

Intellectual property in the UK in 2025: trends and developments

Nina O’Sullivan, Partner, at Mishcon de Reya, highlights the main areas of reform to IP law and practice for the year ahead

As 2024 drew to a close, the UK Government published a consultation on Copyright and AI, with a deadline of 25 February 2025 for those wishing to respond. The focus of the consultation is on two, potentially competing, objectives, namely encouraging investment in AI development in the UK, whilst also ensuring creativity is protected. It also raises a number of interesting questions for businesses using generative AI in the course of their day-to-day business.

This is just one intellectual property (IP) topic to monitor closely in the coming months, and demonstrates the ongoing challenge of ensuring that existing laws and practice keep pace with technological change.

In this article, we take a look at the position around GenAI and IP, as well as other areas of reform to IP law and practice expected to take effect during 2025. We also consider the impact of some important recent decisions which rights holders should take into account when devising their IP protection and enforcement strategies, and of which, similarly, those at risk of infringing third party rights should also be aware.

Interplay between AI and IP

The interplay between generative AI and copyright is a complex issue. Faced with both a regulatory gap, and the prospect of legislators globally adopting divergent approaches, IP rights holders have taken the argument to the Courts, with over 30 copyright infringement cases pending around the world (these are mostly in the USA, but proceedings are also underway in the UK, Germany, Canada, China and India).

The crux of the issue is that developing generative AI tools requires access to very large amounts of good quality data in which to train the models. However, rights holders do not (typically) want their content scraped and used in this way, at least not without their consent and/or appropriate remuneration. They are also concerned that the developers of the most popular models have not been transparent in terms of the data used to train those models (and the extent

to which it includes IP-protected content, or indeed pirated content).

In the face of this conflict of approach, the Government proposes what it perceives as a compromise solution - a new text and data mining (TDM) exception when copyright works are reproduced for the purposes of training an AI model, subject to a rights reservation (i.e., an opt-out) for rights holders. Should this proposal be implemented, rights holders would be able to either opt out their works, or license them for AI training and negotiate an appropriate licence fee. To make the TDM exception and opt-out model effective, the Government says that there will be robust transparency requirements in relation to training materials, coupled with simple and effective technical means to allow copyright owners to exercise their opt-out rights.

A TDM regime, with right holder opt-out, currently already applies in the EU, following the implementation of its Digital Single Market Copyright Directive. However, whilst it remains early days for the EU regime, there are already challenges in its implementation. For example, opt-outs must be effected by “machine-readable means”, but it remains unresolved as to whether a rights holder can simply include opt-out wording in the terms and conditions of its website, or whether it must use technical mechanisms such as robots.txt which seek to prevent AI tools from scraping those websites.

Mechanisms such as robots.txt themselves present issues, particularly when dealing with multiple formats and works (for example, in the video game industry). It can be difficult to use them to exercise granular control over the use of individual works, and they are also at risk of circumvention. Putting the onus on rights holders to opt-out from TDM (rather than requiring them to opt-in) runs the risk that many rights holders will simply be unaware of this requirement.

In addition to inputs, the consultation covers GenAI outputs, which may be of particular interest to those using GenAI tools as part of their day-to-day business. There is a risk, for example, that GenAI outputs might infringe upon a third party’s IP rights by reproducing

a substantial part of a copyright work. This could result from the type of data used to train those models, though GenAI developers argue that this is an infrequent occurrence, and the Government appears to agree that this is not a significant issue in practice. However, it is a live issue in several of the cases currently going through the US courts, and also in the UK GenAI/copyright case of *Getty Images v Stability AI* (where the High Court is considering questions of both infringing inputs and outputs). In particular, the risk of infringing outputs does seem elevated when using text-to-image models which a business might employ, for example, to create marketing or website copy, or other materials.

Businesses should implement internal policies to deal with the risk of

infringing outputs as a result of a particular prompt used by a user (and cover off other risks, such as those relating to data protection, confidentiality, bias, accuracy etc). The *Getty Images* case is due to have its liability trial in the High Court this summer and so there may be some judicial guidance in 2025 on these important issues, including the extent to which liability for infringing outputs rests on the user and/or on the developers of such tools.

The consultation also focuses on the extent to which IP protection should be available to protect so-called 'computer-generated works' (CGWs) (i.e., works generated by a computer in circumstances where there is no human author of the work). UK law, unusually, currently provides such protection, albeit with a shorter term of copyright protection than for other types of work. The consultation

identifies a definitional issue: to be protected as a 'copyright work', a work must be 'original' which requires it to be the author's own intellectual creation, reflecting their personality and as an expression of their free and creative choices. However, this

human-centred approach to originality does not sit easily with works generated by AI (as opposed to where the author is assisted by AI), though clearly there could be debate over the creativity and skill used when writing prompts. The Government is currently minded to remove protection for CGWs entirely, unless persuaded there is an economic or other incentive for such protection to exist.

Aside from UK developments, businesses should monitor for updates in relation to the EU's AI Act. This legislation

came into force on 1 August 2024, and has certain implementation deadlines approaching in 2025. We also expect further developments in the US copyright cases, as well as statements of policy from the US Copyright Office.

Design law and practice: reforms in the EU and UK

Another area to monitor for policy developments in 2025 concerns the framework for protecting and enforcing designs, with changes to the EU regime taking effect from 1 May 2025, and the UK Intellectual Property Office (UKIPO) expected to issue a consultation on the UK framework also. Even after Brexit, the EU and UK design regimes have been largely aligned (albeit the UK created a new right, the Supplementary Unregistered Design Right (SUDR)), but the

forthcoming changes to the EU regime introduce some areas of divergence.

The EU reform introduces a number of changes for those looking to register their designs in the EU, which are aimed at promoting efficiency and accessibility, including:

- re-naming the 'Registered Community Design' and 'Unregistered Community Design' to 'Registered EU Design' (REUD) and 'Unregistered EU Design' (UEUD) respectively;
- permitting applicants to combine multiple designs within the same REUD application (to a maximum of 50), regardless of which class they fall under. This will effectively introduce a 'bulk discount' and will have a significant positive impact on design filings;
- changes to fee levels, including a higher increase for the third and fourth renewal periods of an REUD. Impacted businesses may wish to consider whether to renew relevant designs before or after 1 May 2025 in order to benefit from the best fee. The EU Intellectual Property Office [has issued guidance on this](#). There are also changes to the calculation of the six-month grace period for renewing a design.

There are also changes to the scope of protection of designs in the EU:

- The definition of a 'design' is updated to clarify that it covers animated designs. Meanwhile, the definition of a 'product' (to which a design is applied) will also include embodiments in non-physical form, with specific reference being made to graphical user interfaces and interior/exterior spatial arrangements (shop layouts etc).
- REUD owners will be able to inform the public that their design is registered by displaying © (the letter D in a circle) alongside a product in which the design is incorporated or to which it is applied (this can be accompanied by the design registration number or

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a hyperlink to the entry in the register).

- There are new infringing acts (concerning 3D printing and transit of counterfeit products through the EU), as well as new defences. These include referential use (such as in comparative advertising) where it is in accordance with fair trade practices, and also a new 'repair' provision, subject to certain criteria being met.

One significant topic not explicitly addressed in the reforms concerns the rules around first disclosure of designs. There has long been uncertainty as to whether a design must first be disclosed in the physical territory of the

EU in order to be protected by the EU's unregistered design regime (with similar uncertainty as to whether the UK's SUDR requires first disclosure of a design to take place in the UK). This issue currently leads to a potential gap in protection for those looking to rely on unregistered design protection in both the UK and EU, with such businesses forced to consider registered protection and/or to seek to disclose their designs simultaneously in both territories. Due to the wording of the new EU Design Regulation, however, it does appear arguable that designs first disclosed outside of the EU may actually be protectable in the EU as an UEUD but, until this is clarified, designers should continue to proceed with caution on this point, and to seek advice as to the appropriate location and format for disclosure of their designs.

The UKIPO's anticipated consultation in relation to the UK's design law

framework is expected in 2025. It is expected that this will also reflect changes arising as a result of the recent adoption of the Design Law Treaty at the Diplomatic Conference of WIPO Member States in Riyadh.

It is also worth noting the implications of the EU's Packaging and Packaging Waste Regulation (the PPWR) which is expected to come into force in 2025 (and sits alongside various pieces of green reform in both the EU and UK).

The PPWR includes measures aimed at packaging minimisation, with the relevant rules due to apply from 2030 – subject to a potential exception for packaging that is protected by registered trade marks or designs in the EU, provided that this protection is in place before the PPWR

enters into force.

Copyright – challenges in protecting works of applied art

A further issue highlighting divergence between the UK and EU concerns whether copyright (with its longer term of protection) is available to protect so-called works of applied art, which include, for example, certain pieces of furniture, clothing etc.

This issue has arisen in two recent disputes in the Intellectual Property Enterprise Court (IPEC), concerning respectively a water rowing machine (*Waterrower (UK) Limited v Liking Limited t/a Topiom* [2024] EWHC 2806 (IPEC)), and the control panel for an electronic AGA cooker (*AGA Rangemaster Group Limited v (1) UK Innovations Group Limited (2) Michael*

Patrick McGinley [2024] EWHC 1727 (IPEC)). The AGA case is due to be heard by the Court of Appeal later in 2025, and it is possible also that the *Waterrower* case will be appealed.

Under UK law, to be protected by copyright, a work must fit into one of the categories of protection listed in the Copyright, Designs and Patents Act 1988 (CDPA) (which operates as a 'closed list'). The argument in *Waterrower* focused on whether the water rowing machine was a 'work of artistic craftsmanship' under the CDPA, a statutory provision that has proven very difficult to explain, with no clear principles emerging from the leading House of Lords case.

Meanwhile, EU law has adopted a more liberal approach to protection of works of applied art requiring merely that they meet the originality test, with no requirement of aesthetic effect. An obvious tension between the two tests has been percolating for some time but, in *Waterrower*, the IPEC had to meet this tension head on. The Court concluded that, whilst the design of the *Waterrower* met the EU test for protection as a copyright work (which the Court treated as a 'gateway' question), it did not meet the UK test under the CDPA for a work of artistic craftsmanship.

Subject to any appeal, (or indeed any legislative intervention), the clear implication is that it may now be harder to protect such works in the UK through copyright, as compared to the EU. This should therefore be considered carefully when considering IP protection strategies in the UK (as well as the EU), in terms of what other rights may be available.

Trade marks – scope of protection

Another recent case with significant implications, (and which again represents a divergence of UK legal thinking from that of the EU), is the Supreme Court decision in *Sky Ltd & ors v SkyKick UK Ltd & anr* [2024] UKSC 36, in which the author's firm acted for the claimant. The Court gave its decision in the matter, despite the parties having settled the case, because of the points of principle that arose.

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Whilst upholding the finding of infringement by SkyKick, the Supreme Court found that Sky's trade mark registrations were partially invalid on the grounds of bad faith because it had obtained registrations over a broad range of goods and services, some of which it had no intention (at the time of filing the application) of selling or providing, (for example, by using overly broad categories such as 'computer software').

The *Skykick* decision presents a number of challenges for trade mark owners who should take it into account when devising clearance, filing, and enforcement strategies. In relation to trade mark filing, the UKIPO may issue its own guidance as to the impact of the case on, for example, the use of broad terms (such as 'computer services').

It would be worthwhile for a trade mark applicant to make a written record of its commercial rationale at the time of filing for a trade mark. As for enforcement, trade mark owners should consider the risks of an invalidity counterattack when considering enforcing registrations for broad terms, and factor this risk into their enforcement strategy.

On the flip side, those seeking to defend enforcement actions, or to clear a trade mark in the face of prior rights, should likewise consider the extent to which bad faith arguments may be used as leverage.

Lookalike products and packaging also continue to be a topic of debate before the Courts. In January 2025, the Court of Appeal delivered its judgment in *Thatchers Cider Company Limited v Aldi Stores Limited [2025] EWCA Civ 5*, upholding Thatchers' appeal against a decision which had rejected its claim for trade mark infringement in relation to lookalike packaging for its cloudy lemon cider product. Even though the marks were not confusingly similar, the court concluded that Aldi had taken unfair advantage of Thatchers trade mark for its packaging, underlining the value of securing registered protection (*See also News & Views p.18*).

Meanwhile, the Supreme Court is due to hear argument in 2025 in an appeal from the Court of Appeal

relating to Umbro branded football boots (*Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anr [2024] EWCA Civ 29*). This case will consider the impact of consumer perception, including potentially interesting arguments around the relevance of post-sale confusion.

Other IP issues

Some other current IP issues merit discussion. The first is the approach taken by the Courts to the potential liability of individual directors for IP infringements committed by the company of which they are a director, following the Supreme Court's decision in *Lifestyle Equities C.V. & anr v Ahmed & anr [2024] UKSC 17*. This case has impacted upon the practice of seeking to join individual directors as defendants to IP infringement actions – for such cases to succeed, there must be evidence that the director in question had knowledge of the 'essential facts' of the underlying infringement (which is more than having knowledge of actions which resulted in an infringement). This test should be borne in mind carefully at the pre-action stage of any IP dispute.

Secondly, it remains to be seen whether there will be any changes to the UK approach to exhaustion of IP rights in the context of parallel trade. The previous government had consulted on this issue in 2021/2022 but concluded that there was insufficient economic evidence to change the approach it had put in place following Brexit – namely the so-called 'UK+ regime' which means that the UK unilaterally participates in the EEA exhaustion regime (but without reciprocity from the EU). It had been thought that the previous government favoured a move to an international exhaustion regime, thereby enhancing parallel trade into the UK, but no further steps were taken before the change in government, and it is not yet clear whether the current Government will re-open this issue.

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