

# PATENT AND PHARMA UPDATE, FEBRUARY 2020

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Legal Briefings

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## Key recent developments in the United Kingdom and Europe relating to patents and the pharmaceutical sector

In this [issue](#) we report on the Supreme Court decision of *Shanks v Unilever* on employee inventor compensation. We update on two CJEU decisions relation to public access to documents submitted to the EMA and a key competition decision on “pay-for-delay” agreements. We cover a string of patent-related UK Court of Appeal cases, including *Ablynx v VHSquared* on jurisdiction, *Anan Kasei v Neo* on insufficiency and joint tortfeasorship and *L’Oreal v Liqwd* on claim amendments and admission of late evidence. We provide brief updates from the EPO on the recent CRISPR priority decision, as well as its AI inventorship decision. We have bumper SPC and FRAND updates covering key Court of Appeal and CJEU decisions in respect of SPCs and a string of interesting interim decisions in the UK in the case of FRAND. We round off the issue with a link to our new IP podcast series and updates on Brexit and the UPC.

### 1. EMPLOYEE INVENTOR COMPENSATION

In the much reported on case of *Shanks v Unilever* the Supreme Court considered the inventor compensation provisions in the Patents Act.

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## **2. THE CJEU PERMITS THIRD PARTY ACCESS TO REPORTS SUBMITTED BY AN APPLICANT IN AN MA APPLICATION**

In two recent decisions concerning third party requests for documents submitted to the EMA, the CJEU decided that exceptions to public access to documents need to be interpreted and applied strictly.

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## **3. CJEU RULES FOR THE FIRST TIME ON “PAY-FOR-DELAY” AGREEMENTS**

The CJEU has clarified for the first time the criteria governing whether so-called “pay-for-delay” agreements entered into between originator and generic pharmaceutical companies fall foul of EU competition law rules.

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## **4. WHO HAS JURISDICTION AND WHO DECIDES WHO HAS JURISDICTION - THE COURT OF APPEAL RULING IN ABLYNX V VHSQUARED**

In Ablynx v VHSquared the Court of Appeal overturned the first instance decision, declining jurisdiction in favour of the Belgian courts. In doing so, the Court of Appeal considered in detail the interplay between the provisions of the Recast Brussels regulation relating to exclusive jurisdiction clauses and intellectual property.

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## **5. COURT OF APPEAL CONSIDERS INSUFFICIENCY BY UNCERTAINTY, BREADTH OF CLAIM INSUFFICIENCY, AND ISSUES OF JOINT TORTFEASORSHIP**

Lord Justice Floyd sets out useful guidance on the scope of insufficiency by uncertainty and claim breadth insufficiency, which has now been included in the UKIPO’s Manual of Patent Practice. He also considered issues around joint tortfeasorship in the context of joining additional parties to proceedings.

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## **6. NO SECOND CHANCES: COURT OF APPEAL CONFIRMS MR JUSTICE BIRSS'S DECISION NOT TO ADMIT NEW EVIDENCE AFTER JUDGMENT HAS BEEN HANDED DOW**

We report on an application to introduce new evidence after hand down of a judgment. While the Court of Appeal accepted that it was possible in principle, it rejected the application in this case.

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## **7. COURT CONSIDERS CROWN USE DEFENCE IN THE TELECOMS SECTOR**

The Crown use defence is rarely raised in patent cases and there is consequently little case law on its application. In *IPCom v Vodafone* the Patents Court considered the requirements for a defendant to make good such a defence and adopted a permissive interpretation to establishing Crown use.

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## **8. CRISPR**

We summarise the recent decision of the EPO Board of Appeal regarding entitlement to priority in relation to certain CRISPR patents.

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## **9. SPC UPDATES**

There have been a number of key SPC decisions in recent months. In *Santen Advocate General Giovanni Pitruzzella* issued his Opinion on the interpretation of Article 3(d) of the SPC Regulation. In the UK case of *Eli Lilly v Genentech*, following a refusal of the referral by the CJEU, the High Court declined to provide a reasoned decision of its own on the important issue of granting an SPC based on a third party's marketing authorisation. In *Teva v Gilead* the Court of Appeal considered Article 3(a) of the SPC regulation following a referral to the CJEU.

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## **10. STRIKING THE LIMITS OF ARROW DECLARATIONS?**

An unsuccessful attempt by Mexichem to strike out Arrow declarations which were sought alongside the usual claims for revocation. The declarations sought in this case were notable as they were not tied to a particular commercial product.

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## **11. FRAND UPDATES**

In advance of the Supreme Court decision in Unwired Planet and Conversant, there have been a number of interim FRAND decisions, including: Optis v Apple, in which the Court dismissed Apple's jurisdictional challenge; IPCOM v Lenovo, where anti-anti-suit injunctions were granted; IPCOM v Xiaomi, where the Court refused to grant an interim injunction as IPCOM had failed to show it would suffer irreparable harm; and Philips v ASUS, in which the Court dismissed ASUS' application to free itself from a planned FRAND trial.

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## **12. FINDING OF INFRINGEMENT 'IN THE BAG' FOR PATENTEE ASSERTING DOCTRINE OF EQUIVALENTS**

We consider the court's approach to applying the doctrine of equivalents in the UK arising in a recent IPEC case relating to a patent for an ammunition bag.

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## **13. EPO PUBLISHES REASONS FOR REJECTING AI AS INVENTOR ON PATENT APPLICATION**

The EPO has published its reasons for rejecting two patent applications on the grounds that an AI system known as DABUS, rather than a human, was named as the inventor. We set out analysis of the EPO's decision.

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## **14. PODCAST LAUNCH AND SUPREME COURT UPDATES**

We have recently launched a new Intellectual Property Podcast series, featuring interviews, discussions and thought pieces from members of our global IP team. We also briefly update on a couple of Supreme Court cases to watch out for.

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## **15. BREXIT**

An update on how Brexit will affect IP rights in the UK.

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## **16. OPTIMISM FROM THE EPO AND UPC PREPARATORY COMMITTEE ON UPC START DATE; EU JURI COMMITTEE REPORT HIGHLIGHTS CONTINUING CHALLENGES**

We update on the UPC in light of comments made at the EPO and UPC preparatory committee which met in January of this year.

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## **17. TABLE OF PATENTS DECISIONS**

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## **18. TABLE OF OTHER RELEVANT DECISIONS**

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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