – which have enough to do already - to look after themselves in this complex world of intellectual property. They need your help.

24. Thank you very much.