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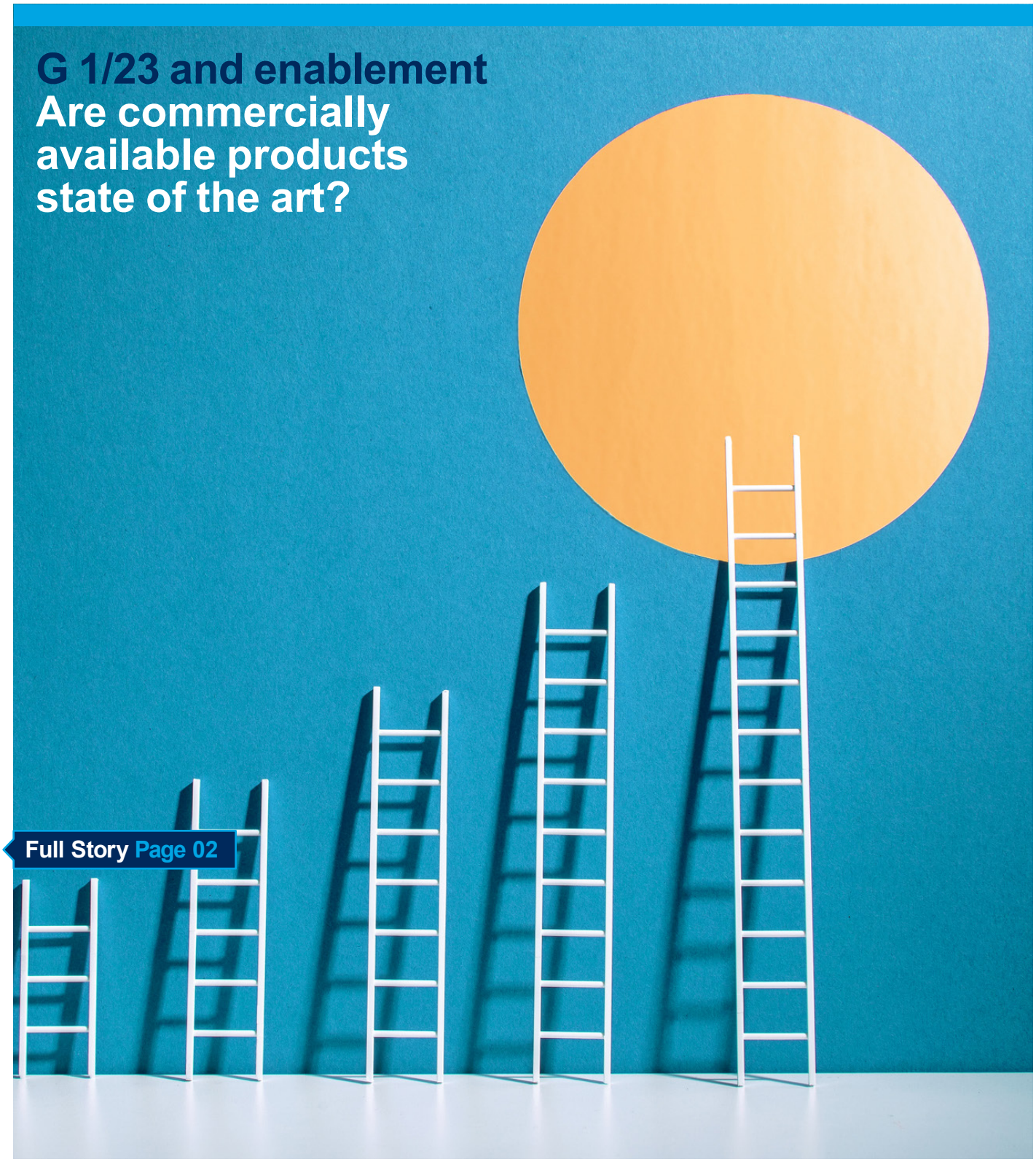
Are commercially available products state of the art?



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Editorial

Patents protect innovation, but also are indicators of the current state of innovation, which evolves not only in subject matter, but also in definition. When have inventions been publicly disclosed? What parts of an invention should be claimed? What are the trends in what is being claimed? This month we take a look at all of these questions. Meanwhile, the UPC is really settling in and we are forming an even clearer understanding of the way that various important aspects of patent litigation are being handled by the court. In this edition we share our learnings about auxiliary claim request and added subject matter issues.
It's summertime! I recommend you take a seat in the sunshine with your favourite chiplet-powered reading device and let us guide you through all of these interesting topics. Happy reading!

Nicholas Malden, Editor

Events

IPO Annual Meeting
07-09 September 2025, San Diego USA
Attending: Andrew Cockerell, Garreth Duncan & Jackie Johnson

IFA 2025
08 September 2025, Berlin Germany
Presenting: Jonathan Jackson

CIPA UPC Conference
11 September 2025, London UK
Attending: Rachel Bateman, Jonathan DeVile, Laura Jennings & Alice Stuart-Grumbar.

World Agri-Tech Innovation Summit
22-23 September 2025, London UK
Attending: Doug Ealey

IP Inclusive: Ten Years On, Ten Ahead
01 October 2025, Southampton UK
We are a regional host for this national event

Climate Technology Show
01-02 October 2025, London UK
Attending: Andrew Cockerell & Joseph Flood

CIPA Congress: IP and AI
09 October 2025, Bristol UK
Attending: Ryan Lacey & Florian Zobel

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Prior art / inventive step

G 1/23 and enablement
Are commercially available products state of the art?

In this eagerly awaited European Patent Office (EPO) decision, the Enlarged Board of Appeal concluded that a product put on the market before the date of filing of a European patent application should not be excluded from the prior art for the sole reason that its composition or internal structure could not be analysed and reproduced by the skilled person before that date.

Background

This case relates to an appeal, T 438/19, filed against the decision of the Opposition Division to reject an opposition against EP2626911. In order to determine whether the subject matter of claim 1 involved an inventive step in this case, it was necessary to establish whether a commercial product (a complex polymer sold under the trade mark ENGAGE® 8400) had been made available to the public before the effective filing date of the patent, and could thus represent the closest prior art.

The referring board noted that previous case law in this area has given rise to diverging interpretations, leading to legal uncertainty regarding when commercially available products are considered state of the art. In particular, the referring board highlighted the diverging interpretations regarding the extent the commercial product must be **analysable and reproducible** in order to be considered state of the art.

Further details regarding the background of this case can be found in our article of 01 August 2023 "G 1/23: assessing whether commercially available products are prior art": *dycip.com/g123-aug2023*.

The questions

The questions referred to the Enlarged Board of Appeal were as follows:

1. Is a product put on the market before the date of filing of a European patent application to be excluded from the state of the art within the meaning of Article 54(2) EPC for the sole reason that its composition or internal structure could not be analysed and reproduced without undue burden by the skilled person before that date.
2. If the answer to question 1 is no, is technical information about said product which was made available to the public before the filing date (for example, by publication of technical brochure, non-patent or patent literature) state of the art within the meaning of Article 54(2) EPC, irrespective of whether the composition or internal structure of the product could be analysed and reproduced without undue burden by the skilled person before that date?
3. If the answer to question 1 is yes or the answer to question 2 is no, which criteria are to be applied in order to determine whether or not the composition or internal structure of the product could be analysed and reproduced without undue burden within the meaning of opinion G 1/92? In particular, is it required that the composition and internal structure of the product be fully analysable and identically reproducible?

The answers

In its decision, the Enlarged Board of Appeal answered the three questions as follows:

1. No
2. Yes
3. Redundant in view of 1 and 2.

> The Enlarged Board of Appeal's answers taken together ultimately conclude that a product's non-reproducibility cannot prevent that product, and technical information relating thereto, from forming part of the state of the art.

Many have noted that the Enlarged Board of Appeal's conclusion acts to align European practice with the "on-sale bar" criteria found in USA patent practice, which dictates that if a product has been sold or is on sale, it cannot be later patented even if it is difficult to reproduce that product.

Case details at a glance
Decision level: Enlarged Board of Appeal
Parties: Borealis GmbH (appellant) v Mitsui Chemicals Inc and Mitsui (respondents) Chemicals ICT Materia Inc
Citation: G 1/23
Date: 02 July 2025
Decision (PDF): dycip.com/epo-eboa-g123

The reasoning behind the conclusion is interesting and warrants further discussion.

Correct reading of G 1/92

The questions referred to the Enlarged Board of Appeal in G 1/23 stemmed from diverging interpretations regarding a possible reproducibility criterion introduced by the earlier decision in G 1/92. In particular, this earlier decision required that the chemical composition of a product only represents the state of the art when the product can be analysed **and reproduced** by the skilled person. The Enlarged Board of Appeal's decision in G 1/23 gives significant weight to establishing how this language should be interpreted.

The Enlarged Board of Appeal identified that the "reproduced" language of G 1/92 has typically been interpreted in the case law as requiring that the product is "manufacturable" from specific starting materials. Indeed, the Enlarged Board of Appeal highlighted that the statements made in G 1/92 and the questions referred in G 1/23 only "make sense" when this understanding of "reproduced" is adopted.

Taking this reading forward, the Enlarged Board of Appeal considered that two possible interpretations of G 1/92 were available:

1. where the composition (and therefore the product) cannot be reproduced, **the product itself** is not part of the state of the art; or

2. where the composition (and therefore the product) cannot be reproduced, **only the composition** of the product does not belong to the state of the art but the product itself and its reproducible properties do.

However, the Enlarged Board of Appeal noted that regardless of which interpretation is adopted, "manifestly absurd" results are obtained. Specifically, the Enlarged Board of Appeal concluded that every man-made material can ultimately be reduced back to a starting material that could not be made by the skilled person using the common general knowledge (for example, a chemical element). Following either of the above interpretations, such starting materials would not be reproducible and would thus not be considered state of the art. Adopting a consistent approach, if it is found that an irreproducible starting material does not form part of the state of the art, any product stemming from that starting material would also need to be eliminated from the state of the art. The Enlarged Board of Appeal highlighted that this would lead to a situation where "no material in the physical world would belong to the state of the art".

In view of the above, the Enlarged Board of Appeal proposed that the "reproduced" language adopted in G 1/92 should be read more broadly so that it encompasses obtaining the product from the market in its readily available form. In this situation, the reproducibility requirement would be made redundant since it would be inherently fulfilled by a product existing on the market. The Enlarged Board of Appeal highlighted that this interpretation represents the normal working practice of the skilled person, who would routinely purchase products from manufacturers.

As a result, the Enlarged Board of Appeal proposed that the proper reading of G 1/92 is: "The chemical composition of a product is part of the state of the art when the product as such is available to the public and can be analysed by the skilled person, irrespective of whether or not particular reasons can be identified for analysing the composition."

Employing this reading, the Enlarged Board of Appeal noted that "all analysable properties of the product put on the market will belong to the state of the art, i.e. they will represent technical information that the skilled person is aware of and will consider relying on when looking at technical solutions".

Implications

The implications of the Enlarged Board of Appeal's decision in G 1/23 will be far reaching. In its simplest sense, the decision adopts what this author considers a common sense approach in that any product placed on the market becomes prior art whether or not it is "manufacturable" because the skilled person is able to obtain a tangible copy of that product. The Enlarged Board of Appeal's decision thus broadens the scope of the prior art and further emphasises the importance of timing when it comes to launching products and filing patent applications.

That being said, the Enlarged Board of Appeal's decision appears to maintain that the product becomes part of the state of the art together with features of the product that can be analysed (without any need for motivation to analyse). However, little guidance is provided as to whether there are any "legal limits" as to the extent of analysis. The Enlarged Board decided not to make a determination on this. As a result, it is likely that this will form a key battle ground for cases going forward in this area.

It is also important to note that the Enlarged Board of Appeal's decision distinguishes between the situation of novelty and inventive step when it comes to products put on the market. In particular, the board highlights that for novelty "the comparison of the invention with the state of the art does not require some particular motivation from the skilled person".

On the other hand, for inventive step "the skilled person may have good reasons for disregarding some prior art, for example because of insufficient information attached to it. There are **no formal and strict rules** as to how a non-reproducible but publicly available product or any of its properties can be taken into account when inventive step is examined". As a result, in the context of inventive step, the Enlarged Board of Appeal's decision appears to suggest that whether a product on the market can be considered the closest prior art and whether modifications to that product are obvious, will be highly dependent on the facts of a given case.

In view of the possible complexity regarding the implementation of the G 1/23 decision, we will be keeping a close eye on future decisions in this area.

Author:
Oliver Cartwright

Technologies for plastics waste management
Patent trends & incentives supporting innovation

Useful links

EPO report, "Plastics in transition: technologies for plastics waste management" (PDF): dycip.com/epo-plastics-transition-2025

UKIPO guidance, "Patents: accelerated processing", including information about the Green Channel: dycip.com/ukipo-accelerate-patents

The European Patent Office (EPO) has recently published its analysis highlighting the innovation trends in tackling one of the most urgent environmental challenges: plastic waste. The report "Plastics in transition - Technologies for plastics waste management", published in April 2025, draws on nearly five decades of patent filing data and tracks how technological progress is shaping the future of plastics recovery and recycling.

Patent trends in plastics management

Between 1975-2023, nearly 13,000 inventions were found in the fields of plastics waste management. Interestingly, the field has seen dramatic growth, with an eighteen-fold increase in patenting activity from 1990-2023 which is over four times faster than the average growth of all other technology areas. Growth has been particularly rapid since 2015 and reflects the increasing regulatory pressure, public concern, and industry demand for sustainable solutions.

The report looks at two sub-categories of plastic waste management: waste recovery and waste recycling. Waste recovery (which includes collecting, separating and preparation for further processing) accounts for around 32% of inventions. Waste recycling (which includes transforming recovered plastics into new materials using mechanical, chemical or biological processes) makes up the remaining 68% of inventions.

Historically, mechanical recycling dominated the field, involving the physical processing of plastics (such as melting and reshaping). However, more recently, there has been a notable rise in pyrolysis (thermal decomposition of materials in the absence of oxygen) and chemolysis (chemical decomposition of materials), methods that allow plastics to be converted into high-value feedstocks. Waste recovery technologies relating to selective dissolution and optical methods show consistently strong activity. There has also been a recent surge in technologies addressing persistent pollutants like microplastics, nanoplastics and per- and polyfluoroalkyl substances (PFAS).

The EPO has recently analysed innovation trends in pastic waste management

The report also identifies areas of future innovation potential. These areas show low but growing activity and include chemical and biological processes in waste recovery, and healthcare and cosmetics in waste recycling.

> Regional trends demonstrate that Europe is a global leader in innovation against plastic waste, accounting for 44% of patent activity between 1990-2023. Germany, France, Italy, and the United Kingdom are among the top contributors.

However, since the 1990s, countries in Asia, notably Japan, the Republic of Korea and China, have significantly ramped up patenting activity. As a result, Asia is now level with North America, with each region contributing just under 30% of inventions globally.

The role of patent systems in supporting innovation

As the global plastics industry transitions from a linear to a circular economy model, these innovations are essential. But technology alone is not enough; regulatory incentives and supportive patent systems also play a role.

In the UK, one such mechanism is the Green Channel offered by the UK Intellectual Property Office (UKIPO). The scheme allows patent applicants to request accelerated processing for inventions that have an environmental benefit, including those relating to plastics waste management. There is no fee to use this service, and it can be used to fast-track patent search, examination, and/or publication. While early processing may bring forward costs that may otherwise be deferred, it can offer strategic advantages, such as early certainty on patentability or faster grant for commercialisation purposes.

Outlook

The EPO's report underscores the importance of patents not just as legal tools, but as indicators of emerging technology trends. As pressure mounts to reduce plastic pollution, supportive patent systems and forward-thinking policies will remain vital in encouraging innovation and supporting the transition to a cleaner, more sustainable plastics economy.

Authors:
Catherine Keetch & Peter Quinn

Chiplets
Providing commercially valuable patent protection for modular products

Many products are assembled from components manufactured and distributed separately, and it is important to consider how such products are manufactured when seeking to provide commercially valuable patent protection. This article provides an example in the field of computer chip manufacture.

Chiplets

A system-on-a-chip (SoC) is a type of integrated circuit product which acts as an entire computer in a single package, providing low-power and high performance data processing. SoCs are widely used, and provide the brains of smartphones, leading edge laptops, IoT devices, and much more.

A SoC includes essential functionality such as a central processing unit (CPU), memory, input/output circuitry, and so on. A traditional SoC provides these functions within a single monolithic piece of semiconductor material (for example, silicon) manufactured and distributed as a single integral device.

An emerging technology is the manufacture of a chiplet-based SoC by assembling a number of separately manufactured microchips known as "chiplets" together in a package. Each chiplet is a building block having some functionality, and the collection of chiplets together provides the functionality of the SoC.

A chiplet-based SoC can have various advantages over monolithic SoCs, including increased production yield due to testing of individual chiplets, increased design flexibility as chiplets can be made using different manufacturing processes, and allowing simplified SoC design by assembling off-the-shelf chiplets.

The law

In the UK, direct infringement under s.60(1) UK Patents Act requires that an infringing product includes every feature claimed in a patent claim.

This is fairly straightforward when considering infringement by an integral device such as a monolithic SoC: anyone making, importing, or selling a monolithic SoC including the claimed invention infringes the patent. For a monolithic SoC it doesn't matter which parts of the SoC perform the different parts of the invention: the SoC is manufactured in one go and therefore an infringing SoC includes all of the claimed features from the point of manufacture.

However, due to the introduction of chiplets, a SoC is also an example of a product which may be assembled from separately manufactured parts. When patenting inventions in SoCs, such as developments at an architectural or micro-architectural level or techniques which might be implemented using a SoC, it may be natural to claim features of the SoC as a whole based on an assumption that a monolithic SoC would be used. However, this might lead to difficulties enforcing the patent.

In particular, a patent claim for an invention implemented in a chiplet-based SoC might include features provided by different chiplets, meaning that no chiplet alone provides all of the features of the invention. Therefore, manufacturers (or importers or sellers) of individual chiplets might not directly infringe the patent. The patent might only be directly infringed when the chiplets are finally assembled into a SoC, and this can diminish the commercial value of the patent as large parts of the supply chain are unprotected.

Indirect infringement under s.60(2) UK Patents Act might provide a get-out in some cases where a chiplet could be considered to indirectly infringe a patent for a SoC even if the chiplet does not include all the claimed features. However, it is often much harder to prove that indirect infringement has occurred, especially in cases of cross-border sale between a manufacturer in one territory and a downstream party in another territory.

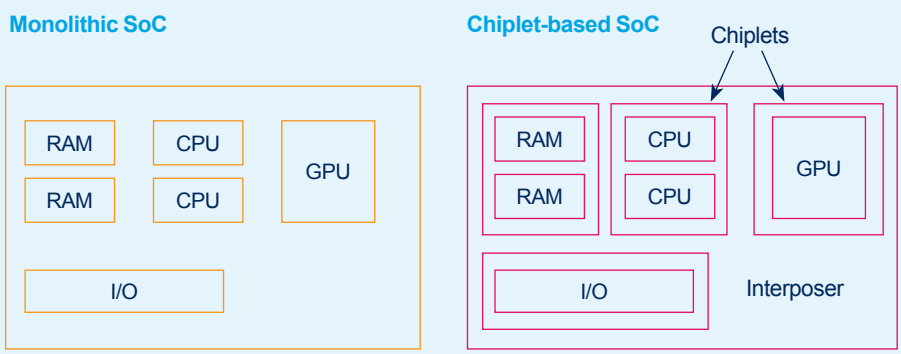
Practical advice

It is important that an attempt is made to draft claims so they are directly infringed by products which are manufactured and distributed together. In the field of computer chip manufacture, claims should attempt to cover individual chiplets rather than full SoCs.

Often the core concept of an invention is actually provided by features of a particular sub-component, such as a particular chiplet. A careful selection of claim features can limit the claims to that particular component, so manufacture and sale of the component alone directly infringes the claim. If other elements are important to provide context for the inventive concept, it may be sufficient to refer to those elements indirectly in the claims so that they are not required for infringement.

It is worth noting that, as demonstrated by the introduction of chiplets changing the way SoCs are manufactured, what might be considered an integral product is liable to change as technology develops. We therefore recommend seeking professional advice from a patent attorney familiar with the technical field of your invention.

Monolithic system-on-a-chip (SoC) and chiplet-based SoC



Authors:
Robbie Berryman & Henry Davies

Agritech prototyping
The risk of public disclosure

To get a patent for any new device or process it must be novel, meaning that it has not already been made available to the public.

> Importantly, a thing may be made available to the public even if no-one actually sees it; a book on a library shelf is clearly available to the public whether someone reads it or not. Therefore this is not a question of whether anyone actually sees and understands your invention, but merely whether they could have.

For agritech prototyping, often involving large equipment or field-scale processes, this is a pressing question when farms typically have multiple points of public access, either due to footpaths, nearby roads, farm shops, or a seasonal labour that are not direct employees.

Unlike for a library book, the question of whether testing a prototype device or process discloses an idea in a way that enables understanding is more nuanced, and has been tested several times in case law. In each case the key question has been what a member of the public is "free in equity and law" to glean from such activity.

To illustrate this, four court cases are briefly discussed below.

Manitowoc Beverage Systems: beer dispensing system

In the case of Manitowoc Beverage Systems Limited, BL O/019/14, a new system was developed for dispensing beer, which was cooled on the way to a dispensing font that was also cooled to create an ice effect. The system used a single glycol sub-zero coolant tank to the cool the beer and to ice the font. This system was provided to several pubs for a short period of beta-testing before any patent application had been filed. Subsequently, after a patent was applied for and granted, Manitowoc sued a third party for infringement, which in turn claimed the patent was not valid as the system was made available to the public via these pubs. It was accepted there was no written evidence of a confidentiality agreement with the pubs, but notably the prototype cooler was provided inside a box that was riveted closed and security sealed.

Without opening the box it was not possible to understand how the system worked; meanwhile opening it would require damage to remove rivets and break the seal. It was therefore concluded that a reasonable person would understand that the box implied an obligation of confidentiality, and so the system in the box was not "made available to the public" despite being in public possession for some time.

Lux Traffic Controls: traffic light system

By contrast, in Lux Traffic, [1993] RPC 107 Ch D (Pat), in similar circumstances a new traffic light system was beta tested in field trials, with the new control system again in a locked box. This time however, the invention related to how the timing of the lights responded to traffic, and it was determined that a member of the public, just by observing the lights, could deduce the new behaviour produced by the control system. Therefore an enabling disclosure of the invention, if not the specific device implementing it, was made available to the public.

From this one can see that the issue is whether a member of the public can theoretically understand the invention in circumstances where there is no explicit or implicit obligation of confidentiality.

Emson: self-extending and retracting hose

Next, in the case of E Mishan & Sons Inc (trading as Emson) v Hozelock, [2019] EWHC 991 (Pat), the invention was for a self-extending and retracting hose that had a loose concertinaed outer tube of the extended length and an inner elastic tube of the retracted length, with the two layers only being attached at each end. When water was applied under pressure the elastic layer expanded to the full extended length and an increased diameter, but did not burst as it was constrained by the outer tube.

The inventor assembled a prototype of the hose in their garden, in view of the road, in September. They then tried the hose in their garden in November, before filing a patent application.

Again subsequently after a patent had been applied for and granted, Emson sued a third party for infringement which then claimed the patent was invalid due to public disclosure. In this case, it was accepted that the assembly process did not make clear that the goal was a variable length hose, and the later use did not reveal the internal assembly of the hose or exactly how it functioned: it would be necessary to be present on both occasions and to appreciate that they were the same item in both cases. Such a "mosaic" of disclosures was deemed inappropriate. However the judge noted that this decision relied on specifics of what could be understood on each individual day, and in different circumstances a skilled onlooker could have put two and two together. As such, the case did not create a general principle regarding mosaics that can be relied upon.

Interestingly however, in an obiter comment the judge noted that the inventor said he would be uncomfortable with someone watching him from the street and in this case would have packed up his materials and taken them into his house. The judge suggested that this made a difference; whilst if the public is given access to information then it is disclosed whether the public actually looks or not, it is quite another thing to say that information is available to the public if in fact no member of the public could have accessed it. If anyone trying to observe the inventor would not have seen anything because he would have packed everything up, then the situation is more

Case details at a glance

Jurisdiction: England & Wales
Decision level: Patents Court
Parties: Lux Traffic Controls Limited v Pike Signals Limited
Date: 10 June 1993
Citation: [1993] RPC 107 Ch D (Pat)

Jurisdiction: England & Wales
Decision level: UKIPO
Parties: Manitowoc Beverage Systems Limited & Messrs Scott
Date: 15 January 2014
Citation: BL O/019/14
Decision: dycip.com/ukipo-manitowoc

Jurisdiction: England & Wales
Decision level: High Court of Justice Patents Court
Parties: E Mishan & Sons Inc trading as Emson v Hozelock Limited, Blue Gentian LLC and Telebrands Corp
Date: 17 April 2019
Citation: [2019] RPC 17, [2019] EWHC 991 (Pat)
Decision: dycip.com/emson-hozelock

Jurisdiction: England & Wales
Decision level: IPEC
Parties: Claydon Yield-O-Meter Limited v Mzuri Limited and Christopher Martin Cole
Date: 22 April 2021
Citation: [2021] EWHC 1007 (IPEC)
Decision: dycip.com/claydon-mzuri

Mzuri's Pro-Til

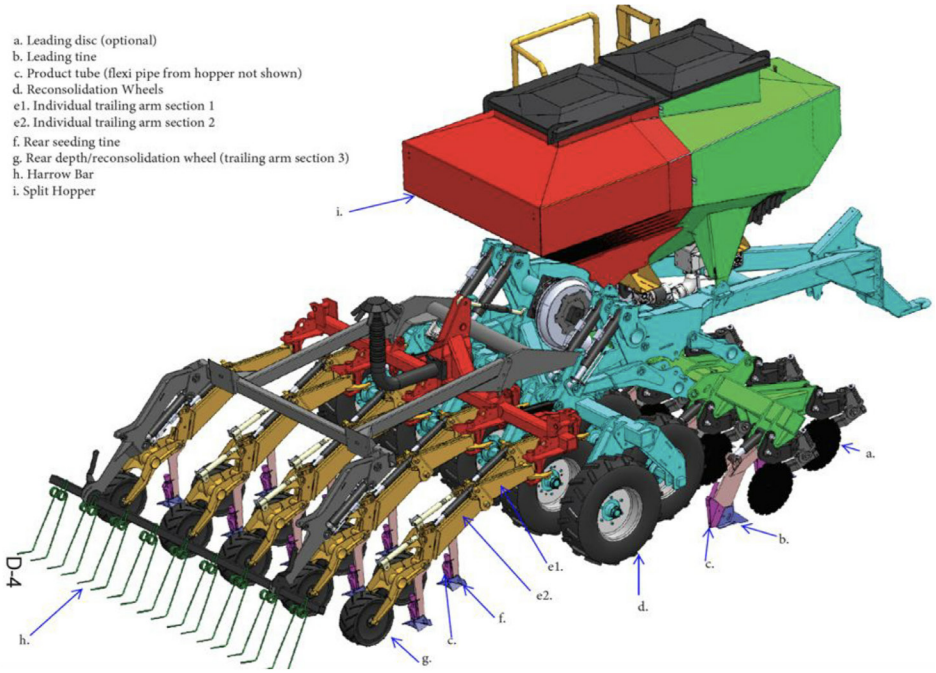


Image sourced from [2021] EWHC 1007 (IPEC): dycip.com/claydon-mzuri

like the locked box in Manitowoc; there is a deliberate censoring of information that is otherwise in the public sphere.

Claydon Yield-O-Meter: tractor-drawn seed-drill

The notion of active censorship during prototyping or trials was itself recently tested within an agricultural context, in the case of Claydon Yield-O-Meter v Mzuri Ltd, [2021] EWHC 1007 (IPEC).

Mr Claydon's invention was a tractor-drawn seed-drill that minimised the disturbance of soil between sown rows of a crop, based on an exact alignment of cultivating tines in front of seeding tines. As with the cases already discussed, testing was carried out before filing a patent application, and in subsequent court action a potential infringer questioned whether the idea had been disclosed to the public.

Mr Claydon had previously "learned the hard way" that public prior disclosure of his invention would affect his ability to patent it, and so intended to prevent anyone who happened to be on a nearby public footpath from seeing any relevant details of the prototype, by using his vantage point in the tractor cab to move away before they got close.

As it turned out, there was never any member of the public present. However, the judge also noted that manoeuvring the tractor to prevent the public from seeing the prototype seed drill would have been much more difficult in practice than hiding a prototype garden hose in the circumstances of Emson. Separately, whilst not specifically discussed, it would also not be clear that a tractor turning in a field was imparting an air of confidentiality on a passerby. A skilled person would have had enough time to see that there were two tines, with the second set supplied by seed delivery tubes. Whilst it may have been harder to see or deduce exact alignment, they could have deduced that the tines must be aligned to the extent that the drill left in its wake strips of undisturbed soil between strips of disturbed soil. Notably the patent only claimed that "each of the tines in the second row is aligned with one of the tines in the first row whereby in use soil will only be disturbed in spaced apart linear regions". Accordingly, the judge decided that: "Mr Claydon had to test his prototype, nobody saw any of the testing and I entirely understand why he believed that his invention was not publicly disclosed. Unfortunately for him, in law the prototype was made available to the public".

Timing is everything

These four cases make clear that best practice is therefore to file a patent application before there is any risk of public disclosure. Actual witnesses are not necessary, and agritech prototypes are less likely to benefit from any of the small exemptions to the general principle of public disclosure discussed above.

If you have any questions about prototyping, disclosure, or patent applications, your D Young & Co advisor will be happy to help.

Author:
Doug Ealey

Related articles

"Agritech innovation: how IP is cultivating the farms of the future", 16June 2025:

dycip.com/agritech-ip-future

"The engine of precision farming: AI and agritech at the EPO", 19 June 2025:

dycip.com/agritech-ip-ai-epo

"Agritech: farm use exemptions to patent infringement in the UK", 25 July 2025:

dycip.com/agritech-infringement-farming

Related event

World Agri-Tech Innovation Summit, 22-23 September 2025. World Agri-Tech is a summit for those invested in advancing nature-positive, resilient agriculture and food systems. Doug Ealey will be attending:

dycip.com/event-world-agritech-2025

Unified Patent Court
Auxiliary claim requests

Case details at a glance
Decision level: Munich Local Division
Parties: President and Fellows of Harvard College
Citation: UPC_CFI_298/2023
Date: 13 January 2025
Decision: dycip.com/upc-cfi-298-2023-jan2025

Decision level: Court of Appeal
Parties: Meril Italy srl v Edwards Lifesciences Corporation
Citation: UPC_CFI_255/2023
Date: 27 February 2024
Decision: dycip.com/upc-cfi-meril-edwards

Amidst the buzz of rapidly developing patentability and infringement case law at the Unified Patent Court (UPC), you could be forgiven for overlooking the formal requirements underpinning its day-to-day operation.

In the first in a series of articles discussing the UPC's burgeoning procedural case law, we will take a look at what is considered a "reasonable" number of auxiliary claim requests.

EPO v UPC

The idea of filing a number of auxiliary claim requests will not be new to those familiar with opposition and appeal proceedings at the European Patent Office (EPO). Usually, the patentee will file a most-preferred main request alongside one or more additional auxiliary requests numbered in order of preference should the main request be rejected.

There is no official set limit on the number of auxiliary requests that can be filed during opposition and appeal proceedings at the EPO. Indeed, in more complex proceedings, the number of auxiliary requests can even reach hundreds.

In a similar vein, Rules 30 and 50 of the Rules of Procedure (RoP) of the UPC permit the proprietor of a European patent subject to a revocation action to lodge an application to amend the claims (and/or specification) of the patent.

> However, unlike at the EPO, Rule 30.1(c) RoP of the UPC states that auxiliary claim requests must be "reasonable in number in the circumstances of the case".

It has been left to the various divisions and courts of the UPC to interpret and apply this (perhaps deliberately) vague language.

How many auxiliary requests is reasonable?

In 10x Genomics & Harvard v Nanostring (UPC_CFI_298/2023), the judge-rapporteur at the Munich Local Division initially held that 10x and Harvard must reduce its 55 auxiliary requests to a single digit number, agreeing with Nanostring that 55 auxiliary requests was excessive.

However, on full panel review, it was held that the reasonable number of auxiliary requests depends on the scope of the counterclaim for revocation and the complexity of the case. The full panel noted that the case under consideration was extremely complex, and concluded that, even though the number of auxiliary requests may be extremely high, this does not necessarily mean that the number is unreasonable. This approach is aligned with that of the Paris Central Division in Edwards v Meril (UPC_CFI_255/2023), where the Paris Central Division held that 84 auxiliary requests was a reasonable number in view of the complexity of the case.

However, such a large number of auxiliary requests has not always been accepted at the UPC. In Kunststoff v Häfele (UPC_CFI_526/2024), the Munich Central Division rejected Häfele's submission of two sets of 40 auxiliary requests, for a total of 80. Häfele had argued that parallel ongoing proceedings for the patent in suit and other patents in the family as well as the possibility of conflicting decisions meant that the high number of auxiliary requests was justified. The Munich Central Division noted that these parallel proceedings were at a much more advanced stage than the UPC proceedings, so Häfele should have been able to narrow to the most relevant auxiliary requests based on the key issues in the other parallel cases.

The Munich Central Division also took issue with the way in which Häfele had presented its auxiliary requests. Although the Munich Central Division noted that there was no requirement in the European Patent Convention (EPC) that the requests are convergent, the manner in which they had been presented made it "unduly difficult" for both the claimant and the court to prepare for the hearing. The court concluded that up to 10 auxiliary requests would likely be considered reasonable under the specific circumstances of the case.

A further case where the UPC considered the meaning of a "reasonable number" of auxiliary requests can be found in NJOY v Juul (UPC_CFI_316/2023). In this case, the Paris Central Division noted that the complexity of the case meant that 12 auxiliary requests would have been considered reasonable. The court also passed another interesting comment, noting that there is no provision to dismiss all auxiliary requests as a whole simply because they are considered too numerous.

What is the impact of parallel EPO proceedings?

It is becoming increasingly clear that the EPO and UPC are keeping a close eye each other's decisions, ostensibly in an effort to ensure harmonisation between the two organisations and to provide legal certainty for parties. Indeed, in two recent decisions, the EPO's Opposition Division and Boards of Appeal have directly referred to UPC decisions (see the recent Opposition Division decision for EP3666797 and the Board of Appeal decision in T 1535/23).

How, then, will parallel EPO proceedings influence the auxiliary requests allowed in cases at the UPC?

In the 10x Genomics & Harvard v Nanostring case discussed above (UPC_CFI_298/2023), the Munich Local Division passed an interesting comment regarding the impact of parallel EPO proceedings. Acknowledging that the reasonable number of auxiliary requests could not be determined until opposition proceedings had concluded, the Munich Local Division noted that auxiliary requests which are subject to the parallel proceedings before the EPO at the time of the decision of the Opposition Division will be allowed also within the present proceedings. This could be taken as an indication that parties will be allowed to present their complete

Case details at a glance

Decision level: Munich Central Division
Parties: Kunststoff KG Nehl & Co v Häfele SE & Co KG
Citation: UPC_CFI_526/2024
Date: 18 April 2025
Decision: dycip.com/upc-cfi-526-2024

Decision level: Paris Central Division
Parties: NJOY Netherlands BV v Juul Labs Inc
Citation: UPC_CFI_316/2023
Date: 17 January 2023
Decision: dycip.com/upc-ord-598564-2023

Decision level: Munich Local Division
Parties: JingAo Solar Co Ltd
Citation: UPC_CFI_425/24
Date: 31 March 2025
Decision: dycip.com/upc-cfi-425-2024

Decision level: Paris Central Division
Parties: NJOY Netherlands BV v VMR Products LLC
Citation: UPC_CFI_310/2023
Date: 22 January 2025
Decision: dycip.com/upc-cfi-310-2023

case from opposition proceedings at the UPC, but the Munich Local Division did not develop its point further.

However, it is important to note that the auxiliary requests under consideration in the parallel proceedings before the EPO could be considered to form part of the patentee's original case. Therefore, the auxiliary requests effectively represented a reduction in the number of auxiliary requests under consideration before the UPC.

Unfortunately, we will not get further clarity in this line of cases, since the 10x and Harvard v Nanostring dispute appears to have come to an end with a settlement between 10x and Bruker, who acquired Nanostring in May 2024.

In another positive decision for patentees, the Munich Local Division in JingAo v Chint (UPC_CFI_425/24) allowed the patentee to introduce into UPC infringement proceedings auxiliary requests that had been upheld by the Opposition Division. In its decision, the Munich Local Division emphasised that the UPC must aim to "synchronise" its proceedings with those of the EPO in line with Rule 295(a) RoP, and this could only be achieved "if it is possible to introduce claim versions amended by the EPO into proceedings before the UPC".

However, not all divisions of the UPC have been so accommodating when it comes to introducing auxiliary requests from parallel EPO proceedings. For example, in NJOY v VMR (UPC_CFI_310/2023), the patentee had initially chosen to pursue different defence strategies in the parallel proceedings, and later attempted to introduce auxiliary requests that had been presented in parallel EPO proceedings. The Paris Central Division highlighted that the patentee had not indicated from the outset of proceedings that it intended to coordinate its defence strategy at the EPO and UPC, and therefore did not allow the patentee to introduce into UPC proceedings auxiliary requests which were on file in parallel EPO proceedings. This decision from the Paris Central Division aligns with the UPC's "front-loaded" procedural system, where there is a requirement that a party present its case comprehensively in its initial submissions.

Conclusions

These cases demonstrate that the UPC's assessment of what constitutes a "reasonable number" of auxiliary requests will largely be taken on a case-by-case basis, with due consideration given to the complexity of each case. However, it is becoming increasingly clear (for both auxiliary requests and the vast majority of other procedural matters) that the UPC will prioritise procedural efficiency and a smooth process wherever possible.

> It does appear, however, that there are things that the patentee can do to improve their chances of being allowed a larger number of auxiliary requests, such as presenting them in a logical and manageable manner and/or mirroring those filed in opposition proceedings.

Indeed, when it comes to ongoing parallel proceedings (or when the patentee reasonably expects parallel proceedings to begin) it would be prudent to indicate the intention to align the case strategy across both forums in the initial submissions before the UPC where this is possible and desirable for the patentee. This may improve the chances of being able to introduce auxiliary requests under consideration in parallel EPO proceedings into ongoing UPC proceedings.

This is in-keeping with the UPC's continued heavy emphasis on the "front-loaded" nature of proceedings, which will become increasingly apparent as this series of articles on UPC procedural matters continues.

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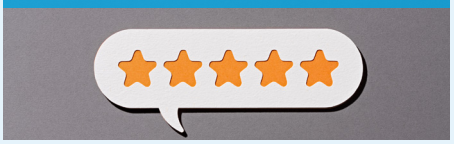
Legal directory top tier results IP STARS, WIPR Patents, and Financial Times rankings

Top tier patent practice rankings 2025



We are grateful for the support from our clients, colleagues and peers for their positive feedback in three recent legal directory surveys.

IP STARS

The D Young & Co patent team has been once again ranked as a top tier UK practice for patent prosecution services in the IP STARS (Managing IP) global survey. We are also delighted to be one of only ten UK patent and trade mark firms ranked in the top tier for our patent prosecution work for 2025, and to have been ranked as a top tier firm for over ten years by Managing IP.

WIPR UK Patents

We are delighted to report that D Young & Co is ranked top tier ("outstanding") in the inaugural "WIPR Rankings: UK Patents 2025" for non-contentious matters, which include patent prosecution (drafting, filing, and managing patent applications) and transactional IP work (advising on licensing, joint ventures, and due diligence related to patent assets).

WIPR UK highlights D Young & Co as one of only 10 UK "outstanding" patent practices, and also highly recommends individual partners Alan Boyd, Garreth Duncan, Tom Pagdin, and Kit Wong. Partners Anthony Albutt and Simon O'Brien are also mentioned as key members of the team, and partners Jonathan Jackson, Arun Roy, David Alcock, Sophie Slater, Charles Harding, Jennifer O'Farrell, and Neil Nachshen are also noted for their patent filings and prosecution work, and EPO opposition and appeals.

Financial Times

D Young & Co also features as a leader in the results of the Financial Times' 2025 survey of Europe's leading patent law firms. We are pleased to have been recognised in the survey every year since it was first published in 2019.

Unified Patent Court
Added subject matter

The European Patent Office (EPO) is renowned for its strict test for added subject matter, but will the Unified Patent Court (UPC) follow in the EPO's footsteps, or carve its own path? We review recent UPC decisions relating to added subject matter, with early signs that the UPC is open to a slightly more relaxed approach.

Will the UPC be more lenient on added subject matter than the EPO's "gold standard"?

The EPO's "gold standard" approach

Added subject matter is governed by Article 123(2) EPC, which states that a European patent application may not be amended such that it contains subject matter extending beyond the disclosure of the application as originally filed.

> The "gold standard" test is applied when dealing with Article 123(2) EPC, in which the EPO asks whether the skilled person is presented with information which is directly and unambiguously derivable from the application as filed when account is taken of matter which is implicit to a person skilled in the art (G 2/10).

In practice, this test often becomes a near literal assessment of the language used in the application as originally filed. Such a rigid approach has seen European patents revoked for as little as a missing comma (T 1127/16 and T 1473/19).

The EPO's approach to intermediate generalisations

The situation is complicated when the claims are amended to include a feature isolated from a particular embodiment, or to omit a feature from a particular embodiment. Thus, one or more features in the claim is only described in the application documents in combination with one or more other features omitted from the claim.

In these scenarios, the EPO explores whether there is a structural and functional relationship between the isolated (or omitted) feature and the other features in the embodiment. The EPO first determines whether or not the feature is inextricably linked to the other features of the embodiment, and then whether the overall disclosure of the application justifies the isolation of the feature and its introduction to (or omission from) the claims (Guidelines for Examination H-V 3.2.1). An amendment failing this test is judged to be an unallowable intermediate generalisation, contravening Article 123(2) EPC.

Abbott v Sibio: landmark cases for added subject matter at the UPC

In Abbott v Sibio (UPC_CFI_131/2024), the UPC's Hague Local Division explicitly applied the EPO's "gold standard" test and denied Abbott a preliminary injunction on the basis that claim 1 of EP3831283 likely contained an unallowable intermediate generalisation.

However, the UPC's Court of Appeal overturned the Hague Local Division's ruling and granted Abbott a preliminary injunction, taking a somewhat more holistic approach to the assessment of added subject matter (UPC_CoA_382/2024).

The decisions of the Hague Local Division and the UPC Court of Appeal hinged on whether the omission from claim 1 of an elastomeric seal in the recess of the base portion of the claimed glucose-monitoring device amounted to an intermediate generalisation. Abbott argued that the elastomeric seal was not an essential feature, evidenced by its absence from some of the drawings in the patent. Sibio argued that the elastomeric seal was consistently disclosed in combination with the recess.

At first instance, the Hague Local Division held that a structural and functional relationship existed between the elastomeric seal and the recess. Therefore, the absence of an elastomeric seal in claim 1 was held to be an unallowable intermediate generalisation.

On appeal, the Court of Appeal characterised the key test as "what the skilled person would derive directly and unambiguously using his common general knowledge and seen

Case details at a glance

Decision level: Hague Local Division
Parties: Umedwings Netherlands BV, Sibio Technology Limited v Abbott Diabetes Care Inc
Citation: UPC_CFI_131/2024
Date: 19 June 2025
Decision: dycip.com/upc-cfi-131-2024

Decision level: Court of Appeal
Parties: Abbott Diabetes Care Inc v Sibio Technology Limited, Umedwings Netherlands BV
Citation: UPC_CoA_382/2024
Date: 14 February 2025
Decision: dycip.com/upc-coa-282-2024

Decision level: Paris Local Division
Parties: Hurom Co Ltd v NUC Electronics Europe GmbH, NUC Electronics Co Ltd, Warmcook
Citation: UPC_CFI_163/2024
Date: 23 May 2025
Decision: dycip.com/upc-cfi-163-2024

Decision level: Düsseldorf Local Division
Parties: Seoul Viosys Co Ltd v expert e-Commerce GmbH, expert klein GmbH
Citation: ORD_598459/2023
Date: 10 October 2024
Decision: dycip.com/upc-ord-598459-2023

Decision level: Paris Central Division
Parties: NJOY Netherlands BV v Juul Labs Inc
Citation: ORD_598482/2023
Date: 5 November 2024
Decision: dycip.com/upc-ord-598482-2024

Decision level: Paris Central Division
Parties: NJOY Netherlands BV v Juul Labs Inc
Citation: ORD_598564/2023
Date: 17 January 2025
Decision: dycip.com/upc-ord-598564-2023

objectively and relative to the date of filing, from the whole of the application as filed, whereby implicitly disclosed subject matter, i.e. matter that is a clear and unambiguous consequence of what is explicitly mentioned, shall also be considered as part of its content". Although the general principles laid out by the UPC Court of Appeal are consistent with the EPO's "gold standard" approach, the UPC Court of Appeal placed an increased emphasis on accounting for implicitly disclosed subject matter.

Applying this standard, the UPC Court of Appeal held that claim 1 did not contain an unallowable intermediate generalisation. Importantly, the Court of Appeal did not find that the two features were separable based upon the content of the application. Instead, the Court of Appeal noted that no guidance was provided in the application regarding the advantages and disadvantages of any particular type of seal. Thus, the Court of Appeal was satisfied that, when looking to the function of the elastomeric sealing, the skilled person "would not consider the use of an elastomeric sealing to be necessary for achieving the overall aim and effect of the invention".

Further application of the Abbott v Sibio approach

The decision in Abbott v Sibio was applied directly by the Paris Local Division in Hurom v NUC (UPC_CFI_163/2024), which concerned Hurom's EP3155936, relating to a juicing machine.

A key argument presented by NUC was that dependent claim 3 as originally filed required a first shaft gear to be "interposed between" the driving shaft and power connector of the claimed juice squeezing module. However, during examination, dependent claim 3 had been amended such that the driving shaft, power connector and first shaft gear are merely "connected to each other". This language was inserted into claim 1 of the main request during UPC proceedings.

There was no verbatim basis for the "connected" language in the application as filed, and NUC argued that it thus extended beyond the content of the application as originally filed. However, the Paris Local Division noted two embodiments in the description; one using the original "interposed" language, and another which required the first shaft gear to be "engaged" with the power connector.

The Paris Local Division considered that the "connected" language of amended claim 1 was an "appropriate concept that covers both embodiments". The Paris Local Division cited a further paragraph in the description which noted that the structure of the brush rotating means (which contained the first shaft gear) could be "freely varied". As such, the Paris Local Division held that the skilled person should not interpret the configuration of the first shaft gear too literally and that the claim did not contain added subject matter.

Conclusions

Over the last two years, several first instance decisions at the UPC have applied the EPO's "gold standard" test for added subject matter (for example, ORD_598459/2023, ORD_598482/2023, ORD_598564/2023 and UPC_CFI_131/2024). This led to the expectation that this test would become standard at the UPC. Indeed, in its first consideration of added matter, the UPC Court of Appeal's approach appears to be broadly consistent with that of the EPO.

> However, the UPC Court of Appeal now appears to be more willing to consider what the skilled person would understand to be implied from the original disclosure as a whole, in particular in view of the overall aim and effect of the invention.

In our view, the Paris Local Divison's decision in NUC v Hurom contrasts with the way in which the EPO likely would have assessed the added subject matter objections. In applying the "gold standard", the EPO Opposition Division and Board of Appeal can often take a harsh stance on amendments not based on verbatim language from the original claims or description.

However, the EPO Board of Appeal appears keen to show that the UPC and EPO are aligned on added subject matter. In T 1535/23 (*see page 12 of this newsletter*), the EPO Board of Appeal concluded that the omission of a feature from claim 1 of the patent in suit amounted to an intermediate generalisation. Interestingly, in its decision, the EPO Board of Appeal addressed the UPC Court of Appeal's approach in Abbot v Sibio directly, noting that the approaches were highly dependent on the facts of the respective cases and therefore were not conflicting.

It remains to be seen how the UPC's emerging approach will be interpreted in other added-subject-matter disputes. For example, will it be easier at the UPC for patentees to justify making selections from separate lists? Furthermore, given the willingness of the UPC Court of Appeal to place claim amendments in the context of the wider description, will there be an increase in the importance of catch-all, "boilerplate" language noting that features from any one embodiment may be combined with features of another embodiment?

The UPC Court of Appeal's emphasis on taking into account the whole content of the application as filed is consistent with the claim interpretation principles established in NanoString v 10x Genomics, where the Court of Appeal held that the description and drawings must always be used. This case continues to loom large over the burgeoning UPC case law, being cited in almost every substantive decision, and serves as a reminder of the influence of the Court of Appeal in setting standard practice at the UPC for interpreting the EPC. Whether the recent Court of Appeal decision on added matter has a similar effect, such that a more lenient approach than the EPO's "gold standard" test becomes the standard at the UPC, remains to be seen.

Authors:
Corey Chapman & Rebecca Price

EPO & UPC interplay
Added subject matter by intermediate generalisation

Case details at a glance
Decision level: Court of Appeal
Parties: Abbott Diabetes Care Inc v Sibio Technology Limited, Umedwings Netherlands BV
Citation: UPC_CoA_382/2024
Date: 14 February 2025
Decision: dycip.com/upc-coa-282-2024

Decision level: Technical Board of Appeal
Parties: Pfizer Inc (proprietor) va STADA Arzneimittel AG, Teva Pharmaceutical Industries Ltd, Galencium Health SLU and Generics (UK) Limited (opponents)
Citation: T 1535/23
Date: 02 June 2025
Decision: dycip.com/epo-appeal-t153523

The interplay between the European Patent Office (EPO) and the Unified Patent Court (UPC) is of great interest to European practitioners. In this article, we therefore examine a recent decision from the EPO Technical Boards of Appeal which explains divergence from an earlier UPC Court of Appeal decision on the topic of added subject matter by intermediate generalisation.

In decision T 1535/23, the EPO Board of Appeal revoked Pfizer's patent (EP3431475) on the grounds of added matter and specifically because of an intermediate generalisation regarding the parent application under Article 76(1) EPC. In reaching its decision, the Technical Board of Appeal acknowledged an earlier decision of the UPC Court of Appeal (Abbott v Sibio, UPC_CoA_382/2024), which had dealt with added matter due to intermediate generalisation. The Technical Board of Appeal highlighted that the UPC Court of Appeal had:

1. used the same test as applied by the EPO as its "gold standard" (G 2/10, OJ EPO 2012, 376), but

2. came to a different conclusion on intermediate generalisation because of the facts underlying the case before it.

This is an interesting development because it highlights how the EPO Boards of Appeal appear to be keeping a watchful eye on the developing case law of the UPC.

Background to T 1535/23

The appeal concerned auxiliary request 5 as maintained following opposition proceedings. Claim 1 of auxiliary request 5 was directed to a method of making a crystalline free base of the compound "palbociclib". The claim specified palbociclib as having: (a) a powder X-ray diffraction pattern comprising specific peaks; and (b) a primary particle size distribution within a specific range.

Claim 1 of auxiliary request 5 was derived from independent claim 19 of the parent application as filed. This claim was also directed to a method of making a crystalline free base of palbociclib, but did not state the above characteristics (a) and (b) of palbociclib. Rather, claim 19 of the parent application specified that the compound had a **specific surface area of ≤ 2 m^2/g**. The absence of the specific surface area from claim 1 of auxiliary request 5 was the central issue considered by the board.

Added matter assessment

When assessing compliance with Article 76(1) EPC, the Technical Board of Appeal acknowledged that there were various passages in the parent application as filed which taught characteristics (a) and (b) of the palbociclib free base in claim 1 of auxiliary request 5.

However, it was found that the parent application did not suggest that the specific surface area could be omitted in the characterisation of the free base form. That is, **the specific surface area was considered an essential feature** of the invention disclosed in the parent application.

In its reasoning, the Technical Board of Appeal explained that the passages relied upon by the patentee referred to embodiments all having this specific surface area, and that claim 1 of auxiliary request 5 included embodiments having a specific surface area larger than 2 m^2/g. Hence, the omission of this feature added subject matter beyond the content of the application as filed.

UPC_CoA_382/2024

The topic of intermediate generalisation was recently considered by the UPC Court of Appeal in Abbott v Sibio (UPC_CoA_382/2024). Decisions on added matter are often fact-specific and so it is notable that the Technical Board of Appeal in T 1535/23 found it necessary to comment on why its conclusion was not in contradiction with the decision of the UPC Court of Appeal (Reasons 1.7 of T 1535/23).

In UPC_CoA_382/2024, independent claim 1 of the patent related to an on-body glucose-monitoring device comprising a sensor assembly and an enclosure with an electronics assembly. The point of dispute was whether the omission of an elastomeric sealing member for sealing the coupling between the sensor assembly and the electronics assembly added subject matter.

The UPC Court of Appeal found that as the original application disclosed a need for sealing **and several methods to achieve sealing**, the skilled person would understand that the specific method of sealing (for example, an elastomeric seal) was not necessary for achieving the overall aim of the invention. Therefore, omission of the elastomeric sealing member did not extend beyond the content of the application as filed.

In reaching its conclusion, the UPC Court of Appeal did not explicitly mention the European Patent Convention (EPC) or any case law of the EPO Boards of Appeal. In T 1535/23, however, the Technical Board of Appeal noted that the UPC Court of Appeal had in fact used "the same test as applied by the EPO as its gold standard (see also G 2/10, OJ EPO 2012, 376)", that is, "what the skilled person would derive directly and unambiguously using his [sic] common general knowledge and seen objectively and relative to the date of filing, from the whole of the application as filed".

The Technical Board of Appeal then justified why it had come to the "opposite conclusion" on omission of a feature. It reasoned that the divergence in outcomes of the two cases was not a result of a difference in legal considerations, but rather a difference only in the facts of the respective cases. As a final remark the Technical Board or Appeal noted: "both the Court of Appeal and the board in this case, **and the EPO in general**, use the same principle in judging whether an amendment extends beyond the content of the application as filed" (emphasis added).

The Technical Board of Appeal's mention of "the EPO in general" suggests a general willingness of the EPO to align with the UPC. This is a welcome approach to parties using the EPO and the UPC for their European patent portfolio.

Authors:
Rachel Bateman & Chris Sharrock

And finally...

Webinars

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European biotech patent case law

Our July 2025 Eureopean biotech patent case law webinar is now available to view at a time convenient to you. In this webinar European Patent Attorneys Matthew Caines and Nathaniel Wand discuss G 1/24 (claim interpretation and relevance of the description), T 0435/20 & T 0326/22 (sufficiency of antibody claims defined by discontinuous epitopes) and T 1390/22 (distinguishing second medical use claims using a disclaimer):
dycip.com/biotech-patent-jul2025

UPC case caw, observations & analysis

In June 2025, D Young & Co UPC representatives Anthony Albutt, Rachel Bateman, Jonathan DeVile and Tom Pagdin asked where we are two years after the launch of the UPC. This webinar, part of our ongoing series of webinars dedicated to analysing the UPC's decisions, also examines subjects such as substantive considerations, added matter & inventive step, procedural matters, long arm jurisdiction, and asks "what's next?":
dycip.com/upc-patent-jun2025

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