



# United Kingdom Patent Decisions 2023

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**Abstract** This report highlights a selection of the most important UK patent decisions from 2023, including: one Supreme Court judgment dealing with artificial intelligence; five Court of Appeal judgments (one relating to confidential information, one dealing with plausibility, two dealing with patent revocations and one addressing unjustified threats); seven Patents Court judgments (two undertaking a FRAND determination, one dealing with FRAND generally, three patent revocations and one dealing with experts' duties); and one High Court decision from the Chancery Division regarding artificial intelligence.

**Keywords** Arrow declaration · Artificial intelligence · Confidential information · Experts' duties · FRAND · Patent revocation · Plausibility · SEPs · Unjustified threats

**Cases** *Aerotel v. Macrossan* [2006] EWCA Civ 1371; [2006] 10 WLUK 737; *Akebia v. Fibrogen* [2020] EWHC 866 (Pat); [2020] 4 WLUK 194; *Astellas Pharma Industries Ltd v. Teva Pharmaceutical Industries Ltd & Ors* [2023] EWHC 2571 (Pat); [2023] 10 WLUK 160; *AT&T Knowledge Venture v. Comptroller of Patents* [2023] EWHC 2948 (Ch); [2023] 11 WLUK 343; *Autostore Technology AS v.*

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*Ocado Group Plc* [2023] EWHC 716 (Pat); [2023] 3 WLUK 620; *Best Buy Co Inc v. Worldwide Sales Corporation Espana SL* [2011] EWCA Civ 618; [2011] FSR 30; *Brain v. Ingledew Brown Bennison and Garrett (No 3)* [1997] FSR 511; *Cassie Creations Ltd v. Blackmore* [2014] EWHC 2941 (Ch); *Conor Medsystems Inc v. Angiotech Pharmaceuticals Inc* [2008] UKHL 49; [2008] 7 WLUK 255; *Dr Reddy's Laboratories (UK) Ltd v. Eli Lilly & Co Ltd* [2009] EWCA Civ 1362; [2009] 12 WLUK 609; *Emotional Perception AI Ltd v. Comptroller-General of Patents, Designs and Trade Marks* [2023] EWHC 2948 (Ch); [2023] 11 WLUK 343; G0002/21 (Reliance on a purported technical effect for inventive step (plausibility)); *Generics (UK) Ltd v. Yeda Research & Development Co Ltd* [2013] EWCA Civ 925; [2013] 7 WLUK 907; *Idenix Pharmaceuticals Inc v. Gilead Sciences Inc* [2016] EWCA Civ 1089; [2016] 11 WLUK 200; *InterDigital Technology Corporation & Ors v. Lenovo Group Ltd & Ors* [2023] EWHC 539 (Pat); *JC Bamford Excavators Ltd v. Manitou UK Ltd & Anor* [2023] EWCA Civ 840; [2023] 7 WLUK 224; *JC Bamford Excavators Ltd v. Manitou UK Ltd & Anor* [2022] EWHC 1724 (Pat); [2022] 7 WLUK 23; *Koninklijke Philips N.V. v. Asustek Computer Incorporation* [2019] EWCA Civ 2230; [2019] 12 WLUK 214; *Medimmune v. Novartis* [2011] EWHC 1669 (Pat); [2011] 7 WLUK 92; *L'Oreal (UK) Ltd v. Johnson & Johnson* [2000] FSR 686; *L'Oreal SA v. eBay International AG* [2009] EWHC 1094 (Ch), [2009] ETMR 53; *Nokia Technologies OY & Anor v. OnePlus Technology (Shenzhen) Co, Ltd & Ors* [2023] EWHC 1912 (Pat); [2023] 7 WLUK 399; *Optis Cellular Technology LLC & Ors v. Apple Retail UK Ltd & Ors* [2022] EWCA Civ 1411; [2022] 10 WLUK 342;; *Optis Cellular Technology LLC & Ors v. Apple Retail UK Limited & Ors* [2023] EWHC 1095 (Ch); [2023] 5 WLUK 465; *Philip Morris Products S.A. & Anor v. Nicoventures Trading Limited & Anor* [2023] EWHC 2616 (Pat); [2023] 10 WLUK 268; *Pozzoli SpA v. BDMO SA* [2007] EWCA Civ 588; [2007] 6 WLUK 524; *Sandoz Ltd v. Teva Pharmaceutical Industries Ltd* [2022] EWHC 822 (Pat); [2022] 4 WLUK 81; *Sandoz Ltd & Anor v. Bristol-Myers Squibb Holdings Ireland Unlimited Company* [2023] EWCA Civ 472; [2023] 5 WLUK 46; *Shenzhen Carku Technology Co Ltd v. The NOCO Company* [2022] EWHC 2034; [2022] 8 WLUK 10; *Sycurio Ltd (formerly Semafone Ltd) v. PCI-Pal PLC & Anor* [2023] EWHC 2361 (Pat); [2023] 9 WLUK 242; *T & A Textiles and Hosiery Ltd* [2015] EWHC 2888 (IPEC); *Teva Pharmaceutical Industries Ltd & Anor v. Astellas Pharma Inc* [2023] EWCA Civ 880; [2023] 7 WLUK 341; *Thaler v. Comptroller-General of Patents, Designs and Trade Marks* [2020] EWHC 2412 (Pat); [2020] 9 WLUK 227; *Thaler v. Comptroller-General of Patents, Designs and Trade Marks* [2021] EWCA Civ 1374; [2021] 9 WLUK 172; *Thaler v. Comptroller-General of Patents, Designs and Trade Marks* [2023] UKSC 49; [2023] 12 WLUK 257; *The Noco Company v. Shenzhen Carku Technology Co. Ltd* [2023] EWCA Civ 1502; [2023] 12 WLUK 238; UKIPO Decision O/542/22; *Unwired Planet International Ltd v. Huawei Technologies (UK) Co Ltd* [2020] UKSC 37; [2021] 1 All ER 1141; *Unwired Planet International Ltd v. Huawei Technologies (UK) Co Ltd* [2017] EWHC 711 (Pat); [2017] 4 WLUK 74; *Vernacare Ltd v. Moulded Fibre Products Ltd* [2023] EWCA Civ 841; [2023] 7 WLUK 246; *Warner-Lambert Co LLC v. Generics (UK) Ltd* [2018] UKSC 56; [2018] 11 WLUK 177.

**Legislation** Directive (EU) 2016/943; Patents Act 1977; Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597)

**Other** Civil Procedure Rules; ETSI Intellectual Property Rights Policy; European Patent Convention

## 1 Introduction

The Patents Court and Court of Appeal continued to be busy in 2023, handing down a number of interesting patent decisions. To sign off the year, just before the Christmas vacation, the Supreme Court gave a much anticipated judgment on the patentability of “inventions” produced by artificial intelligence (AI). As seen in previous years, a wide range of topics were litigated, with telecoms and life sciences maintaining their dominance. There were two notable decisions relating to AI handed down in 2023 and it is likely that this will be an increasing trend in forthcoming years as the role generative AI plays in our day-to-day lives continues to increase. This review article will focus on a selection of the most notable decisions from the Supreme Court, Court of Appeal and Patents Court handed down during the course of 2023.

## 2 *InterDigital Technology Corporation & Ors v. Lenovo Group Ltd & Ors*

The first notable judgment of 2023 was a long-awaited decision from the Patents Court in this standard essential patent (SEP) licensing dispute concerning the terms on which Lenovo should take a licence to InterDigital’s patent portfolio. The court undertook the task of determining what licence terms were fair, reasonable and non-discriminatory (FRAND).<sup>1</sup> This was another extremely lengthy FRAND judgment and we will pick out some of the most salient points.

The court had to determine whether it was appropriate to treat past and future sales differently.<sup>2</sup> Mellor J found that InterDigital retained significant room for manoeuvre in the way it apportioned an overall lump sum consideration to a past release, so the differing allocations to past and future was “somewhat artificial”.<sup>3</sup> Therefore, Mellor J, following *Unwired Planet*,<sup>4</sup> decided that the same rate should apply to both past and future sales.<sup>5</sup> He also found that InterDigital’s allocations should not bind an analysis of what FRAND is. The court stated that FRAND is not concerned with, nor affected by, a party’s own internal justification for the sum

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<sup>1</sup> [2023] EWHC 539 (Pat).

<sup>2</sup> *Supra* 1, [417].

<sup>3</sup> *Supra* 1, [423]–[425].

<sup>4</sup> [2017] EWHC 711 (Pat); [2017] 4 WLUK 74.

<sup>5</sup> *Supra* 1, [423].

paid, received or the way in which their accounts deal with the sums in their accounts and do not form part of the licence agreement.<sup>6</sup>

In the decision, Mellor J made three key findings of principle concerning FRAND determinations generally. The first related to the application of differing national limitation periods and how that would be taken into account in a FRAND assessment. Lenovo had not pleaded limitation as a direct defence to the claim but it had indirectly pleaded it in support of its argument that it would not be FRAND for the agreement to require significant sums to be paid for past sales.<sup>7</sup> Mellor J found that limitation periods do not “have any part to play in a determination of FRAND terms between (necessarily) a willing licensor and a willing licensee”.<sup>8</sup> He continued, that while national limitation periods would be relevant if the claim was for damages or an account of profits, that was not the case here where the claim was for the determination of the terms of a FRAND licence.<sup>9</sup>

Second, the judgment considered the evidence put forward by the parties in regard to volume discounts. Mellor J concluded that the volume discounts applied to the largest InterDigital licensees “do not have any economic or other justification. Instead, their primary purposes is to attempt to shore up InterDigital’s chosen ‘program rates’. Their primary effect is discrimination against smaller licensees”.<sup>10</sup> However, the judge did go on to clarify that he was not “deciding that volume discounts of any magnitude are not FRAND”.<sup>11</sup>

Third, the judge held that when undertaking a FRAND determination it is necessary to set aside any subjective views from either the SEP licensor or SEP licensee, and only employ objective measures.<sup>12</sup> When completing the analysis, Mellor J considered that most of these subjective views came from the SEP licensor, InterDigital.<sup>13</sup> The judge held that employing objective measures brings about several significant benefits: (i) it removes the incentive for implementers to hold out; (ii) it sets aside any subjective decisions with respect to apportionment between past and future rates; (iii) it avoids any artificial inflation of future rates; (iv) it allows the court to employ an objective measure of any patent licensing agreement; and (v) it provides for greater transparency in the market.<sup>14</sup>

Mellor J set a FRAND rate for InterDigital’s portfolio at ~65% lower than the rate it had sought (InterDigital sought a per unit dollar rate of \$0.498 and the court set a rate of \$0.175, which amounted to a lump sum payment of \$138.7m).<sup>15</sup> Mellor J decided the FRAND rate based on a comparable licence analysis. He focused on seven licences relied upon by Lenovo (rejecting the other 20 licences relied upon by

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<sup>6</sup> *Supra* 1, [426].

<sup>7</sup> *Supra* 1, [433].

<sup>8</sup> *Supra* 1, [431], [456].

<sup>9</sup> *Supra* 1, [432].

<sup>10</sup> *Supra* 1, [495].

<sup>11</sup> *Supra* 1, [507].

<sup>12</sup> *Supra* 1, [560].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Supra* 1, [562]–[566].

<sup>15</sup> *Supra* 1, [23], [813]–[814].

InterDigital)<sup>16</sup> and alighted on the unpacked rate in InterDigital's 2017 licence with LG which he used as the basis of his rate for Lenovo. He also held that InterDigital did not act as a willing licensor and, for the most part, Lenovo acted as a willing licensee.<sup>17</sup>

### 3 *Autostore Technology AS v. Ocado Group Plc*

Leaving aside FRAND for now, next came a decision that was a part of an ongoing global dispute relating to automated warehouse technology. In this decision, two of AutoStore's patents were invalidated due to prior public disclosures of its inventions in Russia.<sup>18</sup>

The case is particularly interesting because HHJ Hacon's finding required an assessment of Russian law as of the date of disclosure.<sup>19</sup> Russian law was the applicable law because it was the hypothetical location where any damage would occur in the event of a breach of confidence.<sup>20</sup> Under Russian law, whether an obligation of confidence arose depended on whether there was an express contract of confidentiality between the parties.<sup>21</sup>

The Central Bank of the Russian Federation instructed an intermediary, EVS, to undertake discussions with AutoStore to determine whether its system could be used for automatically storing and handling currency. To meet the bank's requirements, AutoStore emailed EVS details of its proposed designs for a new system, along with computer-generated sketches.<sup>22</sup> At trial, AutoStore, EVS and the bank all stated that they regarded the contents of that email to be confidential.<sup>23</sup> Discussions between the parties then advanced the following year, whereby terms of a distribution agreement were negotiated and agreed.<sup>24</sup>

An invention will form part of the state of the art if it has been made available to the public.<sup>25</sup> AutoStore maintained that the disclosures were not public because they were made under an obligation of confidence. HHJ Hacon applied Russian law and decided that there was no obligation of confidence binding EVS and an email disclaimer stating that the contents is confidential was not enough to conclude that there was an obligation of confidence.<sup>26</sup> As there was held to be no obligation of

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<sup>16</sup> *Supra* 1, [793]–[814].

<sup>17</sup> *Supra* 1, [928], [931]–[932].

<sup>18</sup> [2023] EWHC 716 (Pat); [2023] 3 WLUK 620.

<sup>19</sup> *Supra* 18, [357]–[395].

<sup>20</sup> *Supra* 18, [356].

<sup>21</sup> *Supra* 18, [358].

<sup>22</sup> *Supra* 18, [207].

<sup>23</sup> *Supra* 18, [212].

<sup>24</sup> *Supra* 18, [213], [216]–[217].

<sup>25</sup> *Supra* 18, [227]–[228], [262].

<sup>26</sup> *Supra* 18, [395].

confidence, the disclosures were novelty destroying and the patents were held to be invalid.<sup>27</sup>

HHJ Hacon did, however, note *obiter* that both the email and later meeting disclosures would have been made under an equitable obligation of confidence under English law.<sup>28</sup> Nonetheless, he also stated *obiter* that even if the patents had been valid, they would not have been infringed by Ocado.

This decision serves as a reminder of the strict novelty requirement in patent law and emphasises that caution should be employed when considering what law will be applied to a disclosure made outside of the UK and whether it will actually be held to be a confidential disclosure or not.

#### **4 *Sandoz Ltd & Anor v. Bristol-Myers Squibb Holdings Ireland Unlimited Company***

The Court of Appeal was kept busy in 2023 with a number of patent appeals.<sup>29</sup> First came this appeal of a first instance decision,<sup>30</sup> which found BMS's patent and corresponding SPC concerning the compound apixaban to be invalid for "lack of plausibility".

The Court of Appeal's decision in this case was the first UK judicial consideration of the concept of plausibility in light of the EPO Enlarged Board of Appeal's decision in G2/21.<sup>31</sup> The decision was also the first time that the Court of Appeal held a patent invalid for "lack of plausibility" as a ground on its own.<sup>32</sup>

In giving the leading judgment, Arnold LJ set out the extensive UK case law in respect of plausibility, including: *Conor Medsystems Inc v. Angiotech Pharmaceuticals Inc*;<sup>33</sup> *Generics (UK) Ltd v. Yeda Research & Development Co Ltd*;<sup>34</sup> *Dr Reddy's Laboratories (UK) Ltd v. Eli Lilly & Co Ltd*;<sup>35</sup> *Idenix Pharmaceuticals Inc v. Gilead Sciences Inc*;<sup>36</sup> and *Warner-Lambert Co LLC v. Generics (UK) Ltd*.<sup>37</sup> He also set out the line of EPO case law leading up to G2/21.<sup>38</sup>

Usefully, Arnold LJ summarised the six central grounds of appeal as:

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<sup>27</sup> *Supra* 18, [440].

<sup>28</sup> *Supra* 18, [357].

<sup>29</sup> [2023] EWCA Civ 472; [2023] 5 WLUK 46.

<sup>30</sup> [2022] EWHC 822 (Pat); [2022] 4 WLUK 81, covered previously in the 2022 overview, see IIC 54:381–398 (2023) <https://doi.org/10.1007/s40319-023-01294-y>.

<sup>31</sup> Case G0002/21 at the EPO. The decision was handed down on 23 March 2023.

<sup>32</sup> *Supra* 29, [106].

<sup>33</sup> [2008] UKHL 49; [2008] 7 WLUK 255.

<sup>34</sup> [2013] EWCA Civ 925; [2013] 7 WLUK 907.

<sup>35</sup> [2009] EWCA Civ 1362; [2009] 12 WLUK 609.

<sup>36</sup> [2016] EWCA Civ 1089; [2016] 11 WLUK 200.

<sup>37</sup> [2018] UKSC 56, covered previously in the 2019 overview, see IIC 51:341–361 (2020) <https://doi.org/10.1007/s40319-020-00913-2>. [2018] 11 WLUK 177.

<sup>38</sup> *Supra* 29, [43]–[53].

1. The judge erred in law because, in the case of a claim to a single chemical compound, there is no requirement that the specification makes it plausible that the compound is useful. It is sufficient that the specification discloses the structure of the compound and a method of synthesis and contains an assertion of potential utility for the compound, provided that that assertion is not manifestly speculative or wrong.
2. The judge erred in law because he applied the standard of plausibility laid down by the majority in *Warner-Lambert* when he should either have applied the standard advocated by the minority or applied the standard laid down by the majority less strictly.
3. The judge erred in law because he wrongly held that it was not enough for the specification to encourage the skilled person to test the efficacy of the claimed compound and to identify simple tests which the skilled person could carry out for that purpose and which, if carried out, would confirm that the compound was likely to have the efficacy claimed for it.
4. The judge erred in law or principle because he failed to stand back and consider whether the claimed invention fulfilled the “patent bargain”.
5. The judge erred in principle because he should have held that the Application contained an implicit disclosure that apixaban had a nanomolar  $K_i$  against factor Xa or (which comes to the same thing given the judge’s finding as to common general knowledge) had a  $K_i$  which made it suitable for therapeutic use.
6. The judge was wrong to hold that page 170 line 28-32 and Example 18 taken together did not make it plausible that apixaban was an effective factor Xa inhibitor.<sup>39</sup>

BMS had tried to argue that *Warner-Lambert* was not binding on compound patent claims. In rejecting ground (1), Arnold LJ noted that the present case was not “legally distinguishable from *Warner-Lambert*”<sup>40</sup> and that “the criterion of plausibility must be applied when determining whether the claimed invention involves an inventive step and is sufficiently disclosed”<sup>41</sup> because the fundamental underlying principle is “that the scope of the patent monopoly must be justified by the patentee’s technical contribution to the art. This remains so whether the scope of the claim is broad or narrow”.<sup>42</sup>

In rejecting ground (2), Arnold LJ stated that the standard of plausibility to be applied was the standard adopted by the majority in *Warner-Lambert*.<sup>43</sup> In rejecting ground (3), Arnold LJ, citing Lord Sumption in *Warner-Lambert*, confirmed that “subsequent data cannot be a substitute for sufficient disclosure in the

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<sup>39</sup> *Supra* 29, [89].

<sup>40</sup> *Supra* 29, [91], [92].

<sup>41</sup> *Supra* 29, [93].

<sup>42</sup> *Supra* 29, [92].

<sup>43</sup> *Supra* 29, [94].

specification”.<sup>44</sup> In rejecting ground (4), Arnold LJ noted that there was nothing in Lord Sumption’s judgment that supported BMS’ claim that the trial judge should have considered whether the claimed invention fulfilled the “patent bargain” after conducting his evaluation: “[f]ulfilling the patent bargain requires sufficient disclosure in the specification”.<sup>45</sup>

Ground (5) was held to be a new case that could not be argued on appeal, and was therefore rejected. In any event, it was held not to assist BMS.<sup>46</sup> Lastly, ground (6) was held to be “a bald assertion that the judge was wrong in his evaluation of plausibility” and the court is only justified in intervening in a multi-factorial evaluation where there has been an error of law or principle.<sup>47</sup> The trial judge was found to have made no error in his assessment and the court went further in endorsing the trial judge’s approach.<sup>48</sup>

In light of the Court of Appeal’s finding here, it is likely that we will see “lack of plausibility” as a ground on its own being deployed by parties more frequently in the future.

### **5 *Optis Cellular Technology LLC & Ors v. Apple Retail UK Limited & Ors***

Turning back to FRAND, the Patents Court handed down its second judgment of the year determining a global FRAND licence.<sup>49</sup> Marcus Smith J held that the licence would be a worldwide, 4G multi-standard licence, covering any and all future Apple products that might infringe Optis’ portfolio to achieve what the judge described as “patent peace”.<sup>50</sup>

He determined that the FRAND annual royalty rate for Optis’ patent portfolio was US\$8.235 million.<sup>51</sup> He held that Apple did not require a licence to the whole portfolio, and therefore reduced the amount payable by Apple for the Optis portfolio to US\$5.13 million per annum,<sup>52</sup> with the court holding that Apple should pay Optis \$30.78m for past infringements (based on a six year release)<sup>53</sup> plus a provisional view that this should attract 5% per annum compound interest,<sup>54</sup> and a sum of \$25.65m for the future term of the licence (equivalent to five years’ worth of the annual rate).<sup>55</sup>

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<sup>44</sup> *Supra* 29, [95].

<sup>45</sup> *Supra* 29, [96].

<sup>46</sup> *Supra* 29, [98], [99].

<sup>47</sup> *Supra* 29, [100].

<sup>48</sup> *Supra* 29, [103].

<sup>49</sup> [2023] EWHC 1095 (Ch); [2023] 5 WLUK 465.

<sup>50</sup> *Supra* 49, [495]–[496].

<sup>51</sup> *Supra* 49, [487].

<sup>52</sup> *Supra* 49, [494].

<sup>53</sup> *Supra* 49, [501].

<sup>54</sup> *Supra* 49, [502].

<sup>55</sup> *Supra* 49, [497]–[498].



Optis had argued that Apple's conduct was one of hold-out.<sup>56</sup> Optis advanced the case that the comparable licences provided by Apple were not comparable as they were obtained by hold-out and were lower than FRAND. Marcus Smith J did not accept this submission and alighted on a new principle of "legitimate hold-out".<sup>57</sup> However, he did criticise Apple's approach on a number of levels but concluded that, at the time, it did not amount to "illegitimate hold-out".<sup>58</sup> But he questioned whether in the future, in light of the Supreme Court's decision in *Unwired Planet*,<sup>59</sup> such behaviour would be acceptable. This was not a matter that he needed to determine here so the judge declined to do so but did issue the following warning: "I would only say that SEP Owners and Implementers ignore the regime established by the Supreme Court at their peril".<sup>60</sup>

Marcus Smith J similarly rejected Apple's methodology to price based on smallest saleable patent practising unit (or SSPPU) as "indefensible".<sup>61</sup> Although the judge agreed with Apple's argument that the baseband chipset does contain the cellular functionality of the standards,<sup>62</sup> he concluded that focussing on the SSPPU did not assist with deriving a price for the technology licence: "[w]hat matters is the price that can be charged in the market; not an artificial attempt to localise the technology in issue to a particular component".<sup>63</sup>

When assessing the comparable licences put forward by Optis, Marcus Smith J noted that they were all for the same portfolio as the case at hand, nevertheless he found could not rely on them<sup>64</sup>.

Marcus Smith J derived no benefit from the work of either parties' valuation expert, finding their evidence to be unhelpful when resolving the FRAND question.<sup>65</sup> Accordingly, and in contrast to the approach adopted in *InterDigital*,<sup>66</sup> Smith J decided that the "[t]he best approach [...] is to seek to price the value of the entire Stack to Apple, and then to apportion that price pro rata amongst the co-owners of the Stack in proportion with their holding [...] I am not making any assessment of the value of the individual patents. I am pricing the Stack and what Implementers (and, specifically, Apple) should pay for it".<sup>67</sup>

<sup>56</sup> *Supra* 49, [20], [210].

<sup>57</sup> *Supra* 49, [320], [481].

<sup>58</sup> *Supra* 49, [481iii].

<sup>59</sup> [2020] UKSC 37, IIC 51:1018–1019 (2020) <https://doi.org/10.1007/s40319-020-00984-1>; [2021] 1 All ER 1141.

<sup>60</sup> *Supra* 49, [481iii].

<sup>61</sup> *Supra* 49, [212]–[213].

<sup>62</sup> *Supra* 49, [214]–[215].

<sup>63</sup> *Supra* 49, [220].

<sup>64</sup> *Supra* 49, [398].

<sup>65</sup> *Supra* 49, [311].

<sup>66</sup> *Supra* 1.

<sup>67</sup> *Supra* 49, [456].

In other cases, such as *InterDigital*,<sup>68</sup> the approach taken to determining the FRAND rate was by extrapolation from comparable licences.<sup>69</sup> However, this was “difficult” in this case because the judge held that: (i) the Optis and Apple comparable did not provide “a reliable guide to a market rate” because they required “unpacking”; and (ii) Optis was a “monopolist” and therefore there are “no such other sellers”, which would force the court to “impose a price without the benefit of ‘true’ comparators, arising out of a ‘free’ market”.<sup>70</sup>

To value the stack, Marcus Smith J used licences Apple had entered into with other SEP owners where Apple had paid a lump sum for each licence. To create a “degree of equivalence”, the judge went on to produce a figure for 1% of the whole stack. In his methodology, Marcus Smith J used as many Apple licences as possible because “[u]se of multiple data sources means that outliers or unrepresentative cases can be averaged out, and a safer, more reliable, overall figure obtained.”<sup>71</sup> Marcus Smith J discounted some licences that he considered to be outliers, but included as many “reliable outliers” in the calculations as possible due to the “limited” number of comparables available to him.<sup>72</sup> The judge then calculated an average annual lump sum for 1% of the stack, then scaled that to Optis’ share of the whole stack, which was 0.61%.<sup>73</sup>

There are two interesting points about this case. The first is the finding that a SEP owner is not in a dominant position. The second is the judge’s entirely new “top down” approach based on licence lump sums, which he used to reach the FRAND royalty rate. No doubt this judgment is of global interest to both SEP owners and implementers as the number of courts who are prepared to set global FRAND rates are limited and the judge’s methodology here was different to what has come before, although it appears to be specific to Apple.

## 6 *JC Bamford Excavators Ltd v. Manitou UK Ltd & Anor*

Before the summer court recess, the Court of Appeal handed down a decision of broad relevance, relating to the redaction of confidential information/trade secrets in judgments.<sup>74</sup> The underlying substantive proceedings related to JCB’s claims of patent infringement by Manitou and Manitou’s counterclaim for revocation.<sup>75</sup> This judgment, though, concerned an appeal by Manitou concerning an order from HHJ Hacon. HHJ Hacon had partially refused an application for an order under Civil Procedure Rule (CPR) 31.22(2) restricting use of parts of various documents read or referred to at a public hearing on the ground that the documents contained

<sup>68</sup> *Supra* 1.

<sup>69</sup> *Supra* 49, [425].

<sup>70</sup> *Supra* 49, [425].

<sup>71</sup> *Supra* 49, [462].

<sup>72</sup> *Supra* 49, [483].

<sup>73</sup> *Supra* 49, [487].

<sup>74</sup> [2023] EWCA Civ 840; [2023] 7 WLUK 224.

<sup>75</sup> [2022] EWHC 1724 (Pat); [2022] 7 WLUK 23.

confidential information. JCB cross-appealed against HHJ Hacon's decision that the information was confidential in the first place.<sup>76</sup>

Before dealing with the appeals, Arnold LJ (who gave the leading judgment) made two preliminary observations. Firstly, he acknowledged that the case involved Manitou's private interest in protecting its allegedly confidential information and the public interest in open justice.<sup>77</sup> Manitou argued that JCB had some private interest in the outcome and was not acting "altruistically" but the judge noted that JCB was entitled to defend its private interests.<sup>78</sup>

Secondly, Arnold LJ held that the correct way to describe Manitou's application was "an application to protect alleged technical trade secrets", rather than "confidential information" (the expression used by the parties).<sup>79</sup> The distinction affected the legal analysis as: (i) it reflects the long-standing exception to the open justice principle in English law; and (ii) it brings into play the Trade Secrets Directive<sup>80</sup> and the Trade Secrets (Enforcement etc) Regulations<sup>81</sup> (neither of which had been referred to by the parties or the judge below).<sup>82</sup>

Logically, JCB's cross-appeal was dealt with first – was the information confidential? Arnold LJ highlighted the applicable legal principles,<sup>83</sup> noting that prior to the Trade Secrets Directive, trade secrets were simply a particular category of confidential information and were differentiated from other forms of confidential information in that they received more protection from disclosure as a result of proceedings in open court.<sup>84</sup> He also discussed the Directive<sup>85</sup> and Regulations,<sup>86</sup> which the parties agreed informed the approach the court should adopt to the issues on appeal, although they were not directly applicable as there was no claim of unlawful acquisition, disclosure or use of a trade secret.<sup>87</sup>

JCB's cross-appeal was rejected as it was held that the trial judge had correctly stated the law and recognised that the dispute was about the use that can be made of documents.<sup>88</sup> JCB had argued that the information could be ascertained by a process set out in its expert's evidence, while Manitou successfully argued that information recorded in the relevant documents had relative confidentiality even though it could be deduced by someone who undertook the process outlined by JCB's expert

<sup>76</sup> *Supra* 74, [1].

<sup>77</sup> *Supra* 74, [34].

<sup>78</sup> *Ibid.*

<sup>79</sup> *Supra* 74, [35].

<sup>80</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

<sup>81</sup> Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597).

<sup>82</sup> *Supra* 74, [36].

<sup>83</sup> *Supra* 74, [37]–[58].

<sup>84</sup> *Supra* 74, [53].

<sup>85</sup> *Supra* 80.

<sup>86</sup> *Supra* 81.

<sup>87</sup> *Supra* 74, [54], [58].

<sup>88</sup> *Supra* 74, [70].

because possession of the document provided a short cut. Manitou's argument was held to be "sound in principle and supported by the evidence"<sup>89</sup> and it was consistent with the Directive and Regulations.<sup>90</sup>

With regard to Manitou's appeal as to whether the information should be disclosed, Arnold LJ again detailed the relevant legal principles<sup>91</sup> and held that Manitou's appeal hinged on the correct characterisation of its claim that it was seeking to protect technical trade secrets.<sup>92</sup> Open justice must only give way to the protection of trade secrets when, and to the extent that, it is necessary.<sup>93</sup> Where it is necessary to protect trade secrets then open justice "must give way to a still greater principle, which is justice itself".<sup>94</sup> This may result in a court having to sit partly in private and part of the court's judgment redacted (or otherwise kept confidential). The judge noted that although this may make it impossible for the public to understand the court's reasoning, it "is the price that must be paid for proper protection of trade secrets" and is supported by English law, and the Directive and Regulations.<sup>95</sup> Accordingly, an order under CPR 31.22(2) was made.<sup>96</sup>

### 7 *Vernacare Ltd v. Moulded Fibre Products Ltd*

In July, the Court of Appeal handed down a judgment that overturned a first instance decision from the Intellectual Property Enterprise Court (IPEC).<sup>97</sup> The Court of Appeal held that a patent relating to paper pulp washbowls for use in hospitals, care homes, and nursing homes was invalid.

The appeal was brought by Moulded Fibre Products on three grounds. The first ground was that the trial judge had failed to articulate a construction of the term "washbowl".<sup>98</sup> Sir Christopher Floyd, giving the leading judgment, stated that the trial judge had not produced a comprehensive definition of the term, but clarified that judges did not need to give a comprehensive definition of every word or phrase in a claim.<sup>99</sup> He said: "[i]n some cases it may be sufficient to point out that, whatever else the term covers, it does not cover the particular disclosure alleged to fall within the claim, provided, of course, that the judge identifies the reason why this is so."<sup>100</sup> Therefore, this ground was rejected as the trial judge had excluded

<sup>89</sup> *Supra* 74. [66]–[67].

<sup>90</sup> *Supra* 74. [69].

<sup>91</sup> *Supra* 74. [71] *et seq.*

<sup>92</sup> *Supra* 74, [108].

<sup>93</sup> *Supra* 74, [110].

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Supra* 74, [112].

<sup>97</sup> [2023] EWCA Civ 841; [2023] 7 WLUK 246.

<sup>98</sup> *Supra* 97, [27].

<sup>99</sup> *Supra* 97, [28].

<sup>100</sup> *Ibid.*

articles with a different purpose and stated that it must contain sufficient water to be useful washing.<sup>101</sup>

The second ground was that the trial judge wrongly formulated the inventive concept.<sup>102</sup> Sir Christopher Floyd pointed out that although the various structured tests for obviousness, such as *Pozzoli*,<sup>103</sup> are useful for answering the statutory test, “they are aids and not substitutes for the test laid down by the statute”.<sup>104</sup> The judge noted that questions 2 and 4 in *Pozzoli*<sup>105</sup> refer to the inventive concept, when bearing in mind the test being an aid, “it is clear that the inventive concept is synonymous with ‘the invention’”.<sup>106</sup> Although the phrase inventive concept allows the court to focus on the important features of the claim, it does not allow for re-writing of the claim or the importation of features that are not present when properly construed.<sup>107</sup>

The judge decided that the inventive concept of claim 1 was a washbowl (which Sir Christopher had found to be a bowl that had a degree of detergent resistance and that can hold a sufficient quantity of water to wash a patient<sup>108</sup>) made from a paper pulp containing a fluorocarbon, i.e. “the appreciation that a detergent resistant washbowl can be made from pulp containing a fluorocarbon, rather than a detergent resistant washbowl so made”.<sup>109</sup> The trial judge had held it to be the latter and made an error in doing so.<sup>110</sup> Had it been properly construed, there would have been no requirements for the fluorocarbon to be added to confer detergent resistance or for the maker of the washbowl to appreciate the fluorocarbon was added for that purpose.<sup>111</sup> When the claim was properly construed, it was held to be obvious over a Japanese patent application.<sup>112</sup>

Dealing with the third ground of appeal, whether the trial judge wrongly found claim 9 to be independently inventive,<sup>113</sup> Sir Christopher held that the judge had not dealt with the evidence of the expert, which entitled the Court of Appeal to re-evaluate the issue of obviousness of the claim.<sup>114</sup> It was held that the range of amounts of fluorocarbon additive given in claim 9 would have been obvious ones to try and accordingly claim 9 was invalid.<sup>115</sup>

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<sup>101</sup> *Supra* 97, [29].

<sup>102</sup> *Supra* 97, [27].

<sup>103</sup> [2007] EWCA Civ 588; [2007] 6 WLUK 524.

<sup>104</sup> *Supra* 97, [35].

<sup>105</sup> *Supra* 103.

<sup>106</sup> *Supra* 97, [36].

<sup>107</sup> *Ibid.*

<sup>108</sup> *Supra* 97, [37].

<sup>109</sup> *Supra* 97, [38]–[39].

<sup>110</sup> *Supra* 97, [30].

<sup>111</sup> *Supra* 97, [39].

<sup>112</sup> *Supra* 97, [46].

<sup>113</sup> *Supra* 97, [27].

<sup>114</sup> *Supra* 97, [53].

<sup>115</sup> *Supra* 97, [57].

## 8 *Teva Pharmaceutical Industries Ltd & Anor v. Astellas Pharma Inc*

Also in July, the Court of Appeal upheld the validity of a patent relating to treatment of overactive bladder (OAB).<sup>116</sup> Teva appealed Meade J's finding that Astellas' patent claiming mirabegron for the treatment of OAB was valid, alleging that the patent was obvious over an Australian patent application.

Arnold LJ (giving leading judgment) again reminded that obviousness involves a multi-factorial assessment and the Court of Appeal can only intervene when there is an error of law or principle.<sup>117</sup> He also noted that Teva faced two additional hurdles: (i) the judge's assessment of the expert witnesses, which he stated they "cannot and do not challenge"; and (ii) on the face of it, the judgment "contains a very careful, detailed and nuanced consideration of the evidence and the issues".<sup>118</sup>

Interestingly, Teva had secured permission to appeal from the judge below, Meade J, on the basis that there was an arguable tension between the House of Lords' decision in *Conor v. Angiotech*<sup>119</sup> and the Court of Appeal's decisions in *Pozzoli*<sup>120</sup> and *Koninklijke Philips v. Asustek*,<sup>121</sup> the resolution of which could "lead to a different view of what the technical contribution of the patent was and a different assessment of obviousness".<sup>122</sup> However, before the Court of Appeal, Teva accepted that there was no conflict between *Conor*, *Pozzoli* and *Philips*. Instead, it argued that the judge had erred in principle as he did not correctly apply the law as stated in *Pozzoli* and *Philips*.<sup>123</sup>

Teva maintained that the judge's reasoning depended on two uncertainties that the patent did not dispel: (i) the uncertainty of  $\beta_3$  adrenoreceptor ( $\beta_3$ -AR) agonist therapy as an approach to treating OAB pending human clinical trials; and (ii) the uncertainty as to whether mirabegron was a human  $\beta_3$  selective agonist (or a sufficiently potent one). It claimed that these uncertainties were not dispelled in the patent because the patent presented results of experiments in rats, with no clinical results or even results from experiments on human tissue.<sup>124</sup>

Arnold LJ rejected both arguments, noting that the second argument was "a more subtle variant of the argument rejected by the House of Lords in *Conor*".<sup>125</sup> Arnold LJ stated:

The invention claimed in the Patent is a medical use: the use of mirabegron to treat OAB. It is an implicit requirement of the claim that mirabegron is efficacious for that purpose (although no particular level of efficacy is

<sup>116</sup> [2023] EWCA Civ 880; [2023] 7 WLUK 341.

<sup>117</sup> *Ibid.*, [70]–[71].

<sup>118</sup> *Ibid.*

<sup>119</sup> *Supra* 33.

<sup>120</sup> *Supra* 103.

<sup>121</sup> [2019] EWCA Civ 2230; [2019] 12 WLUK 214.

<sup>122</sup> *Supra* 116, [72].

<sup>123</sup> *Ibid.*

<sup>124</sup> *Supra* 116, [75].

<sup>125</sup> *Supra* 116, [79].

specified). *The Appellants accept that the Patent makes it plausible that mirabegron is effective for the treatment of OAB. That being so, Conor makes it clear that the question of obviousness does not depend on the amount of evidence presented in the Patent to justify that conclusion. Thus the question is simply whether 288 read together with the common general knowledge made it obvious to try mirabegron as a treatment for OAB with a reasonable expectation of success.* As discussed above, the judge held that the answer to that question was no, based upon findings as to common general knowledge and as to the disclosure of 288 and upon a careful assessment of the expert evidence, none of which are, or can be, challenged.<sup>126</sup>

Teva also advanced the argument that Astellas was not entitled to the monopoly conferred by the patent because the patent made no technical contribution to the art as it had not identified a new human  $\beta$ 3-AR agonist or a new use for  $\beta$ 3-AR agonists.<sup>127</sup> However, Meade J had found that it had made a technical contribution and he was “fully entitled to reach that conclusion on the evidence”.<sup>128</sup> Teva’s appeal was dismissed.

### 9 *Nokia Technologies OY & Anor v. OnePlus Technology (Shenzhen) Co, Ltd & Ors*

In another SEP licensing dispute,<sup>129</sup> Meade J heard a dispute about whether it was a requirement for an implementer to commit to take the UK court’s FRAND licence, when it had already committed to take the FRAND licence determined in the People’s Republic of China.<sup>130</sup> Meade J considered three key questions: (i) whether Oppo was already licensed pursuant to the ETSI IPR Policy;<sup>131</sup> (ii) whether Oppo was a beneficiary of clause 6.1 of the ETSI IPR policy;<sup>132</sup> and (iii) whether Nokia’s conduct amounted to an abuse of a dominant position.<sup>133</sup>

In considering (i) above, Oppo had argued that an implementer invokes their right to a licence on request, which, without more, causes a contractual relationship to arise.<sup>134</sup> Meade J noted that “[c]onceptually this is easy to understand [...] but the problem comes because the patentee and the implementer may have absolutely no idea what the terms of the resulting second contractual relationship, the licence, are.”<sup>135</sup> Meade J emphasised that ETSI clause 6.1 must have “a single, uniform

<sup>126</sup> *Supra* 116, [80] (emphasis added).

<sup>127</sup> *Supra* 116, [81].

<sup>128</sup> *Ibid.*

<sup>129</sup> [2023] EWHC 1912 (Pat); [2023] 7 WLUK 399.

<sup>130</sup> *Supra* 129, [52]–[55].

<sup>131</sup> *Supra* 129, [241]–[263].

<sup>132</sup> *Supra* 129, [264]–[302].

<sup>133</sup> *Supra* 129, [315]–[337].

<sup>134</sup> *Supra* 129, [245].

<sup>135</sup> *Supra* 129, [247].

meaning that works generally. Under Oppo's approach, an implementer could put itself in a contractual relationship with a patentee when they had had no previous dealings at all with each other and not even any negotiating history".<sup>136</sup> Further, Meade J went on to highlight that Oppo's approach meant "that an implementer can obtain a licence without any prior discussion".<sup>137</sup> The judge decided that the interpretation that clause 6.1 requires a patentee to make an offer "fits with the importance that the ETSI IPR regime attaches to negotiation"<sup>138</sup> and is more consistent with existing case law.<sup>139</sup>

After considering French law, Meade J agreed with Nokia, holding that the obligation in clause 6.1 of the ETSI IPR policy requires the patentee to make a FRAND offer, which is capable of being accepted and is actually FRAND.<sup>140</sup> He continued that in practice this means that a FRAND matter comes to the Patents Court with a concrete set of terms for consideration and the court applies the standard of whether the offer is FRAND or not and, if not, what would be FRAND.<sup>141</sup> In cases thus far, the patentee has undertaken before the FRAND trial that it will offer what the court determines to be FRAND, which complies with its obligation under clause 6.1 of the ETSI IPR policy.<sup>142</sup> In the "unlikely event" that the patentee does not give this undertaking before trial then it would not comply with clause 6.1 and would not be entitled to an injunction. It is possible that the court may say more than one offer is FRAND then the patentee can choose what to offer but this would be "rare in practice".<sup>143</sup>

In regards (ii), Oppo had alternatively argued that it was a clause 6.1 beneficiary because it was unqualifiedly willing to take a licence and would bind itself to the outcome of the Chinese proceedings whatever the result.<sup>144</sup> Meade J accepted that this was a different position to that of Apple at the time of Trial F in *Optis v. Apple*<sup>145</sup> but questioned whether it made a difference.<sup>146</sup>

Nokia made two arguments: (i) the Patents Court has a special responsibility to determine the content of the licence because it is a SEP owner's usual right to obtain an injunction from the Patents Court when it finds infringement and the licence is a "contractual limit on the patentee's ability to obtain contractual relief";<sup>147</sup> and (ii) a patentee can choose between FRAND options and it chooses the terms set by the Patents Court.<sup>148</sup>

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<sup>136</sup> *Supra* 129, [248].

<sup>137</sup> *Supra* 129, [250].

<sup>138</sup> *Ibid.*

<sup>139</sup> *Supra* 129, [251].

<sup>140</sup> *Supra* 129, [258].

<sup>141</sup> *Supra* 129, [258], [259].

<sup>142</sup> *Supra* 129, [259].

<sup>143</sup> *Supra* 129, [261]–[262].

<sup>144</sup> *Supra* 129, [265].

<sup>145</sup> [2022] EWCA Civ 1411; [2022] 10 WLUK 342.

<sup>146</sup> *Supra* 129, [265]–[266].

<sup>147</sup> *Supra* 129, [268].

<sup>148</sup> *Supra* 129, [269].



With respect to the first argument, Meade J said that this first required him to consider whether the Chinese court would set FRAND terms at all. Meade J stated there was a risk that an implementer could opt for a FRAND assessment in a court that would either be slow in handing down a decision, or might not set FRAND terms at all.<sup>149</sup> Meade J did, however, accept that the English court may not always be obliged to set FRAND terms itself, and it may leave it to another court (but he did not provide an example of then this might happen).<sup>150</sup> Similarly, he said that the issue of whether a FRAND judgment from abroad would be enforceable in the UK or give rise to *res judicata* were also issues “for another day”.<sup>151</sup>

Concerning Nokia’s second argument, Meade J held that English case law indicates that patentees can choose which FRAND licence to offer (if both are FRAND) – an important finding when considering the global SEP licensing landscape.<sup>152</sup> Oppo argued that these authorities related to a scenario where the same court finds more than one set of terms to be FRAND, whereas in this case the FRAND terms could be set by different courts.<sup>153</sup> Meade J stated that he could not see why this mattered and held that the principle of a patentee choosing is applicable where more than one court is considering FRAND.<sup>154</sup> Accordingly, Oppo was found not to be an ETSI clause 6.1 beneficiary and committing itself to the outcome of the Chinese proceedings was not enough to make it one.<sup>155</sup>

Meade J dealt with Oppo’s allegations of abuse briefly, stating that Oppo had “simply failed to show anything amounting to an abuse”.<sup>156</sup>

## 10 *Sycurio Ltd (formerly Semafone Ltd) v. PCI-Pal PLC & Anor*

Moving away from SEP licensing disputes again, in September, the Patents Court handed down a decision that serves as a important reminder of what an expert’s duties are and the responsibilities of instructing solicitors.<sup>157</sup> Ultimately, here, the patent, which related to the processing of telephone calls in call centres to reduce fraud by call centre agents, was held to be obvious over two US patents. However, more interestingly, the court helpfully considered what amounts to an expert’s “expertise”.<sup>158</sup>

The CPRs set out the rules that apply to experts, for example, experts have a duty under CPR 35.3(1) “to help the court on matters within their expertise” and the requirement under CPR 35.10(1) for an expert’s report to comply with the

<sup>149</sup> *Supra* 129, [299].

<sup>150</sup> *Supra* 129, [301].

<sup>151</sup> *Supra* 129, [302].

<sup>152</sup> *Supra* 129, [271].

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> *Supra* 129, [311].

<sup>156</sup> *Supra* 129, [337].

<sup>157</sup> [2023] EWHC 2361 (Pat); [2023] 9 WLUK 242.

<sup>158</sup> *Supra* 157, [256].

corresponding Practice Direction (PD) 35. Under PD 35, the report should be an independent product of the expert not influenced by the litigation and should provide “objective, unbiased opinions on matters within their expertise”.

Bacon J accepted that an expert may need to do some further research to enhance their existing knowledge in the field in order to be able to assist the court.<sup>159</sup> They may also wish to do background reading on a related field in which they do not have specific expertise in order to understand the context of the questions being asked of them that do fall within their expertise.<sup>160</sup> However, they should not give evidence on the basis that they have “sought to read in and educate themselves in the relevant field for the purposes of the case in question”<sup>161</sup> or give evidence that “falls outside of their expertise, even if they consider that they understand the topic ‘well enough’ to express a view on it”.<sup>162</sup> An expert should be instructed on the basis that they are a genuine expert in the relevant field and their opinions may be relied upon and given weight by the court.<sup>163</sup>

Bacon J stated that *Medimmune v. Novartis*<sup>164</sup> correctly sets out that in specialist cases, such as this one, it is likely that experts will need a “high level of instruction by lawyers”<sup>165</sup> and, in practice, this often means that expert reports are drafted by lawyers based on what the expert had said and amended as appropriate by the expert.<sup>166</sup> The judge made clear that this process should not obscure the duties of the expert in CPR 35 and PD 35 and must not lead to the expert giving evidence on matters outside of their expertise where they have been asked questions by the solicitor that they have attempted to answer.<sup>167</sup> Solicitors cannot assume experts will understand the requirements of CPR 35 and PD 35 and it is their responsibility to ensure the expert has the necessary expertise and understands their duties as an expert.<sup>168</sup>

In this case, the judge said that one of Sycurio’s expert was giving evidence on matters outside of her expertise, with the expert admitting she had done a “huge amount of research” to be able to understand various technical points.<sup>169</sup> The expert sent Sycurio’s solicitors “copious notes”, from which the expert report was drafted, but it should have been “readily apparent to her instructing solicitors” that she was giving evidence on points outside of her expertise.<sup>170</sup> The court did not give any weight to the expert’s evidence as all of the disputed matters in the case concerning expert evidence were matters on which the expert had opined but was not qualified

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<sup>159</sup> *Supra* 157, [11].

<sup>160</sup> *Ibid.*

<sup>161</sup> *Supra* 157, [12].

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> [2011] EWHC 1669 (Pat); [2011] 7 WLUK 92.

<sup>165</sup> *Supra* 164, [110].

<sup>166</sup> *Supra* 157, [13].

<sup>167</sup> *Supra* 164, [14].

<sup>168</sup> *Ibid.*

<sup>169</sup> *Supra* 157, [22].

<sup>170</sup> *Supra* 157, [22]–[23].

to do so.<sup>171</sup> This meant that Sycurio’s barrister had to make his closing submissions on the basis of undisputed fact and he even had to rely on PCI-Pal’s evidence. This is a stark reminder of what an expert’s duties are and the important responsibilities of instructing solicitors!

## 11 *Astellas Pharma Industries Ltd v. Teva Pharmaceutical Industries Ltd & Ors*

The Patents Court handed down a decision concerning another of Astellas’ patents<sup>172</sup> relating to the treatment of OAB (here, there was a claim for a modified release pharmaceutical composition containing mirabegron as an active ingredient).<sup>173</sup>

The trial focussed on the construction of the phrase “a pharmaceutical composition for modified release” in claim 1 of the patent.<sup>174</sup> Astellas argued that it meant a formulation in which the dissolution rate of the drug from the formulation was 85% or less after 30 minutes from the beginning of a dissolution test carried out under certain conditions.<sup>175</sup> The drug release was controlled to the extent that the effects of food were reduced. The judge agreed with that contention.<sup>176</sup>

Mellor J interestingly made comments on whether the extent to which construction of a patent claim should be influenced by a finding of sufficiency.<sup>177</sup> The judge considered that it was not an “ordinary” case and the finding of sufficiency cannot influence or determine the issue of construction, because the inventors went to the trouble of setting out a definition.<sup>178</sup>

In considering the arguments on excessive claim breadth insufficiency, Mellor J applied the relevant threshold for plausibility (“the specification must disclose some reason for supposing that the implied assertion of efficacy in the claim is true”) set out by Lord Sumption in *Warner-Lambert*<sup>179, 180</sup>. Teva argued that it was not plausible that the invention worked with substantially all formulations falling within the scope of claim 1.<sup>181</sup> Mellor J rejected this argument, finding that the disclosure in the patent did make it plausible that the food effect would be reduced when the formulation allowed for four hours or more drug absorption.<sup>182</sup> This was the case

<sup>171</sup> *Supra* 157, [24].

<sup>172</sup> [2023] EWHC 2571 (Pat); [2023] 10 WLUK 160.

<sup>173</sup> *Supra* 172, [2].

<sup>174</sup> *Supra* 172, [140].

<sup>175</sup> *Supra* 172, [240].

<sup>176</sup> *Supra* 172, [276].

<sup>177</sup> *Supra* 172, [215].

<sup>178</sup> *Supra* 172, [216].

<sup>179</sup> *Warner-Lambert Co LLC v. Generics (UK) Ltd* [2018] UKSC 56; [2019] Bus LR 360, [36].

<sup>180</sup> *Supra* 172, [231].

<sup>181</sup> *Supra* 172, [224].

<sup>182</sup> *Supra* 172, [276].

across the breadth of the claim, which specified limits on how fast the formulation could dissolve.<sup>183</sup>

Obviousness was considered in light of three prior art citations.<sup>184</sup> On his construction, Mellor J held that the patent was not obvious.<sup>185</sup> Although on his construction Mellor J found the amended claim to be valid, he held it was not infringed by Sandoz's product. Infringement by Teva's original product had been admitted but with infringement by its revised product remained to be determined.<sup>186</sup>

## 12 *Philip Morris Products S.A. & Anor v. Nicoventures Trading Limited & Anor*

Next we had another Patents Court decision relating to British American Tobacco's (BAT) patents for heat not burn (HNB) e-cigarette products.<sup>187</sup> Philip Morris, the claimant, sought revocation of BAT's, patent. BAT counterclaimed for infringement by the sale of Philip Morris' product. BAT applied to conditionally amend its patent to overcome invalidity for inventive step and Phillip Morris applied for *Arrow* declaratory relief with respect to the system.<sup>188</sup>

HHJ Hacon ultimately held that Phillip Morris' product did not fall within the scope of the patent's claims on either a normal construction<sup>189</sup> or as an equivalent.<sup>190</sup> Moreover, the patent was held to be invalid for lack of inventive step<sup>191</sup> and permission to amend the patent was refused as the amendments would have made no different to the inventive step finding<sup>192</sup> and would have added matter.<sup>193</sup> Phillip Morris was also denied the requested *Arrow* declaration.<sup>194</sup> Nevertheless, the judge made some interesting points relating to *Arrow* declarations and we will focus only on this issue.

Phillip Morris sought a declaration that the marketing and sale in the UK of certain products<sup>195</sup> would have been acts relating to products that, at the relevant date, were not new and/or were obvious over certain cited prior art.<sup>196</sup> BAT tried to argue that Phillip Morris's products did more than the cited prior art and therefore it was seeking to expand the declaration of lack of novelty beyond what the prior art disclosed.<sup>197</sup>

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<sup>183</sup> *Supra* 172, [447].

<sup>184</sup> *Supra* 172, [4].

<sup>185</sup> *Supra* 172, [422], [431].

<sup>186</sup> *Supra* 172, [449].

<sup>187</sup> [2023] EWHC 2616 (Pat); [2023] 10 WLUK 268.

<sup>188</sup> *Supra* 187, [1]–[8].

<sup>189</sup> *Supra* 187, [73]–[74].

<sup>190</sup> *Supra* 187, [81] *et seq.*

<sup>191</sup> *Supra* 187, [146], [165].

<sup>192</sup> *Supra* 187, [147].

<sup>193</sup> *Supra* 187, [172].

<sup>194</sup> *Supra* 187, [215].

<sup>195</sup> *Supra* 187, [173].

<sup>196</sup> *Ibid.*

<sup>197</sup> *Supra* 187, [180].

HHJ Hacon rejected this swiftly, stating that an application to declare that the subject matter of the prior art was old at the relevant date would be pointless – “[i]t is expected therefore that the subject-matter of the declaration is different”.<sup>198</sup> He added that there was no procedural reason to refuse to make a declaration that the subject matter of the prior art plus any additional feature(s) should not be allowed, provided that it would serve a useful purpose.<sup>199</sup>

On whether a declaration would serve a useful purpose, the judge set out 12 principles that could be drawn from the relevant case law<sup>200</sup> and added two further points. First, subject to certain qualifications, an *Arrow* declaration is likely to serve a useful purpose if the applicant can show that: (a) the respondent’s patent portfolio creates “real doubt”, which is likely to continue for “a significant period”, as to whether the applicant can lawfully exploit the technical subject-matter in issue; (b) the applicant’s “reasonable intention” to exploit the subject-matter would be of “significant commercial advantage”; and (c) if granted, the declaration would “eliminate or significantly reduce the delay”. Here, “significant” means “cumulatively sufficient to warrant the intervention of the court”. Second, where the respondent’s behaviour is consistent with intending to prolong any doubt then the court will more readily find that there is a useful purpose.<sup>201</sup>

In declining to grant the declaration, the judge held that Phillip Morris had not established that BAT had intentionally behaved in a manner to prolong Phillip Morris’ commercial uncertainty.<sup>202</sup> Nevertheless, he also acknowledged that a declaration may still be granted if BAT’s patent families have had and will for some time continue to have the effect of preventing Phillip Morris from pursuing a reasonable and valuable commercial goal.<sup>203</sup>

However, HHJ Hacon held that it was not clear what the Phillip Morris’ commercial goal was. The declaration sought had not been properly drafted to show that the declaration was needed to allow the marketing of one of Phillip Morris’ products to launch and the evidence submitted did not address the effect the declaration would have on this launch or its commercial value with respect to the launch.<sup>204</sup> As such, he concluded that Phillip Morris had decided that the declaration would be useful “in a general sort of way”, which does not provide the level of clarity needed to convince the court to exercise its discretion.<sup>205</sup>

This judgment reminds that if an *Arrow* declaration is sought then what is being asked of the court must be drafted with sufficient clarity and supported by clear and

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<sup>198</sup> *Supra* 187, [181].

<sup>199</sup> *Supra* 187, [182].

<sup>200</sup> *Supra* 187, [190].

<sup>201</sup> *Supra* 187, [198].

<sup>202</sup> *Supra* 187, [204]–[207].

<sup>203</sup> *Supra* 187, [207].

<sup>204</sup> *Supra* 187, [209], [211].

<sup>205</sup> *Supra* 187, [212]–[213].

precise evidence on the effect and commercial value the declaration would have. As for the respondent's behaviour, this must reach a relatively high bar to be given weight. Here, Phillip Morris had argued that BAT's delaying behaviour was evidenced by that fact that it had five patent applications with "absurdly wide claims". The judge held that this was not evidence of attempting to prolong uncertainty rather than it is usual for applicants to start with "optimistically broad claims and then make concessions on breadth as [...] necessary during prosecution".<sup>206</sup> Phillip Morris also argued that BAT's consent to revoke a patent (which had been in these proceedings) was evidence of shielding. Again, the judge disagreed, stating "I would also be reluctant to discourage parties from consenting to the revocation of their patents pleaded in an action where it is prudent to do so".<sup>207</sup>

### 13 *Emotional Perception AI Ltd v. Comptroller-General of Patents, Designs and Trade Marks*

Towards the end of 2023, there were two significant decisions regarding AI. The first of these was a High Court judgment that overturned a decision from the UK Intellectual Property Office (UKIPO).<sup>208</sup> The UKIPO had held that the invention, which was based on an artificial neural network (ANN), fell foul of the computer program patentability exclusion.<sup>209</sup>

The patent in issue claimed an improved system for providing media-file recommendations to end users based on an ANN that had been trained in a distinct manner. The claim was wide enough to cover both a hardware ANN and a computer emulated ANN (that is, an emulation of a hardware ANN run on software).

At the UKIPO, the Hearing Officer followed the staged approach set out in *Aerotel v. Macrossan*<sup>210</sup> and the signposts from *AT&T Knowledge Venture v. Comptroller of Patents*<sup>211</sup> to determine whether the invention was caught by the computer program exclusion. The Hearing Officer concluded that the invention was "no more than a computer program" and the invention's contribution was "no more than a computer programming activity".<sup>212</sup> He also rejected the contention that the provision of file recommendations by the system was a technical effect over and above the running of a computer program, finding the benefit of the recommendation to be "of a subjective and cognitive nature" instead.<sup>213</sup>

Emotional Perception appealed the decision by arguing that the computer program exclusion was not engaged at all as the invention is not a computer

<sup>206</sup> *Supra* 187, [204].

<sup>207</sup> *Supra* 187, [205].

<sup>208</sup> [2023] EWHC 2948 (Ch); [2023] 11 WLUK 343.

<sup>209</sup> Patents Act 1977 Pt I Sec. 1(2)(c).

<sup>210</sup> [2006] EWCA Civ 1371; [2006] 10 WLUK 737.

<sup>211</sup> [2023] EWHC 2948 (Ch); [2023] 11 WLUK 343.

<sup>212</sup> UKIPO Decision O/542/22, [61]–[62].

<sup>213</sup> UKIPO Decision O/542/22, [69].

program. The judge, Sir Anthony Mann, agreed. The UKIPO conceded during the appeal that the computer program exclusion would not have applied to a hardware ANN but continued to argue that it applied to an ANN emulated in software. However, the judge stated that the emulated ANN (which was fixed in terms of its operation since it had been trained) was “operating at a different level (albeit metaphorically) from the underlying software on the computer”.<sup>214</sup> It was operating in the same way as a hardware ANN and, as such, he held that if the computer program exclusion did not apply to a hardware ANN then it should not apply to an emulated ANN either.<sup>215</sup> Neither type of ANN was held to be a computer program “as such” for the purposes of the exclusion from patentability.<sup>216</sup>

Given that it had been acknowledged that a computer program was present during the ANN training stage, and in case his finding that the invention was not a computer program was wrong, the judge went on to consider *obiter* the question of technical effect.<sup>217</sup> Emotional Perception had argued alternatively that even if the invention was a computer program, it was not a computer program “as such”, as the claimed invention had a “technical effect”. Emotional Perception argued that the technical effect claimed was the sending of the improved recommendation by message to the end user.<sup>218</sup>

After considering a number of cases,<sup>219</sup> the judge stated that the Hearing Officer had been wrong to find the benefit of the recommendation to be subjective and therefore not technical.<sup>220</sup> Although the criteria by which the file recommendation is selected cannot be described in “purely technical terms”, the ANN was said to have made its analysis and selection in a technical way.<sup>221</sup> The judge stated that this was sufficient to meet the requirement of a technical effect to avoid the exclusion and, therefore, the invention was not a computer program “as such”.<sup>222</sup>

Moving away from considering the technical effect from the perspective of the outcome of the invention (the improved recommendation message), Sir Anthony Mann also went further by stating that a trained hardware or emulated ANN would itself be capable of being an external technical effect.<sup>223</sup> This would prevent the exclusion applying to any computer program used in the training process.

Importantly, although it was acknowledged in this case that a computer program is needed to train ANNs, the judge was clear that the claim did not claim that computer program; rather it was a “subsidiary part of the claim”.<sup>224</sup> Equally, it was held that the ANN itself was not a computer program. This meant the computer

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<sup>214</sup> *Supra* 208, [56].

<sup>215</sup> *Ibid.*

<sup>216</sup> *Supra* 208, [61].

<sup>217</sup> *Supra* 208, [63].

<sup>218</sup> *Supra* 208, [68].

<sup>219</sup> *Supra* 208, [64] *et seq.*

<sup>220</sup> *Supra* 208, [76].

<sup>221</sup> *Ibid.*

<sup>222</sup> *Supra* 208, [77].

<sup>223</sup> *Supra* 208, [78].

<sup>224</sup> *Supra* 208, [61].

program patentability exclusion could be circumvented despite the involvement of a computer program during the training stage. This is an important finding that suggests that the judge was mindful of preventing a lacuna of patent protection around ANNs (a key policy reason for the exclusion is to avoid duplicate protection for computer programs, which are generally protected by copyright). This decision has already been impactful, prompting the UKIPO to issue new patent examination guidance on applications relating to ANNs.<sup>225</sup> Whether the decision will be appealed remains to be seen.

#### 14 *The Noco Company v. Shenzhen Carku Technology Co. Ltd*

Before turning to the only Supreme Court patent judgment in 2023, there was a final decision from the Court of Appeal handed down just before the Christmas recess.<sup>226</sup> This decision gave insight into when unjustified threats of infringement are considered to have been made in circumstances where a complaint is made to a platform provider, in this case – Amazon.<sup>227</sup> The Court of Appeal upheld the High Court’s decision<sup>228</sup> that NOCO’s complaint to Amazon via its IPR complaints procedure regarding Carku’s products amounted to a threat of patent infringement under the statutory threats regime.

The court firstly reviewed the statutory provisions covering the basis of the act of patent infringement, the legal remedies available to a patentee and what is necessary for a threat to be actionable.<sup>229</sup> Statute<sup>230</sup> defines the concept of a “permitted communication” flexibly but the court agreed that a request to a distributor or retailer to stop distributing or selling a product, respectively, cannot be a permitted purpose.<sup>231</sup>

The court also reviewed previous case law (decided when the statutory provisions were different but reinforced by current legislation),<sup>232</sup> which established that a “threat” covered “any intimation that would convey to a reasonable person that some person had rights under a patent and intended to enforce them against another person”. Whether the threat was implicit, conditional or future, or made in response

<sup>225</sup> UKIPO, Examination of patent applications involving artificial neural networks (ANNs) (29 November 2023): <https://www.gov.uk/government/publications/examination-of-patent-applications-involving-artificial-neural-networks/examination-of-patent-applications-involving-artificial-neural-networks-ann>. Accessed 26 January 2024.

<sup>226</sup> [2023] EWCA Civ 1502; [2023] 12 WLUK 238.

<sup>227</sup> Section 70 Patents Act 1977.

<sup>228</sup> *Shenzhen Carku Technology Co Ltd v. The NOCO Company* [2022] EWHC 2034; [2022] 8 WLUK 10, covered previously in the 2022 overview, see IIC 54:381–398 (2023) <https://doi.org/10.1007/s40319-023-01294-y>.

<sup>229</sup> *Supra* 226, [15]–[20].

<sup>230</sup> Section 70(B) Patents Act 1977.

<sup>231</sup> *Supra* 226, [21].

<sup>232</sup> *L’Oreal (UK) Ltd v. Johnson & Johnson* [2000] FSR 686, 693 (Lightman J dealing with trade mark infringement); *Best Buy Co Inc v. Worldwide Sales Corporation Espana SL* [2011] EWCA Civ 618; [2011] FSR 30, [21] (Lord Neuberger MR also dealing with trade marks).



to an enquiry made by the person threatened was not relevant.<sup>233</sup> Moreover, the key question to be asked is: “what would a reasonable person, with knowledge of the circumstances at the date of the communication, have understood the communication to mean?”<sup>234</sup> In considering this, first impressions are important and it was held that a sequence of communications must be reviewed as a whole, as a “document which is not threatening when taken in isolation may well be when read in the context of the rest of a sequence of correspondence”.<sup>235</sup>

The court therefore rejected an argument that the IPR procedure would always be understood by Amazon to be a threat of IP litigation. NOCO’s form both asserted infringement and also requested Amazon to remove the “impugned products” from sale, even before any investigation of the complaint.<sup>236</sup> The court noted that this went beyond simply providing the additional information that is contemplated by Amazon’s form.<sup>237</sup> What caused the loss to Carku was the fact that Amazon delisted the products and whether this action was taken because Amazon perceived a threat to itself or to someone else did not alter the “causative potency of the threat”.<sup>238</sup>

This judgment is clear that notifications to online platforms are capable of amounting to threats of IP litigation, therefore rightsholders will have to consider the threats regime when deciding whether to issue takedown notices to online platforms. With the increasing prevalence of sales via online platforms, it is possible that we will see more unjustified threats related litigation.

### 15 *Thaler v. Comptroller-General of Patents, Designs and Trade Marks*

To finish off the year, the Supreme Court handed down a highly anticipated decision<sup>239</sup> relating to AI inventorship, upholding the majority judgment in the Court of Appeal.<sup>240</sup> By way of background, this case arose as Dr Thaler filed two patent applications at the UKIPO naming an AI-powered machine known as DABUS as the inventor. Dr Thaler was subsequently notified by the UKIPO that he would need to file a statement of inventorship and an indication of the derivation of his right to the grant of the patents in accordance with Sec. 13(2) of the Patents Act 1977 and the rules implementing it. Dr Thaler maintained that DABUS was the inventor and that he was entitled to the grant by virtue of his ownership of DABUS. The UKIPO rejected the applications, holding that DABUS was not a person and therefore could not be an inventor under Sec. 13, and the applications were deemed

<sup>233</sup> *Supra* 226, [23].

<sup>234</sup> *Supra* 226, [26].

<sup>235</sup> *Brain v. Ingledew Brown Bennison and Garrett (No 3)* [1997] FSR 511, [521]; *Supra* 226, [27]–[28].

<sup>236</sup> *Supra* 226, [37].

<sup>237</sup> *Ibid.*

<sup>238</sup> *Supra* 226, [45].

<sup>239</sup> [2023] UKSC 49, *see* this issue of IIC at <https://doi.org/10.1007/s40319-024-01446-8>. [2023] 12 WLUK 257.

<sup>240</sup> [2021] EWCA Civ 1374; [2021] 9 WLUK 172.

withdrawn. Dr Thaler's appeal was dismissed by the High Court<sup>241</sup> and by the majority in the Court of Appeal.<sup>242</sup>

Lord Kitchin, giving the leading judgment, clarified that the appeal was not concerned with “whether technical advances generated by machines acting autonomously and powered by AI should be patentable” but was confined to the proper interpretation of the Patents Act 1977 and the rules that implement it.<sup>243</sup> As such, the appeal turned on three main issues: (i) the scope and meaning of the term “inventor”;<sup>244</sup> (ii) whether Dr Thaler was entitled to apply and obtain a patent for the inventions generated by DABUS by virtue of being its owner;<sup>245</sup> and (iii) whether the Comptroller was entitled to hold that the applications would be deemed withdrawn.<sup>246</sup>

The court held that the term “inventor” did not extend to AI-powered machines.<sup>247</sup> Lord Kitchen stated:

The structure and content of sections 7 and 13 of the Act, on their own and in the context of the Act as a whole, permit only one interpretation: an inventor within the meaning of the 1977 Act must be a natural person, and DABUS is not a person at all, let alone a natural person: it is a machine and on the factual assumption underpinning these proceedings, created or generated the technical advances disclosed in the applications on its own.<sup>248</sup>

The court went on to clarify that Sec. 7(3) provided that the “inventor” meant the actual deviser of the invention.<sup>249</sup> Nothing in Sec. 13 suggested that the inventor may be a machine<sup>250</sup> and this was further exemplified by the context of the Patents Act in Secs. 2(4), 8 and 37 which are consistent with that interpretation.<sup>251</sup>

On the second issue, the court held that given that the court had already confirmed that DABUS was not an inventor, Dr Thaler failed to meet the requirements set out in Sec. 7 of the Patents Act, which the court emphasised provides a complete code setting out exhaustively who has the right to apply for a patent.<sup>252</sup>

Further, the court held that Sec. 7 does not confer the right to obtain a patent “for any new product or process created or generated autonomously by a machine, such

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<sup>241</sup> [2020] EWHC 2412 (Pat); [2020] 9 WLUK 227.

<sup>242</sup> *Supra* 240.

<sup>243</sup> *Supra* 239, [48].

<sup>244</sup> *Supra* 239, [54].

<sup>245</sup> *Supra* 239, [74].

<sup>246</sup> *Supra* 239, [91].

<sup>247</sup> *Supra* 239, [73].

<sup>248</sup> *Supra* 239, [56].

<sup>249</sup> *Supra* 239, [57].

<sup>250</sup> *Supra* 239, [65].

<sup>251</sup> *Supra* 239, [68]–[72].

<sup>252</sup> *Supra* 239, [77].

as DABUS, let alone a person who claims the right purely on the basis of ownership of the machine”.<sup>253</sup> Parliament had not had this in mind when enacting the legislation and therefore the legislation could not be extended to encompass such a situation unless it were to be amended by Parliament.<sup>254</sup>

Dr Thaler also tried to rely on the doctrine of accession, claiming that DABUS’s “inventions” were the “fruits” of the machine he owns, by analogy with the situation where a person who owns a cow will automatically own a calf produced by the cow.<sup>255</sup> This was dismissed on two bases: firstly, it relied on the incorrect underlying assumption that DABUS met the definition of inventor for the purposes of the Act; and, secondly, the doctrine of accession only applies to new tangible property produced by existing tangible property, which was not the case here.<sup>256</sup>

Lastly, the court held that the UKIPO was entitled to deem the patent applications to be withdrawn for failing to satisfy Sec. 13 of the Patents Act.<sup>257</sup> Dr Thaler had failed to meet both grounds set out in Sec. 13 – failing to name an inventor and failing to state the derivation of his right to apply for the patent.<sup>258</sup> Dr Thaler’s reliance on DABUS as inventor was “flawed and legally impossible”.<sup>259</sup>

While this decision was long awaited and eagerly anticipated, the outcome was unsurprising. It is important to remember that this case formed part of a global test-litigation strategy to test the limits of patent law. Moving forward, it is clear in the UK that claiming that a machine has autonomously devised a technical advancement and naming the machine as the inventor in a patent application will not be acceptable. However, as the court acknowledged, if DABUS had been framed as a “sophisticated tool” used by Dr Thaler to assist him to create the invention, then the outcome might have been different.<sup>260</sup> It is also worth reiterating this is decision does not impact on the acceptability of patenting AI inventions themselves (as evidenced in *Emotional Perception* above).

## 16 Conclusion

This article has provided an overview of some of the most notable patent decisions in the English courts in 2023. As has been clear, SEP licensing disputes have been a mainstay of patent litigation in 2023 and will remain so in 2024. The increasing number of FRAND disputes in the UK courts had previously prompted the UKIPO to launch a consultation to seek views on whether the SEP ecosystem is functioning

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<sup>253</sup> *Supra* 239, [79].

<sup>254</sup> *Ibid.*

<sup>255</sup> *Supra* 239, [83], [87].

<sup>256</sup> *Supra* 239, [88].

<sup>257</sup> *Supra* 239, [97].

<sup>258</sup> *Supra* 239, [98].

<sup>259</sup> *Supra* 239, [95].

<sup>260</sup> *Supra* 239, [52].

efficiently and whether there is a need for UK government intervention.<sup>261</sup> Last year, the UKIPO's response to the consultation suggested that the government would seek views on how best to "encourage and promote greater use of arbitration" and whether there should be government intervention.<sup>262</sup> This echoed separate calls for a system of mandatory arbitration made by Arnold LJ in *Optis v. Apple*.<sup>263</sup> Whether we will see any further activity from the UKIPO in 2024 as SEP licensing disputes continue to occupy the English courts remains to be seen. We will also look at how the European Commission's proposal to reform SEP licensing disputes in the EU progresses throughout 2024.<sup>264</sup> This proposal could potentially have an effect on the global SEP litigation and licensing landscape, including in the UK.

Separately, the Unified Patent Court (UPC) has now been in full operation since June 2023 and has proved itself to be an important venue in the European patent litigation landscape. Although the UK is not participating in the new system, it remains a key jurisdiction for parallel litigation and we will continue to watch how the two systems interact throughout the course of 2024. Stay tuned for an action packed 2024 ...

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<sup>261</sup> UKIPO, Standard Essential Patents and Innovation: Call for Views (7 December 2021): <https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views>. Accessed 26 January 2024.

<sup>262</sup> UKIPO, Consultation Outcome: Standard Essential Patents and Innovation: Call for Views (5 July 2023): <https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views#frameworks-patents-licensing-and-litigation>. Accessed 26 January 2024.

<sup>263</sup> *Supra* 145, [115].

<sup>264</sup> COM (2023) 232, Proposal for a Regulation on standard essential patents and amending Regulation (EU) 2017/1001: [https://single-market-economy.ec.europa.eu/system/files/2023-04/COM\\_2023\\_232\\_1\\_EN\\_ACT\\_part1\\_v13.pdf](https://single-market-economy.ec.europa.eu/system/files/2023-04/COM_2023_232_1_EN_ACT_part1_v13.pdf). Accessed 26 January 2024.