UK Supreme Court allows appeal in Emotional Perception's patent case

A personal commentary on [2026] UKSC 3

In the 1990's television series *»All's well that ends wishing well«*, a Disney cartoon loosely based on A. A. Milne's *»Winnie the Pooh«*: his striped friend Tigger is deeply unhappy. Tigger has got no birthday. And never had one he feels. Pooh and his other friends, good friends as they are, simply make up a birthday party for Tigger, with presents and all. Tigger rejoices bouncing about on his new pogo-stick, screaming *»exactly what I wanned!«*.

And in a sense, this can also be said about this appealed ex parte patent case. It got to many what they wanted:

i) Most notably of course to the Applicant-Appellant Emotional Perception AI Limited (»Emotional Perception«). They got what they wanted, as the UK Supreme Court1 (UKSC) in effect allowed their appeal from the original underlying decision2 by the UK Patent Office (UKIPO) that had refused their patent application,

and,

ii) it is also the claimed invention itself that gave its users what they wanted.

At issue was the claimed »media file recommender system«: This system recommends to users media files they likely want. Applicant-Appellant's name is a giveaway of what is happening: the recommended media files are said to correspond to the emotional state of the user. The system guesses, magically, how you are feeling today, and treats you to the right music. Except, it is not magic. It is machine learning acting as the user's soul-searching DJ.

The media file recommender system (»the system«), in the application referred to as an »intelligence system«, is an instance of what is colloquially referred to as »artificial intelligence« (AI).

[1] [2026] UKSC 3 of 11 February 2026 - »the instant decision«.
[2] [BL O/542/22] of 22 June 2022

The recommended files correspond to the emotional state, e.g., desires or wishes, of the user, who makes their emotional state known in form of an input media file. The input media file may be a soundtrack of music, video, imagery, etc., whatever the media of interest (for the sake of this article, let's use music tracks as an example, following the UKSC), which the user happens to like. Based on this input (called the »target file«), the claimed system returns another music file, which, it is said, will correspond to the user's emotional state, just as the input file does.

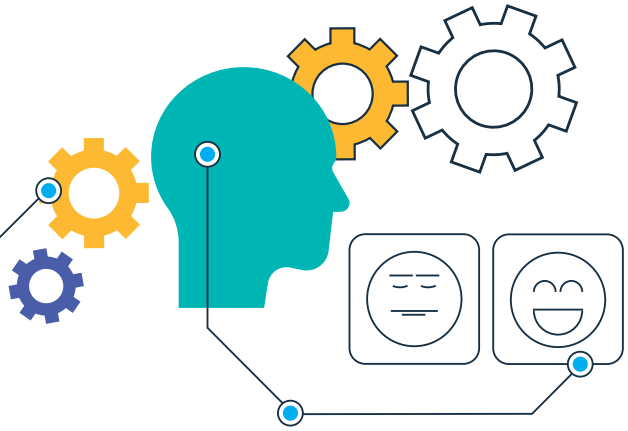
The underlying tech of this AI system is fascinating. But so is the judgment, which usefully went beyond the main contentious issue, which was whether the claimed system is a mere »program for a computer« and should therefore not be patentable. The Court additionally laid out a new legal test to be used for assessing such questions as »excluded matter«, the »program for a computer« being one category of such matters excluded from patenting by UK statute (the UK Patents Act 1977). The legal test so far used by the UK Courts and UKIPO to assess such questions is no longer good, it was held by the UKSC. The hitherto used »Aerotel test« was abandoned in favor of the new test, which may be called a modified version of a test that was used by the European Patent Office (EPO) for a long time, the »COMVIK[3]« test.

The claimed AI system at issue in more detail

The system is based on a trained machine learning model, an »artificial neural network« (ANN), which has been trained in a particular way in pair-wise fashion on pairs of training data. The training data includes preferably a large number of media files, such as audio files for different pieces of music. Each such music track from the training data has a respective natural language (NL) description associated with it. Those could be messages of earlier listeners that had commented on the respective music track.

Alternatively, they might have come from music reviews, or any other source. It may be as simple as noting whether the music is sad, or happy, gloomy, creepy, etc., or as complicated as wordy reviews by music journalists in outlets such as Rolling Stone™ or the Gramophone™. This training data, i.e., the music tracks plus their NL description, are operated on in two vector data spaces when training the ANN: one is called the »semantic space«, the other the »property space«. In semantic space, there are semantic vectors that represent the respective NL descriptions of the music tracks. Notably, the vectors represent semantic understanding: vectors that represent similar sentiments are closer together in the semantic vector space than those that do not. Closeness in this vector space can be represented by a distance measure. In short, one can do semantic geometry! Such vector representations can be gotten by using embedding technology that turns text into numerical vectors, usually very long ones with possibly hundreds of dimensions. But such embedding technology was already known, and is not the main »trick« in this invention[4].

The main »trick« (see at par. 11 in the instant decision) is pairwise training across the two vector spaces, i.e., the semantic space and the property space. In this property space, physical, observable, and hence measurable properties of the media file are recorded as corresponding property vectors. They represent the sort of thing one can measure when doing a spectral analysis of audio signals that the media files encode. Just like in semantic space, there is a natural distance measure defined there for property vectors in property space. In the pairwise training, for any pair of training media files (each having their respective semantic vector and property vector), the ANN is trained to map each training data file to their property vector, in a way that respects the closeness in both spaces. Thus, vectors that are close in the semantic space are mapped to property feature vectors that are close in that property space: »The result is that in the trained ANN, files clustered close together in property space will in fact have similar semantic characteristics, and those far apart in property space will have dissimilar semantic characteristics[5]« . The upshot is that the ANN has the vectors of each pair »dance« in the two vector spaces S, P in synchrony with respect to their distances d, d'.



[3] T 641/00

[4] Embeddings are one of the enabling technologies behind modern LLMs, such as Chat GPT for example. They can be understood as a geometrical version of the linguistic concepts by L. Wittgenstein or Rupert J. Firth.

[5] See at par. 53 in the underlying UKIPO decision.

Then, after training of the ANN, the user provides, via a communication network, the target input media file representative of the user's emotional state. This is then mapped into the property space P via the ANN, and its property vector so gotten is compared with the clusters of the property vectors of the reference files. Those reference files whose property vector is close to the property vector of input file are considered to be those the user wanted, as they represent the same emotional state. Notably, emotions as per natural language have been essentially »transposed« into measurable properties in the property space. At this point, the semantic space S vectors are no longer needed. This is because files that have their property vectors close to each other will have their semantic vectors be close to one another, by the very construction, thanks to the training of the ANN. With this invention, one may argue, as elusive a subject as »emotions« has been transposed into the realm of the computable! Via the communication network, one or more of the reference files sufficiently close in the property space to the target file are then forwarded to the user for use on their device. The claims at issue recited the database on which the reference files are stored, the training of the ANN, the trained ANN, the communication network, and the user device.

Timeline of Proceedings

A claim to this method and a counterpart system claim were rejected by the hearing officer before the UKIPO; it was said that the claim is drawn to exclude subject matter and falls foul of the UK Patents Act 1977's excluded matter provisions in its Section (s) 1(2). In particular, the claimed media file recommender system was deemed to be a mere »program for a computer« as per *s1(2)(c)*, which is one of the excluded categories for which »as such« no patent can be obtained. The Applicant appealed this to the High Court (under Justice Mann, in [2023] EWHC 2948 (Ch)), which sided with the Applicant-Appellant in holding that the claimed matter is not a »program for a computer«. Respondent (the UKIPO) cross-appealed, and the case then made its way to the Court of Appeal. Here, Birss LJ re-aligned ([2024] EWCA Civ 825) with the UKIPO and felt the application should indeed be refused because it is nothing but a »program for a computer« at all, and therefore does fall foul of the engaged excluded matter provision *s1(2)(c)* of the UK Patents Act 1977. In a last-ditch effort, the matter was taken by Applicant-Appellant Emotional Perception to the third level of appeal before the UKSC, who ultimately decided in Applicant-Appellant's favor in the instant decision. The case was remanded back to the UKIPO for continued examination of the application in light of the new test (including modified COMVIK).

The issues

The UKSC boiled it all down to three issues:

Issue 1) *Should Aerotel no longer be followed? (page 8 of the instant decision)*

Issue 2) *Is an »ANN … a program for a computer?« (page 23 of the instant decision)*

Issue 3) *Is the entire subject matter of the claims excluded? (page 32 of the instant decision)*

Issue 1)

The UK Supreme Court went further than merely sorting out issue 2), the main point of contention in the foregoing proceeding, in that it ruled in issue 1) that the thus far applicable UK test for excluded subject matter, the Aerotel test, ought to be abandoned. **With that, the UKSC, in this landmark decision, sets aside more than 20 years of case law which relied on the now abandoned Aerotel test.**

The Aerotel test was the result of the 2006 Court of Appeal decision ([2006] EWCA Civ 1371) under Jacob LJ. In this decision, the Aerotel test was set up as a multi-step test. It is a test to apply the exclusion provisions of *s1(2)* UK Patents Act 1977 to claims that engage these provisions. Such claims are normally drawn to anything related to software, mathematics, algorithms, etc.; in short, the sort of thing deemed to fall under the exclusion provisions *s1(2)*, in particular *s1(2)(a), (c)* UK Patents Act 1977.

The instant decision, in abandoning Aerotel, is less surprising than it seems at first blush, although no less game changing. This is because the UK Patents Act 1977 has an in-built mechanism in its s130(7) that asks for certain of its provisions, including the exclusion provisions *s1(2)*, to be so »*… framed as to have, as nearly as practicable, the same effects in the United Kingdom as the corresponding provisions of the European Patent Convention*«. **Thus, alignment with the EPO was probably bound to happen at some point in time, and that time has now come.**

The European Patent Organization, a non-EU club of countries, got together in the 1970s and set up the EPO for granting EP patents under a then new statute, the European Patent Convention (EPC). Interpretation of the EPC was in the hands of the EPO's Boards of Appeal , with the highest authority being the Enlarged Board of Appeal (EBoA). The EBoA is to ensure consistency in the statutory interpretation of the EPC. Initially, when the EPC was adopted, contracting states, including the UK, re-wrote their statute books on patent law, to align with the language of the EPC. Thus, the exclusion provisions *(a)-(d)* of section *s1(2)* UK Patents Act 1977 mirror the corresponding exclusions *(a)-(d)* under Art. 52(2) EPC. Therefore, **the exclusion provisions *s1(2)(a)-(d)* UK Patents Act ought to be interpreted like *Art. 52(2)(a)-(d)* EPC**. The exclusion of main concern herein is category *(c)*, »program for a computer«. But there are also other excluded matters, such as »mathematical methods« in category *(a)*, or »methods of doing business«, »artistic work«, and others still.

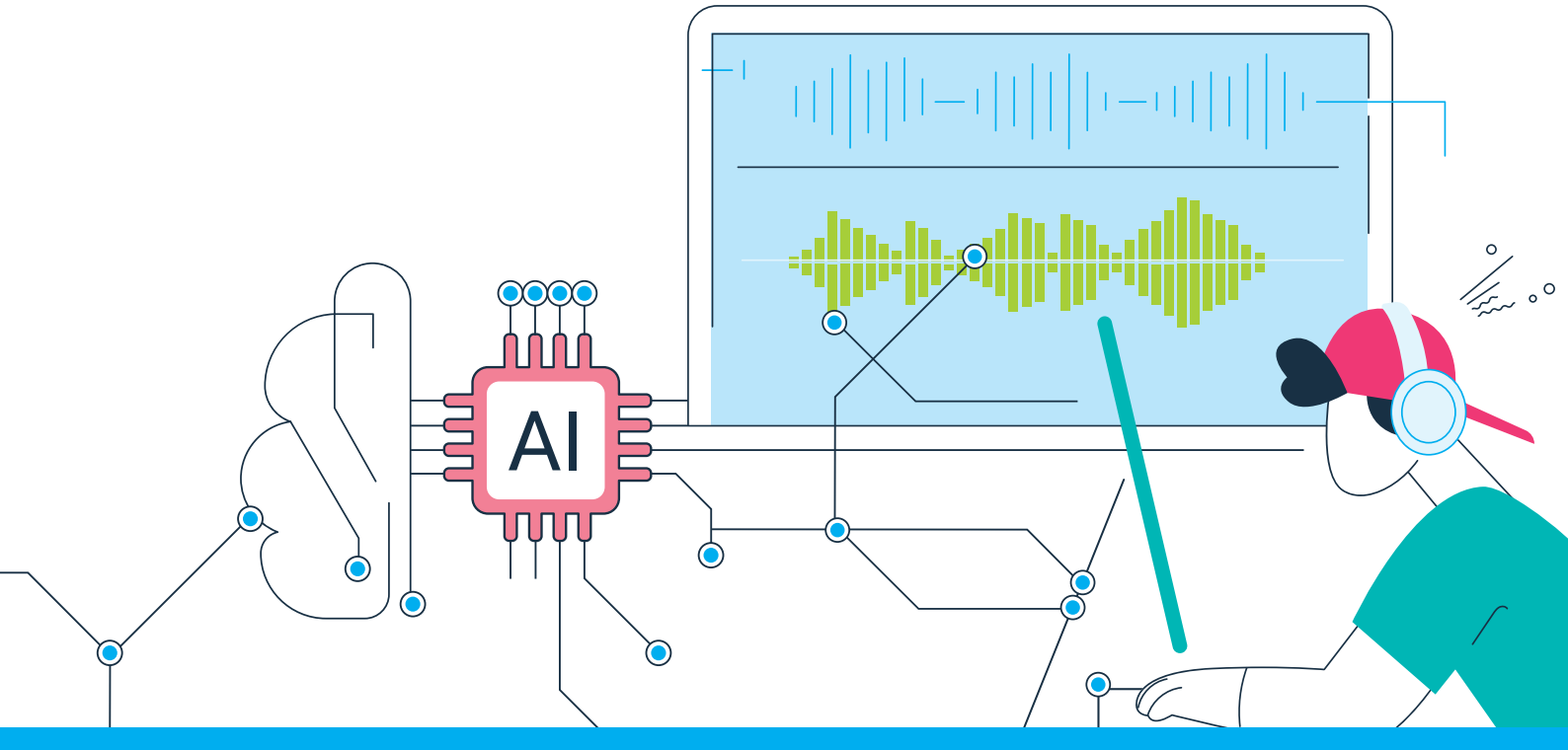
Once the EPO got underway, it had to find its feet as to how to deal with subject matter that engages those exclusions according to Art. 52(2) EPC. Initially, in the early days, up until the early 90s, a so-called *»contribution approach«* was started to be applied by the EPO, and this was essentially adopted by the UK Courts in formulating tests that culminated in the Aerotel test in the 2006 landmark »Aerotel« decision (supra). In that case, Aerotel, an Israeli Company, sought a patent for a new phone exchange system, a kind of pay-as-you-go setup. Users hold a credit account and have a unique code. They phone in via a generic number and with their code. If there is enough credit, they can key in the desired phone number and are put through. In litigation at the High Court, in a counterclaim, the Aerotel patent was revoked because it was said to be drawn to excluded matter; hence the appeal. The contribution approach was later abandoned by the EPO and morphed into the COMVIK approach. It so happens that the COMVIK case (supra) was also about phoning. It concerned using a SIM card with two identities, usable selectively for business or leisure calls, respectively, which thus allowed for splitting up costs.

The COMVIK approach was later refined in the 2006 decision *DUNS LICENSING ASSOCIATES (DUNS)*[6]. *DUNS* spelled out the principles in COMVIK on applying exclusions in a seven principles (A)-(G) framework. It is this rendition of the COMVIK test, which the UKSC enthusiastically embraced (safe for its last step (G)[7] – on which more below), combined with the »any hardware« approach formulated by a much older decision *PENSION BENEFIT SYSTEMS*[8].

[6] T0154/04

[7] T0154/04: *»(G) For the purpose of the problem-and-solution approach, the problem must be a technical problem which the skilled person in the particular technical field might be asked to solve at the relevant priority date. The technical problem may be formulated using an aim to be achieved in a non-technical field, and which is thus not part of the technical contribution provided by the invention to the prior art. This may be done in particular to define a constraint that has to be met (even if the aim stems from an a posteriori knowledge of the invention)«.*

[8] T 0931/95

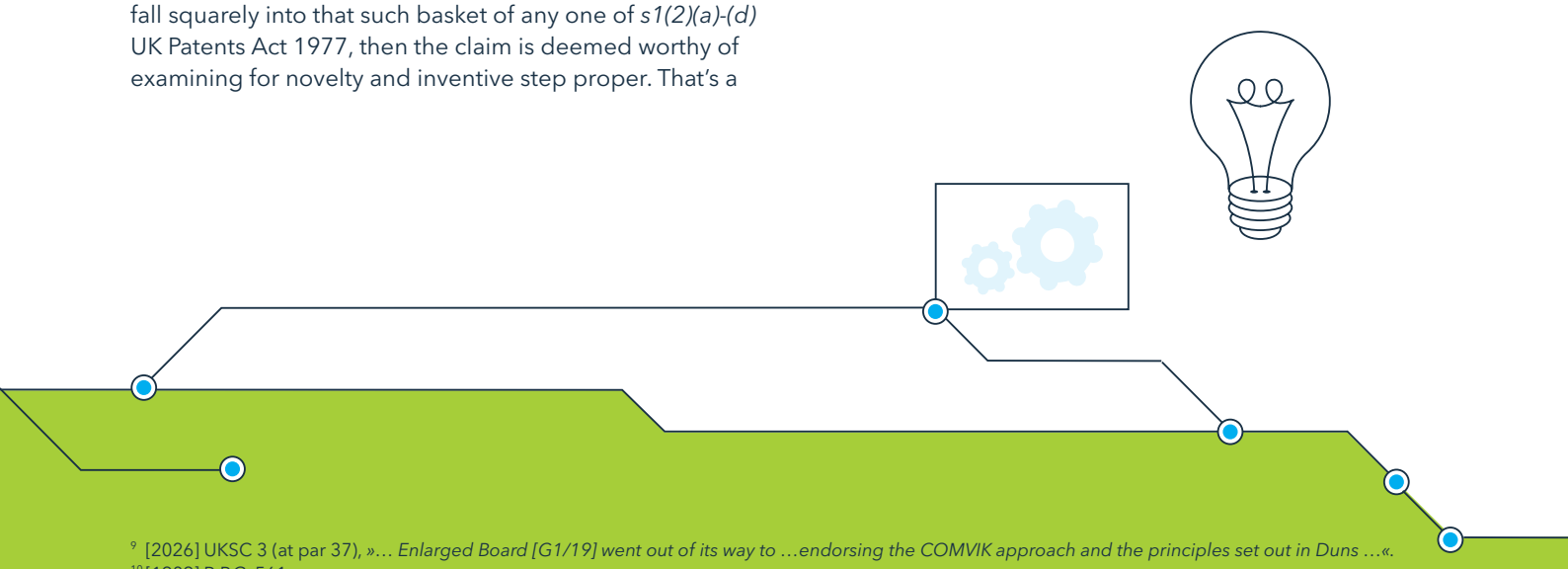


Hence, for the last 20 years, the UKIPO/UK Courts on the one hand, and the EPO on the other hand, diverged on how excluded subject matter should be handled. Jacob LJ himself said, when formulating the Aerotel test in the Aerotel Court of Appeal decision, that the case law at the EPO is not fully settled on the issue of how to deal with such matters, and therefore opted to maintain principles of the contribution approach in the Aerotel test version. But even this decision could be read and interpreted to mean that one day the situation may well change, mainly if the EPO sufficiently settled on the matter of how it wants to deal with excluded subject matter (see at par. 29 in Aerotel *(supra)*). And so it did, when the decision G 1/19, to do with a computer simulation of pedestrian movement, issued in 2021. As noted by the UKSC, Decision G 1/19, in no unambiguous terms[9] endorsed the test to be used for assessing Art. 52(2) EPC-exclusions as »COMVIK + PENSION BENEFIT SYSTEMS«. And indeed, the UKSC in the instant case saw the G1/19 decision as the moment when statutory interpretation of Art. 52(2) EPC crystallized into settled case law. Thus, it ordered to follow the G1/19 endorsed test »COMVIK + PENSION BENEFIT SYSTEMS« (albeit in a modified version) instead of Aerotel.

The contribution-based approach, thus far used in the UK, was in a sense an exercise in »guillotining« claims that dare engage the excluding matter-provision of *s1(2)* UK Patents Act 1977. In its extreme form, the »Falconer approach«, the contribution approach chops off from the claim any overhang that there may be when the claim is held against what was known in the relevant art, and asks whether the chopped off bit falls squarely into the baskets labeled »excluded matters«, such as »program for a computer«, »mathematical method«, etc., as per the excluded categories in *s1(2)* UK Patents Act 1977. If it does, the claim is deemed to be drawn to such matter, and is rejected. If it does not fall squarely into that such basket of any one of *s1(2)(a)-(d)* UK Patents Act 1977, then the claim is deemed worthy of examining for novelty and inventive step proper. That's a lot of hoops that need jumping through. Thus, it may be fairly said that the contribution approach is inherently somewhat biased against anything that engages the exclusions, in particular, mathematical methods, software/programs, and similar related matters that have the perceived quality of being somewhat »abstract«. Coincidentally, it is precisely some of those excluded matters (software, math) that drive much of the current technology reshaping our economies and our lives. This includes AI, but also previous inventive efforts such as data encryption (there would no privacy without this), encoding (networks will choke if this is not used), Code Division Multiple Access (CDMA – no cell phone call without this one), packet switching (it will be many times »Waiting for Godot« without this in network nodes expecting to receive data), etc.

However, even in the UK, the extreme form of the contribution approach, the said »Falconer« approach, first applied in the first instance decision by J Facloner in the Merrill Lynch case[10], where an attempt was made to patent a business method, was ultimately rejected in this purest, most fundamental approach by the Appeal. The approach was then ultimately developed into the Aerotel test, a nicer version of the harsh Falconer knife, with some refinements, like *AT&T*[11]'s five sign-posts (including *inter alia*, »*technical effect*«, »*better computer*«).

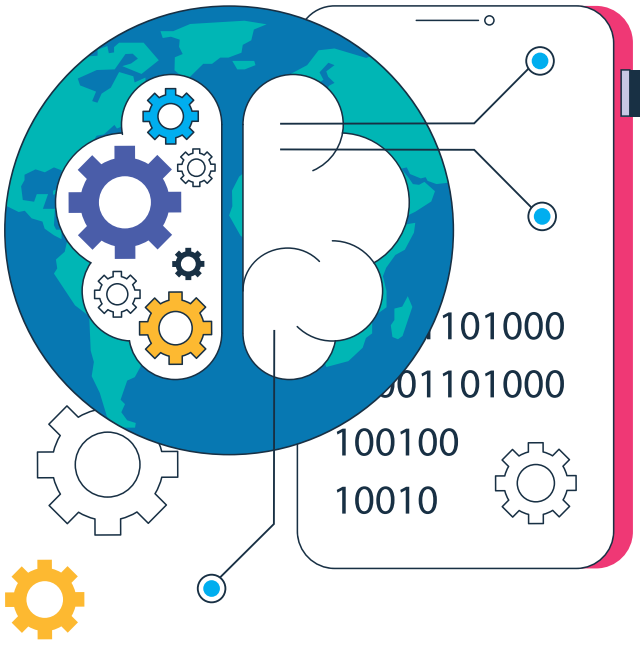
The Aerotel test was summed up by none other than he who devised it, Jacob LJ, as: »*What has the inventor really added to human knowledge perhaps best sums up the [Aerotel test] exercise*«[12]. The test feels natural enough. But it always had its critics, and it tuns out the UKSC is one of them (with one of the Law Lords on the UKSC panel, Lord Kitchin, being a former member of the EBoA).



[9] [2026] UKSC 3 (at par 37), »*… Enlarged Board [G1/19] went out of its way to …endorsing the COMVIK approach and the principles set out in Duns …*«.
[10] [1989] R.P.C. 561
[11] AT&T Knowledge Ventures/CVON Innovations v Comptroller General [2009] EWHC 343 (Pat))
[12] Par. 43 in [2006] EWCA Civ 1371

On occasion, the contribution approach entertained by the UK courts was in for criticism by the EBoA. For example, in G 3/08 (see point 10.6), the contribution approach was felt to lead to absurd conclusions. For example, it was said there that a cup that differs from another cup purely by bearing a certain graphical logo would be excluded subject matter according to the contribution approach in its purest form. This is because the cup without the logo, when compared to the cup having the logo, yields as difference just that, the logo. And the logo as such is clearly excluded subject matter (artistic creation). Thus, the absurd conclusion under the contribution approach would be that the cup itself, solely because of bearing the logo, is excluded subject matter.

The EPO abandoned the contribution approach more than 20 years ago in favor of the COMVIK approach. The contribution approach was thought to fly into the face of the fact that the EPC asks for excluded matter provisions to be separate from the questions of novelty and inventive step. The contribution approach on the other hand is based on comparing the claimed matter against something already known. It hence introduces, through a back-door, as a sleight-of-hand, a »pocket-sized« inventive step-analysis into the excluded matter-assessment. This was thought incompatible with the EPC.



The reason why the UKSC now felt it was apt to follow (most of) COMVIK was three-fold:

i) the resoluteness with which G 1/19 (»emphatically«, see [2026] UKSC 3 at 56) rejected Aerotel,

ii) the cogency of the reasoning behind COMVIK and DUNS,

and

iii) its endorsement by G 1/19.

The COMVIK approach was thought to address the EPC's separation of questions of excluded matter vs. novelty and inventive step, in particular when COMVIK is combined with PENSION BENEFIT SYSTEMS's »*any hardware*« approach (supra). In short, COMVIK + PENSION BENEFIT SYSTEMS »*unclutt[ers]*« (see par. 60 of [2026] UKSC 3) matters, whilst Aerotel was »*jumbling them up*« (see par. 63 of [2026] UKSC 3).

The COMVIK approach can be thought of as a democratization of claim features. COMVIK does not ask whether the features are excluded matter or not. It simply asks whether any claim feature, whether or not it is, on its face, technical, has a technical effect. If it does, it ought to be considered in the assessment of inventive step. If it does not , it is simply ignored, with the consequence that the original subject matter bleeds those »inactive« features, and ends up being sizzled down to nothing but than a plain compute, at least in most cases concerning computer implemented inventions. This is hardly inventive. Thus, all features are treated equally - technical or not. In that sense, even features that are undoubtedly technical may end up thrown out: for example, in a novel combustion engine in a car, the fact that the car may also have a cupholder is irrelevant for the technical effects that stem from novel features of the new engine. Under COMVIK, even the physical, palpable cupholder feature is ignored, just like a new software feature that does not contribute to technical effect in the claimed context would.

That being said, the COMVIK approach is not without its weaknesses, as pointed out by Jacob LJ in Aerotel: »*not intellectually honest*« (see par. 27 in Aerotel (supra)). The Supreme Court felt equally uneasy about this, and decided to ditch the last step (G) of COMVIK as formulated in DUNS *(supra)*, having to do with the traditional way the EPO tests for inventive step.

As most judges who deal with patents will tell you, it is when assessing for inventive step that the hard part gets started. Is there inventive step? Or is the claimed matter obvious?

The EPO has devised a framework for assessing inventive step (Art. 56 EPC) based on the so-called problem solution approach, i.e., a legal test for inventive step. It has been around for a long time and is one of the EPO's legal bedrocks. It got one of its first proponents in the then Technical Board of Appeal Chairman George Szabo in the early 1990s. But its history goes way back, depending on how far you want to go. The idea of looking at an invention in terms of problems to be solved can be traced back to Plato's »… *Necessity is the mother of our invention* … «[13].

In the problem solution approach, one looks at the claim's differential features against the prior art and asks whether there are any technical effects flowing from those differences. If there are, then one formulates the following test problem: whether the skilled person, given the state-of-the-art on the table, would have arrived at the invention in trying to achieve those technical effects.

But plain vanilla COMVIK/DUNS has left a bitter aftertaste for many when applied to claims that engage excluded matter. The problem solution approach, some say, does not stop short of sleight of hand either, for it essentially asks for those non-technical features (that have no technical effect) to be slyly imported into the problem to be solved, in effect making them part of the state-of-the-art, although they may well not have been. For example, a business method aspect may well be new on its own, even if it has no technical effect in the narrower patent sense, and yet it is assumed, all of a sudden, to be previously known when it finds its way into the problem formulation. It is this rabbit-out-of-the-hat trick (i.e., step (G)) that was called out as »*intellectually not honest*« by Jacob LJ in Aerotel (see par. 27 in Aerotel, supra). The Supreme Court, in the instant case, whilst essentially adopting the COMVIK approach for tackling excluded matter, also felt uneasy about this importation of unknown features into the public domain. They opted to keep COMVIK as formulated by DUNS but dropped its step (G) where, in effect, such importation was required. The UKSC therefore felt that this pruned down version of COMVIK, which may be referred to herein as »*COMVIK'*«[14], a modified version, is the correct test for UK courts to be using in the future. The UKSC, in adopting COMVIK', strikes out the contentious problem solution approach-based feature importation trick, referred to as step (G) in DUNS (see at par. 39 in [2026] UKSC 3). And, following G 1/19, the UKSC additionally combines COMVIK' with the »any hardware« approach of PENSION BENEFIT SYSTEMS (supra). The Respondent (the UKIPO) has called out the proposal to use »COMVIK plus PENSION BENEFIT SYSTEMS« a »*Frankenstein*« construct (see at par. 67 in [2026] UKSC 3). But for the UKSC, the future test to use is not COMVIK + »*any hardware*« but COMVIK' (i.e., pruned down COMVIK) + »*any hardware*«. Thus, it is now COMVIK' (i.e., minus step (G) of the original) + PENSION BENEFIT SYSTEMS that is recommended by the UKSC as the future framework to use for subject matter that engages the exclusion provisions.

Here is how the »*uncluttering*« works according to COMVIK' + »any hardware«: As per the »any hardware« approach, for any claim that engages the excluded matter provision, if this claim also recites some technical means (e.g., computer, etc.), then the claim is not drawn to excluded matter, because something clearly technical is recited. This prong of the test can thus always be met. The formerly dreaded exclusion provision was dwarfed to a »paper tiger« – a requirement (or »hurdle«) only by name. One can then move on to examine novelty and inventive step. But now, COMVIK's teeth show, because one can only use those features that have a technical effect over the prior art. Those that do not cannot enter the analysis on inventive step. This is the adopted part of COMVIK. Thus, with COMVIK' + PENSION BENEFIT SYSTEMS, instead of doing the preliminary excluded matter wrangling, the question is now transposed into the »intermediate step« (see at par. 43 in [2026] UKSC 3) of analyzing for technical effect (if any) of the claim features and filtering out those that do not yield such technical effect (see at par. 66 in [2026] UKSC 3). The UKSC felt this approach is what the EBoA in G 1/19 approved when G1/19 coined the term »intermediate step«, which was much liked by the UKSC. And hence COMVIK' + »any hardware« should be taken as settled law and should be followed by the UK Courts and the UKIPO instead of the Aerotel test. Of note, the UKSC made clear that their following of the EPO on this is not a matter of »slavishly following the ship« (see par. 49 of [2026] UKSC 3), but a matter of due regard for the law (i.e., s130(7) UK Patents Act 1977) and carefully weighing the soundness of arguments advanced by the EBoA (see at par. 49 in [2026] UKSC 3).

[13] Formulated in a dialogue in his »The Republic« (page 369, in the translation by B Jewott, 1908.
[14] Pronounced »COMVIK prime«.

Issue 2)

Is an ANN nothing but a computer program? This was the question in issue 2 considered in the instant decision.

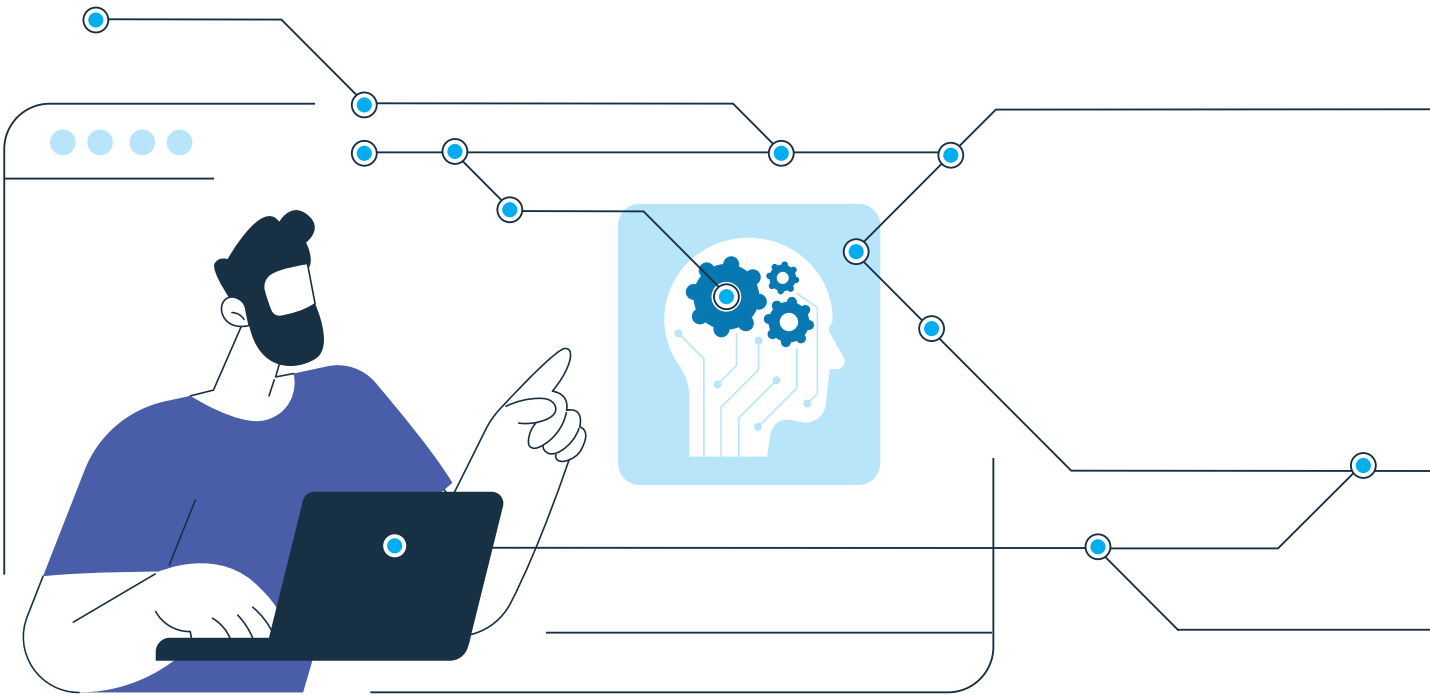
Tigger, whilst he did get some of what he wanted, didn't get it all – there were no lima beans for him. And so it is with the Applicant-Appellant. The UK Supreme Court did not follow their line of argument and rather ruled: yes! The ANN indeed **is** a »program for computer« under s1(2(c) UK Patents Act 1977.

This may be surprising because in the decision it is accepted by the Court that a neural network is essentially a »model« (see at paras. 81 and 84 in the instant decision). They rely on expert opinion for this. The expert refers to ANN as a »computational model«. In this line of argument, the UKSC rejected another one of Applicant-Appellant's submissions that the ANN is more like a »machine«. It is not a »machine«, the Court said, it is not a physical object. At best, it is an »abstract machine« in the Court's opinion, but ultimately the Court went on to conclude that the ANN is in fact a »program for computer«.

Whilst convincingly drafted overall, it is felt that on this point the reasoning of the instant decision is perhaps at its weakest. The ANN clearly is a **mathematical model** and cannot really be said to be a »program for a computer« any more than a blueprint for a car can be said to be a car. It would seem that, out of the excluded categories *(a)-(d)* on offer in *s1(2)* UK Patents Act 1977, »mathematical method« at *(a)* would appear more appropriate than *(c)*'s »program for a computer«. What could be argued though is that ANNs are akin to a »meta-program«, and so in that sense may be arguably considered a kind of program after all. Yet category *(a)* »mathematical model« seems more natural.

But luckily, in the context of the decision, this seems a moot point. Just like Tigger, it tuns out, did not like lima beans anyway, it doesn't really matter into which category of exclusions ANN happens to fall. The outcome of the overall analysis based on the new test adopted by the UKSC is all the same. Because even if ANN is a »program«, according to issue 3) (see below) the claim as a whole is not excluded. And the ANN will likely be seen as enabling the technical effect of translating emotional states from semantic space into concrete measurable properties in property space (see the summary at par.12 in the instant decision; emphasis added »*The recommendation [of the media file] is made without recourse to any semantic comparisons*«.

Another line of reasoning advanced by the Applicant-Appellant is that ANN is not a »program for computer«, because it does not need a programmer telling the computer what to do. This line of arguments caused some confusion in the High Court stage of the proceedings. Whilst not specifically said, this line of reasoning may probably be traced back to an alleged definition attributed to one of the godfathers of machine learning (ML), Arthur Samuel,



who devised the checker playing computer in the 1950s. According to this alleged definition, ML may be thought of as giving computers the ability to learn **without being explicitly programmed**[15]. Others have taken up this line of thought, and this manner for defining ML/AI is not only making its round in various internet forums, but has apparently also informed same statutory language in some jurisdictions, such as in the US[16].

J Mann in the High Court (supra) then concluded that, well, if there is no programmer needed, there cannot be a computer program; and how can the claim then be excluded? And thus he sided with Applicant-Appellant.

The surprising observation of emergent properties in artificial intelligence, like those that have come to light with large language models since at least 2022, is truly baffling and it is fair to say that even the creators were stunned by this. Still, the reason for this is ultimately apt modeling, i.e. a model that is free enough without being constrained to a particular type of pattern it ought to find in the training data. But the model still needs to be applied. And nobody may be able to predict the outcome beforehand. That is the point in using a model after all. But to have the model applied, a program of some sort is still needed. However, ultimately, again, this is a moot point because of the final, third issue.

Issue 3)

Here, it was asked whether the claimed subject matter **as a whole** is excluded subject matter, which, of course, in light of issue 1, was denied by the UKSC. It is not. The »any hardware approach«prong in the test adopted by the UKSC clearly lifts the claim outside the *s1(2)* exclusions, as it recites not only the »*ANN*« (which would engage *s1(2)(c)* as per issue 2), but also recites sundry hardware components (»communications network«, »user device«).

The patent application was remanded back to the Hearing Officer at the UKIPO to re-evaluate the application in light of the new test (COMVIK' + »any hardware«). It seems that a grant is likely as the inventive merits of the claim have already been accepted by the Hearing Officer (see par. 49 of the underlying UKIPO decision).

The case did not have an EP counterpart. It may be interesting mulling over how the case may have fared before the EPO. Likely better, is one view. The trick in the claimed system of lifting semantic considerations into property space of measurable properties sounds just like the sort of matter that may entice the EPO to issue their intention to grant under Rule 71(3) EPC.

s1(2) UK Patents Act 1977

It is hereby declared that the following (among other things) are not inventions for the purposes of this Act, that is to say, anything which consists of –

(a) a discovery, scientific theory or mathematical method;

(b) a literary, dramatic, musical or artistic work or any other aesthetic creation whatsoever;

(c) a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer;

(d) the presentation of information;

but the foregoing provision shall prevent anything from being treated as an invention for the purposes of this Act only to the extent that a patent or application for a patent relates to that thing as such.

Article 52(2) EPC

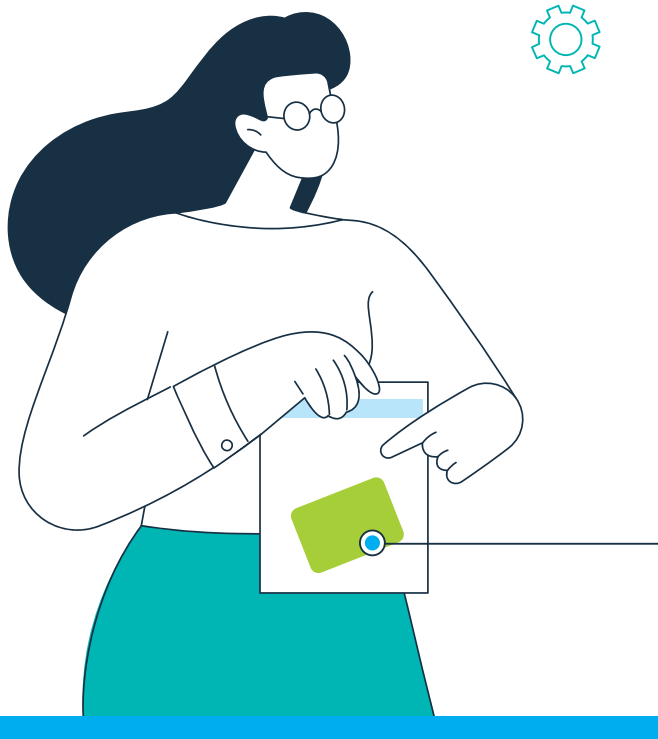
The following in particular shall not be regarded as inventions within the meaning of **paragraph 1**:

(a) discoveries, scientific theories and mathematical methods;

(b) aesthetic creations;

(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;

(d) presentation of information.



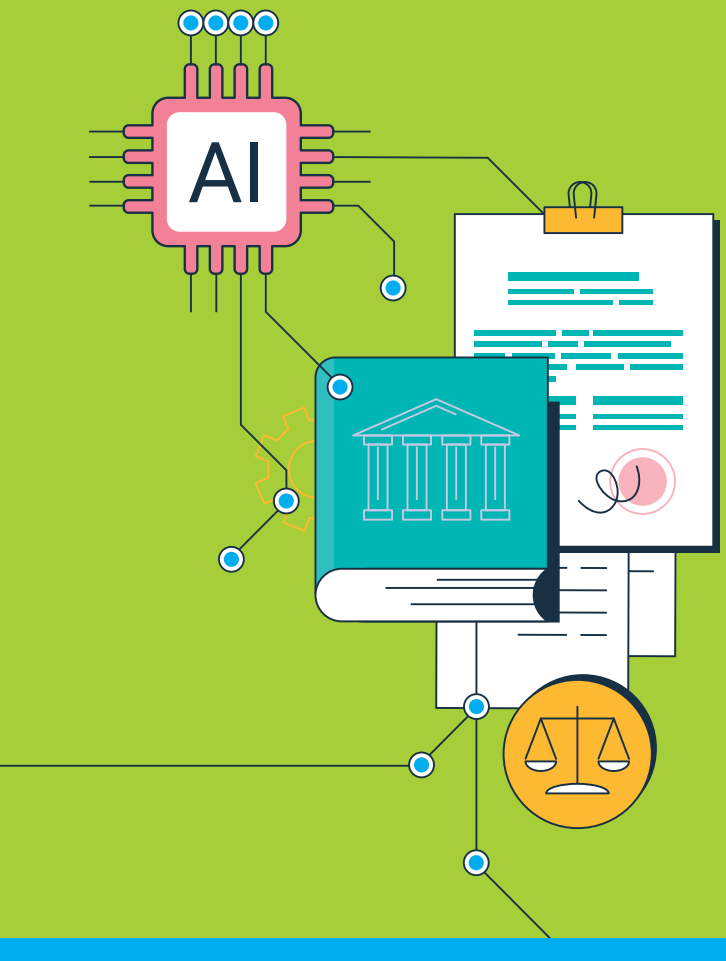
[15] Although it appears there is no evidence that A Samuel said this, a statement to similar effects may be found in his seminal paper (A. L. Samuel »Some studies in machine learning using the game of checkers«, IBM Journal of Research and Development, vol 3(3), pp 210-229; see page 211, »Introduction«, left column, first paragraph, last line there.

[16] See, e.g., the US code on commerce and trade, title 15 USC, chapter 119, §9401(11).

Some Thoughts

The UK patent law has come a long way. The UK Patents Act 1949, the predecessor to the UK Patents Act 1977, was in a sense more liberal than the new law. It had no exclusions in it. It merely asked for »*any new and useful manufacture*«. Exclusions were later formulated by judges before the Courts. The »*new and useful manufacture*« language is memorable as it hails from an even earlier law, the 1623 »*Statutes of Monopolies*« that came into being under the reign of King James I/VI.

There was also much statutory interpretational heavy lifting needed to read a »method« as a »*new and useful manufacture*«. When it came to methods of computing, most were thought no to fall under the »new and useful manufacture« language. Things brightened up in case Slee and Harris's Applications [1966] RPC 19. It was one of the first UK cases, still under the old UK Patents Act 1949, that dealt with matters that can be said would have engaged the exclusion of the UK Patents Act 1977. In this Appeal from the UKIPO, Applicant was pursuing a method of running on a computer the then new technique of »linear programming«[17]. Ultimately, in *Slee and Harris*'s Applications, the computer running the code for the linear programming method was deemed as in principle patentable.



Conclusion

Whether this landmark decision will have all stakeholders rave on pogo sticks like Tigger is of course not known at this point, but it may well do, as it will likely make obtaining patents for subject matter that engages the exclusions of *s1(2)* UK Patents Act 1977 easier in the future.

This may be welcome news some in the AI industry that, according to estimates (Financial Times of 8 February 2026), is expected to spend to the tune of 660 billion dollars on developing the recent AI technology through 2026. At the moment, the battles over AI are fought in other areas, namely regulation and copyright in connection with the underlying training data that powers much of the AI tech. But in those fields, there is still some fine-tuning by lawmakers needed for finding apt statutory language. In contrast, patent law is already well positioned in handling rights around AI tech. Thus, having a reasonable prospect of successfully patenting such matters is undoubtedly welcome by some stakeholders.

Because it is the UK Supreme Court, a widely esteemed authority in the IP field, with a string of famous patent decisions[18], who weighed in on excluded matter, it is expected that note will be taken also outside the UK, such as in the US, where the current system under the Alice/Mayo[19] test can also be thought to be biased against claims for software or algorithms, etc. The Alice/Mayo test asks in essence for two separate inventions; one to overcome the exclusion, and another for proper novelty and inventive step considerations. Maybe an overhaul of that test is also in the cards soon, and may be welcomed by some.

[17] It is a curious twist of history that »linear programming« regained some attention as of late as it can be used in some cases by the recently re-emerging AI technology of »re-enforced learning« that attempts to dethrone large language models from their current dominant position in the AI world.

[18] »*Doctrine of Equivalence*«, Actavis v Eli Lilly [2017] UKSC 48, »*Purposive (claim) construction*«, Kirin-Amgen v Hoechst Marion Roussel [2004] UKHL 46, »*plausibility*«, Warner-Lambert v Generics [2018] UKSC 56; »*Biogen Insufficiency*«, Biogen Inc v Medeva plc [1997] UKHL 18, (1997), »*Inventor must be natural person*«, Thaler v Comptroller-General [2023] UKSC 49, and others.

[19] Alice Corp. v. CLS Bank International, 573 U.S. 208 (2014); Mayo v. Prometheus, 566 U.S. 66 (2012)

Attila Kimpan
/ Of Counsel
/ European Patent Attorney
/ UPC Representative
/ Mathematician