

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 48 NO. 20)

Dear Readers,

Time Flies! It is one year, since we started TILC's information initiative, *Friday Fortnightly*. Over the course of the year, thanks to your regular feedback, inputs & comments, we could make a steady progress and bring *Friday Fortnightly* to the standard form that it takes today.

In this edition, as always, you will find an overview of the key developments in Competition, Copyright, Patents, Designs and Trademarks for November-December 2021.

In addition to the newsletter, you can now, also connect with us on [LinkedIn](#) and [Instagram](#).

The Innovator's Legal Aid Clinic's (TILC) information initiatives – Friday Fortnightly and IP Talks – are open to contributions by students and alumni from the intellectual property law programmes offered at the Faculty of Law, Maastricht University.

We very much look forward to your feedback, inputs, and suggestions.

With kind regards,

C. Coutier, C. Annani, D. Baltag, D. Kermode, M. Koci, S. Van Zuylen van Nyevelt, T. Kuznetsova, Y Lu and K. Tyagi

Email: [m.kotsi@student.maastrichtuniversity.nl](mailto:m.kotsi@student.maastrichtuniversity.nl) & [k.tyagi@maastrichtuniversity.nl](mailto:k.tyagi@maastrichtuniversity.nl)



*Serving innovative start-ups pro-bono with the wisdom of intellectual property laws*

## 1. Competition law

### 1.1 Facebook (Meta)/ Kustomer merger: Meta offers remedies to the Commission

On 26<sup>th</sup> June, Facebook (now Meta) notified to the Commission its proposed acquisition of Kustomer. Following concerns that the proposed merger may lead to anti-competitive effects in the market for Customer Relation Software (CRM) solutions, the Commission initiated its phase-1 investigations. Commission's key concerns are the resulting foreclosure effects in the



Business-to-Consumer (B2C) over the top (OTT) messaging channels of communication. To address Commission's preliminary concerns, on 26<sup>th</sup> November, Facebook submitted its first set of commitments. As a next step, the Commission will market test these commitments, and request inputs from competitors, customers and other market players, as to whether these commitments can effectively alleviate anti-competitive concerns in the relevant markets of concern. The Commission has also accordingly extended its initial provisional deadline from 8<sup>th</sup> December to 28<sup>th</sup> January 2022.

The merger was earlier unconditionally

approved by the UK and the Australian competition authorities.

*Sources: Reuters, 26 November 2021, available [here](#). Economic times, 27 November 2021, available [here](#). FX Empire, 26 November 2021, available [here](#).*

*Image Source: Getty images, available [here](#).*

### 1.2 Digital Markets Act receives EU Competitiveness Council's approval

On 25<sup>th</sup> November, the Competitiveness Council Meeting approved the Digital Services Act (DSA) package. The DSA package comprises of the Digital Services Act that deals with content and the Digital Markets Act, that deals with the more economic aspects that directly impact competition in the platform markets.

While approving, the ministers of economy from across the Member States also added their inputs to the Commission's 2020 DSA proposal. Notable changes include expedition of the timeline and amendment of the criteria to designate a given platform as a gatekeeper (1); strengthening of end user rights in the platform economy (2) and to prevent fragmentation of the internal market, confirmation of the European Commission as the "sole enforcer" of the Regulation (3). Member States may empower the national competition authorities (NCAs) to initiate investigation, and the findings therein may subsequently be shared with the European Commission. With this "general approach", the Council Presidency under the leadership of Slovenia completed the "negotiation process" for the DSA package. As a next step, from

January 2022, France (in charge of the Council of the European Union presidency from 1st January to 30<sup>th</sup> June 2022) will shepherd negotiations with the European Parliament.

*Sources: European Council, 25 November 2021, available [here](#). Politico, 25 November 2021, available [here](#). Pinsent Masons, 26 November 2021, available [here](#).*

*Image Source: Getty Images, available [here](#).*

### 1.3 Big Tech fined by China for failure to report acquisitions

On 20th November, the Chinese State Administration for Market Regulation (SAMR) fined a number of Chinese big tech companies including Alibaba, Baidu and JD.com for their failure to report up to 43 acquisitions over the last decade (starting 2012). These acquisitions span across sectors as diverse from retail, real estate, medical technology and food delivery to insurance, customer mapping, energy vehicles and navigation systems.

The companies must pay a fine of 500,000 yuan (US \$76,000) per violation, the highest possible fine under the 2008 Chinese Anti-monopoly law (AML).

China's strict enforcement policy against unreported mergers first emerged in December last year, when it fined Alibaba; Tencent-backed China Literature and Shenzhen Hive Box about 500,000 yuan each for "improper reporting" of their acquisitions.

*Sources: ABC news, 20 November 2021, available [here](#). Jurist, 20 November, available [here](#). Reuters, 20 November 2021, available [here](#).*

*Image Source: Getty images, available [here](#).*



## 2. Copyright

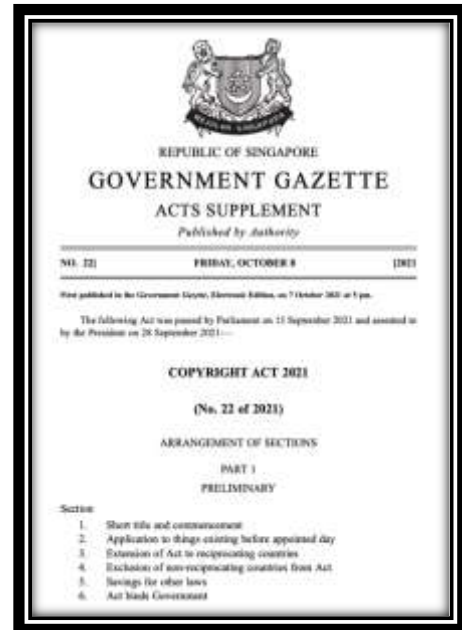
### 2.1 Singapore amends its Copyright Act

On 21<sup>st</sup> November, Singapore's new Copyright Act (Amended Act) entered force. This amendment in Singapore's copyright law is a legislative response to the recent technological developments.



The Amended Act comprises of the following seven notable changes. First, an amended right for creators and performers to be "clearly and reasonably" identified, following a public use of their work. "Public use" in this context, will refer to the use of works online, including the publication, performance and use of works in corporate materials. Second, the author of a work

(including commissioned works) shall henceforth, be the owner of the work by default. Category of works referred to in this amendment include portraits, photographs, engravings, sound recordings and films. Third, introduction of a new exception to protect “computational uses of lawfully acquired, non-infringing works (including text and data mining, [the] training stage of machine learning)”. Pre-amendment, this particular use was partially covered by the more generic fair dealing exception in the Singaporean copyright law. Fourth, addition of new exceptions that cannot be contractually overridden. These include, “computational data analysis [1]; use of work in judicial proceedings and for legal advice [2] and acts in relation to galleries, libraries, archives and museums [3]”. Fifth, right for copyright owners of sound recordings to earn fees for public broadcast of their recordings. This includes license fees for public broadcast of the recordings and license fees for public performance of the underlying music. Sixth, possibility for copyright owners to sue sellers of devices and services used to infringe and access or making available their copyright-protected works. Seventh, change of the title of the general “fair dealing” to the “fair use” exception. This change in name to “fair use” is also accompanied by a change in factors to be taken into consideration. Earlier, in addition to the US four factors (purpose of use [1]; nature of work [2]; amount of work used [3] and the potential impact of the use [4]), Singapore copyright law also took the possibility to access the copyright-protected work on reasonable commercial prices, as an additional fifth factor. Fair use, like the US fair use test, will henceforth, only take the first four factors into account.



*Sources: Infojustice, 1 December 2021, available [here](#). The National Law Review, 1 December 2021, available [here](#). Media Writes.law, 1 December 2021, available [here](#).*

*Image source: Singapore Statutes Online, available [here](#)*

## 2.2 Embellished Stormtrooper helmets as Non-Fungible Tokens



In early 2021, London-based artist and curator, Ben Moore along with US developers, DeFi Network and photographer Bran Symondson, created a non-fungible token (NFT) collection. There were about 1,138 NFTs in total, out of which about 100 were based on earlier decorated Star Wars Stormtroopers helmets developed by leading British artists Anish Kapoor, David Bailey, Damien Hirst and Jake & Dinos Chapman. The said artists had developed these helmets for another charitable project.



Moore's NFT collection resulted in sales worth 1.6 Ethereum (ETH) transactions, about £5 million, within a short period of few months. Legal challenge emerged as Moore and his team attached these original works to the NFT work, without the original rightholders' permission.

Following complaints by the artists, "Opensea", the platform hosting the referred NFT work immediately removed three art works. Opensea had earlier removed NFT's linked to Damien Hirst's artwork. These works are expected to be reinstated



only after the dispute has been resolved or the parties enter into a suitable licensing agreement.

*Source: The Times, 1 December 2021, available [here](#). The Art Newspaper, 1 December 2021, available [here](#). Financial Times, 1 December 2021, available [here](#) (subscription required).*

*Image source: The Art Newspaper, available [here](#)*

### 2.3 Copyright infringement on Instagram: Khloé Kardashian on the spot



In January 2017, Khloé Kardashian posted on her Instagram account, a picture of the top model Bella Hadid wearing denim from her brand, "GoodAmerican LLC". In the said post, Bella was seen "wearing [GoodAmerican's] leather jacket and a pair of distressed black jeans" followed by a caption. Bella promptly replied the post with a positive remark (*see Image*).

On the 22th of November, photographer Alo Photography, the plaintiff, filed a complaint before the US District Court of California alleging copyright infringement, as the photos were captured by the company and were subsequently registered at the U.S. Copyright Office in December 2020.

The photographer sued GoodAmerican on the grounds that Khloé enjoyed effective control over both the accounts as she took "active and pervasive role in the content posted on its account". Furthermore, Khloé had not only used a copyright protected image, but she and her company had also benefited from this use. This infringement, even if for a short duration of time, benefitted Khloé and here company in the following two ways. First, it led to an instant increase in traffic to her Instagram account; and second, it led to a substantial increase in merchandise sales of GoodAmerican's products. Based on the foregoing, Alo Photography sought an action for damages and disgorgement of the profits resulting from the use of the photograph.

*Source: The complaint filed to the District Court of California, available [here](#).*

*Source and image source: The Fashion Law, available [here](#).*

### 3. Design

#### 3.1 Comprehensive safety solution for faster certification of industrial designs

An autonomous and connected digitally-enabled future requires high quality and “state-of-the-art”, “safety-compliant semiconductors”. On 19th October, Cadence Design Systems’s launched its Cadence Safety Solution. The Solution meets this requirement for safety-critical applications. This new system helps faster certification of various safety standards, and thereby accelerates the process of bringing new digital innovations to the market. The system helps determine whether a given chip, that is still in its development phase, meets the internationally accepted safety standards ISO 26262 and IEC 61508.



The system includes already existing design validation tools such as the Jasper Functional Safety Verification (FSV). The new notable addition of the current system is the Midas Safety platform. This platform puts forward a novel mechanism for testing failure points within the system (FMEDA analysis). This new authorization system is particularly apt for cutting-edge operations, that involve Artificial Intelligence (AI)-enabled innovations in fields as diverse from automotive, industrial manufacturing to aviation.

*Sources: Business wire, 19 October 2021, available [here](#). Electro pages, 25 October 2021, available [here](#).*

*Image Source: Business wire, 19 October 2021, available [here](#).*

### 4. Patent

#### 4.1 Novo Nordisk to focus on RNAi research, acquires Dicerna for USD 3.3 billion

RNAi refers to a biological process, whereby small pieces of RNA interfere with gene expression by binding to messenger RNAs (mRNAs). By silencing disease-causing genes, the process promises more precision-based medicine. Following patent cliff in the past decade, whereby dozens of blockbuster pharma molecules lost their patent exclusivity, big pharma is progressively looking at gene-based therapy to improve its bottomline. The trend was initiated by Novartis in 2019, as it acquired The Medicines Co. for USD 9.7 billion and thereby, became the owner of the “anti-cholesterol RNA drug Leqvio, or in inclisiran”.

On 18th November, Novo Nordisk tread the direction of gene therapy, as it announced the planned acquisition of Dicerna for USD 3.3 billion. Dicerna, a US-based biopharmaceutical company, focusses on RNA interference (RNAi) research and owns well known GaIXC™ and GaIXC-Plus™ RNAi technologies. Since 2019, the two companies have collaborated closely to explore over 30 liver cell targets, with the first target expected to be initiated in 2022.

The GaIXC platform offers the potential to treat difficult health conditions, while the GaIXC-Plus platform enlarges access to extrahepatic cell and tissue types. Dicerna also actively collaborates with other big pharma companies such as Roche, Eli Lilly and Alexion.



Following this acquisition, Novo Nordisk will own Dicerna’s worldwide patent portfolio, which includes four core US patents (valid until 2030) that protect the GaIXC and GaIXC-Plus platforms and some other key patents specific to the promising RNAi technology. The key goal of this partnership is to “deliver life-changing precision medicine” for chronic and rare diseases.

*Sources: Official website of Novo Nordisk, 18 November 2021, available [here](#). Reuters, 18 November 2021, available [here](#). IAM Media, 23 November 2021, available [here](#) (subscription required).*

*Image source: Getty images, available [here](#).*

#### **4.2 Ericsson strengthens focus on wireless enterprise solutions, acquires Vonage**

On 22th November, Ericsson entered into an agreement to acquire Vonage for USD 6.2 billion. Vonage is a US-based global provider of cloud-based communications. In addition to the rich patent portfolio, Ericsson plans to leverage from Vonage’s cloud-based Vonage Communications Platform (VCP) and its Application Programming Interface (API) platform. These platforms permit developers to embed a variety of communications without back-end infrastructure or interfaces. Ericsson’s latest addition of Vonage, is complemented by its September 2020 acquisition of Cradlepoint for USD 1.1 billion. With Cradlepoint, Ericsson strengthened its patent portfolio to connect Internet of Things (IoT)-enabled devices over a 4G and 5G network.



Vonage’s patent portfolio of over 197 active families, primarily covers wired networks, processors, social media and security. Following this acquisition, Ericsson’s patent portfolio will reach 20,408 active patent families, including 15,569 granted patents. In recent years, Ericsson’s key focus area has remained strategic patent-filing in wireless networks, location and satellite, security and machine learning. Vonage’s patent estate is expected to further strengthen this strategic patent portfolio.

*Sources: Official website of Ericsson, 22 November 2021, available [here](#). Reuters, 22 November 2021, available [here](#). IAM Media, 26 November 2021, available [here](#) (subscription required).*

*Image source: Getty images, available [here](#).*

## 5. Trademark

### 5.1 Foreign alphabets lead to likelihood of confusion: says EU General Court

Cole Haan LLC sought registration of a mark depicting the letter ‘Ø’ (a Danish alphabet). Samsøe and Samsøe Holding A/S had an earlier registered European Union Trade Mark (EUTM) for the letter ‘Ф’ (a Cyrillic, Bulgarian and Greek alphabet). On 14<sup>th</sup> July, the EU General Court (GC) rejected Cole Haan’s request and upheld the decision of the European Union Intellectual Property Office’s (EUIPO) Board of Appeal (BoA) in its entirety.

In 2017, Cole Haan requested registration of the mark ‘Ø’ at the EUIPO. In February 2018, Samsøe and Samsøe intervened on grounds of an earlier registered mark ‘Ф’ for Class 18 (for briefcases, wallets etc.) and Class 25 (for clothing and accessories). The Opposition Division found merit in the plea and accordingly refused registration on the basis of Article 8(1)(b) of Regulation 2017/1001. On appeal, the BoA upheld the decision of the Opposition Division. In particular, the Board of Appeal assessed the likelihood of confusion of the mark from the point of view of “French-speaking general public” with no knowledge of Danish, Bulgarian or Greek. On account of the lack of knowledge, such a public would find the two marks as “visually highly similar”. Further, no conceptual or phonetic comparison could be made since the general public had no knowledge of the languages in question. Even though the distinctive character of the earlier mark was found to be low for the public in question; the visual characteristics of the two marks had greater weight in the assessment of confusion.

Upholding the findings of the BoA, the GC undertook an almost identical assessment. It emphasized the lack of knowledge of the languages by the concerned French speaking public. In light of this, knowledge of letters from a different language could not be assumed, and Cole Haan’s request for registration of the trade mark was rejected.

*News Source: Judgement of the General Court of 14 July 2021, available [here](#). Kluwer Trademark Blog, 26 November 2021, available [here](#).*

### 5.2 “JRR token” cryptocurrency is a trade mark infringement: says WIPO Panel

On 26<sup>th</sup> February, Matthew Jensen registered the domain name “thetokenofpower.com” to sell a newly created cryptocurrency, “JRR token”. Jensen’s company advertised its new currency using wizard-like characters, with some of the characters being notably similar to Prof. J.R.R. Tolkien’s Lord of the Rings and The Hobbit characters and used phrases like “The One That Rules Them All” from his works.

On 7<sup>th</sup> August, Tolkien Estate Limited filed a complaint at the World Intellectual Property Office’s (WIPO) Arbitration and Mediation Center. The complaint alleged infringement of the mark “J R R Tolkien” registered in the UK (in 2004) and the US (in 2005).





The Center, led by a Sole Panellist, first assessed the similarity between the domain name and the trademarks and found that two were indeed confusingly similar. Moreover, reference to Prof. Tolkien's works on the website (such as similar characters and use of phrases from his books) further substantiated this finding of "confusing similarity". The complainant, in addition, also successfully proved that Jensen had no legitimate interest in using the trade mark. Moreover, in light of the reputation of Tolkien's works, registration of the domain name in bad faith was clearly evident, as the use of the name endowed commercial advantage to the respondent.

On the basis of the foregoing, Jensen and his company were ordered to stop the infringement of the mark and transfer the domain name to the Complainant, Tolkien Estate Limited.

*Sources: Decision of the WIPO, 24 September 2021, available [here](#). Intellectual Property Magazine (subscription-based), 23 November 2021, available [here](#).*

*Image source: BBC News, 24 November 2021, available [here](#).*

### **5.3 Trade mark infringement may not always lead to reasonable royalties: says Italian SC**

In its decision no. 24635 of 13 September 2021, the Italian Supreme Court offered an interpretation of the "reasonable royalty criterion" following a trade mark infringement.

In the case at hand, the owner of the trade mark "MODO" had owned the registered trade mark for well over 38 years, though he used it only in a "limited sense". The limited use was made to avoid revocation of the mark, following non-use. The alleged infringer had used the same sign "MODO" for his shirts, and thereby engaged in "literal infringement". The Court of First Instance (CFI) offered damages totalling 2.5 per cent of the total profits of the infringer on grounds of "limited diffusion of the trade mark".

Following an appeal, the Court of Appeal (CoA), reversed the decision of the CFI on the grounds that reasonable royalty may be a suitable way to assess damages; but it was "not an automatic consequence of infringement".

On appeal by the trade mark owner, the Italian Supreme Court agreed with the CoA's decision on the grounds that the trade mark owner had failed to offer "any specific fact" that led to damages following the infringement of the trade mark.

It must also be added here that this decision was driven by the particular facts of the case, most notably, negligible commercial turnover of the products bearing the trade mark by the original right holder and limited marketing of the trade mark, which overall led to a low level of knowledge about the disputed mark amongst the relevant public.

*Source: IP Kat, 18 November 2021, available [here](#).*