
THE INTELLECTUAL PROPERTY REVIEW

FIFTH EDITION

EDITOR
ROBERT L BAECHTOLD

LAW BUSINESS RESEARCH

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THE
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EDITOR'S PREFACE

It is not an overstatement to say that essentially all business is global, and the protection of intellectual property is the lifeblood of all business. The scope and implementation of that protection, however, varies from country to country.

It would be ideal if there was one universal set of laws, rules and procedures. But, while the efforts of many dedicated individuals have accomplished much in harmonising intellectual property protection, we remain defined as much by our differences as by what we have in common. It is therefore incumbent on all of us, as advisers to our clients, to be conversant with the individual practices in each of the economically significant countries.

The goal of this review is to provide that guidance. We have assembled a body of leading practitioners to explain the opportunities for intellectual property protection in their respective jurisdictions, together with the most significant recent developments and any aspects that are unique to their country. The authors of each chapter will provide an overview of the intellectual property rights available and highlight the notable developments in their respective countries. While we have striven to make the book both accurate and comprehensive, we must note that it is necessarily a summary and overview, and we strongly recommend that the reader seek the advice of experienced advisers for application of the principles contained in this review to any specific matter.

This review is a testament to the flux of intellectual property law worldwide. We first published this review in 2011, with chapters from 24 countries. This fifth edition now includes chapters from 30 countries, a clear indication of the truly global reach of intellectual property law and the need to remain current for our clients worldwide. Since the first edition, we have observed the dramatic overhaul of the patent system in the United States with the implementation of the American Invents Act. In Europe, we have seen the near completion of the Unified Patent Court. It is our hope that the reader will find this a useful compilation and often-consulted guide.

Robert L Baechtold

Fitzpatrick, Cella, Harper & Scinto

New York

May 2016

Chapter 28

UNITED KINGDOM

*Gordon Harris, Rebecca Costen, Andrew Maggs and
Ailsa Carter¹*

I FORMS OF INTELLECTUAL PROPERTY PROTECTION

i Patents

A patent may be granted covering the UK for an invention that is new, involves an inventive step, is capable of industrial application, and is not otherwise excluded from patentability. The term of protection is 20 years from the application date, unless a supplementary protection certificate (SPC) is granted (which may extend the term) or renewal fees are not paid (in which case the patent may lapse sooner).

An application for a patent conferring protection in the UK can either be made to the UK Intellectual Property Office (for a GB patent) or to the European Patent Office (for a European Patent designating the UK). Alternatively, either can be designated as part of a Patent Cooperation Treaty (PCT) application.

ii Supplementary protection certificates

An SPC is a form of intellectual property that extends the protection of patented active ingredients present in pharmaceutical or plant protection products.

The term of the SPC is intended to compensate, to some degree, for the period elapsing between the filing of an application for a patent for a new medicinal or plant protection product and the grant of authorisation to place the medicinal product or plant protection product on the market. The duration of protection is the term that elapsed between those dates, reduced by a period of five years, subject to a maximum period of protection of five years.

¹ Gordon Harris is a partner, Rebecca Costen and Andrew Maggs are principal associates and Ailsa Carter is a PSL senior associate at Gowling WLG.

iii Designs

In the UK, designs may be protected by a mixture of UK and Community rights, which vary in their subsistence, scope and duration.

Registered designs – UK and EU

Designs that are new and have individual character can be registered with the UK Intellectual Property Office (UKIPO) (for the UK) or with the European Union Intellectual Property Office (EUIPO, formally named Office for Harmonisation in the Internal Market (OHIM)) (for the EU).

Three-dimensional, two-dimensional and one-off designs can all be protected. However, computer programs, features of an article that have a technical function or that interconnect with other parts of the article and are necessary for the article to perform its function, and designs that are contrary to public policy are not registrable.

Registered designs are monopoly rights (which can be enforced without copying having occurred). The term of protection is 25 years provided that renewal fees are paid.

Unregistered designs

UK unregistered design right (UDR) protects the shape and configuration of the whole or part of an article (external or internal) that is original (i.e., not commonplace), recorded in a design document or the subject of an article made to the design, and created by a qualifying person.

UDR will not subsist in a method or principle of construction, the shape or configuration of an article that 'must fit' another, or the appearance of an article that 'must match' another.

UDR arises automatically. The term of protection is the lesser of: 15 years from first recording in a design document or first making to the design; or 10 years from first making the article available for sale or hire (dates calculated from the end of the relevant calendar year). The owner has exclusive rights to reproduce the design for commercial purposes. During the final five years of the term licences of right are available. If the terms are not agreed, they will be settled by the Comptroller General of Patents, Designs and Trademarks.

EU unregistered Community design right is broadly similar to UK UDR. EU protection lasts for a period of three years from the date on which the relevant design is first made available to the public and pan-European relief is available.

iv Copyright

Copyright may subsist *inter alia* in original literary, dramatic, musical and artistic works, sound recordings, films and broadcasts and typographical arrangements of published editions, provided the work qualifies by its author's nationality or domicile or by the place of first publication of the work. Protection arises automatically when works are recorded in writing or some other form.

Copyright in literary, dramatic, musical or artistic works generally lasts for 70 years from the end of the calendar year in which the author dies. For some literary works, including computer generated works, databases, tables and compilations, and for sound recordings and broadcasts, protection will last for 50 years from the end of the calendar year in which they are created.

Copyright is infringed if the work, or a substantial part of it, is copied, not if another work is created independently.

v **Database rights**

Databases can be protected in two ways; by copyright and by the *sui generis* database right.

Where there has been a substantial investment in obtaining, verifying or presenting the contents of a database the *sui generis* right will arise. Protection lasts for 15 years from the end of the calendar year in which the database was completed.

Where all or a substantial part of the contents of the database are extracted or reutilised without the owner's permission, database rights will be infringed.

vi **Registered trademarks**

A mark or sign may be registered as a trademark if it is capable of distinguishing the goods or services of one undertaking from those of another and of being represented on the register in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of protection. It must also not be devoid of distinctive character or consist exclusively of indicators that may designate the kind, quality, quantity, or other characteristics of the goods or services, although it may be shown that the mark has acquired distinctiveness through use. Registered trademarks can include words, domain names, colours and the shape of goods or their packaging.

A trademark can be registered for the UK (with the UKIPO); or as an EU Trade Mark (EUTM, formerly called a Community Trade Mark, with the EUIPO, for the EU). A trademark will be registered for specified goods and services listed in the classes of the International Classification of Goods and Services.

The proprietor of a trademark has the exclusive right to use the registered mark in connection with the classes of goods or services for which it is registered. The trademark may be enforced in respect of: (1) an identical mark for identical goods or services; and (2) an identical or similar mark for identical or similar goods or services where such use has caused or is likely to cause confusion. Also, if a mark has a reputation, it may be enforced in respect of an identical or similar sign for goods and services where the use causes detriment or leads to unfair advantage.

A trademark may remain registered provided that the renewal fees are paid.

vii **Passing off**

A claimant can bring a claim for passing off where:

- a* there is goodwill attached to his or her goods or services in the UK;
- b* there has been a misrepresentation by the defendant leading or likely to lead the public to believe that the goods or services offered are the goods or services of the claimant; and
- c* the claimant suffers damage as a result.²

Passing off can be used as a way of protecting unregistered trademarks, names, logos or get-up from being misused by others wanting to trade off the claimant's goodwill.

2 *Reckitt & Colman Products v. Borden* [1990] UKHL 12; *Starbucks v. British Sky Broadcasting* [2015] UKSC 31.

viii Confidential information

Confidential information is broadly defined as information that has the necessary quality of confidence that is disclosed in circumstances imparting an obligation of confidence.

Confidential information may be protected by non-disclosure agreements or confidentiality agreements. It is common for employers to request that their employees sign such agreements if they have access to confidential information.

While in theory it is possible to protect confidential information indefinitely, there may be limits on how long information will retain its confidential status. For example, non-disclosure and confidentiality agreements may be time-limited, the information may become available from non-confidential sources and information may be made available to other parties or the public in the course of litigation.

ix Plant varieties

A plant variety right may be available for a new, distinct, uniform and stable plant variety. 'New' is assessed by reference to sale or disposal.

A plant variety right entitles the holder to prevent anyone from producing or reproducing, conditioning for the purpose of propagation, offering for sale, selling, exporting, importing or stocking for any of those purposes, the qualifying variety. The term of protection is 30 years from the date of grant (for potatoes, trees and vines); or 25 years from the date of grant (all other cases). Protection is available for the UK (from the UK Plant Variety Rights Office) or for the EU (from the Community Plant Variety Office).

II RECENT DEVELOPMENTS

i EU trademark reform

EU trademark legislation has been reformed by the entry into force on 23 March 2016 of Regulation (EU) No. 2015/2424. Key amendments are reflected within this chapter. EUTMs filed before 22 June 2012 with goods and services listed by reference to class headings are deemed limited to the goods and services within the literal meaning of the class heading concerned, unless an 'Article 28(8)' declaration is filed by 24 September 2016.

ii Recent notable case law

Seeking of injunctive relief in relation to infringements of standards essential patents (SEPs)
In *Huawei v. ZTE*³ the Court of Justice of the European Union (CJEU) provided guidance regarding the steps that a patent owner must take prior to seeking injunctive relief in respect of a patent that is essential to a technical standard, and in respect of which it has given an obligation to grant a licence on fair, reasonable and non-discriminatory terms. The CJEU also made clear that the alleged infringer cannot be criticised for challenging the validity or the essential nature of the patents, or whether they are infringed.

Concurrent jurisdiction

The question of concurrent jurisdiction has been addressed by the English courts in two distinct areas: stays of substantive proceedings; and stays of remedies.

3 Case C-170/13.

In *IPCom v. HTC Europe*⁴ the Court of Appeal recast previous guidance on when UK proceedings should be stayed pending the outcome of opposition proceedings at the EPO.

In *Actavis v. Pharmacia*⁵ a stay of proceedings was awarded after the Pharmacia undertook not to seek injunctive relief and only to seek damages of 1 per cent of net sales for the life of the patent. In *Eli Lilly v. Janssen Sciences*⁶ the court refused to stay Eli Lilly's revocation action, essentially because the offered undertaking only to seek a reasonable royalty did not resolve commercial uncertainty regarding the duration of protection (should an SPC be granted) or the level of royalty payment.

In *Adaptive Spectrum and Signal Alignment v. British Telecommunications*,⁷ after a finding of liability for infringement of two patents, the Court of Appeal refused to stay the final injunction or to make it the subject of a cross-undertaking in damages pending the outcome of opposition proceedings. In contrast, in *Smith & Nephew v. ConvaTec*,⁸ after finding that Smith & Nephew had infringed ConvaTec's patent, the Court of Appeal agreed to stay injunctive relief pending determination of Smith & Nephew's application to the Supreme Court for leave to appeal and an expected decision of the EPO's Technical Board of Appeal. The decision in *Adaptive Spectrum* was distinguished on the facts.

Construction of Swiss-form claims

In *Warner-Lambert v. Actavis*,⁹ the Patents Court refused to award interim injunctive relief against Actavis, in part because it found there to be no serious issue to be tried on infringement of the Swiss form claims in issue. The Court of Appeal confirmed that Swiss form claims are process claims, and opined that the claim language requires that the manufacturer knows, or can reasonably foresee, the ultimate intentional use (i.e., for the claimed indication).¹⁰ Subsequently, the Patents Court noted that the test was not one of pure foreseeability, and that a requirement of intention was central to the interpretation.¹¹ Further guidance is expected from the Court of Appeal in the same case in the course of 2016.

iii Court fees

A substantial change to the quantum of court fees was introduced in England and Wales in March 2015. For money claims (damages or account of profits) over £10,000 or unlimited in value, fees are now 5 per cent of the value of the claim up to a maximum fee of £10,000.

iv Experts

The Guidance for the Instruction of Experts in Civil Claims 2014 came into effect on 1 December 2014. Experts must be informed of whether there is a specific budget for their fees, parties must provide to the court an estimate of the cost of the expert evidence to

4 [2013] EWCA Civ 1496.

5 [2014] EWHC 2611 (Pat).

6 [2016] EWHC 313 (Pat).

7 [2014] EWCA Civ 1462; [2014] EWCA Civ 1513.

8 [2015] EWCA Civ 803.

9 [2015] EWHC 72 (Pat).

10 [2015] EWCA Civ 556.

11 [2015] EWHC 2548 (Pat).

the court, the expert's fees and costs can be limited by the court, and payment of expert's fees contingent upon the nature of their evidence or the outcome of the case is strongly discouraged.

v Interim relief

Since the decision of the High Court in *Twentieth Century Fox v. BT*,¹² website blocking orders have been granted to music and film copyright owners to impede access to websites that are predominantly used to share copyright infringing content.

In October 2014, in *Cartier v. B Sky B*,¹³ the High Court concluded that internet service providers could similarly be ordered to block websites that advertise and sell trademark-infringing products. The court noted evidence that website blocking orders had reduced traffic to targeted websites from the UK. The case paved the way for brand owners to seek blocking orders not just in respect of websites selling counterfeit goods, but in respect of infringements of intellectual property rights more generally.

In March 2015, following its reasoning in *Cartier v. B Sky B*, the Patents Court ordered NHS England to issue guidance on the prescribing and dispensing of generic pregabalin medicines.¹⁴

III OBTAINING PROTECTION

i Patentability

The Patents Act was enacted in the course of the United Kingdom's accession to the European Patent Convention. Certain sections of the Patents Act are expressed as framed so as to have, as nearly as practicable, the same effects in the UK as the corresponding provisions on the EPC, the Community Patent Convention and the PCT.

Pursuant to the EPC, European patents shall be granted for any inventions, in all fields of technology, provided:

- a* they are new, involve an inventive step and are susceptible of industrial application;
- b* patentability is not expressly excluded; and
- c* the application meets certain other requirements, namely, unity of invention, disclosure of invention and clear and concise claims supported by the description.

New

An invention shall be considered to be new if it does not form part of the state of the art. The state of the art comprises everything made available to the public anywhere in the world by means of a written or oral description, by use, or in any other way before the date of filing of the European patent application. Additionally, the content of earlier filed (but not yet published) patent applications (UK or EPC designating the UK) is considered as comprised in the state of the art. A patent (or application) lacks novelty (is 'anticipated') if the prior art provides an 'enabling disclosure' of what is claimed.¹⁵

12 [2012] 1 All ER 806, [2012] Bus LR 1471, [2011] RPC 28, [2011] EWHC 1981 (Ch).

13 [2014] EWHC 3354 (Ch).

14 [2015] EWHC 485 (Pat).

15 *Synthon BV v. SmithKline Beecham plc* [2005] UKHL 59.

Involves an inventive step

An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter that forms part of the state of the art (earlier filed but not yet published patent applications are not included in the state of the art for this purpose). In *Conor v. Angiotech*¹⁶ the House of Lords (the predecessor to the UK Supreme Court) considered the issue of obviousness and approved the following statement of Kitchin J in *Generics v. Lundbeck*:¹⁷

The question of obviousness must be considered on the facts of each case. The court must consider the weight to be attached to any particular factor in the light of all the relevant circumstances. These may include such matters as the motive to find a solution to the problem the patent addresses, the number and extent of the possible avenues of research, the effort involved in pursuing them and the expectation of success.

In *Teva v. Leo*¹⁸ the Court of Appeal built upon this guidance in the context of the ‘obvious to try with a reasonable prospect of success’ doctrine: the inclusion of a specific solvent in a list of solvents to be tried was not sufficient to render the claimed invention obvious unless the solvent itself was obvious to try – and the prospect of success had to raise it over and above other candidates.

Industrial application

An invention shall be taken to be capable of industrial application if it can be made or used in any kind of industry, including agriculture. The notion of industry is construed broadly.¹⁹

Exclusion from patentability

The following are declared not to be inventions (and are therefore not patentable):

- a* discoveries, scientific theories and mathematical methods;
- b* literary, dramatic, musical or artistic works or any other aesthetic creation; and
- c* schemes, rules or methods for performing a mental act, playing a game or doing business, or a program for a computer; the presentation of information.

However, this only prevents patentability to the extent that the patent or application relates to the thing as such.

Patents also shall not be granted for the following:

- a* inventions the commercial exploitation of which would be contrary to public policy or morality;
- b* plant or animal varieties or essentially biological processes for the production of plants or animals (not including microbiological processes or the products thereof);

16 [2008] UKHL 49, [2008] RPC 28.

17 [2007] RPC 32.

18 [2015] EWCA Civ 779.

19 *Eli Lilly v. Human Genome Sciences* [2008] EWHC 1903 (Pat); [2008] RPC 29.

- c* methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body (although this does not apply to products, in particular substances or compositions, for use in any of these methods);
- d* the human body, at various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene;
- e* processes for modifying the germline genetic identity of human beings;
- f* uses of human embryos for industrial or commercial purposes; and
- g* processes for modifying the genetic identity of animals, which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

Other requirements for grant

A patent application shall relate to one invention only or to a group of inventions so linked as to form a single general inventive concept.

The specification must disclose the invention clearly and completely enough for it to be performed by a person skilled in the art. It must be sufficient to allow the invention to be performed over the whole scope of the claim and without undue burden.²⁰

The claims of a patent define the matter for which protection is sought. They must be clear and concise and be supported by the description.

ii Subject-specific case law

Methods of medical treatment and diagnostic methods

Methods of medical treatment and diagnostic methods are excluded from patentability. However, products, including substances, for use in such methods may be patented, including where the invention (and novelty) resides in the new use of a known product: purpose-limited product claims are permissible (i.e., claims in the form 'X for use in the treatment of Y').

Previously, for inventions residing in a second or subsequent use of a known medicament, claims in Swiss form were permissible (i.e., 'use of X in the manufacture of a medicament for the treatment of Y') but following the decision of the EPO's Enlarged Board of Appeal in G2/08 (Abbott Respiratory/dosage regimes)²¹ this is no longer the case. The changes introduced in 2010 made no change to practice regarding existing Swiss form claims already in force.

Patents with claims in Swiss form do not prevent (under the double patenting exclusion) the grant of a related application with claims in purpose-limited product format because the subject matter of such claims is considered different.²² For the same reason, it is not possible to amend granted Swiss form patent claims to purpose-limited product format.

In the context of inventions concerning medical treatments, the term 'plausibility' has been coined to characterise what it is that a patent specification must provide in order to be sufficient, short of full proof of efficacy.²³

20 *Eli Lilly v. Human Genome Sciences* [2012] EWCA Civ 1185, [2013] RPC 22.

21 G2/08 [2010] 10 OJEP 456 and UKIPO Practice Notice 26 May 2010.

22 T 1780/12.

23 *Hospira v. Genentech* [2014] EWHC 1094 (Pat).

Plants and animals and essentially biological processes for their production

Inventions that concern plants or animals may be patentable if the invention is not confined to a particular plant or animal variety but can be granted if varieties may fall within the scope of the claims.²⁴

Whether or not a (non-microbiological) process for the production of animals or plants is ‘essentially biological’ and therefore excluded from patentability has to be judged on the basis of the essence of the invention taking account the totality of the human intervention and its impact on the result achieved.²⁵

Other biotechnological inventions

Finding biological material, such as a microorganism, occurring freely in nature is discovery, not an invention, and so is not patentable as such. However, biological material that is isolated from its natural environment or produced by means of a technical process may be the subject of an invention, even if the material occurred previously in nature. Where the invention resides in a whole or partial gene sequence, the industrial application of the sequence must be disclosed in the application as filed.²⁶

In *Oliver Brüstle v. Greenpeace*²⁷ the CJEU ruled that a ‘human embryo was: any human ovum after fertilisation; any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted; and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis’. The exclusion covered the use of human embryos for purposes of scientific research; only use for therapeutic or diagnostic purposes that are applied to the human embryo and are useful to it being patentable. Further, patentability was excluded where the subject matter involved the prior destruction of human embryos or their use as base material.

Subsequently, in *International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trademarks*,²⁸ the CJEU ruled that an unfertilised human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a ‘human embryo’, within the meaning of that provision, if, in the light of current scientific knowledge, it does not, in itself, have the inherent capacity of developing into a human being.

A claim to a product containing or consisting of biological information is construed as extending to all material (except excluded material) in which the product is incorporated and in which the genetic information is contained and performs its function.

Computer programs

A claimed invention involving the use of a computer program may be patentable if it involves a technical contribution. In deciding whether such a contribution is present the English courts tend to refer to a number of signposts:²⁹

a whether the claimed technical effect has a technical effect on a process that is carried on outside the computer;

24 G 1/98, G 2/12 and G 2/13.

25 UKIPO’s Manual of Patent Practice, 76A.03.

26 UKIPO’s Manual of Patent Practice, 76A.06, G 2/07, G 1/98.

27 [2011] EUECJ C-34/10.

28 [2014] EUECJ C-364/13.

29 Symbian Ltd’s Application [2009] RPC 1.

- b* 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 produced or the applications being run;
- c* whether the claimed technical effect results in the computer being made to operate in a new way;
- d* whether the program makes the computer a better computer in the sense of running more efficiently and effectively as a computer; and
- e* whether the perceived problem is overcome by the claimed invention as opposed to merely being circumvented.

IV ENFORCEMENT OF RIGHTS

This section provides a brief guide to how intellectual property rights may be asserted, focusing on patents. In the courts of the United Kingdom, issues of infringement and validity are almost always addressed together.

i Possible venues for enforcement

The United Kingdom has three jurisdictions: England and Wales, Scotland, and Northern Ireland. Each has its own legal system and procedures, the UK Supreme Court being the final court of appeal for all in civil cases. In the field of IP, almost all legislated substantive law applies throughout the UK. The overwhelming majority of IP litigation in the UK takes place in the courts of England and Wales.

In England and Wales, the Intellectual Property Enterprise Court (IPEC) is the correct forum for less complex and smaller value IP claims. In the IPEC damages are capped at £500,000 (per claim number)³⁰ and recoverable costs are capped at £50,000. The IPEC procedure is distinct from that of the High Court, for example with less separation of argument and evidence than is conventional under English legal practice. The Chancery division of the High Court is the appropriate forum for more complex and valuable IP claims, patent claims being heard in the Chancery division's Patents Court. In the Patents Court there is no cap on recoverable damages or costs.

Patent actions are heard in Scotland by the Court of Session, and in Northern Ireland by its High Court.

The Comptroller General of Patents at the UK Intellectual Property Office (UKIPO) has jurisdiction to adjudicate upon some patent-related issues and may issue opinions on the infringement and validity of patents.

When the Agreement on a Unified Patent Court (UPCA) and associated EU Regulations enter into force (expected in 2017), owners of European patents designating Member States of the EU will (subject to opting-out) be able to enforce those European patents (but not national patents) in the Unified Patent Court (UPC). New Unitary patents will also be enforceable in the UPC. The UPC will have a central division (with its seat in Paris, and sections in London and Munich), local divisions in Member States throughout the EU (e.g., Ireland), and regional divisions covering more than one Member State (e.g., covering Estonia, Latvia, Lithuania and Sweden). Choice of venue will depend on the UPCA

30 *OOO Abbot v. Design & Display* [2014] EWHC 3234.

and the UPC's Rules of Procedure. Decisions in relation to European patents that are not 'opted-out' and all Unitary patents will have effect across the Member States concerned in each case.

ii Requirements for jurisdiction and venue

Jurisdiction may be founded by domicile or by the place where the harmful event occurred or may occur.³¹ In *Actavis v. Eli Lilly*,³² Eli Lilly was found to have conceded jurisdiction, in the course of pre-action correspondence, such that the court considered itself to have jurisdiction to award a declaration of non-infringement covering designations of a European patent for other EU Member States.

The UK courts described in subsection i, *supra* may hear actions for revocation of UK patents and UK designations of European patents but not other national designations of European patents.

iii Obtaining relevant evidence of infringement and discovery

In a civil claim, it is for the claimant to prove his or her case on the balance of probabilities. At the outset, the facts relied upon in support of the claim (or counterclaim) must provide reasonable grounds for making the claim. Without such grounds the claim may be struck out.

Disclosure

Discovery is generally available in the course of litigation after the exchange of pleadings. (In unusual circumstances it may be available from a non-party.) A party discloses a document by stating that it exists. The party to whom disclosure is made is then entitled to inspect the document, except where it is no longer in the disclosing party's control or where the disclosing party has a right or duty to withhold inspection of it, for example because it is privileged. Confidentiality does not confer a right to withhold inspection, but the court may order disclosure of confidential documents on appropriate terms, for example to specified members of a 'confidentiality club'.

Standard disclosure requires a party to disclose only the documents on which he or she relies and the documents that adversely affect his or her own case, adversely affect another party's case or support another party's case. In patent cases, disclosure is usually more limited. Provision of a product or process description by the alleged infringer enables standard disclosure to be dispensed with in relation to infringement. Regarding validity, disclosure is usually constrained to a term two years either side of the earliest claimed priority date. In every case, it is the court that orders the scope of disclosure and it can dispense with it altogether.

31 Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Civil Jurisdiction and Judgments Act 1982.

32 *Actavis v. Eli Lilly* [2013] RPC 37, [2013] EWCA Civ 517; [2014] EWHC 1511 (Pat), [2015] BUS LR 154.

Pre-action disclosure may be obtainable before litigation commences where procedural requirements are satisfied. In *The Big Bus Company v. Ticketogo*,³³ the Patents Court ordered pre-action disclosure of licences previously granted by the patentee to third parties operating in the transport sector.

Evidence

Fact evidence is usually submitted to the court in the form of written witness statements, which stand as the witness's evidence in chief. A witness's oral testimony is usually limited to cross-examination and re-examination.

The court assesses the teachings and scope of a patent through the eyes of 'the person skilled in the art'. He or she is the hypothetical person to whom the patent is addressed. The skilled person has imputed to him or her the 'common general knowledge', which is, essentially, standard technical background of the art in question.

Expert evidence is generally required to assist the court in adopting the mantle of the person skilled in the art and to determine the scope of the common general knowledge. Parties tend to retain their own expert, although they may be ordered to agree upon a single expert. Expert witnesses owe a duty to the court, which overrides any duty they have to the party and its team of legal advisers, and bear a personal responsibility for their evidence.³⁴ Expert evidence in chief is provided by way of a report, with opportunity to respond in writing to the report submitted by the other experts. Oral testimony is usually limited to cross-examination and re-examination. Cross-examination is considered by the courts to be an important tool by which expert evidence that is submitted to the court may be scrutinised.³⁵

Experiments

In appropriate cases, experiments may be ordered upon the application of a party that wishes to establish a fact by experimental proof.

iv Trial decision-maker

For the intellectual property rights listed above, civil claims are heard and determined by a judge.

In the courts of England and Wales, IP claims are usually heard by specialist judges. In the Patents Court more complex patent cases tend to be allocated to Arnold J, Birss J or Carr J – experienced patent judges who are also judges in the wider Chancery Division. In the IPEC, patent cases are heard by intellectual property specialist HHJ Hacon.

v Structure of the trial

Following the exchange of statements of case, the setting of case management directions and the conclusion of the steps ordered (for example, discovery and written evidence stages), the trial of the claim will be heard by the judge. At the hearing, the usual structure is that the claimant makes an opening statement, the parties cross-examine the witnesses relied upon by each other, and then each party makes a closing statement.

33 [2015] EWHC 1094 (Pat).

34 *Synthon v. Teva* [2015] EWHC 1395 (Pat).

35 *Accord v. Medac* [2016] EWHC 24 (Pat).

At the end of the hearing, the judge will either deliver his or her judgment or, more usually, he or she will retire to consider and write the judgment and reconvene the trial at a later date, when the judgment is handed down. An award of injunctive relief may be made with the substantive judgment or shortly afterwards following discussion between the parties or further consideration by the court.

Almost always, the trial is 'split', which means that the substantive legal claim is decided (as described above) and only where a claim is successful will the monetary relief claimed be considered. This consideration takes the form of a second stage to the litigation, involving further directions and a further trial on a damages inquiry or an account of profits, which may run in parallel with any appeal of the main judgment.

vi Infringement

Construction

The court 'construes' the claims of a patent to determine what they would have meant to the person skilled in the relevant art (with that person's common general knowledge) at the priority date. The law on patent claim construction was reviewed by the House of Lords in *Kirin-Amgen v. Hoechst Marion Roussel*.³⁶ Claims are construed purposively, the inventor's purpose being ascertained from the description and drawings, but ultimately one is concerned with the meaning of the language used, in context. There is no general doctrine of equivalents.

Infringing acts

Once the claims of the patent have been 'construed', the court considers whether an act that is capable of being an infringing act has been carried out in respect of the claimed invention.

It is a direct infringement of a patent to do any of the following in the UK without the consent of the patent proprietor:³⁷

- a* where the invention is a product, he makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise;
- b* where the invention is a process, he uses the process or he offers it for use in the United Kingdom when he knows, or it is obvious to a reasonable person in the circumstances, that its use there without the consent of the proprietor would be an infringement of the patent; and
- c* where the invention is a process, he disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.

It is a contributory infringement of a patent to supply or offer to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect. In order to infringe in this way the alleged infringer must know, or it must be obvious to a reasonable person in the circumstances, that the means he has supplied are suitable for putting, and are intended to put, the invention into effect.

36 [2004] UKHL 46, [2005] RPC 9.

37 Section 60(1) of the Patents Act 1977.

Further, a defendant will be liable as a joint tortfeasor if he has assisted the commission of the tort by another person pursuant to a common design with that person to do an act that is, or turns out to be, tortious.³⁸

vii Defences

Statutory exceptions to infringement

An act that would constitute an infringement of the patent will not do so if:

- a* it is done privately and for purposes that are not commercial;
- b* it is done for experimental purposes relating to the subject matter of the invention;
- c* it consists of the preparation in a pharmacy of a medicine for an individual in accordance with a prescription;
- d* it consists of use on a ship or an aircraft temporarily in the territorial sea or air space of the UK; or
- e* it consists of a specified use by a farmer of the product of his or her harvest or an animal purchased with the consent of the patent proprietor.

Invalidity

An alleged infringer may counterclaim that the patent is invalid and seek an order for revocation of it. The grounds for revocation are:

- a* the invention is not a patentable invention;
- b* the specification of the patent does not disclose the invention clearly and completely enough for it to be performed by a person skilled in the art;
- c* the matter disclosed in the specification of the patent extends beyond that disclosed in the relevant application as filed; and
- d* the protection conferred by the patent has been extended by an amendment that should not have been allowed.

A person found to be entitled to be granted the patent may additionally seek its revocation on the basis that it was granted to someone who was not entitled to it, provided the application is filed within the legislated time limits.

Other defences

An act is only capable of infringing a patent if it is done without the consent of the proprietor. Consent, or licence, may be express or implied and may form the basis for a defence. In some (unusual) situations, licences of right or compulsory licences are available.

Where the patentee has already consented to the marketing of the goods within the scope of the claimed invention in another European jurisdiction, the doctrine of exhaustion prevents subsequent enforcement of a patent in the UK in respect of the imported goods.

viii Time to first-instance decision

The time to trial has tended to depend upon the conduct of the parties, the complexity of the case and the diary of the court. In 2015, with the issuing of practice statements and the appointment of an additional judge (Carr J), the Patents Court has indicated intent to list

38 *Sea Shepherd v. Fish & Fish* [2015] UKSC 10.

trials within 12 months of commencement of the action. Parties are expected to start to consider potential trial dates as soon as reasonably practicable, which may be very soon after the proceedings are commenced.³⁹

For two years from 1 October 2015, a pilot ‘Shorter Trial Scheme’ (STS) is operating in the Chancery Division of the High Court, including the Patents Court. For suitable cases the STS packages a more streamlined procedure than is usually adopted with the intent of trial being listed within eight months of the case management conference and judgment being returned within six weeks.

Interim relief can be obtained in a matter of hours in urgent cases, although more usually interim hearings take place within a few days or weeks of the application being filed and served.

ix Remedies

If a patent is found to be infringed, a range of remedies will be available to the patent holder. These include the following.

Injunctions

Following a finding of infringement and validity, the court will usually award a ‘final’ injunction, although the position in relation to standard essential patents and second medical use patents, is more complex and the outcome in each case likely to be more dependent upon the relevant facts.

Injunctive relief may be available at an interim stage where the patentee shows an arguable case of infringement and that a later monetary remedy would not adequately compensate the patentee for the harm caused by the ongoing (alleged) infringement. The court considers the ‘balance of harm’ likely to be suffered by the respective parties before deciding whether to award interim relief and if so the terms of the order. Injunctions are usually prohibitory in nature although mandatory injunctions are possible. The patentee is usually required to provide a cross-undertaking as to damages. According to the CJEU’s decision in *Solvay v. Honeywell Fluorine Products Europe*,⁴⁰ the UK courts may be able to grant interim injunctions on a pan-European basis.

Delivery up

The court can order that infringing articles be delivered up to a party. This is commonly to facilitate destruction or resale.

Damages or an account of profits

Damages compensate for loss and are intended to restore the patentee to the position they would have been in had no wrong been done to him or her. They may be calculated according to the damage caused to the patentee’s profits by the infringement or in accordance with a ‘reasonable royalty’. In an account profits the profits made by the infringer from the infringement of the patent are awarded to the patentee. The court may order the infringer

39 *Celltrion v Biogen* [2016] EWHC 188 (Pat).

40 Case C-616/10, 12 July 2012.

to give some financial disclosure, so that the patentee may make an informed decision as to which remedy to pursue (not both). Neither remedy will be available against an ‘innocent’ infringer.

Declarations

The court can order declarations. For example, of validity (if the patent is found to be valid) or contested validity (if the patent is found not to be completely valid), which can impact the award of legal costs in future challenges; of infringement or non-infringement; and that a party’s product was obvious at a relevant date, which can create a squeeze between infringement and validity and may be of assistance to parties in ‘clearing the way’ in some circumstances.⁴¹

Orders for dissemination and publication

The courts can also order a party to publicise the result of a case at its own expense.

x Appellate review

Decisions of the Comptroller General of Patents and interim decisions of the IPEC may be appealed to the Patents Court. Decisions of the Patents Court and final decisions of the IPEC may be appealed to the Court of Appeal. Decisions of the Court of Appeal relating to important issues of legal principle may be appealed to the Supreme Court.

Experienced specialist patents judges in the Court of Appeal are Kitchin LJ and Floyd LJ, and in the Supreme Court, Lord Neuberger.

In order to appeal, the party wishing to do so needs permission from the court that has issued the decision in question, or from the court to which it wishes to appeal. Permission is granted if the court considers that the appeal has a real prospect of success or if there is some other compelling reason why it should be heard.

Generally, only errors of law may be appealed. The Supreme Court has instructed appellate courts not to interfere with findings of fact unless compelled to do so. Generally, new evidence is not admissible at the appeal stage.

xi Alternatives to litigation

Alternative dispute resolution (ADR) methods include arbitration and mediation. The Arbitration Act 1996 governs the law relating to arbitration with its seat in England and Wales or Northern Ireland. ADR can enable flexibility in procedure and privacy.

V TRENDS AND OUTLOOK

i Unitary patent and Unified Patent Court

The UPCA was signed by 25 participating Member States of the EU in 2013, including the United Kingdom. It is expected to come into force in 2017.

With the implementation of the UPCA and associated legislation, European patents that are not ‘opted-out’ of the UPC system, and granted unitary patents, will fall within the exclusive jurisdiction of the UPC; where a claim for infringement or validity is brought in the

41 *Fujifilm Kyowa Biologics v. Abbvie Biotechnology* [2016] EWHC 425

UPC, the Court's decision will cover the Member States of all designations of the European patent (or Unitary patent) that fall within the court's remit (i.e., the EP designations of all participating Member States that have ratified the agreement at the relevant time); and applicants to the EPO for patent protection will be able to seek unitary protection (a Unitary patent) covering those EU Member States that have deposited an instrument of ratification or accession at the date of grant of the European patent.

ii Construction of second medical use claims and availability of interim relief

Following the decisions of the Patents Court and the Court of Appeal in litigation regarding pregabalin,⁴² it is apparent that courts in different EPC countries have adopted different constructions of Swiss-form claims, with differing consequences for the perceived strength of respective cases on infringement. Further consideration by a higher court in the United Kingdom or another prominent EPC jurisdiction is to be expected before too long.

iii Proposed changes to trade secrets and copyright law in the EU

The EU legislature has proposed the reform of trade secrets and copyright law across the EU. A Directive that would introduce a baseline of protection for trade secrets across the EU is in the course of being approved. Current proposals for copyright reform are intended to improve cross-border accessibility to copyright content and related services, and enhance portability of online content that would allow users to transport content from one device to another without the risk of infringement. The proposals continue to be debated.

v 3D shape marks

2015 and 2016 have seen several cases in which the High Court of England and Wales has found that 3D shape marks do not meet the requirements for registrability or validity. For example, the shape of Nestlé's four-finger Kit Kat product (without a Kit Kat logo embossed on each finger);⁴³ and The London Taxi Company's trademark for the shape of the iconic London 'Black Cab'.⁴⁴

42 [2015] EWHC 92 (Pat); [2015] EWHC 249 (Pat), [2015] EWHC 223 (Pat); [2015] EWHC 485 (Pat). [2015] EWCA Civ 556; [2015] EWHC 2548 (Pat)

43 *Nestlé v. Cadbury* [2016] EWHC 50 (Ch).

44 *The London Taxi Corporation Ltd v. Frazer-Nash Research Ltd* [2016] EWHC 52 (Ch).

Appendix 1

ABOUT THE AUTHORS

GORDON HARRIS

Gowling WLG

Gordon conducts litigation in all UK and European courts for clients seeking to protect their IP, or those who have been accused of infringing other people's rights. He is known as a fighter who will explore every avenue to get the right result, including going to the Supreme Court to change over 100 years of patent law in order to ensure the right outcome for a client.

He has conducted ground-breaking cases on designs and brands in the European Court of Justice, and contested the validity of patents in the European Patent Office.

He has over 25 years' experience in IP and is involved in law reform and development through various committees and organisations. All of which allows him to provide decisive commercial advice to clients and to help them to decide the best avenue to take in any given case.

As a qualified mediator accredited by CEDR and the World Intellectual Property Organisation, Gordon also pursues alternative dispute resolution both on behalf of clients and as a mediator.

REBECCA COSTEN

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Rebecca assists clients with managing and protecting their intellectual property rights from misuse, and with developing strong brands to strengthen their corporate image and add value to their business.

Rebecca specialises in contentious intellectual property matters and has particular expertise in cross-border disputes – she has been recognised for her management and success in cross-border litigation. Rebecca provides practical and effective advice to clients on the mechanisms that can be put into place to protect or enforce clients' intellectual property rights. By devising and implementing effective brand protection strategies, Rebecca helps clients to deal with the challenges they face in identifying and dealing with infringement on a worldwide basis.

Rebecca also has experience in High Court litigation, arbitration and mediation and other alternative dispute resolution procedures. Rebecca is recognised as a 'diligent, perceptive and effective' lawyer (*Chamber and Partners* 2014) and she is identified as one of only seven associate lawyers in the City of London as being 'one to watch specialising in intellectual property' matters (*The Legal 500* 2012/2013).

ANDREW MAGGS

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Andrew has significant expertise working with a range of technology clients, particularly US corporations active in the telecommunications field, in resolving their disputes in the UK, often as part of broader, multi-jurisdictional action.

Andrew is involved in the technical preparation of the case, interviewing and liaising with experts and counsel, as well as advising on tactical and legal considerations.

Andrew helped establish Gowling WLG's Guangzhou office and assists clients to resolve their technology disputes in China.

AILS A CARTER

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With an undergraduate degree in chemistry, Ailsa has specialised in advising and representing clients in the pharmaceutical, biotech and consumer products sectors. This has focused on acting in litigation and wider disputes concerning patents, confidential information and trademarks. Ailsa has also collaborated with lawyers in many other jurisdictions, coordinating and assisting in the context of multi-jurisdictional disputes and projects involving litigation outside the UK.

At Gowling WLG, Ailsa is in a professional support role focusing on the development of knowledge, the production of material for publication and the training of fee earners in the intellectual property team.

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