D YOUNG & CO PATENT NEWSLETTER no.112

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In this issue:

Remembering Nicholas Malden

Editorial

In this edition we take a moment to reflect as well as to look ahead. We remember a valued colleague whose contribution to the firm and our people will not be forgotten, and whose legacy continues to shape our work and culture. At the same time we share news of growth in the firm, including the promotion to Senior Associate for Simon Schofield and Khalil Davis and the appointment of new partner David Al-Khalili. These milestones speak to the strength of our team, built on shared commitment, professionalism, and respect for those who have helped us along the way.

Events

IRIS 2026
Leiden, Netherlands, 20-21 April 2026
Andrew Cockerell will be attending the International Radioisotope Supply Chain Meeting.

UK-China Spring Business Forum
London, UK, 30 April 2026
David Al-Khalili, Jonathan DeVile and Kit Wong will be attending the forum.

TCT 3Sixty, Interplas & Med-Tech
Birmingham, UK, 02-02 June 2026
Andrew Cockerell will be attending this leading event for 3D printing and additive manufacturing.

UPC Case Law, Observations & Analysis
Webinar, 17 June 2026
David Al-Khalili, Rachel Bateman and Sophie Slater present our latest analysis of UPC decisions.

BIO International Convention
San Diego, USA, 22-26 June 2026
Antony Latham, Jennifer O'Farrell, Simon O'Brien and Tom Pagdin look forward to meeting with biotech colleagues from around the world.

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Remembering Nicholas Malden

It is with great sadness that we inform you that our dear friend, colleague and partner Nicholas Malden passed away in February. Nick's kindness, humour and intelligence will be sorely missed.

Nick joined D Young & Co in 2005 after a promising academic career in high energy physics research. After qualifying as a UK and European patent attorney in 2009, Nick was made partner in 2011. Although proficient in virtually every aspect of physics, electronics and engineering, Nick had a particular fondness for patents relating to computer architecture, consumer electronics, medical devices, network-related technologies, nuclear power technologies, and cloud-based data and media handling. His commercially-focused and pragmatic advice was much valued by his clients.

Nick was a great influence on many at D Young & Co, having mentored and trained many attorneys including current partners of the firm. For many years Nick served on the International Liaison Committee of the Chartered Institute of Patent Attorneys (CIPA), as well as being a member of the Software Related Inventions Committee of the American Intellectual Property Owners Association (IPO). The relations Nick built via his committee memberships were valuable in bringing business into the firm.

Nick was a true polymath, having wide-ranging interests including not only science, technology and law but also travel, cookery, cycling, climbing, skiing, music, languages, reading, and woodworking. Nick's thirst for knowledge in all areas of human endeavour meant that conversations and trips with him were always a pleasure, and that he had an unerring ability to connect and bond with anyone. He particularly enjoyed surprising colleagues with his wide-ranging and often unexpected wealth of knowledge.

Nick was passionate in making the workplace a pleasant and fun environment for all. He had a dry sense of humour and was known to play occasional good-natured practical jokes on colleagues. His

Remembering Nicholas Malden

office and the surrounding shared work areas were a veritable oasis with Nick tending to a variety of plants and shrubs to brighten up the workspace for all. Nick valued his relationships with colleagues, often forming lasting friendships that extended beyond the workplace.

Nick was diagnosed with Multiple Myeloma and Amyloidosis in 2012. The charitable Amyloidosis Research Fund within the Royal Free Charity provides invaluable support for world leading research, development of new treatments and delivery of key tests that are not available elsewhere. Donations can be made to this important charity via: *www.justgiving.com/page/nickmalden*.

We thank Nick for his huge contribution to the firm over the years, and will greatly miss him both as friend and colleague. Our sincere condolences go to the Malden family. With fond recollection of trips with Nick to the south of France, we raise a Kir Royal in Nick's memory.

Robbie Berryman, on behalf of all at D Young & Co.

Navigating the post-Aerotel landscape

UKIPO's "two-implementation" approach to mixed-type inventions

Related article
Artificial neural networks are programs for a computer: UK Supreme Court revisits boundaries of AI patentability: dycip.com/supreme-court-ai-ANN

The dust is beginning to settle on the landmark 2026 Supreme Court judgment in Emotional Perception AI Ltd, and we are finally seeing how the UK Intellectual Property Office (UKIPO) intends to apply the ruling in practice.

As practitioners will recall, the Supreme Court fundamentally altered the assessment of excluded subject matter in the UK. The court axed steps 2 to 4 of the long-standing Aerotel test, mandating instead that an "intermediate step" be used to filter out features that do not contribute to the technical character of the claim when assessing mixed-type inventions. While the court ruled that an artificial neural network (ANN) does constitute a computer program, it found that Emotional Perception's invention possessed technical character and was not a computer program "as such," thereby clearing the first patentability hurdle.

However, the Supreme Court declined to provide strict guidance on exactly how examiners should implement this new intermediate filtering step during the second hurdle: the assessment of inventive step.

A newly issued examination report on the remitted Emotional Perception application (GB1904713.3), dated 27 March 2026, reveals how the UKIPO is navigating this transitional period. To ensure robustness, the examiner applied two parallel "implementations" of the Supreme Court's intermediate step. It is highly probable that this dual-track examination is merely a temporary safeguard. As office practice settles and new precedent is established, we expect that the UKIPO will eventually drop the belt-and-braces approach, and one of these implementations will emerge to dominate standard practice.

Implementation 1: filtering before prior art comparison

In the first implementation, the examiner applies the intermediate step to filter the claim before making any comparison to the prior art.

The examiner evaluates the invention as a whole to determine which features contribute to its technical character. In this specific case, the examiner determined that several core characteristics lacked technical character:

- The formulation of semantically relevant recommendations.
- The use and internal workings of the ANN.
- The underlying mechanism for training the ANN.

Because these features did not relate to a technical solution for a technical problem, the examiner stripped them out. After filtering, the only remaining features were generic computer hardware elements: a processor capable of hosting models, memory, a communications network, and a user device. When this filtered, generic system was compared to the cited prior art (an Apple patent application), the examiner concluded that any differences were purely non-technical, resulting in a lack of inventive step.

Implementation 2: filtering after identifying differences (the Comvik approach)

In the second implementation, the examiner applies the filter after identifying the differences over the prior art, heavily mirroring the EPO's well-known Comvik approach.

- The examiner first utilises the traditional Pozzoli framework to identify the inventive concept and the differences between the claim and the closest prior art.
- The examiner then applies the intermediate filtering step specifically to those differences.
- Because the differences in this application (the ANN, its training methods, and the semantic similarity identification) were deemed devoid of technical character, they were filtered out.
- Consequently, the claim was found to lack the required inventive step.

Takeaways for applicants

While still not actually taking a position on how, precisely, such cases should be handled, the UKIPO has made its position clear on this particular application: both implementations currently arrive at the exact same destination.

> While the Supreme Court's ruling may have made it easier for AI and software inventions to survive the initial Section 1(2) exclusion hurdle, the battleground has shifted to the assessment of inventive step.

Going forward, it is not enough for an AI system to simply possess an overarching "technical character." Patent applicants must meticulously draft their claims and specifications to demonstrate how the distinguishing features provide (possibly via interaction with other elements) technical character. Without this, applications will falter at the newly fortified inventive step hurdle.

What's next: a return to the courts?

Given the high-profile nature of the Emotional Perception case, and the fact that the examiner could not identify any amendable features in the specification to overcome these rejections, this application is almost certainly heading to a UKIPO hearing officer.

However, the journey is unlikely to end there. Because this case represents the very tip of the spear for interpreting the Supreme Court's new framework, this application may be appealed back through the courts and the judiciary may soon be forced to weigh in once again, this time to explicitly mandate exactly what is the legally correct manner for the UKIPO to apply the intermediate filtering step (that is, to require that technical character is present). Until then, practitioners should prepare their AI applications to withstand a range of possible approaches.

If you have any questions on this subject, or would like assistance with protecting your invention, please contact your usual D Young & Co representative.

Authors:
Anton Baker & Alan Boyd

Ona Patents v Google
UPC places strong emphasis on procedural economy and a "front-loaded" approach

Case details at a glance
Jurisdiction: UPC
Decision Level: Düsseldorf Local Division
Parties: Ona Patents SL v Google Ireland Limited ao
Date: 15 January 2026
Citation: UPC_CFI_100/2024 & UPC_CFI_411/2024
Decision: dycip.com/upc-cfi-100-2024

Related articles
Permissibility of new arguments and facts during proceedings: comparing EPO and UPC practice, 31 October 2025: dycip.com/upc-epo-facts-arguments

The Unified Patent Court (UPC)'s Düsseldorf Local Division has dismissed a direct infringement claim brought by Ona Patents against Google Ireland Ltd and Google Commerce Ltd ("Google" collectively) in respect of the French and German parts of EP2263098 , while also dismissing Google's counterclaim for revocation.

While the decision closely follows the UPC's established case law on infringement and validity, it includes notable commentary on Ona Patent's "confusing and inconsistent" position on proprietorship and entitlement, as well as on its late-filed claim for indirect infringement.

Proprietorship and entitlement

Ona Patent filed a direct infringement claim against Google at the Düsseldorf Local Division in March 2024 in respect of the French and German parts of EP2263098 , with arguments centring on Google's "Find My Device" technology. However, at that time, Ekahau Oy (Ekahau) was registered as sole proprietor of the patent on both national registers. Therefore, Google lodged a counterclaim for revocation against both Ona Patent and Ekahau. Ekahau argued that it had been incorrectly included in the counterclaim and requested that it be removed as counter-defendant.

Google raised concerns surrounding the power of attorney documents filed by the representative of Ona Patent and Ekahau, questioning whether the representative was properly authorised to act for both parties. Google also objected to the completeness and authenticity of the documents filed as evidence of the transfer of ownership from Ekahau to Ona Patent.

The Düsseldorf Local Division shared some of Google's concerns and the judge-rapporteur issued an order for Ona Patent and Ekahau to produce specific documents to clarify the ownership position. These documents were provided shortly thereafter alongside several other "unsolicited" documents.

Ultimately, the Düsseldorf Local Division held that Google had been correct to bring its counterclaim against both parties,

This decision is a reminder of the UPC's "front-loaded" procedural approach

emphasising that, in proceedings concerning validity and/or non-infringement, priority is given to information recorded in the patent registers. Here, the Düsseldorf Local Division confirmed that the claimant need not attempt to verify the true Proprietor beyond the information available on the register.

Despite Google being unsuccessful in its counterclaim for revocation, the Düsseldorf Local Division decided that Ona Patent's "confusing and inconsistent" position on entitlement and proprietorship, alongside the fact that an order from the judge-rapporteur was required before Ona Patent produced certain documents, meant that Ona Patent should share in the costs.

Accordingly, the court ordered Ona Patent to bear 20% of the costs relating to the counterclaim, which would have been expected to be borne by Google in their entirety.

Late filed claim for indirect infringement rejected

After the written procedure had been closed, Ona Patent filed further submissions seeking to introduce a new indirect infringement claim. Initially, the judge-rapporteur rejected this new claim, but Ona Patent requested a review, arguing that all points relevant to indirect infringement had already been discussed.

The Düsseldorf Local Division upheld the initial decision to reject the indirect infringement claim, citing the need for a "front-loaded" procedure and the need to allow the defendant to properly respond to such a claim. The Düsseldorf Local Division also highlighted Ona Patent's lack of justification for the late filing, especially since Google had highlighted in its statement of defence that no indirect infringement claim had been made.

Key conclusions

This decision provides another reminder of the UPC's emphasis on a "front-loaded" procedure in which parties are expected to present all facts, claims, arguments and requests at the earliest possible stage. As noted in an earlier article (see related articles), parties seeking to amend their case after the statement of claim will face significant procedural hurdles.

The decision also takes a dim view of Ona Patent's delay in clarifying its position on proprietorship and entitlement. The Düsseldorf Local Division took particular issue with the fact that an order from the judge-rapporteur was required for Ona Patent to provide the required documents. While the resulting cost allocation was relatively modest, the decision signals that the UPC is prepared to penalise parties that create unnecessary procedural complications, particularly where procedural economy is impeded.

Finally, the decision highlights the crucial importance of ensuring that ownership is properly reflected in the relevant registers before commencing UPC proceedings, as well as ensuring that a clear "paper trail" is in place for both representation and any transfers of ownership.

Author:
Corey Chapman

G 2/21 and the admittance of post-filed data for inventive step

T 1989/19 & T 1847/23 and reliance on common general knowledge

Related webinar now on demand

European biotech patent case law
First broadcast 24 February 2026, this webinar includes an update on G 2/21 and discussion of these factors in more detail:
dycip.com/webinar-feb2026

In G 2/21, the Enlarged Board of Appeal of the European Patent Office (EPO) held that a patent proprietor may rely upon a technical effect for inventive step if the skilled person, having the common general knowledge in mind, would derive said effect as being encompassed by the technical teaching and embodied by the same originally disclosed invention.

To assess whether these requirements are met, the EPO Boards of Appeal have been considering several factors, including:

1. Is a relationship between the claimed subject-matter and the technical effect known?
2. Are there any reasons to doubt the technical effect is achieved by the claimed subject-matter?
3. Is the selected embodiment preferred in any way?

This article focuses on factor 1 and the contrasting outcomes in T 1989/19 and T 1847/23. In each of these decisions, the boards considered whether the problem of stability is a common technical problem in the field of pharmaceutical compositions.

T 1989/19: post-filed data was admitted

In T 1989/19, the claim at issue related to a crystalline micronisate characterised by particle size, specific surface area, specific heat of solution, and water content.

The claimed water content was a distinguishing feature from the closest prior art and the patent proprietor referred to post-filed test reports as evidence that this feature led to improved storage stability. The Technical Board of Appeal had to decide whether this technical effect was "encompassed by the technical teaching and embodied by the same originally disclosed invention", in accordance with G 2/21.

The board held that the application focused on the use of the crystalline micronisates as an inhalation powder and taught that a certain particle size range is required for administration by inhalation. The board further held that it could be inferred from the application that particle size stability is an essential prerequisite for the administration of the crystalline micronisates.

The board stated that it was generally known to the skilled person that particle size stability is of crucial importance for the administration of a medicinal product by inhalation. Several documents were cited to establish that this was common general knowledge and were referred to by the board.

Consequently, the board decided that the technical effect of improved storage stability shown in the post-filed documents did not change the nature of the claimed invention and could be considered for inventive step. Based on the post-filed data, an inventive step was acknowledged.

T 1847/23: post-filed data not admitted

In T 1847/23, the claim at issue related to a pharmaceutical composition comprising maropitant, cyclodextrin, and 7-18 mg/ml benzyl alcohol. The closest prior art differed in that the composition comprised 20 mg/ml benzyl alcohol. The patent proprietor filed a set of post-filed stability tests to demonstrate that this difference was associated with improved storage stability.

On the face of it, the facts appear to be similar to those in T 1989/19. However, in contrast to the earlier decision, **the Technical Board of Appeal held that the preparation and/or storage of a drug composition at low temperatures is neither systematic nor widely practiced**. It was held that there was no indication in the application or prior art that the compositions comprising the active agent maropitant have to be prepared and/or stored under these conditions. On the contrary, in the prior art the injectable maropitant formulation was to be stored at room temperature.

Consequently, the board held that the behaviour of compositions comprising maropitant under low temperatures could not be considered as a common problem and the post-filed stability tests could not be considered. Nonetheless, the claim was deemed inventive because the lower concentration of benzyl alcohol was deemed non-obvious.

Take-home messages

The headnote of G 2/21 explicitly confirmed that common general knowledge should be considered when determining whether post-filed data should be admitted for the purposes of inventive step. However, the decisions in T 1989/19 and T 1847/23 confirm that boards still have significant leeway to establish whether post-filed data does relate to a common technical problem.

The contrasting decisions in T 1989/19 and T 1847/23 indicate that the boards may not consider "storage stability" in general to be a common technical problem in the context of pharmaceutical compositions. The admittance of post-filed data related to improved storage stability is likely to be decided by boards on a case-by-case basis and dependent on, for example, the claimed active agent.

To maximise the likelihood of post-filed data being admitted, patent proprietors should consider filing review articles or textbook extracts to confirm that the data relates to a common technical problem in the context of the claimed active agent. In T 1989/19, the board explicitly referred to several documents to establish what was common general knowledge. Conversely, in T 1847/23 the prior art contradicted the patent proprietor's contention that the data related to a common problem in the context of the claimed active agent.

We will continue to monitor for further developments relating to G 2/21 and the admittance of post-filed data for inventive step and report on these in upcoming European biotech patent case law webinars.

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Nathaniel Wand

Save the date

Our next European biotech patent case law webinar will run on Tuesday 14 July 2026, presented by Simon O'Brien and Tom Pagdin.

Article 3(d) of the SPC regulation
CJEU referral questions meaning of "first authorisation"

Useful links

Referral: dycip.com/ep2934479-referral

EP2934479: dycip.com/epo-register-ep2934479

Related articles

Goodbye Neurim: CJEU decides only the first authorisation will do for an SPC: dycip.com/goodbye-neurim

Santen (C-673/18): CJEU takes a restrictive view on "first authorisation" for new therapeutic applications: dycip.com/santen

Sheep don't follow authorisation: CJEU decides on Neurim SPC application: dycip.com/neurim

The German Federal Patent Court has referred to the Court of Justice of the European Union (CJEU) a question on the interpretation of Article 3(d) of the SPC Regulation, asking whether a marketing authorisation in respect of a veterinary medicinal product can be considered the "first authorisation" to place that product on the market, even if the same active ingredient has previously been authorised as a human medicinal product. The referral reopens the debate on what constitutes a "first authorisation" under Article 3(d).

Background

The referral arises from an appeal to the German Federal Patent Court by Boehringer Ingelheim following the rejection of its application for a supplementary protection certificate (SPC) by the German Patent and Trade Mark Office (DPMA).

SPCs extend the term of patents for medicinal products in Europe which have been granted a marketing authorisation. However, Article 3(d) of the SPC Regulation requires that the authorisation to place the product on the market as a medicinal product is the first authorisation to place the product on the market.

Boehringer Ingelheim sought to obtain an SPC based on its European patent directed to ciclesonide for the treatment of respiratory diseases in horses. In January 2020, the applicant received veterinary medicinal product authorisation for its Aservo® EquiHaler® product. The active ingredient, ciclesonide, had already been approved as a medicinal product for the treatment of asthma in humans under the brand name Alvesco®.

The DPMA refused the application on the basis that Article 3(d) precluded grant of an SPC due to the earlier marketing authorisation for ciclesonide in humans. In its decision, the DPMA followed the reasoning of the CJEU decision, Santen (C-673/18).

Earlier decisions: Santen and Neurim

In Santen, the French patent office (INPI) had refused an SPC application for a ciclosporin eyedrop for the treatment of keratitis due to the existence of an earlier marketing authorisation for an oral solution of ciclosporin for the treatment of *inter alia* transplant rejection. The CJEU considered that Article 3(d) must be interpreted as meaning that a marketing authorisation for a new therapeutic application of an active ingredient cannot be considered the first marketing authorisation if that active ingredient has already been the subject of a marketing authorisation for a different therapeutic application. The decision was considered a departure from the earlier CJEU decision, Neurim (C-130/11).

In Neurim, the UKIPO refused grant of an SPC for melatonin for treating sleep disorders in humans on the basis that there was an earlier marketing authorisation for melatonin for regulating reproduction in sheep. Neurim appealed the decision, arguing that the relevant marketing authorisation to consider when applying Article 3(d) should be a marketing authorisation covered by the basic patent. Following a referral by the UK Court of Appeal, the CJEU considered that the existence of an earlier marketing authorisation obtained for a **veterinary** medicinal product did not preclude the grant of an SPC for a different application of the same product for which a marketing authorisation has also been granted (provided that the application is within the limits of the basic patent).

Key issues

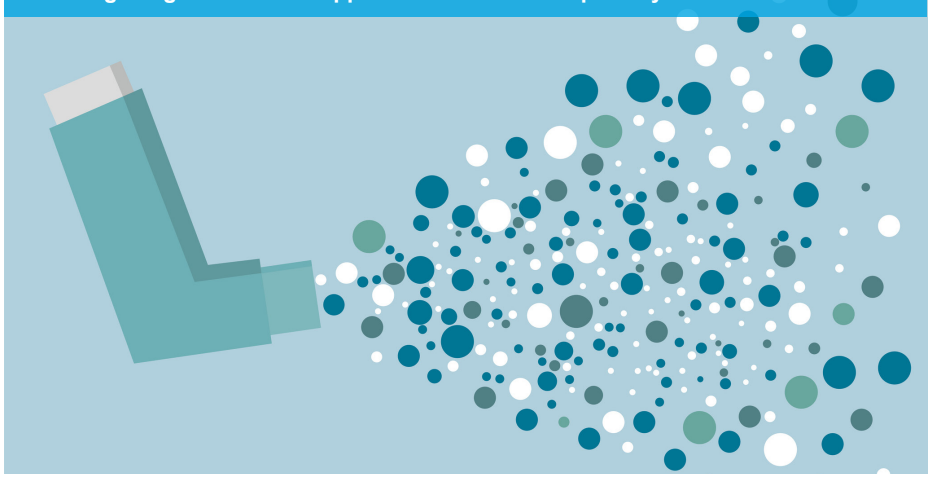
While the Santen decision had generally been regarded as effectively overturning Neurim, the present referral shows that the interpretation of Article 3(d) is not yet settled.

Boehringer Ingelheim argues that the Santen decision does not deviate from Neurim as it only decided that an SPC for a **human** medicinal product cannot be granted based on an authorisation for a new therapeutic use of an active ingredient if that active ingredient has already been authorised for use in humans. Santen did not consider the situation of an earlier **veterinary** authorisation.

Boehringer Ingelheim also highlights that authorisation of medicinal products for veterinary and human use follow different regulatory procedures. Active ingredients used for the first time in veterinary products are classified as "new active substances", requiring new, comprehensive and independent clinical studies, even if the same substance has been approved for use in humans. In contrast, approval of a known human medicinal product for a new indication in humans can make use of data and findings from the earlier approval, thus shortening the authorisation procedure.

The German Federal Patent court was inclined to agree with Boehringer Ingelheim's arguments, nevertheless it considered it necessary to refer the question to the CJEU. We await the CJEU's decision on the matter.

Boehringer Ingelheim's SPC application related to respiratory treatments



Author:
Gemma Seabright

Product-by-process claims at the UPC
Lessons from Düsseldorf

Case details at a glance
Jurisdiction: UPC
Decision level: Düsseldorf Local Division
Parties: Erwin Härtwich, Yellow Sphere Innovations GmbH v Knaus Tabbert AG
Citation: ORD_68984/2024
Date: 10 April 2025
Decision: dycip.com/upc-ord-68984-2024

A decision (ORD_68984/2024) from the Düsseldorf Local Division of the Unified Patent Court (UPC) provides useful guidance on how product-by-process claims are interpreted in litigation. The case concerned alleged infringement of EP3356109 B1, which relates to structural components used in vehicle frames.

The dispute was brought by Yellow Sphere Innovations GmbH and inventor Erwin Härtwich against caravan manufacturer Knaus Tabbert AG.

The claimants alleged that the defendant's caravans, marketed using "Fibre Frame" technology, incorporated structural elements falling within the scope of the patent.

The defendant denied infringement and responded with a counterclaim for revocation of the patent.

The patent

The patent concerns a vehicle frame structure, suitable for caravans or similar vehicles. The invention aims to provide lightweight but structurally robust frame elements.

Claim 1 is directed to a frame for a vehicle with at least one structural part. The claim includes several key features, some of which are defined in terms of a method of manufacture. In particular, the claim requires that:

- the structural part is manufactured as a casting in a casting mold; and
- the mold reproduces the three-dimensional outer shape of the structural part.

This introduces the product-by-process issue: whether the claim is limited to products actually manufactured by that process, or whether it covers products having the resulting characteristics regardless of how they were made.

The court therefore had to address how process language in a product claim should be interpreted when assessing patent infringement.

Product-by-process claims

The court clarified the legal nature of product-by-process claims in a way that aligns closely with established European Patent Office (EPO) practice.

According to the court, such claims are characterised by the fact that the technical contribution of the invention generally lies not in the manufacturing process itself, but in the properties imparted to the resulting product. The process language therefore serves primarily as a means of defining the product.

When assessing infringement, the decisive factor is therefore how the person skilled in the art would understand the information on the manufacturing process and what conclusions they would draw about the structure or characteristics of the resulting product. The focus is on the technical features of the product implied by the process, rather than on whether the process was actually carried out.

This reasoning had a direct impact on the defendant's non-infringement arguments. The defendant attempted to avoid infringement by pointing to differences in its production method, including the use of multiple moulds and additional processing steps. However, under the court's interpretation, such differences are not necessarily decisive.

Instead, the relevant question becomes whether the accused product possesses the structural characteristics that the claimed process would produce. If the person skilled in the art would infer that the product necessarily has those characteristics, the claim may still be infringed even if the exact manufacturing route differs.

The decision therefore confirms that, at least in principle, product-by-process language does not automatically restrict protection to products made by the specified process. Rather, the process wording functions as a tool to define the product's technical features where those features cannot easily be expressed in purely structural terms.

The court also recognised an important qualification to this principle. Where the manufacturing process leads to identifiable properties that can only be achieved through that specific process, the patent may in practice be limited to products that can be manufactured using that process. In the present case, however, the court did not consider this situation to arise and found that infringement had occurred.

Conclusion

Although the case involved a relatively specific technology in the caravan industry, the court's reasoning has wider relevance.

> The decision signals that the UPC is likely to interpret product-by-process claims in a manner broadly consistent with established European patent law principles. In practice, the analysis will focus on the product's technical characteristics as understood by the person skilled in the art, rather than the specific manufacturing method which has been used.

For businesses operating in sectors where manufacturing processes play an important role in defining products (such as advanced materials, chemical engineering, or composite structures) this decision provides important guidance of how such claims may be assessed before the UPC.

Author:
Simon Schofield

Unified Patent Court
Indirect infringement and preliminary injunctions

Two recent cases from the Munich Local Division of the Unified Patent Court (UPC) relate to indirect infringement, leading to the grant of a preliminary injunction. An interesting contrast can be seen in the extent of these injunctions, which varied depending on the case facts.

Background

Article 26(1) of the UPC Agreement defines indirect infringement and states: "A patent shall confer on its proprietor **the right to prevent any third party not having the proprietor's consent from supplying or offering to supply**, within the territory of the Contracting Member States in which that patent has effect, **any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect** therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect." [Emphasis added].

In short, a patent proprietor can prevent a third party from selling means for putting an invention into effect, provided that:

1. The means are **an essential element** of the invention;
2. The proprietor has not **exhausted their rights** by already placing the invention that would be put into effect on the market (see also Article 29 UPCA); and
3. The third party knew or should have known that the means could be used to put the invention into effect.

Hand Held Products Inc v Scandit AG

In ORD_46277/2024, the plaintiff (Hand Held Products Inc) sued the defendant (Scandit AG) for direct and indirect infringement of EP3866051.

EP3866051 claims a device configured to scan decodable indicia (barcodes), which then displays the barcodes alongside images of the products that are associated with those barcodes. The alleged infringing article was a software development kit (SDK) sold by the defendant. According to the plaintiff, this SDK allowed users to make a device as claimed in EP3866051. As evidence, the plaintiff referred to promotional materials associated with the SDK, which the defendant had produced, and which apparently advertised that the SDK could be used to make infringing devices.

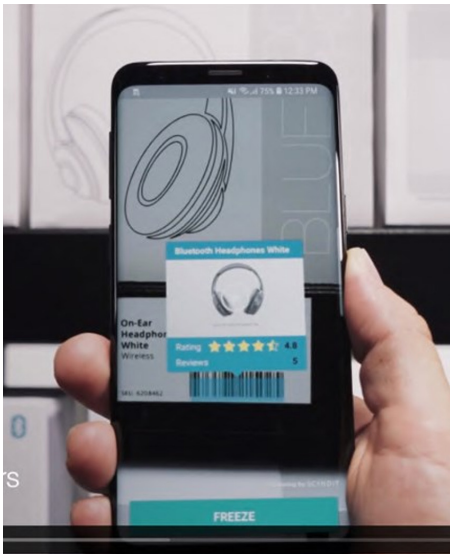


Image source ORD_46277/2024: dycip.com/upc-ord-46277-2024

Direct and indirect infringement

Regarding the allegation of direct infringement, the Munich Local Division considered that: "liability for direct patent infringement can only be assumed in such cases if a specifically outlined completion of the patent-compliant device can be expected with **certainty**" (Headnote 1, emphasis added). It was not considered to be concretely "certain" that the SDK would be used to make an infringing product, and the Munich Local Division therefore ruled that there **was no direct infringement**.

The level of certainty needed to prove direct infringement was similar to providing a kit of parts, with instructions which could **only** lead to the production of an infringing article. In this case, it was found that the SDK merely **could** be used to reproduce an infringing article. Even though this was **likely** to be the case, as illustrated by the defendant's own promotional materials, it was not certain enough to establish direct infringement.

However, the Munich Local Division further ruled that there **was indirect infringement**, because the SDK represented an essential means for reproducing the invention. In this respect, the SDK was considered essential for enabling users to make allegedly infringing devices, even though the users would have to supply their own device hardware and software to do so.

Preliminary injunction

A preliminary injunction was awarded against the defendant. In determining the extent of the prohibition, the Munich Local Division assessed the case-specific factors and interests.

The plaintiff argued that the alleged infringement caused significant damage and loss of market share since the SDK was widely used, and that this could not be compensated monetarily. The defendant argued that the patent was invalid, the plaintiff had unreasonably delayed (around two years) in initiating proceedings, and that a preliminary injunction unduly disrupt its business, especially considering that the SDK also had non-infringing uses.

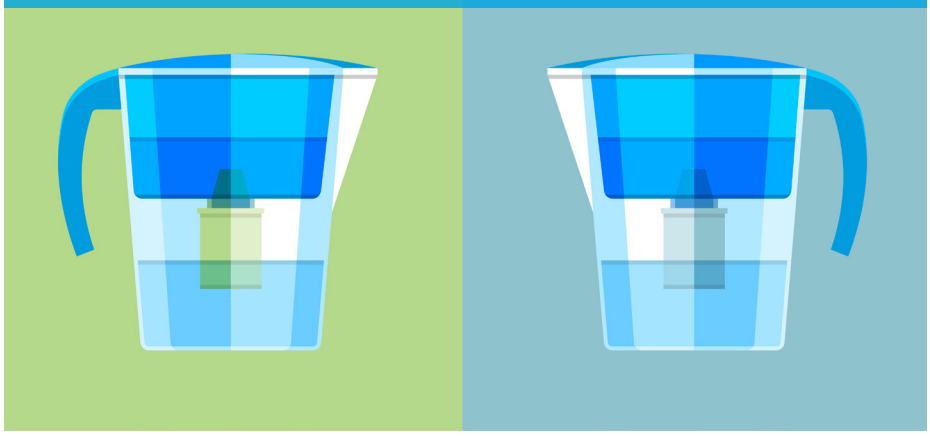
Interestingly, the Munich Local Division limited the defendant to three invalidity attacks in assessing the need for a preliminary injunction (none of which was found convincing). The court also held that the plaintiff bringing proceedings immediately after the patent had granted was not an undue delay.

Ultimately, the court granted a preliminary injunction requiring the defendant to actively remove the cause of infringement from the SDK, rather than merely warning its customers not to use the SDK in an infringing manner. Nevertheless, the injunction only required the **infringing functionalities** to be removed from the SDK, that is, via an update, rather than banning the sale of the SDK outright. The Munich Local Division considered that this balance reflected the possible non-infringing functions of the SDK, whilst avoiding undue disruption to the defendant's business.

Case details at a glance
Jurisdiction: UPC
Decision level: Munich Local Division
Parties: Scandit AG v Hand Held Products Inc
Citation: ORD_46277/2024
Date: 27 August 2024
Decision: dycip.com/upc-ord-46277-2024

Jurisdiction: UPC
Decision level: Munich Local Division
Parties: Brita SE v Aquashield Europe sro, Gasmarine BV Srl, MGR26 Société à responsabilité limitée
Citation: ORD_69429/2024
Date: 22 August 2025
Decision: dycip.com/upc-prd-69428-2024

Brita v Aquashield concerned a valve actuating device for use in a filter jug



Brita SE v Aquashield

In ORD_69429/2024, the plaintiff (Brita SE) sued the defendant (Aquashield) for direct and indirect infringement of EP2387547.

EP2387547 claims a valve actuating device for use in a filter jug, wherein the valve controlling the water outflow remains closed unless a filter cartridge is inserted. The valve actuating device, filter cartridge and jug were individually claimed in EP2387547. However, only the claim to the **filter jug** survived a counterclaim for revocation.

The defendant marketed and sold a filter cartridge, which the plaintiff maintained was an indirect infringement of the remaining claim directed to a filter jug in EP2387547.

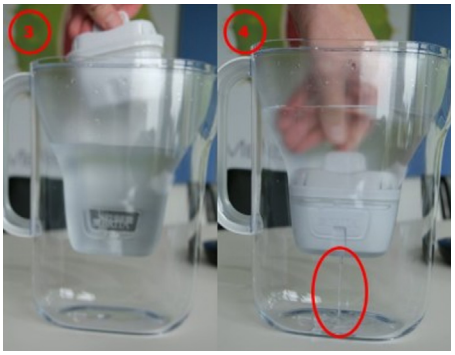


Image source ORD_69429/2024: dycip.com/upc-prd-69428-2024

Indirect infringement

The Munich Local Division considered the filter cartridge to be an **essential means** for making the invention, because the filter cartridge treats water, which is the main purpose of a filter jug. The filter cartridge also comprises the valve actuating device.

The defendant argued that the plaintiff's rights had already been **exhausted**, because the filters were to be used in filter jugs that the plaintiff had already placed on the market.

The Munich Local Division provided some guidance as to when exhaustion of rights may occur: "If the replacement of the part in question is normally to be expected during the lifetime of the product, and if the purchasers therefore may legitimately expect to be able to continue to use or make repeated use of the acquired product by means of the replacement part, this will as a rule be regarded as a permissible use of the patented product placed on the market. The situation is, however, exceptionally different where the technical effects of the invention are reflected precisely in the part that is replaced" (Headnote 8).

However, it was ultimately decided that the original filter jugs placed onto the market by the plaintiff did not fall within the scope of the patent claims. Allegedly infringing articles were **only** made when the defendant's filter cartridges were inserted into the plaintiff's marketed filter jugs.

As such, the court found that there was **no** exhaustion of patent rights due to the sale of the plaintiff's filter jugs, and that there **was** indirect infringement due to the sale of the defendant's filter cartridges for use in those jugs.

Preliminary injunction

The Munich Local Division granted a preliminary injunction, considering that the prohibition had to balance between: "on the one hand, commercial transactions involving the contested object outside the scope of the property right remain unaffected and, on the other hand, the direct infringement of the patent by the purchaser is excluded with sufficient certainty" (Headnote 9).

In this case, a relevant factor was that the alleged indirectly infringing article (the filter cartridge) could also be used **outside** the scope of the patent, that is, in non-infringing filter jugs.

The Munich Local Division ordered the defendant to issue a warning, instructing distributers not to use the defendant's filter cartridges in an infringing way. Given that end users could not be expected to assess infringement, the warning issued to end users extended to any of the plaintiff's relevant branded water jugs.

Key conclusions

- At the UPC, a toolkit (SDK) can indirectly infringe a device claim, even when the end user has to use their own materials and tools (hardware and software) to make an infringing device.
- At the UPC, patent rights may not be exhausted when a product placed on the market by the proprietor does not fall within the scope of the claims; even when that same product is later part of the invention being "put into effect" via an indirect infringement.
- The UPC Munich Local Division takes a flexible approach to preliminary injunctions, altering the extent of the prohibition based on the facts of the case.

Author:
Samuel Smith

How long are the arms of the UPC? UPC Court of Appeal's first referral to the CJEU

Case details at a glance

Fujifilm v Kodak, UPC_CFI_355/2023
Decision (PDF): dycip.com/upc-cfi-355-2023

BSH Hausgeräte v Electrolux, C-339/22
Decision: dycip.com/cjeu-c33922

Alpinestars v Dainese, UPC_CFI_792/2024
Decision (PDF): dycip.com/upc-cfi-792-2024

Hurom v NUC Electronics, UPC_CFI_162/2024
Decision (PDF): dycip.com/upc-cfi-162-2024

HL Display vBlack Sheep Retail Products, UPC_CFI_386/2024
Decision (PDF): dycip.com/upc-cfi-386-2024

The idiom **"the long arm of the law"** refers to the ability of law enforcement to catch you, no matter how far you run, or where you hide. In the case of the UPC, that arm appears to be getting longer and more flexible.

In January 2025, the Düsseldorf Local Division decided it had jurisdiction for infringement actions over the UK designation of an European patent, where the defendant was domiciled in Germany (Fujifilm v Kodak (UPC_CFI_355/2023). Shortly after this, in February 2025, a landmark ruling by the Court of Justice of the European Union (CJEU) in BSH Hausgeräte v Electrolux AB found that, in short, if the defendant has domicile in an EU state, EU courts have jurisdiction on patent infringement cases of foreign patents, and limited jurisdiction on *inter partes* validity defences.

Following the CJEU ruling:

- The Milan Local Division confirmed it had jurisdiction for infringement issues over the Spanish validation of a European patent, where the defendant was domiciled in Italy (UPC_CFI_792/2024).
- The Mannheim Local Division confirmed it had jurisdiction over infringement of a European patent as granted in Poland, Spain, and the UK, when the defendant was domiciled outside of the EU (UPC_CFI_162/2024).
- The Hague Local Division confirmed it had jurisdiction over all countries outside UPC territory where an European patent is valid (namely, Liechtenstein, Ireland, Norway, Poland, Switzerland, and the UK), for a defendant domiciled in the Netherlands (UPC_CFI_386/2024).
- The Paris Local Division confirmed the UPC was competent to hear an infringement action with respect to the Spanish, Swiss, and UK parts of a European patent, for a defendant domiciled in France (UPC_CFI_702/2024).

Following the CJEU ruling, the UPC has confirmed that its jurisdiction to decide on patent infringement cases extends beyond the borders of its 18 member states, and even beyond the borders of the EU, depending on the facts of the case.

Dyson v Dreame International (Hongkong) Limited & others

It is against this backdrop that the UPC has found itself needing to refer, for the first time, to the CJEU. The dispute in Dyson v Dreame International & others (UPC_CoA_789/2025 and UPC_CoA_813/2025) concerns a unitary patent owned by Dyson which covers the technology underpinning the well-known Dyson Airwrap. Of particular importance to the referred questions are the defendants:

- Dreame International (Hongkong) Limited, based in Hong Kong, China; and
- Eurep GmbH, based in Germany, which acts as Dreame's authorised EU representative in order for Dreame to comply with EU product safety regulations.

Dyson sought a preliminary injunction from the UPC, covering the 18 UPC member states, and additionally Spain. The Hamburg Local Division found itself competent in respect of infringement in all UPC territories, and Spain, for all four defendants (including Dreame International (Hongkong) Limited, on the basis of the anchor defendant, Eurep GmbH), and granted a preliminary injunction to Dyson for some, but not all, of Dreame's products; the "Dreame Airstyle" and "Dreame Pocket" (UPC_CFI_387/2025).

An anchor defendant, in law, is a person made defendant to a claim to allow the claims to be brought against a second (or further) defendant over whom a court would otherwise not have jurisdiction.

Both parties appealed.

In its response, the Court of Appeal agreed with the local division that it had jurisdiction to decide on patent infringement cases extending beyond the borders of the UPC member states. Subsequently, the UPC, demonstrating its preference for procedural efficiency, bifurcated the following proceedings.

In the first order of the bifurcated proceedings, directed to infringement in the UPC-member states, the UPC Court of Appeal extended the preliminary injunction to additionally cover all of Dreame's products at issue (the "Dreame Airstyle Pro" and the "Dreame Pocket Neo").

In the second order of the bifurcated proceedings, directed to infringement in Spain, the UPC Court of Appeal stayed the proceedings against Dreame international, to the extent that it relates to Spain, and Eurep GmbH, as these proceedings raise questions concerning the interpretation of EU law, which the Court of Appeal referred to the CJEU. In combination with the above context, the referred questions ask the CJEU how long (and flexible) are our arms?

The four questions summarised

1. If a non-EU based defendant is alleged to have committed infringement of a national part of a European patent which is in force in a non-UPC EU member state, and uses the services of a UPC member state defendant as an intermediary in order to commit said infringement, is such a situation capable of leading to "irreconcilable judgments" resulting from separate proceedings?
2. Does the UPC have jurisdiction to issue EU-wide provisional measures against a non-EU based defendant, if said defendant is alleged to have infringed a European patent in force in a non-UPC EU member state, if said infringement consists of offering the same products in all EU member states through websites that are identical apart from language?
3. Is it relevant to question 2 if the non-EU based defendant company uses the services of a UPC member state company in order to commit said infringement?
4. Does EU law preclude the UPC (or any other common or national court) from issuing a preliminary injunction against an EU member state-based defendant, whose services are used by a non-EU based defendant in order to comply with EU product safety regulations, in order to stop infringement by the non-EU based defendant?

Case details at a glance (continued)
Mul-T-Lock v IMC Creations, UPC_CFI_702/2024
Decision (PDF): dycip.com/upc-cfi-702-2024

Dyson v Dreame International, UPC_CoA_789/2025 & UPC_CoA_813/2025
Decision (PDF): dycip.com/upc-coa-789-2025

Dyson v Dreame International, UPC_CFI_387/2025
Decision: dycip.com/upc-cfi-387-2025-injunction & dycip.com/upc-coa-789-2025-referral

Final thoughts

It is worth noting that the referred questions specifically relate to provisional measures, as opposed to all remedies for infringement available to the UPC. However, absent direct statements to the contrary, it is possible that the CJEU's answers to the above questions may apply equally to all available remedies.

Depending on the answers given by the CJEU to the referred questions, patent owners may find themselves increasingly enamoured by the UPC's pan-European enforcement, whilst defendants may find themselves increasingly wary of the UPC's ever growing reach.

Finally, it is worth noting that Eurep GmbH is merely an authorised representative, which offers compliance services, acts as a formal contact point for consumers and authorities in the EU, and performs administrative tasks related to compliance. Eurep is not a retailer, and did not sell, nor offer to sell, Dreame International's products. If the CJEU confirms such providers can be used as anchors for non-EU domiciled defendants, this could have significant implications on the compliance industry.

Unfortunately, the CJEU does not have the same procedural efficiency as the UPC Court of Appeal. In BSH Hausgeräte v Electrolux referral was made to the CJEU in May 2022, and the CJEU judgment was issued in February 2025. Given such a timeline, we do not expect the CJEU to provide answers to the referred questions until early 2029.

However, we would hope that the CJEU sees the need to act quickly, given that the provisional measures are not extended to the newer Dreame products in Spain or with respect Eurep, despite the Court of Appeal considering there are valid reasons for such provisional measures in UPC member states.

Author:
William Hutton

UPC preliminary measures
No shift in burden of proof when defendant asserts EPO incorrectly construed claims

Preliminary measures, such as injunctions and seizure of goods, covering all of the Unified Patent Court (UPC) participating member states are a powerful tool for patentees.

> In UPC_CFI_723/2025, the court looked at where the burden of proof lies when a defendant to an application for preliminary measures does not agree with the claim interpretation applied during examination.

Overview

The patent central to this request for provisional measures relates to orthodontic and dental treatments using aligners and treatment planning software. The defendants, who are direct competitors of the applicant, offer clear aligner orthodontic treatments systems in Europe.

The defendants argued that the "burden of presentation and proof for facts concerning the lack of validity of a patent lies with the defendant" is based on the presumption that the application was thoroughly examined by the EPO before grant.

The defendants asserted that, in this case, the examination of the patent by the EPO was objectively flawed and failed to meet the standard set by the EPC.

However, the court rejected this line of argumentation stating that the fact the defendants do not agree to the claim interpretation applied in examination does not mean that the burden of proof should shift to the patent proprietor. The court emphasised that the defendants are free to bring forward arguments and evidence as to why the claim should be interpreted differently and why this would lead to invalidity of the patent in suit and, thus, they may also rely on prior art that was already assessed by the examiner.

The court provided a detailed analysis of claim construction and went on to conclude that it was more likely than not that the patent is valid. Based on the general principles concerning preliminary measures, the court considered a preliminary injunction to the appropriate and justified.

An additional point of interest in this order is that the court disregarded arguments concerning non-infringement, which were submitted by the defendant for the first time in the rejoinder, on the ground that they were late-filed.

Practice points

The burden of proof remains with the defendant when asserting that the claim interpretation applied by the EPO during examination is incorrect.

Consequently, defendants should be prepared to provide detailed explanations to support any assertions they make that the claim construction used in examination is not valid.

Additionally, parties should ensure that arguments are filed at the earliest opportunity.

Author:
Stephanie Wroe

Case details at a glance
Jurisdiction: UPC
Decision level: Düsseldorf Local Division
Parties: Align Technology Inc v Angelalign Technoly Inc ao
Date: 12 February 2026
Decision: dycip.com/upc-cfi-723-2025

Related article
UPC preliminary measures: emerging trends, 10 December 2024: dycip.com/upc-preliminary-measures

Protecting your after-market
Part 3: plug and socket inventions

In the first two articles in this series, we discussed strategies for the protection of consumables and spare parts; in this final article, we look at protecting systems where an invention arises from the interaction or interdependence between separate parts, known as "plug and socket" inventions.

Consumables are a specific subset of the plug-and-socket concept, when typically a device and its consumable are designed exclusively with each other in mind to achieve a combined function, whether that is producing a cup of coffee or firing a rivet.

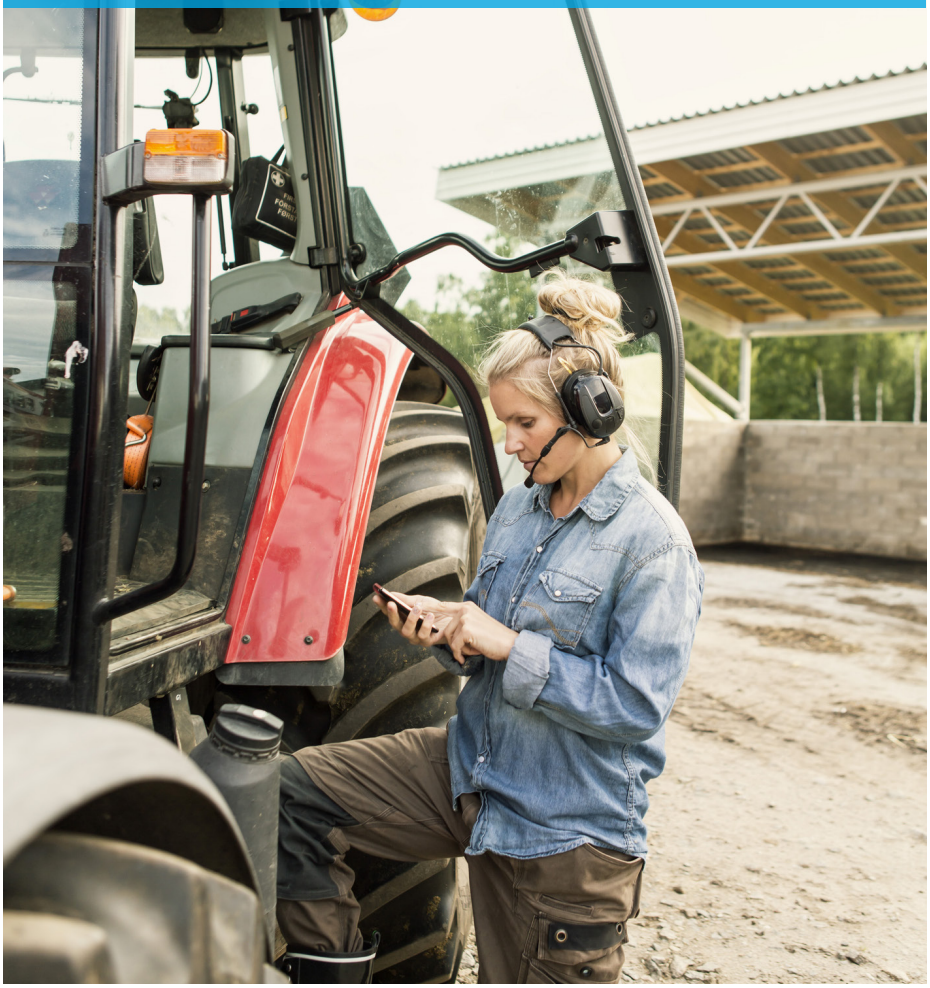
> More often a new device may be interacting with an existing platform as a peripheral, or a new platform may need to interact with an existing ecosystem of peripherals. In this case the limitations of existing interactions or the need for new ones can be an additional source of innovation, but also a barrier to protecting the combined value of the resulting system, particularly when as a result a new invention straddles two or more devices, services, locations, or operating entities.

Leaving to one side the independent protection of the new peripheral, platform or service, we can look first at the issues relating to connectivity.

Plug and socket inventions

There are more than 30 (*see note 1*) standards for interconnectivity just for vehicles, and between vehicles and implements, many of which are applicable to agricultural equipment (*see note 2*). To pick just one, ISO 11783 (ISOBUS) has been a standard for agricultural/ forestry machinery to enable plug-and-play interoperability between tractors and implements since 1991.

There are more than 30 standards for interconnectivity just for vehicles



Clearly, machinery capabilities and data loads have changed over the last 35 years and so has the standard, with the last iteration being published in 2019. Each iteration will have been made to address new problems considered insurmountable by the previous iteration.

Consequently, an invention may relate to achieving new functionality with or through a connector that was defined nearly a decade ago and consequently forces compromise. Alternatively, it may relate to a superset or subset of the connections within the standard, whether logical or physical, electrical or mechanical, that are particularly helpful for certain use cases and are compatible with aspects of the standard even if not - yet - included in it. Hence there are opportunities to explicitly protect how new or enhanced functionality can be accommodated in legacy standards or within legacy constraints.

Clearly also new standards are being developed and updated all the time (*see note 2*), and so there is scope to become involved in such standardisation both to achieve technical goals you consider necessary to your/the market, and also to incorporate your own IP

Notes

1. *See dycip.com/xkcd*
2. *See Wikipedia's ISO standards for trailer connectors for a list of standards for interconnectivity just for vehicles, and between vehicles and implements, many of which are applicable to agricultural equipment: dycip.com/iso-standards-trailer*

Related articles

Protecting your after-market. Part 1, consumables: dycip.com/after-market-consumables

Protecting your after-market. Part 2, repairs: dycip.com/after-market-repairs

into a system that many actors may need to subsequently adopt.

When an invention is incorporated into a formally recognised standard, it normally then forms part of a license pool of IP related to the standard that becomes part of the cost for parties joining the standard, under so-called "FRAND" terms (fair, reasonable, and non-discriminatory). This in turn means that anyone who wishes to use the standard can do so providing they join it. Meanwhile proprietary/exclusive ecosystems typically require having a large enough market to create customer engagement, whether that is your own or through licencing your invention to others to achieve critical mass.

As a separate or complementary approach, rather than looking at the connection itself, one should also look at how the devices or services on either side of the connection interact, particularly when innovation is not neatly split between them, and/or when you only control one side of a wider system.

Transmitter and receiver inventions

Sometimes, the part of the invention that is most protectable may be located primarily in just one of the connected devices or services, and not always in the one that has the most opportunity for revenue. This is often the case for example in transmitter and receiver inventions where the innovation may be primarily at the transmitter, but there are potentially millions of receivers (for example, in the case of phones, TVs, or the like). In the agritech space, an equivalent may be that data acquisition is by a ubiquitous conventional device or a third party platform, but your new innovative process or use of this is provided elsewhere. Conversely, your innovative analysis provide better use of (expensive) conventional systems.

Hence whilst in the ideal world the best way to protect such systems is to split the invention itself into sections that are independently enforceable against a single device or entity, the problem here is that the part of the system that is more valuable (for example, in terms of sales volume or consumable testing kits) may, on its own, appear to have little or no inventive step.

More generally, as you break a complex invention into individual steps implemented by individual devices/services in order to enable direct infringement by one party, the inventiveness of each step alone may become harder to assert. In other words, there can be a trade-off between inventiveness and whether direct infringement of any given part is possible.

One useful strategy for splitting up an invention is to start by identifying your end users/customers, and then progressing along the processing chain to where the invention lies. If it is in the device or service used by the customer, then this is a straightforward patent claim. Meanwhile if it is at one or more remove from the end user, it may be necessary to look at how the inventive contribution can be made to feed back to cover the move valuable market.

There are a number of techniques suitable to particular scenarios, but a typical approach is to claim how a device performs better/differently or is adapted to take advantage of or enable the inventive improvements on the other side of the communication link (whether this link is wireless, electrical, or mechanical), rather than claiming the improvement itself. In other words, it can be useful to pull in the context of the broader invention (in a non-limiting manner) in order to boost the non-obvious nature of the part of the invention found in each device.

This can be done in a variety of ways when drafting a claim, such as using the past tense and passive voice: claiming data or devices that have **had** a process applied or supplied to them often removes the need to include the thing that applies/supplies the process. Similarly, invoking the broader system in which the invention operates, without claiming it in isolation, is possible through use of "suitable for" language in the claim preamble.

Meanwhile, in light of the trade-off mentioned previously, it is generally useful to claim the combined system including the main inventive part, to ty to provide a contributory infringement protection (where infringing part of the system contributes to infringing the whole system) as a back-up plan.

Finally, one can include claims to other parts of the system on the assumption that they may get modified to better exploit the main inventive part; that is, what could be done in future to bring the ecosystem up to speed?

In this way it is possible for an invention that may at first glance appear to be a low value or back-office process to reach through to third-party devices and systems in a wider and more valuable market.

Summary

Using approaches like these can protect your market, particularly when you may be creating demand for user devices you can't easily claim are inventive, or when you have limited control over by who or where some steps of a process you contribute to are carried out.

In agritech in particular where machinery may last for decades, being able to plug into existing systems or provide new services remotely whilst still protecting the most valuable parts of the market may need approaches like the ones mentioned above, or similar techniques tailored to your situation.

As ever, your D Young & Co representative can advise on the best approach in these circumstances.

Author:
Doug Ealey

You can catch up on parts one and two of this series on our website.

Protecting your after-market. Part 1, consumables: *dycip.com/after-market-consumables*

Protecting your after-market. Part 2, repairs: *dycip.com/after-market-repairs*

And finally...

D Young & Co news

Promotions & appointments
01 April 2026

Congratulations to those who have been promoted in our patent and trade mark teams

We are pleased to announce several senior promotions within our patent and trade mark teams.

Chartered and European Patent Attorney David Al-Khalili has been promoted to partner within our electronics, engineering & IT team. David specialises in electronics, telecommunications, mechanical systems, image and signal processing, medical devices and audio/video standards. He has extensive experience drafting and prosecuting patent applications in the UK, Europe and worldwide and represents clients before the EPO and UKIPO in oral proceedings and oppositions. He has a particular focus on contentious matters such as the independent review of standard-essential patents (SEPs).

Also within our patents electronics, engineering & IT team, Simon Schofield has been promoted to Senior Associate, and Henry Davies and Jake Leggat are Associates.

In our patents biotechnology, chemistry & pharmaceuticals team, Khalil Davis is now a Senior Associate, and Joshua Wallington is an Associate.

Kamila Geremek has been appointed Associate in our trade mark team, and Frankie Thomas takes on the role of Trade Mark Assistant.

Congratulations to all on their achievements!

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