

FRIDAY FORTNIGHTLY WEEK: THE IP AND COMPETITION NEWSLETTER (ED. 2022 WEEK 46 NO. 36)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, and Trademarks for the period November - December 2022, and upcoming Events for January 2023.

The Innovation 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.

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

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

With kind regards,

A. Haesaert, A. Lazić, P. Bentham, S. Abel and K. Tyagi

Email: p.bentham@student.maastrichtuniversity.nl & k.tyagi@maastrichtuniversity.nl

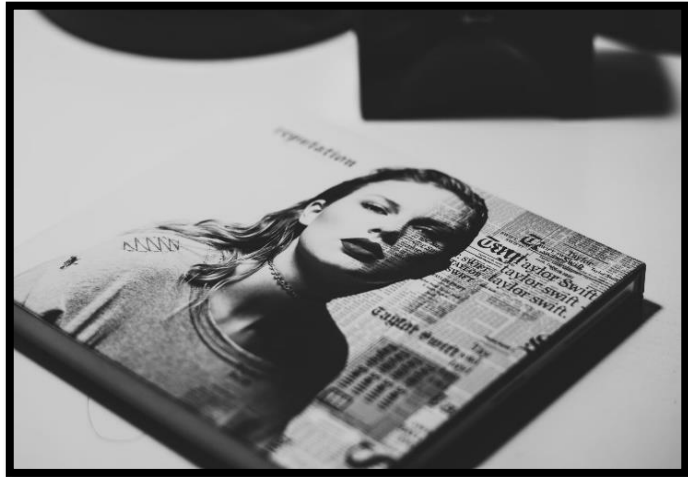


Serving innovative start-ups pro-bono with the wisdom of intellectual property laws

1. Competition law

1.1 Taylor Swift's ticket sales blunder puts Ticketmaster under antitrust scanner

In early November, Taylor Swift officially commenced the sales and other promotion-related activities for her upcoming world tour. Swift used Ticketmaster, a US-based top ticketing company for the sale of tickets, and competitor, AEG for sales and promotion. Shortly following the commencement of ticket sales on Ticketmaster, its platform crashed as it could not handle the huge demand for Swift's concert. This ticket sales fiasco is expected to lead to yet another antitrust action against Ticketmaster.



Many a State Attorney Generals have already initiated antitrust proceedings against the company. This is in addition to the ongoing antitrust investigations launched by the US Department of Justice (DoJ) this summer. In the said investigation, the DoJ is investigating whether Ticketmaster abused its position of dominance by forcing competing music service providers, concert promoters and other market players into unfair contractual arrangements. Ticketmaster's current position of dominance in the multi-billion-dollar live music industry emerges in part from the 2010 Live Nation/Ticketmaster merger, wherein the US DoJ, at the time, allowed the merger with a set of non-structural remedies, such as sale of ticketing assets and licensing deals with competing service providers.

Sources: Politico, 18 November 2022, available [here](#). NY Times (subscription required), 18 November 2022, available [here](#).

Image source: Unsplash, available [here](#)

1.2 Commission erred in its assessment of Luxembourg's aid to Fiat: says CJEU



On 8th November, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered its judgment in joined cases C-885/19 and C-898/19 P, also more popularly known as the Fiat Luxembourg case. The case first emerged in 2012, when Luxembourg tax authorities offered a tax relief of €30 million to Fiat, part of the Fiat/Chrysler group. The contested calculation methodology used to ascertain the taxable income, was subsequently subject to Commission's formal investigations under Article 108(2) of the Treaty for the Functioning of the European Union (TFEU). In its 2015 Decision, the

Commission found that Luxembourg's approval of the Transfer Pricing Agreement for the Fiat Chrysler Finance Europe (formerly, Fiat Finance and Trade) failed to take account of the well-

established arm's length principle. On appeal, the General Court (GC) agreed with the Commission's findings and dismissed the appeal in its entirety. In its decision dt. 8th November, the CJEU reversed the GC's decision, stating that, "... the decision at issue must be annulled in so far as the Commission erred in law in finding that there was a selective advantage in the light of a reference framework comprising an arm's length principle...." (CJEU, at para 117).

Sources: CJEU, 8 November 2022, available [here](#). Loyens & Loeff, 8 November 2022, available [here](#). International Tax Review, 8 November 2022, available [here](#).

Image: Unsplash, available [here](#)

1.3 Yet another complaint against Meta on grounds of profiling and targeted advertising

On 9th November, human rights campaigner, Tanya O'Carroll filed a complaint against Meta, the parent company of Facebook, at the English High Court, King's Bench Division. As per the Complaint, Tanya, a regular user of Facebook, "[was aggrieved and] objects to Meta continuing to process her personal data for the purposes of direct marketing" (Complaint, at para 1). This conduct allegedly comprises of a breach of Article 21(3) of the UK



General Data Protection Regulation (GDPR). Facebook is a multi-sided platform (MSP) that offers its platform for free to the users. In turn, it gets access to valuable personal information (personal data) about these users. Facebook then sells this data to advertisers, the users on the other side of the market, for targeted and personalized advertising. Article 21 offers data subjects the right to object. Notably, as per Article 21(3), in case the data subject raises an objection against "processing [of personal data] for direct marketing purposes", then such a request must be immediately complied with by the service provider. Following an increased awareness about the value of personal data, Meta has put in place "tools for privacy check-ups and ad preferences" which gives users detailed information on their use of data, and how they may control their ad preferences. Carroll requests a declaration that Meta has infringed her rights under Article 21(3), UK GDPR and that, it henceforth, comply with the data protection requirements, namely to "[stop processing her] personal data for direct marketing purposes, including profiling" (Complaint, at para 32).

Sources: Competition Policy International, 21 November 2022, available [here](#). The Guardian, 21 November 2022, available [here](#). TechCrunch, 21 November 2022, available [here](#).

Image: Unsplash, available [here](#).

2 Copyright

2.1 US Federal Court dismisses copyright lawsuit by Riot Games against Moonton

In May this year, Riot Games filed a lawsuit against Shanghai Moonton at the US District Court of California. The Complaint alleged repeated and deliberate copying of Riot's game, "League of Legends: Wild Rift" by Moonton's "Mobile Legends: Bang Bang". For a discussion on the original lawsuit, kindly see [Friday Fortnightly Ed. 2022 Week 20 No. 31](#), News Item 2.4, "League of Legends' makers claim copyright infringement by Wild Rift". In an earlier 2017 lawsuit between the two companies, Riot claimed that Shanghai Moonton's games, "Mobile Legends: 5v5 MOBA" and "Magic Rush: Heroes", infringed the valuable IP in Riot's games.

Following a notice by Riot, Moonton withdrew the two games, and launched “Mobile Legends: Bang Bang”, a close look-alike of the earlier withdrawn games. The said case was, however, dismissed by the court on grounds of non-convenience.



On 8th November, the lawsuit filed in May, was likewise dismissed on grounds of “*forum non-conveniens*”. District Judge, Michael Fitzgerald was of the opinion that China was a more appropriate forum to decide the case at hand, as Riot Games’ parent company, Tencent Holdings was based in China. Riot, on its part, shared grounds, such as the “current travel restrictions in China”, a pertinent ground on which the earlier lawsuit differed from the case at hand. The Judge was, however, unconvinced, and was of the opinion, that Riot pursued such an approach “to harness the US judicial system”, that was likely to work to its advantage and more likely to offer relief when compared with the potential outcome in the Chinese courts.

News and Image Sources: Reuters (subscription required), 10 November 2022, available [here](#). Bloomberg Law, 9 November 2022, available [here](#). PC Gamer, 9 November 2022, available [here](#). Yahoo! News, 10 November 2022, available [here](#). US District Court: Central District Court of California case no. 2:22-cv-3107 p.18, available [here](#).

2.2 Pay US\$ 3.5 million for unauthorised upload of fast movies: says Tokyo district court

In May this year, 13 leading film production companies that are also affiliated to leading film associations, Content Overseas Distribution Association (CODA) and Japan Video Software Association (JVA), filed a copyright infringement lawsuit at the Tokyo District Court. For a discussion on the original lawsuit, kindly see [Friday Fortnightly Ed. 2022 Week 22 No. 32](#), News Item 2.2, “13 Japanese studios, including Fuji Television, sue uploaders of ‘fast movies’”.



As per the Complaint, the Defendants profited from repeat copyright infringement by uploading so-called “fast movies” on leading content sharing platforms, such as YouTube. “Fast movies” are a quick 10-minute sneak preview of an

otherwise full-length feature film, and are generally accompanied by titles and a voice-over narration. On 17th November, the Court ordered the defendants to pay over ¥500 million (approximately \$3.5 million) to the Plaintiffs. The Court determined the damages based on the views that these full-length feature films, absent fast movies, may have otherwise attracted on subscription-based content sharing platforms. The Court, accordingly reached a conclusion that such films may have gathered views worth \$14.5 million. As the requested damages worth US \$ 3.5 million, were only a small proportion of this overall potential revenue worth \$ 14.5 million, the Court accordingly, awarded the full monetary relief, as requested by the Plaintiffs. *Sources: Torrent Freak, 18 November 2022, available [here](#). Japan Today, 18 November 2022, available [here](#). Variety, 18 November 2022, available [here](#). Nippon, 17 November 2022, available [here](#).*

Image source: Pixabay, available [here](#).

2.3 Unicolors fabric design valid, H&M must pay damages: says US court



On 10th November, the Ninth Circuit offered its decision in the ongoing dispute between the clothing company, the H&M Group and the fabric and design company, Unicolors. In February this year, the Supreme Court of the United States (SCOTUS) offered its decision in the case, and remanded the matter back to the Ninth Circuit. In its decision, the SCOTUS offered clarity on the requisite degree of knowledge required for invalidating a registered copyright. The Ninth

Circuit followed the guidance proffered by the SCOTUS, and was of the opinion that “Unicolors’ legal mistake in filing a single copyright application for 31 textile designs, violating the single unit of publication requirement for such a registration satisfied the safe harbour provisions under 17 USC § 411”. On the issue of damages, the Ninth Circuit was of the opinion that the award must be “sustainable by proof”, and accordingly determined a profit disgorgement award of around US \$98,411, and lost profit of \$18,534, resulting in a total remittitur of almost \$116,975 to Unicolors. In case Unicolors disagreed with this award, the Ninth Circuit directed the district court for a fresh trial restricted only to the determination of damages to be awarded to Unicolors.

Sources: MWE IP Update, 17 November 2022, available [here](#). IPWatchdog, 15 November 2022, available [here](#). Bloomberg Law (subscription required), 10 November 2022, available [here](#).

Image source: Unsplash, available [here](#).

3. Patent

3.1 Intel infringed VLSI’s patent, must pay almost \$1 billion in damages: says US court

On 15th November, a federal jury based in Austin, Texas, ordered world’s leading chipmaker, Intel to pay VLSI Technology damages worth \$ 948.8 million for infringing the latter’s US Patent No. 7,606,983 (’983). VLSI Technology is a patent holding company owned by world’s leading investment fund and third-party funder, Fortress Investment Group LLC, which in turn

is a subsidiary of the Soft Bank Corporation, a Japanese multinational investment management company. As per the Complaint, Intel had infringed the US patent '983 by deploying the said technology for enhanced data processing in its Skylake and Cascade microprocessors.

The current dispute is one amongst many ongoing and settled disputes between Intel & VLSI and Fortress. In March 2021, VLSI was awarded damages to the tune of \$2.18 billion in Wacos, Texas. In the following month, the Texas Court relieved Intel of alleged infringement proceedings. All these three disputes – the November 2022 as well as March and April 2021 disputes – in Texas, were presided by the same judge, Judge Alan d. Albright.

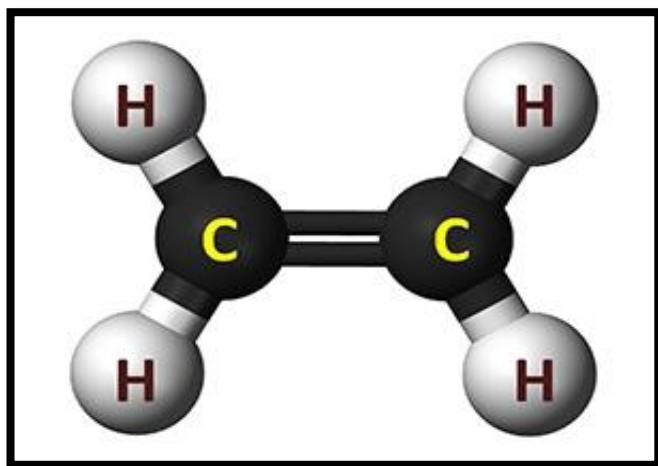
In addition to the foregoing disputes, VLSI has also filed lawsuits in Delaware and the Northern District of California.

Sources: Silicon, 16 November 2022, available [here](#). Bloomberg Law, 15 November 2022, available [here](#).

Image source: Unsplash, available [here](#).



3.2 Nova infringed Dow's patents, must pay C\$ 645 million: says Canadian Apex Court



On 18th November, the Supreme Court of Canada (SCC) dismissed an appeal by Nova Chemicals in its entirety. The said appeal resulted from a decision of the Federal Court of Appeal, which in turn upheld the decision of the Federal Court (FC). Nova Chemicals and Dow Chemicals are leading players in the market for plastics. They manufacture and sell plastics for a variety of uses, ranging from everyday plastic-based household items to plastic bags used for wrapping food, and throwing waste garbage. In the case at hand, Dow

alleged infringement of its key-patented technology used for manufacturing thin, but strong plastic bags used for packaging. All the courts, starting from the district court to the FC, found that Nova did infringe Dow's patents, and must accordingly, compensate the latter for this continued act of infringement.

In the current appeal before the SCC, the key question was the calculation of damages for this patent infringement. Dow had requested that damages be based on the "accounting of profits", meaning the calculation of damages should be based on the profits that result from a violation of the said patent. For this calculation, in turn, two inputs were key to determine the exact amount. The first issue dealt with whether the courts should take account of the actual cost of production incurred by Nova, or whether it should take the average cost of production incurred in manufacturing ethylene (comprising of the infringed patent) by a manufacturer in general. This was central to the calculation of damages, as Nova benefits resulting from large scale

manufacturing of ethylene, and therefore, its average cost of production was way lower vis-à-vis those of competing manufacturers. The SCC was of the opinion that the right value was the “cost of production incurred by Nova”. This cost of production (with products using the patented molecule) was then deducted from total revenues to estimate the profit earned by Nova. The second issue at stake was whether the “springboard profits” be taken into consideration for the determination of damages? “Springboard profits” refer to the profits earned and the market share garnered by the infringer during the period of patent protection. Nova was of the opinion that this profit should be excluded from the determination of damages. The majority bench of the SCC was of the opinion that as this infringement offered Nova a strong position, market share and large profits in the market, Dow was rightfully entitled to a share in these profits earned by Nova.

Sources: Supreme Court of Canada, 18 November 2022, available [here](#). IPWatchdog, 18 November 2022, available [here](#).

Image source: Postharvest, available [here](#).

3.3 ePropelled and Exro reach agreement on clean technology-related patent dispute

On 15th November, Canada-based, Exro Technologies Inc., a leading clean energy technology company and e-Propelled Inc., a US-based leading magnetic engineering solutions provider and owner of the cutting-edge Dynamic Torque Switching (eDTS) technology, entered settlement over US patent 7,382,103 ('103) dispute.

Earlier this year, e-Propelled had filed a patent infringement suit against Exro at the US District Court for the District of Massachusetts. As per the Complaint, Exro infringed e-Propelled's '103 patent



by using the patented technology in its Coil Drive System (CDS) and Coil Drivers. As counter response, Exro had filed a suit for defamation against e-Propelled at the Superior Court of Massachusetts. It had, in addition, also initiated invalidity proceedings against the '103 at the United States Patent and Trademark Office (USPTO). As per the Settlement, the two parties will withdraw all the above pending lawsuits against each other. Exro also undertook to neither manufacture nor commercialize products “capable of driving a permanent magnet brushless motor having three or more winding sections” or having a hybrid phase in the countries, whereby ePropelled enjoyed patent protection for the said technology. The agreement was reached without any monetary compensation. The settlement is important as it is expected to have an impact on the fast-emerging clean energy technology market.

Sources: Exro, 15 November 2022, available [here](#). PR Newswire, 18 November 2022, available [here](#).

Image source: Unsplash, available [here](#).

4. Trademark

4.1 Dior's Saddle bag appealing, but not distinctive enough for a 3-D mark: says EUIPO

In March 2021, Dior requested registration of a 3D trademark in class 18 for its saddle bags and in class 9 for its eyeglass cases. The EUIPO refused registration as it found that the said marks



were not distinctive enough. Dior appealed the said decision on the ground that an average consumer paid a particularly detailed attention to their luxury products. In addition, the high price of their luxury products invited a higher level of attention vis-à-vis other brands.

In its decision dated 7th September, the Board of Appeal (BoA), partially offered relief to Dior, as it found that Dior's eyeglasses cases were "inherently distinctive". However, the BoA refused registration of the Saddle Bag on the ground that "mere departure from the

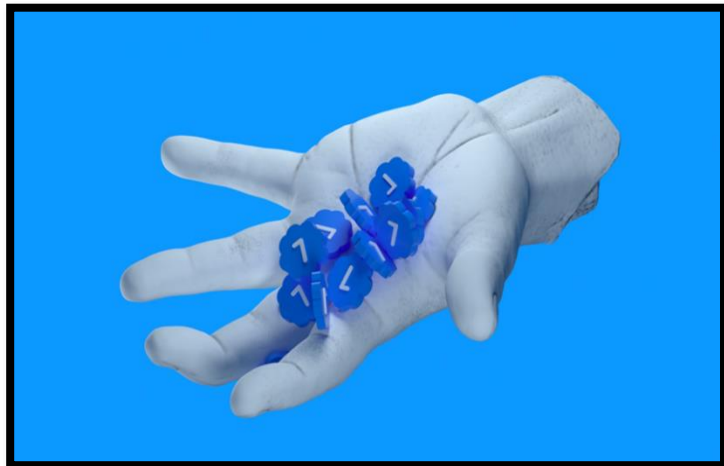
norms [of the sector] was not enough" to get an EU 3-D trade mark.

Sources: Trademark Lawyer Magazine, 17 November 2022, available [here](#). German Maureau, 3 October 2022, available [here](#).

Image source: Dior, available [here](#).

4.2 Musk's Trademark-like Twitter Blues!

On 27th October, Elon Musk finally completed the \$44 billion acquisition of Twitter. Twitter, like Facebook and other online social networking platforms, offers its basic services for free. The key business model for Twitter is advertisement-based revenue model (see News Item 1.3 *supra* on how such a business model works in practice). Following Twitter's acquisition, Musk introduced some immediate changes to Twitter's business model, the "Twitter Blue". One of them is the introduction of "blue check marks". These marks are used for actual identification of the users, and can help distinguish real accounts from the fake ones. These must then be complemented with "Twitter Blue", priced at US\$8 per month. The users of Twitter Blue likewise are verified to ensure that the accounts are held by authentic users.



Interestingly, "blue check marks" function like trademarks. As there remains a possibility of confusion on the true identity of account holders, these marks solve this identification problem, similar to the indication of origin function in the trademarks. The updated approach at Twitter, under the leadership of Musk, requires that these accounts be verified via payment through either a bank account or a credit card. In Musk's opinion, these will automatically filter away fake and bot-driven accounts.

It may be too early to predict how big are Musk's Twitter Blues! However, it is certainly an interesting method to apply a trademark-like approach to the identification of accounts on Twitter.

Sources: Trademark Lawyer Magazine, 17 November 2022, available [here](#). Bloomberg Law, 22 November 2022, available [here](#). CNN Business, 4 November 2022, available [here](#).

Image source: Unsplash, available [here](#).

4.3 Polish IP Court refers spares, repairs and the Audi mark to the CJEU

Earlier this year, the IP Court in Warsaw referred a set of questions dealing with designs and trademark law to the CJEU (C-334/22). In the case at hand, Audi requested an injunction against a third party as the latter imported and offered on the market radiator grills with marks that are either identical or similar to Audi's EU trade mark (EUTM). As the issue concerned spare parts, protected by both – designs as well as trademarks – the referring court found it imperative to



refer the question to the CJEU. Repair clause in EU design law is mentioned in Article 110 (1) of the 2002 Community Design Regulation (CDR), as per which design protection is excluded for visible spare parts, where the objective is “to restore its original appearance”.

However, one does not find an equivalent provision in EU trademark law. Hence, in case both the rights co-exist, there exists, in the opinion of the Polish IP court, an ambiguity on the possibility for third party manufacturers “to produce and sell spare parts with a trademark”. Notably, the IP court requests an interpretation of Article 14 (1) (c) of the 2017 EU Trade Mark Regulation (2017 EUTMR) that limits the right

holder to prohibit a third party from use in the course of trade in case where, “the use of that trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts”.

Source: IPCURIA, 23 May 2022, available [here](#). Kluwer Trademark Blog, 2 September 2022, available [here](#).

Image: Unsplash, available [here](#).

4.4 Banksy may benefit from trademark protection: says EUIPO

Banksy had registered 15 EU trade marks, namely works of art and images by him. Full Colour Black, a London-based greeting cards company, initiated invalidity proceedings to invalidate 7 out of these 15 registered marks.

In May 2021, the Cancellation Division (CD) of the EUIPO declared registration of Banksy's marks as invalid on grounds of bad faith. The owner of the said marks, Pest Control Office Limited, appealed. Banksy holds and manages his trademarks via this legal entity. Out of these 15 marks, the CD held that 6 marks were invalid on grounds of bad faith. The CD was of the opinion that Banksy did not intend to use these marks in the course of trade. His only intention to register these marks was to prevent others from using these marks. Banksy had taken the trademark route to traverse the limitations of copyright.



On appeal, the Board of Appeal (BoA) disagreed with the findings of the CD. In its decision dated 25th October, the BoA found that the “multiplicity of rights”, in this case, simultaneous protection offered by copyright and trademarks, was possible. Moreover, if Banksy intended

that through trade mark protection, he exclude others from using the registered marks, the BoA suggested that this too was well within the scope of protection offered by trademarks, and could in no way, be deemed as an indication of bad faith. On the issue of whether Banksy, and his company, Pest Control, did ever intend to use these trademarks, the BoA noted that the trade mark owner had the freedom to decide a suitable point in time, at which s/he would start using the mark in the course of trade. A perusal of the facts of the case, such as the time period lapsed following the registration of the mark, and the overall situation in the case at hand, did not permit an inference that there was no such intention on the part of Banksy or Pest Control “to not to use” the marks, or license them to a willing licensee.

Sources: Kluwer Trademark Blog, 14th November 2022, available [here](#). Artnet News, 17th November 2022, available [here](#).

Image: Unsplash, available [here](#).

5. Events: Save the date – Next Monday Morning of 2023, with TILC’s IP Talks(!)



On 9th January 2023, Rutger Muijters, an IPKM (Advanced Master in Intellectual Property Law and Knowledge Management) student at Maastricht University, will give a lunch talk on the topic “The Impact of Unitary Patents and Unified Patent Court on Small and Medium Enterprises”.

With the Unitary Patent Project (UPP) comprising of the Unified Patent Court (UPC) and Unitary Patent System (UP) seeing the light of the day, the big

question is how will they impact our patent practice? More notably, what impact will they have on small and medium businesses? Does it mean more innovation, or does it create higher legal costs? For a discussion on the UPC, cf Friday Fortnightly Ed. 2021 Week 44 No. 35, News Item 3.1, “Unified Patent Court announces appointments ahead of Spring 2023 launch”, available [here](#) and Friday Fortnightly Ed. 2022 Week 10 No. 26, News Item 4.1, “Inauguration of the Administrative Committee of Unified Patent Court”, available [here](#).

In his talk, Mr. Muijters will discuss these novel issues that emerge at the intersection of patent law and innovation in light of the much awaited, and heavily debated, UPC system. The talk shall be chaired by **Dr. K. Tyagi**.

Please bring along your lunch, and enjoy an interesting discussion on the “**Unified Patent Court and SMEs**” over lunch. Coffee and tea shall be served.

When: 9th November 2023, 12-13 hrs

Where: KAP 2 0.039 (in Kapoenstraat)

Topic for presentation: “The Impact of Unitary Patents and the Unified Patent Court on Small and Medium Enterprises”

Will you like to join the talk? Just drop by!

Image source: Unified Patent Court, available [here](#).