SLAUGHTER AND MAY/

THE IP BRIEF

a quarterly update of key IP cases and news, with a primarily UK and EU focus.

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/ INTRODUCTION

Welcome to our latest edition of The IP Brief – a quarterly update of key IP cases and news, with a primarily UK and EU focus.

In this edition, we take a look at:

- The UK High Court's highly anticipated decision in *Getty Images v Stability AI*;
- the UK Supreme Court's decision in *Iconix v Dream Pairs*, which considered the role of post-sale confusion in trade mark infringement disputes;
- the role of trade mark licence registration when assessing damages, in light of *Lifestyle Equities v Sportsdirect.com*;
- the prior art status of products that have been put on the market, following the EPO Enlarged Board of Appeal's decision in *G1/23*; and
- the UKIPO's consultations on standard essential patents and changes to the UK designs framework.

COPYRIGHT

UK HIGH COURT HANDS DOWN LANDMARK DECISION IN GETTY IMAGES V STABILITY AI

On 4 November, the UK High Court handed down its highly anticipated decision in ***Getty Images v Stability AI*** - a case that many people have been following closely since Getty's initial claim was filed back in January 2023.

As many readers will be aware, Stability AI has developed a generative AI tool known as "Stable Diffusion" which creates synthetic images in response to prompts entered by users. Getty alleged that Stable Diffusion was trained using millions of copyright-protected images scraped from its websites without its permission. It originally asserted that those actions infringed its copyright and database rights. Getty also claimed that the outputs (i.e. the images) produced by Stable Diffusion infringed their rights by reproducing substantial parts of their copyright protected works or by bearing Getty's trade marks (in the form of its watermark). They therefore sued Stability AI for copyright infringement, as well as database right infringement, trade mark infringement and passing off.

This gave IP practitioners across the country hope that this case might provide guidance on whether generative AI developers' current practices of using unlicensed third party material to train their models was permissible in the UK. However, as the trial progressed, it became clear that we wouldn't get many of the answers we were seeking, with Getty dropping its core claims for direct copyright and database right infringement as part of its closing statements.

In practice, that meant that the main focus of the case before the court, and the judgment, was limited to questions of trade mark infringement and secondary infringement of UK copyright. The court wasn't required

to answer any questions about whether use of Getty Images' copyright works to train Stable Diffusion infringed Getty's UK copyright (such training having taken place outside the UK), nor did the court have to address questions about database right infringement or potentially copyright-infringing outputs.

The majority of the judgment was taken up by the trade mark infringement questions, but it's fair to say that it was the court's views on secondary copyright infringement that were the most keenly awaited.

In essence, the question before the court was whether importing (or downloading) the pre-trained Stable Diffusion model into the UK amounted to secondary infringement of UK copyright. Sections 22 and 23 of the Copyright, Designs and Patents Act 1988 (**CDPA**) provide that importing or dealing with an **article** that is, and is known to be, an **infringing copy** of a work is an act of secondary infringement. Historically, these provisions have only been applied in the context of physical goods and so the first question the court had to consider was whether the word "article" was broad enough to capture intangibles. The court concluded that it was – an important clarification in and of itself.

However, the court rejected Getty's arguments that Stable Diffusion was an "infringing copy". Whilst section 27(3) of the CDPA says that *"[An] article is also an infringing copy if (a) it has been…imported into the United Kingdom, and…(b) its making in the United Kingdom would have constituted an infringement of the copyright in the work in question…"*, the court found that, by its nature, an infringing copy must be exactly that - a copy. This is where Getty's claim for secondary copyright infringement fell down as the court concluded that Stable Diffusion had never contained or stored copies of any of Getty's copyright works. It was not therefore an infringing copy. The fact that copies of Getty's works may have been used in developing that model (in the US) did not change this.

The trade mark infringement side of the dispute has received less press attention, being quite specific to the facts of this case. Getty were, however, partially successful in their claims on that front (albeit in a limited and historic way) on the grounds of double identity and likelihood of confusion, with the court finding that Stability AI itself was responsible for the infringing outputs bearing Getty Images' watermarks, not the user (as Stability AI had sought to argue). Getty's claims of trade mark infringement on the grounds of dilution, tarnishment and unfair advantage, however, all failed, and its claims of passing off were ultimately not addressed.

In practice, the fact that Getty's claim for secondary copyright infringement failed will be a relief to generative AI developers (most of whom are based outside the UK). But it will be seen as a severe blow for owners of UK copyrights who may regard this as holding the door open for developers to circumvent their rights by training their models in jurisdictions that are more AI-friendly, before making the trained models available in the UK. Indeed, subject to any changes to the law that may result from the government's consultation on copyright and AI, the effect of this judgment may be that we see AI companies deliberately avoiding training and developing their models in the UK (which currently looks to be less AI-friendly than other jurisdictions given the limited scope of existing exceptions to primary copyright infringement). In turn, that puts even greater pressure on the outcome of the UK government's consultation.

That all said, we do need to remember that this is only a first instance decision – it remains to be seen if Getty will appeal. It's also important to bear in mind that this is only one side of the story in this dispute. Getty is running a similar claim in the US, which is where the training and development appears to have taken place. It will be interesting to see how that plays out.

TRADE MARKS

POST-SALE CONFUSION IS POSSIBLE, BUT DREAM PAIRS DID NOT INFRINGE THE UMBRO DOUBLE DIAMOND MARK

Over the Summer, the UK Supreme Court handed down its highly anticipated decision in ***Iconix v Dream Pairs***, providing valuable guidance on the role of post-sale confusion in a trade mark infringement context.

Iconix is the owner of the Umbro brand and has UK registered trade mark protection for its double diamond logo (below left), which has been used on football boots for nearly 40 years. In early 2019, Dream Pairs started selling its own footwear in the UK, through Amazon and eBay, which bore the Dream Pairs logo (below right). Iconix sued Dream Pairs for trade mark infringement, on the grounds that Dream Pairs' logo was similar to the Umbro double diamond logo and that its use on footwear gave rise to a likelihood of confusion on the part of the public.

Umbro Mark

Dream Pairs' Sign

At first instance, the High Court dismissed Iconix's claim, finding that there was "at most a very low level of similarity" between the Umbro and Dream Pairs logos and no likelihood of confusion, either at the point of sale or post-sale. This was overturned on appeal, with the Court of Appeal finding that the High Court had erred in a number of respects, including in its assessment of similarity, which the Court of Appeal found to be "rationally insupportable" - at least when the Dream Pairs logo was affixed to footwear and viewed from angles other than square-on. The Court of Appeal went on to re-evaluate the similarity of the marks and the likelihood of confusion, concluding that there was, in fact, a moderately high level of similarity between the logos and that Iconix's claim for trade mark infringement on the grounds of likelihood of confusion had been made out (see the **May 2024 edition** of The IP Brief for further details).

Dream Pairs then appealed to the Supreme Court, where three core issues arose:

1. When assessing the similarity of marks, and the degree of similarity, can post-sale circumstances be taken into account?

2. Can use of a sign give rise to a likelihood of confusion as a result of post-sale confusion even if there is no likelihood of confusion at the point of a subsequent sale[1] or in a subsequent transactional context?

3. Was the Court of Appeal entitled to re-evaluate the question of similarity between the double diamond mark and Dream Pairs' sign, as well as likelihood of confusion, and substitute the High Court's decision with its own?

Taking each of these in turn, on the similarity issue the Supreme Court found that "realistic and representative" post-sale circumstances can be taken into account for the purpose of establishing similarity between the signs in issue, as well as the degree of similarity. However, post-sale circumstances cannot be used to rule out intrinsic similarities between them.

On the second question, the Supreme Court concluded that it is possible for use of a sign to give rise to a likelihood of confusion as a result of post-sale confusion even if there is no likelihood of confusion at the point of a subsequent sale or in a subsequent transactional context. In part, this decision was based on the Supreme Court's analysis of case law and legal principle, but weight was also given to the fact that section 10(4) of the Trade Marks Act 1994 (**TMA**), which sets out a non-exhaustive list of acts that amount to "use" of a trade mark, includes a number of acts that are remote in time from the point of sale.

However, despite both of the above points being resolved in favour of Iconix, the Supreme Court went on to overturn the Court of Appeal's decision. Determining whether there is a likelihood of

[1] By "subsequent", we understand the Supreme Court to mean any sale or transaction that takes place after the post-sale confusion is said to have arisen.

confusion in any given case requires a multi-factorial assessment which, the court said, could reasonably result in different outcomes where different judges faithfully apply the law. In the Supreme Court's opinion, the High Court had correctly applied the multi-factorial test and considered the post-sale context (including the effect of an angled view on the Dream Pairs sign) in reaching its conclusion that there was only faint similarity between the signs in issue and no likelihood of confusion. It was not enough that the Court of Appeal judges would have reached a different conclusion on the facts. The High Court's decision had to have been irrational (which the Supreme Court found it was not) or contained an error of law or principle (which the Supreme Court found it did not). The Court of Appeal was not therefore justified in re-evaluating the High Court's assessment and substituting its own view.

In practice, this judgment serves as a stark reminder that the bar for overturning a first instance decision in UK trade mark infringement proceedings remains high - appeals will not warrant a re-evaluation of a case unless it can be shown that the first instance decision was irrational or contained an error of law or principle, which requires more than the appellate court disagreeing with the earlier court's factual assessment.

The judgment does though give brand owners the freedom to present more creative submissions when seeking to establish trade mark infringement on the grounds of likelihood of confusion, with greater focus on post-sale evidence expected in future cases. This may make it easier for trade mark owners to successfully establish infringement, as it gives them more routes to argue that consumers would be confused in different circumstances, outside the context of sales.

HIGH COURT CONSIDERS ROLE OF TRADE MARK LICENCE REGISTRATION WHEN ASSESSING DAMAGES

In ***Lifestyle Equities v Sportsdirect.com***, the UK High Court considered the impact of failing to register a trade mark sub-licence on the ability of a trade mark owner and its licensees and sub-licensees to recover damages following a finding of trade mark infringement.

Lifestyle Equities CV (**Proprietor**) is the owner of certain registered trade marks for the name BEVERLY HILLS POLO CLUB, which were exclusively licensed to its wholly owned subsidiary (**Exclusive Licensee**). That exclusive licence was registered with the UK Intellectual Property Office (**UKIPO**) on 18 December 2015.

A number of sub-licences had also been granted, including in the UK. Whilst the structure of the sub-licensing arrangements wasn't entirely clear, the court proceeded on the basis that they were non-exclusive licences that had been granted by the Exclusive Licensee. Importantly, none of these sub-licences had been registered with the UKIPO until April 2025.

The Proprietor and the Exclusive Licensee had brought successful trade mark infringement proceedings against SportsDirect for actions that had taken place between 2013 and 2015, and had elected for an inquiry as to damages, claiming all loss they and/or their licensees had suffered as a result of the infringement (amongst other things).

In that context, three questions arose before the court:

1. Does a sub-licensee have to be joined to the proceedings in order to claim losses they have suffered?

2. Does a trade mark sub-licence have to be registered in order for a trade mark owner or exclusive licensee to be able to recover damages sustained by the sub-licensee?

3. Can a sub-licensee apply to register their interest "late" and, if so, what is the effect of such late registration on the recovery of damages before the application for registration was made?

The court answered the first question in the negative. Generally speaking, non-exclusive

licensees have no right to bring infringement proceedings and, as the court had proceeded on the basis that the sub-licences in question must all be non-exclusive, the relevant sub-licensees should not (and could not) be joined as a claimant. However, sub-licensees who have suffered loss may be entitled to intervene in proceedings brought by the trade mark owner under section 30(6A) TMA.

As for the second question, the TMA is clear that any loss suffered or likely to be suffered by licensees (including sub-licensees) is to be taken into account where a proprietor (or exclusive licensee, in appropriate cases) brings infringement proceedings. Where such losses are claimed, the court will assess them in the round and may then give directions on the extent to which the proceeds of any damages awarded are to be held for licensees (including sub-licensees) (section 30(6) TMA).

The court found that until an application to register a sub-licence has been made, the sub-licensee will have no right to intervene in proceedings under section 30(6A) TMA, nor will they be able to obtain the benefit of the court apportioning damages to be held on their behalf. However, the court concluded that failure to register has no effect on the trade mark owner's rights to claim for losses suffered by its licensees/sub-licensees.

This does not necessarily mean that all such losses will be awarded – the court is only required to take those losses into account – but the trade mark owner will be able to seek to recover them. The court did, however, add that, in order for the court to assess the losses in question, the trade mark owner will need to plead the relevant licences in full and provide copies of them.

As for the final question, the court found that there is no time limit for registering a licence in order for a licensee to obtain the protections under section 30 TMA. For the purposes of section 30(6) TMA, where registration is "late", the court can make "such directions as it thinks fit" so that the trade mark owner is not over-compensated. However, it is worth noting that licensee intervention under section 30(6A) may be refused by the court if the application for intervention is made late and is prejudicial to the defendant.

In practice, whilst registration is not required for the court to be able to take into account licensee losses in infringement proceedings brought by the trade mark owner, it is prudent for sub-licensees to seek registration to ensure they can benefit from the full protections of the TMA (assuming they are entitled to damages for infringement under the terms of the licence). However, as this case shows, all is not lost if you have not done so – late registration is better than no registration. It is, however, important when claiming losses down the chain to provide clarity around the licensing structure being relied on. The court was clearly frustrated by the lack of clarity in this case.

PATENTS

EBA CONSIDERS PRIOR ART STATUS OF PRODUCTS ON THE MARKET

The Enlarged Board of Appeal of the European Patent Office (**EBA**) has provided guidance, in its decision in **G1/23**, on the prior art status of products that have been put on the market before the filing date of a European patent application.

As many readers will be aware, in order to be patentable, a product must be new and inventive. An invention will be taken to be new if it does not form part of the state of the art. And it will be inventive if, having regard to the state of the art, it is not obvious to a person skilled in the art.

Article 54(2) of the European Patent Convention (**EPC**) defines "state of the art" as "*everything made available to the public 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*". Whilst at first glance that might seem like a straightforward definition to apply, it has thrown up a number of difficult questions, particularly where products are concerned. This was at the heart of the dispute which led to the referral in G1/23.

Mitsui Chemicals owns a European patent relating to an encapsulating material for a solar cell. Borealis GmbH opposed that patent on the ground that it lacked inventive step over a commercially available complex polymer product called "ENGAGE® 8400". It was common ground that ENGAGE® 8400 was commercially available, but the method for manufacturing it was not in the public domain. The parties also agreed that manufacturing ENGAGE® 8400 would not be straightforward even if the skilled person could access it for analysis. The parties disagreed, however, about the impact of this lack of reproducibility on the state of the art and, in particular, whether ENGAGE® 8400 should be treated as prior art when assessing inventive step.

The Opposition Division found that ENGAGE® 8400 did not form part of the state of the art, rejecting the opposition in the process. Borealis appealed and that ultimately led to a number of questions being referred to the EBA (see below). Importantly, the referring court concluded that if ENGAGE® 8400 was part of the state of the art, then the patent would be invalid on the grounds of obviousness.

Determining whether ENGAGE® 8400 formed part of the state of the art was therefore critical to the outcome of the opposition.

The answer depended on the correct interpretation of a previous EBA decision (G1/92), which had commented on the meaning of "made available" in Article 54(2) EPC in the context of products that were on the market. In that case, the EBA said, "*where it is possible for the skilled person to discover the composition or the internal structure of the product and to reproduce it without undue burden, then both the product and its composition or internal structure become state of the art.*"

With this in mind, the referring court referred the following three questions to the EBA:

1. Is a product put on the market before the date of filing of a European patent application to be excluded from the state of the art within the meaning of Article 54(2) EPC for the sole reason that its composition or internal structure could not be analysed and reproduced without undue burden by the skilled person before that date?

2. If the answer to question 1 is no, is technical information about said product which was made available to the public before the filing date (e.g. by publication of [a] technical brochure, non-patent or patent literature) state of the art within the meaning of Article 54(2) EPC, irrespective of whether the composition or internal structure of the product could be analysed and reproduced without undue burden by the skilled person before that date?

3. If the answer to question 1 is yes or the answer to question 2 is no, which criteria are to be applied in order to determine whether or not the composition or internal structure of the product could be analysed and reproduced without undue burden within the meaning of opinion G1/92? In particular, is it required that the composition and internal structure of the product be fully analysable and identically reproducible?

The referring court suggested two possible interpretations of G1/92 for the EBA to consider, where the composition of a product (and the product itself) cannot be reproduced – (i) both the composition and the product itself (in its entirety) must be excluded from the state of the art, or (ii) only the composition is excluded from the state of

the art but the product itself and its reproducible properties are included.

The EBA rejected the first interpretation. In its view, if this interpretation was correct, it would mean that non-reproducible products would have to be excluded from the common general knowledge (as the common general knowledge cannot extend beyond the state of the art). In turn, non-reproducible products could not be used as starting materials by the skilled person when considering any particular problem. Taking this to its logical conclusion, the EBA found that "*there are no products on earth that are in the end not based on materials that themselves cannot be reproduced*". This interpretation therefore led to the "absurd" result that no material would belong to the state of the art and so the EBA concluded it could not be right.

The second interpretation was also rejected for similar reasons.

Instead, the EBA found a third way, deciding that the concept of reproducibility should be read in a broader sense to include the ability for the skilled person to obtain the product from the market in its readily available form. This ultimately rendered the reproducibility condition from G1/92 redundant and led the EBA to answer the first question in the negative.

On the second question, the EBA concluded that the answer was clearly yes - there is no reason that technical information about a product that is itself part of the state of the art should be excluded. Given the above, the third question was moot.

In practice, this decision broadens the scope of what can be treated as prior art under the EPC. It will be seen as good news for those looking to challenge patent validity. But raises additional considerations for would-be patentees, who will need to think even more carefully about whether to place new products (that may be hard to reproduce) on the market before patent applications have been filed.

UKIPO CONSULTS ON STANDARD ESSENTIAL PATENTS

Following its announcement back in February 2024 (see the **May 2024** edition of The IP Brief), the UKIPO has run its latest consultation on standard essential patents (**SEPs**), which was open for comment between 15 July and 7 October this year. This follows on from the UKIPO's **2021 call for views** and **2023 SME SEP questionnaire**.

As we've previously noted, the focus of this consultation was on examining options that could help improve the functioning of the SEP market and improve transparency for UK businesses.

Transparency has long been a point of contention between SEP holders and implementers, particularly around pricing and essentiality. On the pricing side, licence rates agreed between SEP holders and implementers tend to remain confidential, which can make it tricky for implementers to determine whether rates offered to them are fair, reasonable and non-discriminatory (**FRAND**). This can lead to some implementers significantly overpaying for licences. Given the high costs of litigation in this space, it is also not always possible for implementers to challenge suspected non-FRAND rates through the courts.

To address this, the UKIPO is considering introducing a new "Rate Determination Track" to the Intellectual Property Enterprise Court, which would focus on the narrow issue of rate setting in cases where infringement, validity and essentiality are not disputed. The UKIPO believes this could enable parties to obtain an independently adjudicated (and binding) licence rate in a more efficient and cost-effective way and, in turn, it notes that publication of rates determined in this way would help to improve transparency and efficiency for other SEP licence negotiations (although the UKIPO acknowledges that such publication may deter some stakeholders from using the Rate Determination Track altogether).

Problems can also arise with the current lack of transparency around which patents may have been declared essential to any given standard. Whilst some standard development organisations do publish information on essentiality, as things stand, there is no single source that can be consulted. This, combined with the scale of patents declared essential to any given standard, can make it difficult for implementers to determine which

patents they need to license in order to implement the relevant standard and who they need to get those licences from.

To help alleviate this issue, the UKIPO is considering introducing an additional search function into its One IPO Search service, which would allow users to search for SEPs, with the results highlighting which standard the patent has been declared essential to. However, in order to achieve this, the UKIPO would need to mandate (or otherwise incentivise) patent owners to provide this information.

Closely linked to the above, the UKIPO is also gathering evidence on the effectiveness of existing pre-action protocols in the SEP sector and whether there would be a benefit to introducing a specialist pre-action protocol for SEP licensing disputes – the main objectives being to reduce information asymmetry, by encouraging better exchange of information on pricing and essentiality, and providing consequences for non-compliance.

In addition to the transparency issues noted above, the UKIPO is seeking to gather evidence on a number of other points, including:

- Existing demand for, and use of, essentiality-checking services – including how accessible (and affordable) such services are, particularly for SMEs, and whether there is any scope for the UKIPO to introduce its own such service.
- Whether the remedies available under the current patent framework are adequate and being used appropriately. In particular, the UKIPO notes concerns raised by implementers about SEP owners using the threat of an injunction to extract so called "supra-FRAND" rates, and has asked for evidence on how widespread that practice is and the extent to which it may inhibit innovation.
- The use and effectiveness of alternative dispute resolution (**ADR**) services, including mediation, in SEP disputes. Whilst the UKIPO doesn't appear to be considering mandating the use of ADR, it is keen to understand how frequently ADR services are being used for SEP licensing disputes and whether there is a need to expand existing ADR services (like the UKIPO's mediation service) to provide further support in this space.

DESIGN RIGHTS

UKIPO CONSULTS ON PROPOSALS TO REFORM THE UK DESIGN RIGHTS REGIME

On 4 September 2025, the UKIPO opened its **consultation** on potential changes to the UK designs framework. This follows a **call for views** and **designs survey** in 2022 (see our **blog**) and a further survey in February this year.

The consultation is wide ranging, covering a number of important topics, with key threads including the desire to create a simpler system to support innovation, make the system more accessible to SMEs, and ensure that the UK designs framework remains relevant in our increasingly digital, post-Brexit world.

We've set out below a summary of some of the key areas of focus.

Keeping up with technology

- **Computer-generated designs:** The ability for generative AI models to create new designs has led to questions about whether such outputs should be protectable as designs in the UK. As with copyright, the law relating to UK registered designs and UK unregistered designs (but not supplementary unregistered designs (**"SUDs"**)) provides protection for computer generated designs without a human author, which the UKIPO notes "would appear to apply to designs generated by [AI]". There are, however, questions about how those rules currently apply. In line with its views on copyright (see our earlier **blog**), the UKIPO has stated a preference for removing these provisions. However, the UKIPO is also seeking views on a number of alternatives, including maintaining the status quo (and potentially extending the current provisions to cover SUDs as well); reforming and clarifying the law (e.g. relating to the originality requirement for UK unregistered designs and how that might apply to AI-generated designs); and collecting data on when AI has been used in the creation of designs.
- **Graphical User Interfaces (GUIs) and animated designs:** The UKIPO is considering a number of options to clarify which digital designs (e.g. GUIs and animated designs) can be protected in the UK and how they can make it easier for rights holders to protect such designs. Options include: (a) providing further guidance on how the UKIPO applies existing law in this area; (b) amending the definitions of "design", "product"

or both to better accommodate GUIs and animations (potentially along similar lines to the recent changes in the EU); (c) allowing applicants to upload different file formats (such as video and CAD files) to represent their designs rather than having to rely on still images; and (d) permitting applicants to file an optional description alongside any stills or video clips (e.g. to explain the transition from one still to the next), which will be published on registration and which could be used when interpreting the scope of any given registration.

UK registered designs

- **Improving validity and addressing anti-competitive filings:** In order to be protectable, UK registered designs need to be new and have individual character. As things stand, however, the UKIPO does not assess these requirements as part of the registration process and there is no ability for third parties to oppose registration or file observations. This means that some designs are registered which are not new. There is also evidence that some applicants are deliberately registering third party designs for anti-competitive purposes. Third parties can apply to invalidate a registered design which they believe is not new or lacks individual character, but the existing processes can be time consuming and costly. The UKIPO is therefore seeking views on how problematic this issue is and what options might be available to address it, including: (a) giving the UKIPO power to investigate (e.g. through novelty searches) and object to designs which it suspects are not new or lack individual character; (b) introducing a two-stage system, under which designs would be partially registered without a novelty search, but a novelty search would need to be completed satisfactorily before the design could be enforced; (c) introducing a provision which would enable the UKIPO to object to designs that have been applied for in bad faith; and (d) introducing a third-party opposition or observation period.

- **Deferred registration:** Applicants can currently delay registration and publication of UK registered designs for up to 12 months, but there is no explicit deferment provision in UK law. The UKIPO proposes to introduce an explicit provision allowing for an 18-month deferment, starting from the earliest of the priority or filing date, and deferring both registration and full publication, with only basic information being published. Views are sought on all of these features (including the duration of any deferment period, when the deferment period should start and what information should be published for deferred applications).

Unregistered designs

- **Simplifying the unregistered designs framework and overlap with copyright:** Protection for unregistered designs has developed incrementally in the UK, resulting in a complicated patchwork made up of three core rights – UK unregistered designs, SUDs and copyright (in certain limited circumstances). Acknowledging the difficulties this causes, particularly for SMEs and individual designers, the UKIPO is seeking views on a number of options to simplify the system. As between UK unregistered design rights and SUDs, options include abolishing UK unregistered design right in its entirety, bringing the UK more into line with the EU, or consolidating UK unregistered design right and SUD into a single unregistered design framework (with the UKIPO seeking input on the desired level of harmonisation). As for the overlap with copyright, the UKIPO's preferred approach is to leave things as they are, but it is also consulting on other options, such as amending copyright legislation to clarify where the boundary is between copyright and design protection, and/or to update the copyright exceptions framework.

- **Post-Brexit disclosure issues:** Whilst the UK was part of the EU, a design first disclosed anywhere within the EU could be protected as an unregistered Community design in the UK as well as all other EU member states. Following Brexit, the location of first disclosure may impact where unregistered design protection is available. If first disclosure takes place in the UK, it may be protected by SUD; if first disclosure takes place in the EU, it may be protected as an EU unregistered design. But it is not clear whether (and, if so, how) protection can be obtained in both the UK and the EU. The UKIPO is therefore seeking views on how it can provide more clarity in this space and help businesses that want to obtain unregistered design protection in both territories, with five options being put forward for comment.

Enforcement

- **Jurisdiction of the Intellectual Property Enterprise Court (IPEC) Small Claims Track:** The IPEC small claims track currently has jurisdiction to hear claims relating to a number of IP rights (including copyright and UK unregistered designs), but not UK registered designs. The UKIPO is seeking views on whether to expand this to include UK registered designs.

- **Criminal sanctions:** Unauthorised copying of unregistered designs is not currently a criminal offence in the UK (unlike for UK registered designs). The UKIPO is calling for evidence to determine whether there might be a case for introducing such criminal sanctions in the future.

The consultation closes on 27 November and it will no doubt take time for the UKIPO to assess the responses received. However, given Brexit, the recent changes made to the designs system in the EU and the ever-more digitally focussed world we live in, there appears to be appetite for law reform in this area.

With thanks to Rosie Wilson, Abena Oteng-Gyasi and Miriam Butcher for their contributions to this edition.

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