The Licensing Journal, The year ahead for intellectual property: what to look forward to in 2025, (Mar. 1, 2025)

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There will be a continued focus on the interplay between IP and AI and further development of the UPC, as well as designs reform, and another UK Supreme Court trade mark decision.

This year is set to be another lively year in the intellectual property (IP) world, with a range of high-profile issues coming to the fore. The interplay between IP and artificial intelligence (AI) will continue to be high on the agenda, particularly in the UK in light of the government's recently launched AI and copyright consultation and *Getty Images v Stability AI* coming to trial.

Beyond this, there will also be design reform at the EU level and potential further consultation on design reform in the UK. With respect to patents, the Unified Patent Court (UPC) will continue to develop and business can expect further substantive decisions from the Court of First Instance and likely the Court of Appeal.

What are the main things for businesses to look out for this year?

AI

At the end of 2024, the UK government release its long-awaited consultation on copyright and AI. The consultation principally proposes a new text and data mining (TDM) exception for all purposes where works are lawfully accessed, allowing rightsholders to reserve their rights, and which is underpinned by increased transparency measures. This proposal is similar to the EU's approach, but the government seeks to address the practical difficulties with rights reservation raised in the EU through standardization.

Although this approach is typically seen as more developer-friendly, the government also considers strengthening the copyright framework where AI models are trained in other jurisdictions. The consultation is open until 25 February 2025 and it remains to be seen the extent to which the government's proposals will survive the consultation process and how quickly any resulting action will be taken.

A number of these issues will be considered by the English High Court later this year when *Getty Images v Stability AI* comes to trial in June/July. This case relates to the use of Getty's image library to train the Stable Diffusion text-to-image model and concerns copyright, database rights, and trade mark infringement in the AI context.

The patentability of AI inventions will be on the Supreme Court's agenda this year in *Emotional Perception*. The Supreme Court will have to consider a decision in which the Court of Appeal overturned the High Court to find that an AI invention was a computer program "as such" and therefore was not patentable. The Court of Appeal held that inventions involving artificial neural networks (ANNs) should be treated in the same way as any other computer-implemented inventions and therefore they must make a technical contribution to be patentable. Will the Supreme Court take the same approach? This is an eagerly anticipated decision and should bring clarity to the issue, which is particularly needed as the UK Intellectual Property Office (UKIPO) has had to revise its examination guidance in light of both the High Court and Court of Appeal decisions.

Meanwhile, in the EU, the focus will be on the implementation of the EU AI Act. The Act came into force on 1 August 2024, with staggered deadlines bringing different provisions into force over the course of the next couple

of years. At the end of 2024, drafts of the General-Purpose AI Code of Practice were published. Adherence to it will be an important way for providers of General-Purpose AI to demonstrate compliance with the provisions of the EU AI Act that are specific to them, and which come into force on 2 August 2025. The drafts include detail on the content of policies for complying with copyright laws, including details of steps taken to ensure that AI training does not involve copyright infringement. Drafting will be iterative with a number of drafting rounds running until April 2025. The evolution of this code of practice during the drafting period will be closely watched.

Patents

SEP licensing

Standard essential patent (SEP) licensing disputes have been a mainstay in the English courts over the last few years and that is set to continue in 2025. The increasing number of FRAND (fair, reasonable, and non-discriminatory) disputes in the UK courts had previously prompted the UK Intellectual Property Office (UKIPO) to launch a consultation on whether the SEP ecosystem is functioning efficiently and whether there is a need for UK government intervention.

Although no government intervention has happened yet, the UKIPO's Corporate Plan 2024 to 2025 notes that it is considering policy interventions "to make sure the surrounding ecosystem strikes the right balance for all involved". Will we hear more on that this year as SEP licensing disputes continue to occupy the English courts?

Separately, the European Commission previously released a draft regulation, which, if enacted, would drastically change the SEP litigation and licensing landscape in the EU (with potentially global ramifications). The proposal will be heavily debated as it makes its way through the legislative process, work on which was resumed at the end of last year. Progress on the legislation has been slow because of the divergence of views and last year's parliamentary election but it is likely that we will see some progress this year.

UPC

The opening of the Unified Patent Court in June 2023 was one of the biggest shake-ups to the patent landscape across Europe and it has proved itself to be a highly popular venue, with its caseload continuing to increase, and an increasing number of Unitary Patent applications and registrations.

A number of trends have emerged – and a slew of decisions on procedural issues, jurisdiction questions, preliminary injunctions, and substantive decisions on validity and infringement. In particular, the court has considered issues such as claim construction and the relevance of prosecution history, indirect infringement and infringement under the doctrine of equivalents, right of prior use, joint and intermediary liability, as well as considering the skilled person, the assessment of novelty, inventive step, added matter, and insufficiency. In 2025, we will continue to see substantive decisions from the Court of First Instance and it is likely we will start to see decisions from the Court of Appeal on appeals of substantive decisions.

There are many remaining questions around the UPC's so-called "long arm jurisdiction" (that is, its ability to impose provisional measures, such as interim injunctions, and damages on certain defendants located outside of the EU). We might receive more clarity on this with the anticipated judgment from the Grand Chamber of the ECJ in C-339/22 *BSH Hausgeräte v Electrolux*. The ultimate question in this case is – what is the extent of EU Member State courts' (which includes the UPC for jurisdiction purposes) cross-border jurisdiction in proceedings concerning the validity of foreign patents?

Human medicines regulation and SPCs

On 1 January 2025, new arrangements for the regulation of human medicines and supplementary protection certificates (SPCs) introduced by the Windsor Framework came into effect. This means that all medicines in the UK will be licensed by the MHRA and authorized under the Human Medicines Regulations 2012. This has knock-on effects on SPCs, with the new legislation setting out transitional arrangements for existing SPCs and

applications. In short, after 1 January 2025, centralized European authorizations will generally not be able to be relied upon as the basis for a new SPC application.

The Court of Appeal has already handed down its judgment in *Merck Serono v Comptroller-General of Patents, Designs and Trade Marks*, where the court refused to diverge from the CJEU's decision in *Santen* relating to SPCs for second medical use inventions of previously approved drugs. Merck had argued that *Santen* was wrongly decided and instead sought to rely on the CJEU's previous decision in *Neurim*, which *Santen* had reversed. However, the Court of Appeal held that it was bound by its previous decision in *Newron*, in which it endorsed the position of the CJEU in *Santen*. But, even if it could have departed, it held that it would not have done so. While the *Santen* approach risks investment in the development of second medical uses not being adequately compensated (due to the lack of availability of an SPC), the Court of Appeal clearly accepted that wholesale revision of the SPC Regulation would be required to remedy that risk in a coherent and principled manner. The CJEU decision in *Neurim* had tried to address these policy considerations through a strained interpretation of the existing legislation, but that had led to uncertainty over how the SPC Regulation should be applied. In *Merck* Serono, Arnold LJ went so far as to say that "there is no realistic prospect of the Court of Justice reversing its ruling in *Santen*", although this remains to be seen given the CJEU's tendency to reverse course on the interpretation of the SPC Regulation.

In the EU, work will continue on the introduction of a Unitary SPC, which had been slowed down due to last year's parliamentary election but which has now been resumed.

Trade marks

Bad faith

At the end of 2024, the Supreme Court handed down its landmark decision in *Sky v SkyKick* concerning bad faith. The court found that Sky had acted in bad faith in filing trade marks with overbroad terms and terms it never intended to use. The consequences of a bad faith filing depend on the circumstances, but an entire term may be struck out or narrowed to exclude overbroad protection. The impact of the Supreme Court's decision will be seen throughout the course of 2025 as it effectively opens the door for broad registrations to be attacked on grounds of bad faith and businesses can expect bad faith claims to become a common feature of trade mark disputes in the UK. The decision will also affect long-established filing practices and brand owners need to carefully consider how to describe goods and services when filing applications to try to avoid attacks on this basis. It remains to be seen whether the UKIPO will begin to object to broad terms at the examination stage.

Post-sale confusion

There will be another trade mark case before the Supreme Court in March this year. The court will have to deal with the issue of post-sale confusion in *Iconix v Dream Pairs*. The Court of Appeal held that a " *realistic and representative scenario*" should be used for assessing the post-sale impact of the use of the sign on the average consumer when considering likelihood of confusion in the context of trade mark infringement. Will the Supreme Court agree?

Lookalikes

Lookalike disputes have been back on the agenda already this year, with the Court of Appeal handing down its judgment in *Thatchers v Aldi* where it overturned the High Court to find that Aldi infringed Thatchers' trade mark. The Court of Appeal found that Aldi took unfair advantage of the reputation of Thatchers' mark covering the "get-up" of its cloudy lemon cider drink. The decision emphasizes the importance of registering get-up as a trade mark and promoting that get-up to attract a reputation. From the evidence, it was clear that Aldi deliberately redesigned its product to remind consumers of Thatchers' cider and, as a result, Aldi's sales increased without any advertising spend. The Court of Appeal found that this clearly amounted to an unfair advantage and was not

prepared to allow Aldi to profit from Thatchers' investment in developing and promoting its brand and product. While this decision should help well-known brands tackle lookalikes in the future, Aldi is reported to be pursuing an appeal to the Supreme Court, so this might not be the last we hear on these issues. Although, it remains to be seen whether the Supreme Court would grant permission.

Designs reform

The new EU designs directive and regulation entered into force on 8 December 2024. The reform package aims to facilitate the protection of industrial designs and modernize EU law in this area to meet the challenges of a digital and 3D-printing world. The measures clarify the rules of the "repair clause", which is intended to liberalize the spare parts market. The regulation will apply from 1 May 2025, however, some substantive provisions will not apply until 1 July 2026. Member States will have until 9 December 2027 to transpose the directive into national law.

Back in 2022, the UKIPO held a consultation calling for views on design right protection in light of Brexit and, in its response, the government acknowledged that there were a number of areas it wanted to consider further – for example, pre-registration searches and examination, simplification of the designs regime and the relationship between designs and copyright. No further consultations have yet materialized, however, the UKIPO's Corporate Plan 2024 to 2025 indicates that it will progress its ongoing work on its " *wide-ranging review*" of how to improve the designs framework. There might be further consultations in this regard during the course of 2025.

Database rights

Database rights are an increasingly important right in the AI era and some changes relating to *sui generis* database rights in the EU will be coming this year. Article 43 of the EU Data Act states that *sui generis* database rights will not apply when the data is obtained from or generated by a connected product or related service, for example, data collected from sensors or other machine-generated data.

This is because the Data Act grants users of connected products access to their data and the right to share their data with third parties. The disapplication of *sui generis* database rights to these kinds of data stops data holders from claiming exclusivity over the data generated by connected products, which would undermine the rights granted to users by the Data Act. These provisions of the Data Act will come into force on 12 September 2025. There is no announcement from the UK that it will introduce similar changes.

Final comment

This year is set to be jam-packed with changes and decisions across a range of different areas of IP both in the UK and EU. As expected, key issues such as the interplay between IP and AI, SEP licensing, and the UPC will continue to be of wide interest.

The impact of Brexit will continue to be felt, not just in respect of medicines regulation and SPCs. There has already been one instance in the IP context of the courts departing from CJEU case law. Will divergence be an increasing trend, particularly in light of the abolition of the supremacy of EU law by the Retained EU Law Act? The UK government paused the introduction of more expansive court case law departure powers towards the end of last year with the promise to consider them further in the context of resetting UK and EU relations. It is possible we will hear more on this over the coming year.

Watch this space for an exciting year ahead!

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