

# D YOUNG & CO PATENT NEWSLETTER *no.91*

October 2022

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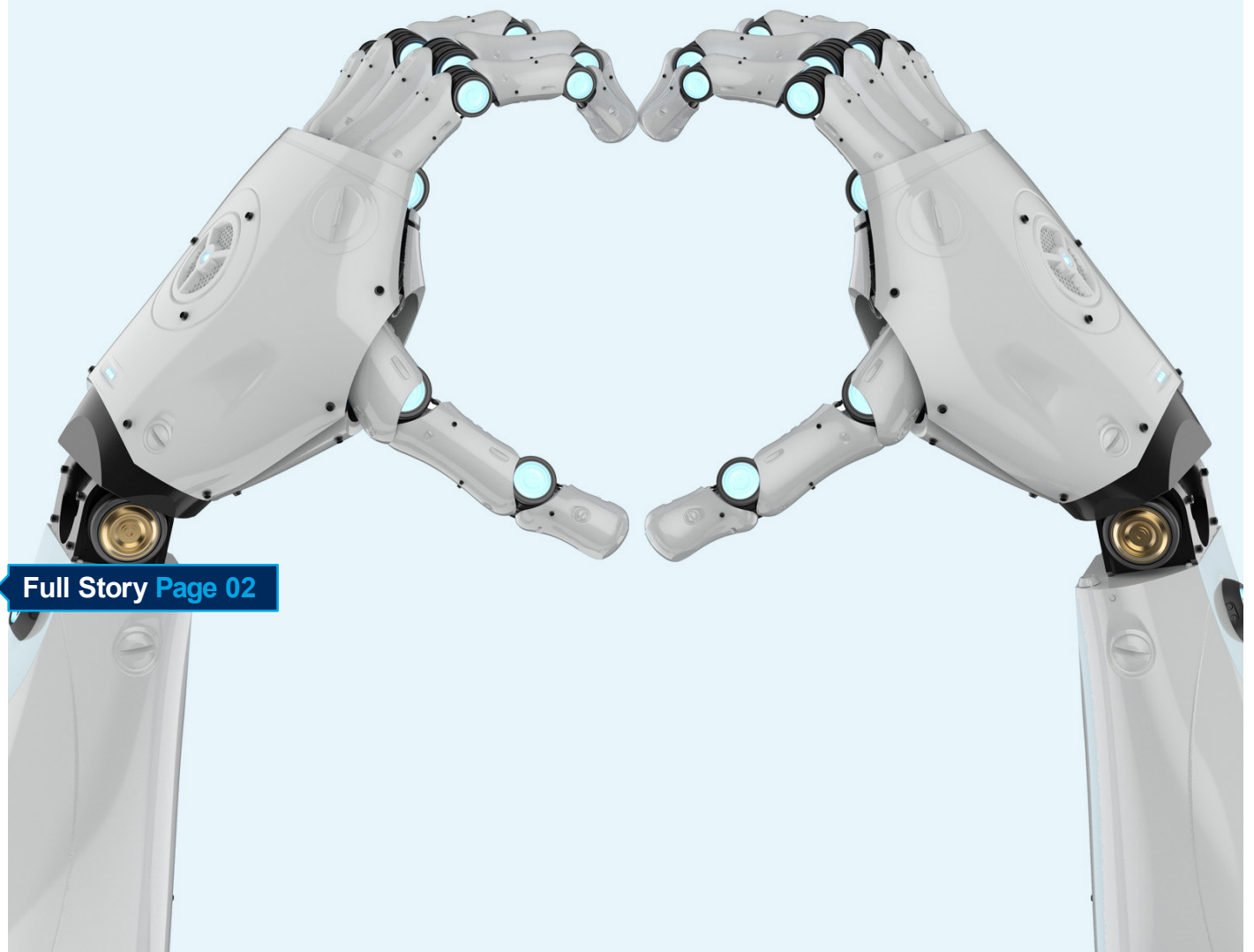
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As we approach the final quarter of 2022 with increasing uncertainty in the world, developments in the patent sphere continue unabated. This newsletter covers a variety of hot topics in the patent world that are likely to keep interested parties busy well into 2023. Developments in the handling of applications directed to AI are covered in two articles reviewing the recent UKIPO consultation and the approach taken by EPO examiners. The lead up to the UP/UPC continues as reported and most recently, the appointment of judges has been announced: <https://dycip.com/upc-judges>. Of significant interest is the preliminary communication of the Enlarged Board of Appeal in advance of the oral proceedings scheduled to take place on 24 November, the ultimate result of which may strongly influence the timing of filings in the pharma and biotech industries. We also report on changes at the EPO influenced by the digital age, from the handling of documents to the scrapping of the "10-day rule". With all these actual and possible changes, your usual D Young & Co advisors will be ready to explain further and provide greater insight as and when new situations arise.

Neil Nachshen, Editor

## Events



### AIPLA Annual Meeting

Washington DC, USA 23-30 October 2022

Catherine Keetch and Alan Boyd will be attending this year's AIPLA meeting.

### Careers Patent Open Afternoon

London, UK 16 November 2022

We are delighted to be holding our Patent Open Afternoon (Biotech, Chem & Pharma) is open to undergraduate and postgraduate students looking to find out more about a career as a patent attorney.

### Patent Easter Internship

Week including 11 April 2023

Applications for our Easter Patent Internship (electronics, engineering, physics and computer science) must be received by Sunday 29 January 2023.

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# UK AI & IP consultation Analysis of the UK Government response

The UK Government has issued its response to a consultation recently conducted into artificial intelligence (AI) and intellectual property (IP).

The consultation explored three areas of patent and copyright law particularly relevant to the commercial exploitation of AI. Here we explore the response in detail, building on our earlier articles (see "related articles" on page 03 for links) summarising the outcomes of the consultation.

### Copyright in computer-generated works

The consultation considered the copyright protection available for computer-generated works (CGWs).

Computer-generated works are works generated by a computer in circumstances such that the works have no human author. Examples of computer-generated works include automated reports and computer-generated artworks. In many examples, computer-generated works may be created with the assistance of, or entirely by, an AI.

The current UK copyright system allows computer-generated works to be protected by copyright. The Copyright, Designs and Patents Act (CDPA) 1988 accords authorship, and thereby first ownership, to the person "by whom the arrangements necessary for the creation of the work are undertaken", and provides a 50 year period of protection.

The consultation sought opinions on whether computer-generated works should continue to be protected by copyright and, if so, for how long. In a previous newsletter article (link below), we explained why our preferred option would be to make no legal change. Despite some respondents arguing against this option, including arguments that protection for computer-generated works risked crowding-out human creators, the UK Government decided to make no legal change for now. The reasoning provided was that the use of AI to create computer-generated works is still an emerging technology and so the impacts of any change would be hard to predict.

AI & IP consultation - focus on copyright for computer-generated works, 29 April 2022: <https://dycip.com/ai-ip-copyright>

Therefore, following the consultation, UK law continues to protect computer-generated works, providing an incentive for the use of AI in creating works.

### Patents

The consultation also considered the inventorship of patents in cases where an invention has been created with the use of an AI.

The UK Patents Act defines an inventor as the "actual deviser" of an invention. In the recent Thaler case (Thaler v Comptroller General of Patents Trade Marks And Designs [2021] EWCA Civ 1374, 21 September 2021), the Court of Appeal agreed that the Patents Act requires an inventor to be a "person", and that AI systems do not qualify as a person. Hence, for now, an AI cannot be considered an inventor on a patent in the UK. However, the Court of Appeal in Thaler did not come to a unanimous agreement on whether this precludes from protection inventions alleged to be invented solely by an AI. The Thaler case will now be heard before the Supreme Court, and therefore further answers should follow.

In the meantime, the present consultation sought views on whether the definition of inventor should be changed, and if so whether it should include AIs and/or include humans responsible for an AI system which creates inventions.

Whilst some respondents, D Young & Co included, argued that the definition of inventor should include humans responsible for the AI, others felt that this might be disingenuous when the invention was devised by an AI. Some argued that the definition of inventor should include AIs, and that doing so would incentivise the development of AI in the UK. However, the UK Government again decided to make no change to the law, preferring the UK to remain harmonised with other countries where AI cannot be named as an inventor.

## ➤ Useful links

*Consultation outcome - Artificial Intelligence and IP: copyright and patents, 28 June 2022:*  
<https://dycip.com/ai-ip-consultation-outcome>

## ➤ Related articles

*Examination of AI inventions at the UKIPO - certainty at last? Page 06 of this newsletter.*

*AI & IP consultation - focus on copyright for computer-generated works, 29 April 2022:* <https://dycip.com/ai-ip-copyright>

*UK AI & IP consultation – new copyright and database exception allowing text and data mining for any purpose, 08 July 2022:*  
<https://dycip.com/ai-ip-tdm>

This will avoid potential difficulties in claiming priority from applications in countries which have different rules regarding AIs as inventors.

In a related development, the UK Intellectual Property Office (UKIPO) has just released their first ever guidance for examiners on how to examine AI inventions, which is discussed in the article [“Examination of AI inventions at the UKIPO - Certainty at last?”](#) on page 06 of this newsletter.

### Text and data mining

The consultation also considered exceptions to copyright for text and data mining (TDM). text and data mining is defined in the CDPA 1988 as a computational analysis of anything recorded in a work. The training of AI systems by feeding them sets of training data will typically fall within this definition of text and data mining.

Carrying out text and data mining, especially for the purposes of training an AI, may involve acts of the type which constitute copyright infringement. These include producing copies of training data, formatting data to be used for training, and storing copies of training data for future validation and analysis of the AI. However, under the exception set out in section 29A CDPA 1988, any copies of a work made for the purposes of text and data mining do not infringe copyright, subject to certain conditions.

A first condition is that the person carrying out text and data mining on a work must have lawful access to the work. A second condition of the current law is that the text and data mining must be for the sole purpose of non-commercial research. This second condition severely limits the scope of the current exception, leaving any commercial applications of text and data mining, such as training a commercial AI, open to the possibility of copyright infringement.

Following the consultation, the UK Government has decided to relax the second condition and extend the copyright exception to text and data mining for any purpose. The UK Government felt that extending the exception, especially to encompass commercial text and

data mining, would encourage investment in AI projects in the UK, relaxing some of the restrictions which might otherwise make the UK a less appealing environment for AI development. The consultation response explained why alternative options were considered less desirable than a complete text and data mining exception, with licensing for text and data mining difficult due to the requirement to identify a large number of licensors in typical sets of training data and opt-outs from the exception presenting similar practical challenges.

Whilst rights holders will no longer be able to charge license fees for the use of works in text and data mining, the requirement for lawful access remains. This requirement provides an avenue by which rights holders may still commercialise works by restricting access behind a fee.

In our response to the consultation, we supported extending the text and data mining exception to allow text and data mining for commercial research and databases. Whilst we felt that the proposed exception allowing text and data mining for any purpose would achieve similar results in encouraging commercialisation of AI, we warned that allowing text and data mining for “any purpose” could invite unintended consequences.

Therefore, the wording of any new legislation to implement the proposed changes is key.

Notably, the new exception should not remove from the persons responsible for the AI any liability for copyright infringement by the results of the AI. The exception should apply only to the use of works for training an AI but not for any downstream uses of that AI. Otherwise, it is foreseeable that methods could be developed to effectively “wash” the copyright from an earlier work. For example, an AI could be trained on a highly restricted dataset, as limited as a single work, and thereby produce outputs that are extremely similar or identical to the works used as training data. For the continued effectiveness of the copyright system, it is desirable that the outputs of AI systems can still be considered infringing copies even

in cases where the training of such an AI falls within the new copyright exception. However, it may not always be easy to determine whether an output of an AI is an infringing copy. For example, developments in AI technology have led to AI programs which can produce artworks of impressive quality, with AI-produced artworks winning art competitions against entries produced by humans. The proposed new exception suggests that it will be allowable to freely train such AIs using the works of human artists. Where such an AI is trained using the artworks of hundreds of artists, and produces an output combining elements of several works, it may be difficult to see how this varies from the way a human artist is inspired by previous artworks.

However, it is interesting to consider whether it would be treated any differently if the AI were trained on the works of a small group of artists, or even the works of a single artist. In each case, the output may not be a strict copy of any work in the training set but may nevertheless be similar in many ways, raising the question of where the cut-off lies between copyright-washing and legitimate use of an AI.

### Conclusion

AI is a rapidly developing technology with many implications for intellectual property. In its response to the consultation, the UK Government has outlined an approach with a strong emphasis on promoting investment in AI in the UK.

By making no change to the law regarding patents and computer-generated works, the law continues to encourage the use of AI in innovation. By introducing a new copyright exception for text and data mining, the UK Government also encourages the development of AI.

The development of the law is ongoing, and the upcoming decision of the Supreme Court in *Thaler*, and the wording of the new copyright exception, may shed more light on the future of AI and IP in the UK.

### Authors:

Henry Davies, Doug Ealey  
and Jennifer O’Farrell



# Unified Patent Court and unitary patent Rules of Procedure, implementation roadmap and new website launch

## UP & UPC information

As preparations for the introduction of a unitary patent (UP) and launch of the Unified Patent Court (UPC) continue our library of UP & UPC updates, guides and webinars can be accessed at [www.dyoung.com/upandupc](http://www.dyoung.com/upandupc).



Readers may find our UPC Opt-Out FAQ of particular interest at this time:

[www.dyoung.com/faq-opt-out](http://www.dyoung.com/faq-opt-out).

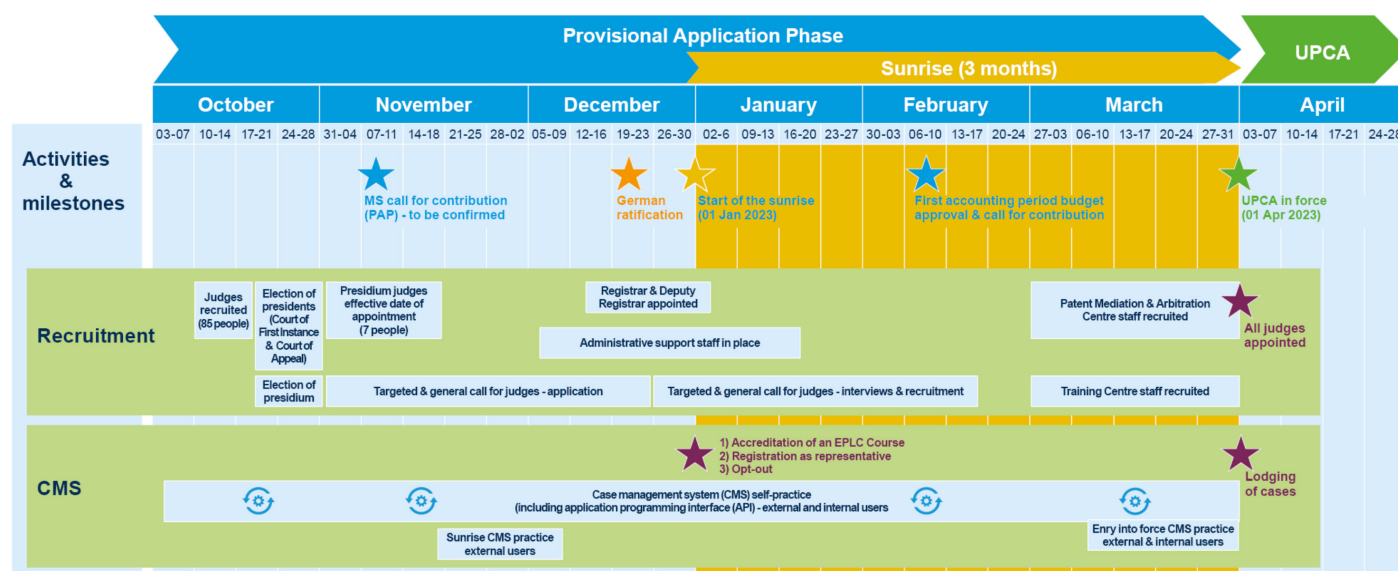
On 06 October 2022, the Unified Patent Court preparatory team shared a UPC implementation roadmap (shown below). According to this roadmap, the start of the sunrise period is currently planned for 01 January 2023, and the start of UPC is planned for 01 April 2023.

The preparatory team also published a notice on 13 October 2022 announcing the planned launch of its remodeled website on 07 November 2022. The revised website promises information about the court locations, Registry and Sub-Registries contact information, legal documents of the court, committees representatives, any

official communication of the court, current and upcoming vacancies at the court, and information on the court's judges. The website link to the new site will remain the same as the current site: [www.unified-patent-court.org](http://www.unified-patent-court.org).

## Author:

Rachel Bateman



## Rules of Procedure of the Unified Patent Court - in force 01 September 2022

Good things take time. The Rules of Procedure of the Unified Patent Court (UPC), supplementing the UPC Agreement (UPCA) and the Statute of the UPC, were adopted by the UPC's Administrative Committee in a meeting on 08 July 2022 with changes to Rules 4, 5, 5A, 262 and 262A.

As will be recalled, Rule 5 relates to lodging of an application to opt-out "classic" European patent applications, European patents and related supplementary protection certificates (SPCs) but not unitary patents (UPs) from the exclusive competence of the new UPC according to Article 83(3) UPCA before an action against any of them can be brought before the UPC as well as subsequent withdrawal of an opt-out. Rule 5A relates to an application to remove an unauthorised application to opt out or unauthorised withdrawal of an opt-out.

## Rules of Procedure of the UPC

The consolidated versions of the Rules of Procedure of the UPC in English, French and German have been made available on the UPC's website: [dycip.com/upc-rules-procedure](http://dycip.com/upc-rules-procedure).

Having entered into force on 01 September 2022, before entry into force of the UPCA itself, the Rules of Procedure of the UPC can be applied during the "sunrise period" during which "classic" European patent applications, European patents and related SPCs may be safely opted-out before the UPC opens its doors, which can, according to the roadmap, be expected to happen on 01 April 2023.

However, applicants, proprietors and holders of European patent applications, European patents and SPCs, respectively, being still sceptical of the new court, are reminded of a unique feature of the UPC:

technically qualified judges appointed on basis of their specific qualifications and experience, ensuring that all fields of technology are covered. This is a first, and expected to make the court agile.

Speaking of the human factor: all judges (all legally qualified judges and technically qualified judges) will be nationals of a contracting member state of the UPC, ensure the highest standards of competence, and have proven experience in the field of patent litigation and good command of at least one of English, French and German, the official languages of the European Patent Office (EPO).

With the "go" for the Unified Patent Court apparently only a few months away, it's time to "get set", now.

## Author:

Hanns-Juergen Grosse





# Digital transformation of the European Patent Office

## Legal changes and new online services

The Covid-19 pandemic has dramatically accelerated moves towards digitalised working practices at the European Patent Office (EPO). Most prominent perhaps, at least to European patent attorneys, has been the adoption of oral proceedings by videoconference.

Read our “Guide to ViCo at the EPO” which includes a brief checklist of actions before proceedings and on the day: [www.dyoung.com/vico-guide](http://www.dyoung.com/vico-guide)

Additionally, the EPO has digitalised its internal workflows, switched to issuing electronic grant certificates (as of 01 April 2022) and work continues to eventually transition to a fully digital patent grant process.

To this end, we understand that the EPO is planning several noteworthy legal changes and new online services to adopt to changes in working practices under the umbrella of “digital transformation”.

### Presentation requirements of documents

The Implementing Regulations governing the presentation of documents and those governing the examination of said requirements reflect the days of paper-based procedures.

To allow more legislative flexibility in the future, the EPO plans to remove certain provisions of the Implementing Regulations relating to the presentation requirements and instead delegate these to the President of the EPO. Changes to the presentation requirements can then simply be effected by decisions issued by the EPO President.

The EPO plans to delete Rule 46 EPC (governing the form of drawings) and to amend Rules 49 and 50 (governing the form of application and subsequently filed documents) to enable the EPO President to determine these requirements. Minor changes to further rules will be made for consistency.

The EPO is in the midst of a major transformation in line with its Strategic Plan 2023



These changes are expected to come into force in November 2022.

We understand that the first decision of the President following the changes is intended to simply re-state the deleted matter from the Implementing Regulations. Thus, while future changes may be implemented more quickly and flexibly, the presently proposed changes are largely foundational and should not lead to any dramatic practical changes for the time being.

Nonetheless, one of the eventual consequences of these changes is that it may become possible to file and publish colour drawings at the EPO. However, we understand that this may have to await the EPO adapting its software systems to allow for end-to-end processing, as well as potential international consultation and alignment.

### Transmittal of search reports

The EPO is required to transmit copies of any document cited in the European

Search Report to the applicant. While the EPO's digital mailbox service is widely used, a huge quantity of paper is still sent through the post each year.

Moreover, non-written prior art such as video clips present additional challenges. To modernise this process, the EPO plans to make citations available for download from a central web-based platform on-demand. To enable this to be implemented, the EPO plans to amend the language of Rule 65 EPC so that cited documents will be “made available” rather than the present requirement for them to be “transmitted”.

This change is also expected to come into force in November 2022.

Author:  
Leon Harrington



# Examination of AI inventions at the UKIPO

## Certainty at last?

In 2021 the UK Intellectual Property Office (UKIPO) invited comments from industry and the legal profession on the relationship between artificial intelligence (AI) and intellectual property. One particular theme that came out of the consultation is that respondents had a great desire for enhanced certainty in what AI inventions were patentable and felt that the current approach taken by UKIPO examiners was not fully consistent. In response, the UKIPO has now, for the first time, produced detailed guidance on how examiners should examine AI inventions.

The guidance is divided into two parts. The first part discusses the legal framework for how examination of AI inventions should be performed, and the second part provides a set of scenarios which provide practical illustrations not only of allowable and non-allowable subject-matter but also provides worked examples of how examiners should step through their reasoning.

The guidance takes as its starting point a definition of AI as being “Technologies with the ability to perform tasks that would otherwise require human intelligence, such as visual perception, speech recognition, and language translation”. The guidance confirms the basic framework that the UKIPO uses in assessing whether computer-implemented inventions should

be considered as excluded subject-matter, namely the Aerotel test. The guidance primarily views compliance or failure of the Aerotel test through the lens of the AT&T signposts. These signposts provide five broad routes by which computer-implemented inventions can satisfy the Aerotel test, and in their current form are most commonly stated as follows:

1. whether the claimed technical effect has a technical effect on a process which is carried on outside the computer
2. whether the claimed technical effect operates at the level of the architecture of the computer; that is to say whether the effect is produced irrespective of the data being processed or the applications being run
3. whether the claimed technical effect results in the computer being made to operate in a new way
4. whether the program makes the computer a better computer in the sense of running more efficiently and effectively as a computer
5. whether the perceived problem is overcome by the claimed invention as opposed to merely being circumvented.

The new guidance does not treat AI monolithically and indeed splits up AI inventions into three different categories. The primary division is between “applied AI” and “core AI” with “applied AI” being further divided into inventions that address problems external to the computer, and those that address problems relating to making the computer itself work better.

### Applied AI: performing processes or solving problems lying outside the computer

As described in the guidance, the first category is entitled “Applied AI: performing processes or solving problems lying outside the computer”. The guidance sets out that the route to grant for these inventions lies in the first and fifth AT&T signposts. In this category, the scenarios list six examples of patentable subject-matter and three examples of non-patentable subject-matter.

On the positive side the scenarios explicitly confirm that the first signpost applies not only to inventions which control a physical entity outside the computer (for example, scenario 5 “Controlling a fuel injector in a combustion engine”) but also several examples where the connection to the real world is on the “input” side (for example, scenario 3: “Analysing and classifying movement from motion sensor data”). This is particularly helpful as examiners sometimes take an overly narrow view of the first signpost as only applying to control of external entities.

On the negative scenario side, the guidance confirms several aspects of long-held practice regarding the non-allowability of controlling a purely business/administrative process (for example, scenario 7:

### The UKIPO consultation raised questions regarding the patentability of AI inventions



#### 🔗 Related articles

*UK AI & IP consultation - analysis of the UK Government response, page 02 of this newsletter.*

*AI (part one): how does AI interact with UK excluded subject matter provisions? 22 April 2021: <https://dycip.com/ai-part1>*

#### 🔗 Useful links

*Examining patent applications relating to artificial intelligence (AI) inventions - the guidance: <https://dycip.com/patent-applications-ukipo-ai>*

*Examining patent applications relating to artificial intelligence (AI) inventions - the scenarios: <https://dycip.com/patent-applications-scenarios-ai>*

### New UKIPO guidance divides AI inventions into “applied AI” and “core AI” categories



“Automated financial instrument trading”) as well as mere classification of computerised data (for example, scenario 9: “Identifying junk e-mail using a trained AI classifier”).

#### Applied AI: making computers work better

The next category is entitled “Applied AI: making computers work better”. The guidance sets out that the route to grant for these inventions lies primarily in the second and fourth signposts. Interestingly, in this category, the guidance did not list any examples of non-patentable subject-matter and listed three positive examples of patentable subject-matter. Helpfully, the scenarios provide us with one example that meets both the second and fourth signpost (scenario 10: “Cache management using a neural network”), one example that only meets the second signpost (scenario 11: “Continuous user authentication”) and one example that only meets the fourth signpost (scenario 12: “Virtual keyboard with predictive text entry”). The guidance also notes that each of these Scenarios would meet the fifth signpost. These three scenarios are extremely helpful as they span the full breadth of how computers can be made to work better, ranging from architecture-level cache handling

to a user-visible keyboard interface.

#### Core AI

The final category “core AI” relates to inventions which do not specify any specific applications for their AI features but instead represent an advance in the field of AI itself.

The guidance sets out that the route to grant for these inventions lies primarily in the third signpost, noting that when the third signpost is met, the fifth signpost would also be met. As a high-level point, the guidance stresses the difficulty of relying on the third signpost noting that “there are few (if any) explicit examples of the positive application of signpost (iii) in decided case law” and accordingly “The IPO acknowledges that this means there is uncertainty about the sorts of effect a computer-implemented invention (or AI invention) must reveal [to meet the signpost]”. Having said that, the guidance provides a stab at what they predict should and should not be allowable providing three example scenarios of patentable subject-matter and three example Scenarios of non-patentable subject-matter.

Looking at the positive examples, it is notable that all three of these include

some aspect of hardware interaction:

- scenario 16 (“Processing a neural network on a heterogeneous computing platform”) discusses adjusting clock speeds to allow heterogeneous elements to complete calculations at the same time;
- scenario 17 (“Special purpose processing unit for machine learning computations”) discusses a system that collates memory address locations for non-zero memory values; and
- scenario 18 (“A multiprocessor topology adapted for machine learning”) discusses the adaptation of a machine learning technique to a non-standard multiprocessor topology.

In contrast, the negatives are much more towards the software end of the spectrum where:

- both scenario 13 (“Optimising a neural network”) and scenario 14 (“Avoiding unnecessary processing using a neural network”) can be considered as reducing the computing resource required to run a neural network; and
- scenario 15 (“Active training of a neural network”) relates to the selection of training data.

As we have seen, while there are some aspects, especially “core AI”, where further certainty would be desirable, the new guidance provides a welcome increase in certainty when prosecuting AI inventions at the UKIPO. We look forward to the new guidance being applied by examiners over the coming months, with the expectation of increased consistency in handling AI inventions. In addition, the new guidance will help us work with applicants to adjust their patent prosecution strategies which should lead to an enhanced grant rate in this area. In the meantime, if you have any questions or concerns regarding this area your D Young & Co representative is here to help.

#### Author:

**Anton Baker**





# EPO Guidelines for Examination Adaptation of the description to the claims

In March 2022 the European Patent Office (EPO) updated its Guidelines for Examination. This included additional detail relating to the requirement of adapting the description in line with amended claims. Of relevance to this is whether the European Patent Convention (EPC) provides legal basis for such a requirement, a topic of many recent decisions of the Boards of Appeal. In this article we summarise the recent developments in this area, as well as the changes to the updated guidelines.

## Legal basis for adapting the description

In T 1989/18, which published in December 2021, the Board of Appeal decided that the EPC did not provide legal basis for requiring that the description be amended in line with allowable claims. However, since then it has become clear that the EPO considers T 1989/18 to be an isolated decision that will not be followed, despite more recent developments in case law.

## T 1024/18 & T 1989/18

From March to May 2022 there were a number of decisions that supported the EPO's view that Article 84 EPC provides legal basis for the requirement to adapt the description. Of particular note was T 1024/18, which explicitly diverged from T 1989/18. T 1024/18 interpreted the need in Article 84 EPC for the claims to be "supported by the description", as the description being consistent with the claims "not only in some part but throughout".

## T 1444/20

However, amongst these more recent decisions is T 1444/20. This decision supported the general principle of T 1989/18: that description amendments are unnecessary if the claims are clear in and of themselves. Although the facts of each case differed slightly, in that T 1444/20 focused on the deletion of claim-like clauses and T 1989/18 related to embodiments in the description being broader than the amended claims. Of particular note is that the legal member of the Boards of Appeal in both decisions was the same.

After recognising that there was a

## Inconsistencies between the claims and description must be removed



need for greater certainty regarding the requirement to adapt the description an expert workshop was held in June 2022. This expert workshop confirmed what the EPO considers to be the established practice: that Article 84 EPC requires that inconsistencies between the claims and the description be removed. This was further justified as being in line with the standard of claim interpretation for national proceedings as per Article 69 EPC. In other words, the EPO considers the support requirement of Article 84 EPC to ensure legal certainty for national post-grant proceedings. The findings of this workshop will be used to refine next year's guidelines.

In summary, it would seem that we might expect the requirement for adapting the description to amended claims to persist.

The conflicting decisions of T 1989/18 and T 1444/20 raise the question of whether a referral to the Enlarged Board of Appeal is imminent, so it will be interesting to see how the case law develops over the coming months and years.

## 2022 Guideline updates

Section F-IV, 4.3, "Inconsistencies", of the 2022 Guidelines for Examination has been updated by the EPO to provide additional guidance and examples as to what examiners are likely to consider an inconsistency between the description and the claims. The updated guidelines should therefore assist applicants when considering amendments to the description.

An inconsistency is now defined as something that could throw doubt on the subject-matter for which protection is sought, thus making the claims unclear or unsupported. For example, parts of the description that give the skilled person the impression that they disclose ways to carry out the invention, but are not encompassed by the wording of the claims, are considered inconsistent with the claims.

According to the updated guidelines an inconsistency arises when, for example, an alternative to a claimed feature is present in the description with a broader or different meaning, or indeed when a



feature in an embodiment in the description is demonstrably incompatible with an independent claim. The description must also be amended to remove terms that refer to a mandatory feature of an independent claim as being optional.

As before, such inconsistent subject-matter must be deleted from the description or marked accordingly. Notably, the latter is now considered an equally valid option, whereas previously the guidelines indicated that this was only acceptable where the embodiment could reasonably be considered useful for highlighting specific aspects of the amended claims.

The updated guidelines also provide helpful examples of what is not considered an inconsistency. For example, an embodiment in the description comprising further features not present in the claims but encompassed by the subject-matter of an independent claim is not considered inconsistent. Further, if an embodiment in the description fails to explicitly mention one or more features of an independent claim, this is not considered inconsistent if the features are implicit or present by reference to another embodiment.

Of note is that for borderline cases, where there is genuine doubt as to whether an embodiment is consistent with the claims (not just a disagreement between applicant and examiner), the benefit of the doubt will be given to the applicant.

Of further note is that before refusing an application, due to an inconsistency between the description and the claims, the examiners must provide at least one example of such an inconsistency. Indeed, if the inconsistency concerns describing a mandatory feature of an independent claim as optional in the description, the examiners should provide an example passage in the description where this inconsistency is present.

The updated guidelines further elaborate on what examiners consider acceptable methods of marking inconsistent subject-matter. Generic disclaimers (for example, statements such as “embodiments not

falling under the scope of the appended claims are to be considered merely as examples suitable for understanding the invention”) that are introduced into the beginning of the description without indicating which parts of the description they specifically refer to are **not allowed**.

Similarly, it is not acceptable to merely replace words such as “embodiment” or “invention” with terms such as “disclosure” or “example”. The EPO considers that, because this wording is not used consistently by the Boards of Appeal, it is not clear whether the subject-matter is excluded or not.

As before, claim-like clauses must be deleted or amended to avoid claim-like language. The updated guidelines provide further explanation on what constitutes a claim-like clause. In brief, claim-like clauses are clauses in the description which, despite not being labelled as a claim, appear as such.

In T 1444/20, the Board of Appeal considered the Examining Division’s decision to refuse an application due to the presence of claim-like clauses in the description. The

Board of Appeal held that even though the claim-like clauses in question were described as “specific embodiments of the invention” they could not be mistaken for claims, since it was clear they were part of the description. Furthermore, there was no reason why having such clauses in the description would affect the clarity of the claims. Thus, T 1444/20 does not appear to align with the present guidelines.

In this regard, the Board of Appeal added that the Guidelines for Examination themselves were inconsistent, in that they acknowledge that claim-like clauses may (and therefore may not) give rise to a lack of clarity, but also require that such claim-like clauses always be removed. It will be interesting to see how the next round of guideline updates may address this point.

In summary, the updated guidelines provide clarification and further examples that should assist applicants when considering amendments to the description.

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**Author:**

**Gemma Seabright & William Smith**

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**For clarity, inconsistent subject-matter should be removed or marked accordingly**



## G2/21

# Enlarged Board of Appeal issues a communication ahead of appeal proceedings

In 2021 we reported on the referral of three questions to the Enlarged Board of Appeal (EBA), in G2/21. These questions related to the question of whether post-published data (data that was not available until after the filing date of a patent application) can be relied upon to demonstrate an inventive step. The Enlarged Board of Appeal has now issued a brief communication (on 13 October 2022) highlighting issues that the board considers to be of potential significance.

The three questions referred to the Enlarged Board of Appeal were:

1. Should an exception to the principle of free evaluation of evidence (see e.g. G 3/97, Reasons 5, and G 1/12, Reasons 31) be accepted, in that post-published evidence must be disregarded on the ground that the proof of the effect rests exclusively on the post-published evidence?
2. If the answer is yes (the post-published evidence must be disregarded if the proof of the effect rests exclusively on this evidence), can the post-published evidence be taken into consideration if, based on the information in the patent application in suit or the common general knowledge, the skilled person at the filing date of the patent application in suit would have considered the effect plausible (ab initio plausibility)?
3. If the answer to the first question is yes (the post-published evidence must be disregarded if the proof of the effect rests exclusively on this evidence), can the post-published evidence be taken into consideration if, based on the information in the patent application in suit or the common general knowledge, the skilled person at the filing date of the patent application in suit would have seen no reason to consider the effect implausible (ab initio implausibility)?

### Admissibility and scope

The Enlarged Board of Appeal noted that the referral appears to be admissible, and also commented on the scope of their



considerations. In particular, while the issue of whether post-published evidence can be considered is arguably relevant to both sufficiency and inventive step, the Enlarged Board of Appeal noted that the referring Board of Appeal had already explicitly acknowledged that the invention was sufficiently disclosed in the patent in question. The Enlarged Board of Appeal, therefore, considered it inappropriate to extend the scope of the referral beyond the issue of using post-published data for demonstrating a technical effect in respect of assessing inventive step.

### Question 1

Question 1 refers to a principle known as the principle of free evaluation of evidence.

According to previous Enlarged Board of Appeal decisions G3/97, G4/97 and G1/12 "(t)he principle of free evaluation [of evidence] would be contradicted by laying down firm rules of evidence defining the extent to which certain types of evidence were, or were not, convincing".

In the present referral question 1 highlights that imposing rules on when post-published evidence can or cannot be considered would appear to go against the principal of free evaluation of evidence. Hence, question 1 asks whether an exception to this principal should be accepted in situations where proof of a technical effect rests solely on post-published evidence.

The Enlarged Board of Appeal commented on this question by stating that: "[d]isregarding such evidence as a matter of principle would deprive the party submitting and relying on such evidence of a basic legal procedural right generally recognised in the contracting states and enshrined in Articles 113(1) and 117(1) EPC."

Hence, from this statement, it appears that the Enlarged Board of Appeal considers that there must be at least some situations in which post-published evidence can be considered when assessing inventive step. However, from the Enlarged Board of Appeal's considerations of questions 2

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The third edition of our book of decisions from the European Patent Office (EPO) Boards of Appeal is available as an ebook download. The selected Board of Appeal decisions have been chosen on the basis of many years of experience in arguing cases before the EPO. In general, they represent some of the most useful and frequently cited decisions used by D Young & Co's patent group during both our defence of and opposition to European patents. In this third edition we have included a number of additional cases and an updated section on the Rules of Procedure of the Boards of Appeal of the European Patent Office. We have also included a new section on oral proceedings being held by video conference (ViCo).

## Contributors

The book was written and co-edited by members of our biotechnology, chemistry and pharmaceuticals patent group - Charles Harding, Antony Latham, Matthew Gallon and Rachel Bateman.



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and 3 (see below), it would appear that the it is leaning towards an answer of "yes" to the first question (that an exception to this principal should, in at least some situations, be granted in respect of using post-published evidence to demonstrate a technical effect).

## Questions 2 and 3

With respect to the specific requirements for when post-published should or should not be relied upon for assessing inventive step the Enlarged Board of Appeal acknowledges that more explicit guidance is required.

In consideration of questions 2 and 3, the Enlarged Board of Appeal suggests that whether or not post-published evidence can be used depends on "whether the skilled person, having the common general knowledge at hand, would have any significant reason to doubt" the purported technical effect, based on the application documents as filed: "It is then on the basis of the application documents and this technical teaching that a purported technical effect relied upon for inventive step is to be assessed as to whether the skilled person, having the common general knowledge in mind, would have significant reason to doubt it."

In particular, the Enlarged Board of Appeal suggests that in absence of such doubts, the use of post-published data to establish whether the technical effect is convincing would seem appropriate: "In the absence of any doubts, the reliance on post-published evidence, such as experimental data, for the purported technical effect would seem to serve as a potential source for a deciding body to conclude whether or not it is convinced of said technical effect when deciding on the inventiveness of the claimed subject-matter."

In contrast, the Enlarged Board of Appeal notes that if the skilled person would have significant reason to doubt the purported technical effect it would appear "questionable" whether it would be appropriate to rely upon post-published data: "However, whether such evidence

could also be successfully relied upon in the event that the skilled person, on the basis of the application as originally filed together with the common general knowledge, had significant doubts in respect of the purported technical effect, appears questionable."

## Conclusion

From this communication, it would appear that the Enlarged Board of Appeal is leaning towards applying the "ab initio implausibility" standard: where post-published evidence can only be disregarded if the skilled person would have significant reason to doubt the purported technical effect based on the application documents as filed.

it would appear that the Enlarged Board of Appeal is leaning towards applying the "ab initio implausibility" standard: where post-published evidence can only be disregarded if the skilled person would have significant reason to doubt the purported technical effect based on the application documents as filed.

However, we will need to wait until after the hearing (scheduled for 24 November 2022) to see the final decision of the Enlarged Board of Appeal (noting that the Enlarged Board of Appeal is not bound by any opinions expressed in the most recent communication).

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## Related article

G 2/21 - questions on the correct plausibility standard referred to the Enlarged Board of Appeal:

<https://dycip.com/g2-21-plausibility>



# Oral proceedings, appeals and divisional applications

## Options for tricky cases at the European Patent Office

We have all experienced tricky cases at the European Patent Office (EPO). Sometimes, it seems the examiner simply cannot be convinced about the patentability of a particular invention. After several rounds of written correspondence, the dreaded “summons to oral proceedings” is therefore received.

It can then be difficult to decide on the best strategy. Should you attend the oral proceedings to plead your case? Would it be better to simply allow the examiner to refuse the application and then file an appeal? Or would filing a divisional application be most appropriate? This article explores some of the options.

### EPO examination procedure

A simplified version of the EPO examination and appeals procedure after an applicant (or appellant) receives the summons to oral proceedings (OPs) is shown in the flow chart. We will discuss the parts of the procedure indicated 1-3.

### 1. Summons to oral proceedings

A summons is issued upon request if the examiner intends to refuse the patent application. This typically happens after one or more written examination reports have been issued (although, in exceptional circumstances, a summons may be issued as the first examination report). The summons schedules the oral proceedings and provides the opportunity to file written submissions (together with one or more claim “requests”) in advance of them taking place. A written explanation of the outstanding objections is provided with the summons. Options in response to the summons include options A, B and C.

### Option A - don't provide written submissions or attend the oral proceedings

Option A may be appropriate if, for example, the examiner's objections seem well founded and the case is of limited commercial importance. Occasionally, option A may also be appropriate if you disagree with the examiner's objections to such an extent that further engagement with the examiner is unlikely to be fruitful (for instance, if the examiner repeatedly refuses to search claims directed to a computer-

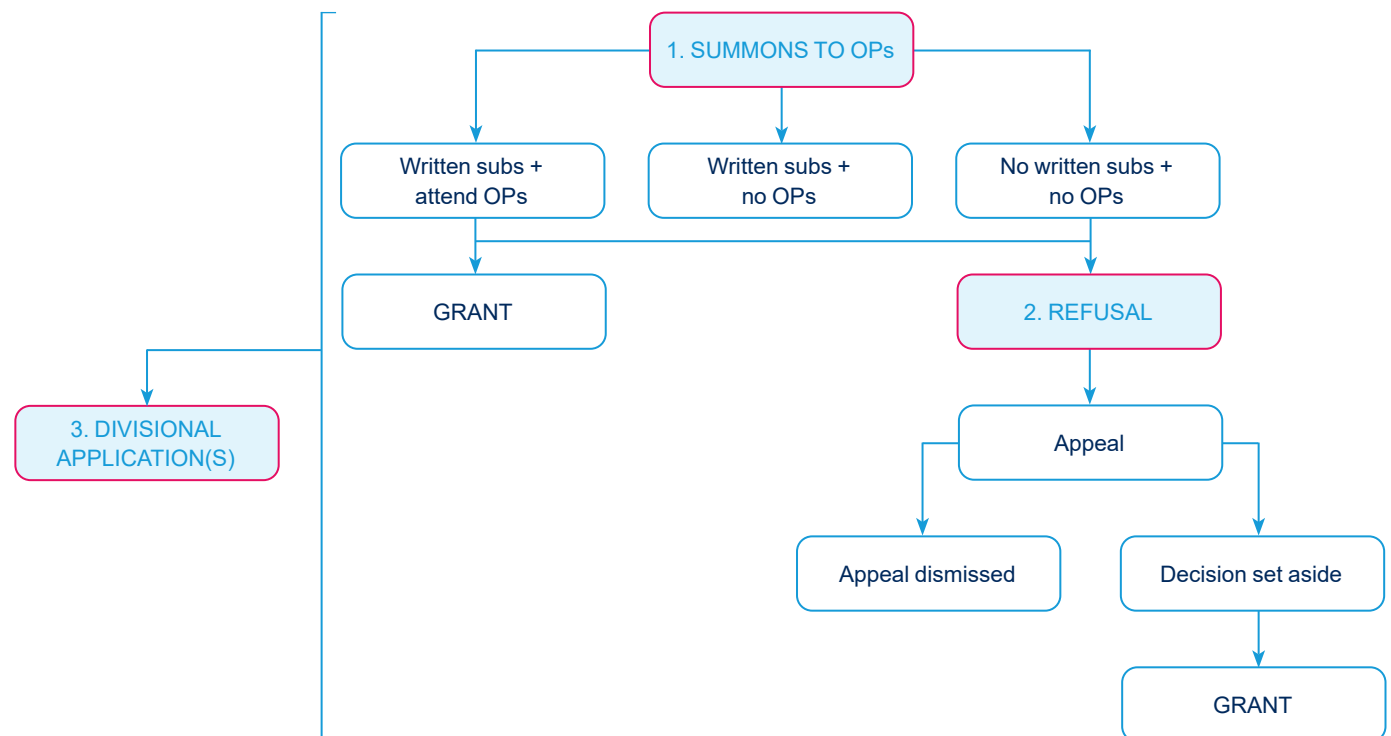
implemented invention due to an alleged “lack of technical effect”). Option A will very likely result in refusal of the application.

### Option B - provide written submissions but don't attend the oral proceedings

Option B may be appropriate if, for example, there are still written arguments and/or amendments you have not put forward which might persuade the examiner but the case is not of sufficient commercial importance to justify the work of attending oral proceedings. If the examiner is convinced by the written submissions, the case will be granted. Otherwise, the case will be refused.

### Option C - provide written submissions and attend the oral proceedings

Option C may be appropriate if, for example, the application is of sufficient commercial importance to justify the work of attending oral proceedings. Even if the examiner's view of the case is negative, filing written submissions (together with all claim “requests” you wish the examiner to consider) in due time and attending the oral proceedings is important because it allows all admissible arguments



(both written and oral) and/or amendments to be discussed at the oral proceedings. This means they should be admissible in an appeal if the case is refused (see below).

Each claim request includes a set of claims which the examiner is asked to consider. Claim requests are usually prioritised (with a “main” request and one or more “auxiliary” requests). It is strongly advisable to file all desired requests with the written submissions in advance of the oral proceedings (whether or not you plan to attend the oral proceedings) to ensure their admittance into the examination proceedings (and therefore being subject of any appeal).

If the examiner believes one of the filed requests overcomes the outstanding objections, they may make contact before the oral proceedings to try to allow the case without holding the oral proceedings.

Many examiners are also happy to, on request, give a further preliminary opinion on the case after the written submissions have been filed but before the oral proceedings in order to allow an informed decision about attendance at the oral proceedings to be made. Thus, if the examiner continues to have a negative view of all requests and the case is of limited commercial importance, you may now decide not to attend the oral proceedings. On the other hand, if the case is of high commercial importance and/or you think the examiner’s objections remain unfounded, the preliminary opinion should indicate the main outstanding issues to help prepare for the oral proceedings.

Filing written submissions and seeing the reaction from the examiner may thus help in deciding between options B and C.

## 2. Refusal

If the examiner can be convinced that the claims are allowable, the application proceeds to grant. Otherwise, the application will be refused. Refusal marks the end of examination proceedings. If an appeal is filed in due time (a notice of appeal being due within two months of notification of the written decision to refuse), the application enters appeal proceedings.

The benefit of an appeal is that the EPO’s Board

of Appeal is completely separate to the EPO’s Examining Division. An appeal therefore allows a completely new set of eyes to review the case.

However, an appeal is not a re-examination of the case. Rather, it is an assessment of whether the Examining Division’s decision to refuse the case was legally correct. An appeal must therefore be based on the requests, facts, objections, arguments and evidence previously put forward during examination. Admission of any new requests, for example, is therefore at the discretion of the Board of Appeal.

The bar for admissibility of new requests is high. Typically, the admissibility of a new request must be justified by the appellant (for example, by demonstrating that a new objection not previously raised during examination has been raised by the Board of Appeal). The new request must also, *prima facie*, overcome any outstanding issues and must not give rise to any new objections.

For commercially important cases, it is therefore generally advisable to file written submissions (together with all claim requests) and attend the oral proceedings before the Examining Division (that is, option C), if budget allows. Doing this ensures that all admissible requests and arguments which might be relied on at appeal are submitted during examination and therefore should be admitted at appeal. For this reason, it is also important to give your patent attorney authorisation to amend the application during the oral proceedings within certain bounds so they can address any new objections the Examining Division may raise.

Appeal proceedings end with either the appeal being dismissed (in which case, the original decision to refuse stands) or the decision to refuse being set aside. If the decision to refuse is set aside and the Board of Appeal concludes the claims are allowable, the application will be allowed. The Board of Appeal will then remit the application (with the allowable claims) back to the Examining Division to continue the granting process.

## 3. Divisional application(s)

In some other jurisdictions, “continuation” applications (or similar) may be used to try

to progress a case repeatedly rejected by an examiner. Unfortunately, trying to use divisional applications at the EPO to similar effect is often not a successful strategy.

This is because a divisional application is likely to be examined by the same examiner as the parent application. If the examiner intends to refuse the parent application, they will therefore also likely look to refuse the divisional application if its claims (which must comply with the EPO’s strict added subject-matter requirements with respect to the parent application as originally filed) contain similar subject matter.

Of course, there are other good reasons for filing a divisional application. For example, a divisional may be required to pursue protection for embodiments removed from the scope of the parent claims to overcome a lack of unity objection. A divisional may also be filed to try to obtain a broader claim scope if the claim scope of the parent is narrowed early during examination to try to obtain a swift grant. It may also be desirable to file a divisional if, for example, examination of the parent case is ending but there is still commercial value in maintaining a pending patent application.

## Key takeaways

For tricky cases at the EPO, it is common to receive a summons to oral proceedings. How to deal with this often depends on the commercial importance of the case. For commercially important cases, filing written submissions (and all claim requests) in advance of the oral proceedings, maintaining contact with the examiner and, if necessary, attending the oral proceedings is usually the best strategy. The case will then either be granted or, at least, should be in a good state for appeal proceedings. Divisional applications are unlikely to be a good alternative to oral proceedings for obtaining allowance of a case. However, there may be other good reasons for filing a divisional application.

For advice on the best strategy for a specific case, please contact your usual D Young & Co advisor.

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# Chinese patent rights

## First CNIPA administrative adjudications on patent infringement

**T**he “China Patent Law 2020” and “Measures for Administrative Adjudication of Major Patent Infringement Disputes” (the measures), both came into force on 01 June 2021. Under this new administrative patent enforcement route the China National Institute of Patent Administration (CNIPA) is empowered to hand down adjudications on patent infringement disputes.

At a first glance it appears that the new legislative provisions will reform the bifurcated system for handling validity and infringement disputes in China into a single patent dispute forum at the CNIPA. In this article we will look into CNIPA's first batch of patent infringement adjudications recently issued in July 2022, and discuss the practical implications on enforcement of patent rights in China.

### Changes to administrative enforcement introduced by the amended China Patent Law

The administrative route of IPR enforcement has a long history in China, and the system has achieved considerable success in combating trademark, copyright, design and patent counterfeiting. However, it proved to be difficult for the local administrative authorities, such as provincial IP offices, to handle patent infringement disputes due to relatively restricted power of investigation under the previous versions of China Patent Law.

The amended Article 69 of the Patent Law provides the administrative authorities with the power of inquiry and investigation, on-site inspection, and product inspection in the procedures of dealing patent infringement disputes. In addition, the newly-added Article 70(1) explicitly provides that the patent administrative department of the

State Council (the CNIPA) may handle patent infringement disputes that have a significant nationwide effect, at the request of the patentee or interested party. The CNIPA also has in place the new administrative regulations “Measures for Administrative Adjudication of Major Patent Infringement Disputes”, to establish the implementing rules for the new centralised forum as a more convenient and efficient administrative protection relief option for patentees.

### Factual background of the disputes and CNIPA's rulings

The CNIPA decisions were issued in response to two requests for administrative adjudication, filed by Boehringer Ingelheim (Boehringer) against two generic drug manufacturers, Guangdong HEC Pharmaceutical Co Ltd. and Yichang HEC Changjiang Pharmaceutical Co Ltd (HEC companies), concerning the same patent No. ZL201510299950.3 (the disputed patent) related to diabetes drug Linagliptin. The alleged infringing acts involved making, using, selling, and offering to sell the generic version of Linagliptin.

The CNIPA held that the adjudication proceeding would not be stayed, since the parallel litigation before the Shanghai IP Court was not the same disputed patent. The CNIPA also considered that Article 75(5) of the Patent Law only exempts acts from patent infringement which are required by obtaining administrative approval for drug marketing. After investigating the case and conducting cross-examination of the evidences, the CNIPA concluded that patent infringement was established and awarded remedies similar to injunctions, which stop the HEC companies from further manufacturing, selling, or offering to sell the generic drug. The adjudication also specifically ordered the HEC companies to remove the generic drug from the official platforms for medicine supply.

### Practical implication of the administrative cases

The two administrative cases were concluded within the time limit specified by the measures, that is, four months after the stay of proceeding was lifted. They are regarded as model cases for demonstrating the CNIPA's capability of handling patent disputes efficiently, not just on technical comparison for deciding patent infringement, but also legal issues such as activities exempted from patent infringement. The cases therefore exemplify that the new CNIPA adjudication route is a feasible option for patentees to enforce their lawful right and stop infringement in a timely fashion.

The CNIPA did not rule on validity of the disputed patent so there is no fundamental change to the long existing bifurcated system for infringement and validity dispute resolution in China. As CNIPA and IP courts have already been conducting joint trials to handle validity and infringement disputes for the same patent, the CNIPA in future may consider consolidating the new adjudication proceedings with its invalidation proceedings to further enhance the efficiency of administrative patent enforcement, such as avoiding delay caused by stay of proceedings.

### Corresponding UKIPO procedures

Compared to the UK practice, the UKIPO procedure for requesting patent infringement opinions and the CNIPA adjudication route look very much alike in many aspects. The opinions issued by the UKIPO under Section 74A of the Patents Act, which may address both infringement and validity questions, are similarly non-binding and relatively quick to obtain – usually within three months. The UKIPO opinions (and submissions filed in the procedure) will also be open to public inspection. Nevertheless, the UKIPO procedure does not grant injunctions based on their findings of infringement. These reasons account for the more passive roles typically played by the UKIPO opinions, such as for negotiation of a settlement or for deciding whether to proceed with full legal court proceedings.

### How do recent CNIPA patent adjudications compare to UK practice?



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# Time to call ten days a day? EPO to scrap “ten day rule” to reflect new digital age

**C**IPA has reported that the European Patent Office (EPO) has approved a proposal to scrap the “ten-day rule” – the regime for determining at what date documents are deemed notified for the purposes of calculating time limits.

This change, set to come into force on 01 November 2023, will do away with the ten-day rule implemented by Rule 126 and Rule 127 EPC which states that by default communications are deemed to have been notified ten days after they are issued. This ten-day period is currently provided to account for potential delays in the postal services and in practice provides an additional ten days to respond to a time limit set in such communications.

However, as part of the EPO's digital transformation and recognising the increased use of electronic communication, the EPO has been considering removing this rule and replacing it with a different safeguard adapted from the PCT.

Having previously announced that this proposal would come into force even earlier and then subsequently shelving the proposal, it appears that the change has now been approved by the Administrative Council.

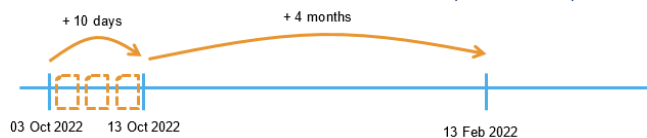
## The ten-day rule

According to the current rules (which will remain in place until 01 November 2023) there is a legal fiction by which notification of a communication from the EPO is deemed to occur ten days after the date of the communication. This regime is in place to account for delays in postal services that were the primary means of these communications being transmitted when the rules were brought in. In the age of electronic communication the ten-day rule largely serves to provide an extra few days to meet certain time limits.

Notably, these additional days occur at the start of the period for responding, and so care should be taken when calculating time limits that these days are not added at the end of the period. It should also be noted that not all time limits before the EPO are set in

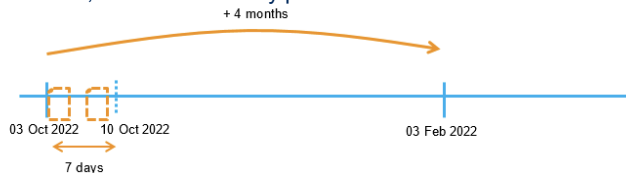
communications in this way, and so for some time limits the ten-day rule does not apply at all.

This principle of the ten-day rule is illustrated in the timeline below. A communication is dated (in this case 03 October 2022) and issued by the EPO. The communication is expected to arrive within ten days of the date it was issued by the EPO (in this example this would be by 13 October 2022). A four-month time period is set to begin ten days after the date of the communication was issued, in this case, from 13 October 2022.



## The proposal

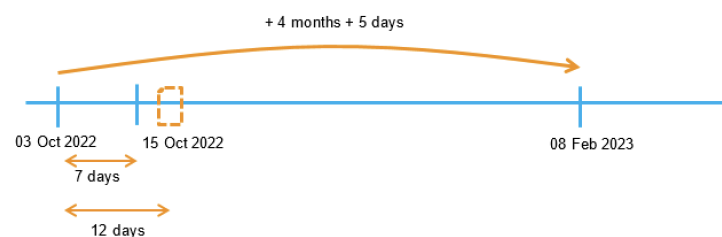
Although full details of the change as it has been approved have not been published, under the EPO's original proposed changes the ten-day rule would be scrapped, with time limits running from the date of the communication. This is shown in the timeline below, where the four-month time period begins on the date that the communication is issued. In this scenario the communication is expected to be received within seven days of issue, but this seven-day period is now included in the four-month time period.



The stated motivation for this change lay in the prevalence of electronic communication and the increased reliability of postal services, rendering these extra days unnecessary for mitigating against delays in documents reaching applicants or their representatives.

To provide a safeguard in case there are delays in the transmission of documents, we understand that the EPO is planning to bring in a safeguard measure similar to that provided under the PCT. Specifically, if the EPO could not show that a particular document reached its addressee within seven days of the date of the document, the period for reply would be extended by the number of days by which the seven days was exceeded.

This is shown in the example timeline below where a communication arriving 12 days after the date of the communication leads to an additional five days being added to the period to reply.



## Conclusion

The removal of the ten-day rule will spell an end to a familiar regime for time limit calculations. While this will take some getting used to in the short-term, this change will lead to a simpler system for calculating time limits where all time

limits can be calculated in the same way. We expect further information about this change to be available in due course.

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