

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 6 NO. 24)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and Events for January and February 2022.

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. Dubois, C. Coutier, C. Annani, D. Baltag, D. Kermode, S. Tosi, S. van Zuylen van Nyevelt, Y. Lu and K. Tyagi

Email: c.annani@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 General Court: Intel gets relief in referral back, entire fine of €1.06 billion set aside



On 26th January, the General Court (GC) partially set aside Commission's decision dt. 13 May 2009. As per the contested decision, Intel had abused its dominant position between October 2002 and December 2007. The abuse comprised of the following two anti-competitive conducts - first, naked restrictions and second, offering conditional rebates to the original equipment manufacturers. This conduct, in the opinion of the Commission, restricted competition in the worldwide market for x86 processors. Intel brought an appeal before the GC, which was dismissed in its entirety on 12 June 2014. Intel pursued an appeal before the Court of Justice, that in turn referred the case back to

the GC for an examination "in light of the arguments put forward by Intel" to determine whether the rebates did indeed have the capability to restrict competition.

In its decision on the referral back, the GC found that the Commission's analysis was incomplete and insufficient to "establish to the requisite legal standard that the rebates at issue were capable of having, or were likely to have, anticompetitive effects". As the GC found it unfeasible to determine what amount out of the total fine (of € 1.06 billion) related exclusively to naked restrictions, and what amount could be attributed to conditional rebates, the GC annulled the entire fine of € 1.06 billion imposed by the Commission on Intel.

Sources: General Court, 26 January 2022, available [here](#). Jurist, 27 January 2022, available [here](#). Politico, 1 February 2022, available [here](#).

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

1.2 Commission formally opens investigation against Pierre Cardin and Ahlers

On 31st January, the Commission formally opened investigations into the licensing and distribution practices of fashion house Pierre Cardin and German clothing manufacturer, Ahlers, Pierre Cardin's top licensee in the European Economic Area (EEA). As a background to the present investigation, on 22nd June 2021, the Commission, accompanied by its colleagues from the Bundeskartellamt, the German competition authority, conducted unannounced inspections at the premises of these companies. Commission's preliminary investigations indicated anti-competitive concerns in the manufacturing and distribution of garments.



With the opening of these formal proceedings, the Commission will assess whether Pierre Cardin and Ahlers entered into an anti-competitive agreement to restrain Pierre Cardin's licensees' ability to compete in the online and offline environment. The Commission will also

assess whether the two developed a coordinated strategy to restrict parallel imports and sale of Pierre Cardin-licensed products to specific groups of customers.

Sources: European Commission, 31 January 2022, available [here](#). Fashion United, 1 February 2022, available [here](#). Competition Policy International, 31 January 2022, available [here](#).

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

1.3 Commission conditionally clears Meta/Kustomer merger



On 27th January, the Commission conditionally approved the merger between Meta (formerly Facebook) and US-based start-up Kustomer. Commission's investigation indicated concerns in the market for the supply of customer relationship management (CRM) software and the market for the supply of customer service and support CRM software. As the proposed transaction combined Kustomer's CRM software in the upstream market with Facebook's control over WhatsApp, Instagram and Messenger of Meta (key messaging channels between customers and

businesses), Commission's principle concern related to the foreclosure of competing service providers. To alleviate the Commission's competitive concerns, Meta offered the following access remedies for a period of ten years. First, Meta promised to offer free and non-discriminatory access to its publicly available application programming interfaces (APIs) for its messaging channels to competing service providers. Second, any further features and functionalities added to Meta's key messaging channels shall be offered to Kustomer's competitors and new entrants. These remedies shall be monitored by a monitoring trustee.

Sources: European Commission, 27 January 2022, available [here](#). Reuters, 27 January 2022, available [here](#). The Nomad Today, 27 January 2022, available [here](#).

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

2. Copyright

2.1 Nintendo's yet another copyright strike on YouTuber GilvaSunner

On 29th January, Youtuber GilvaSunner reported on his Twitter account that Nintendo had blocked over 1300 full video game soundtracks and remixes on his YouTube channel. These soundtracks include all-time favorites such as The Legend of Zelda: A Link to the Past, Yoshi's Island and Luigi's Mansion amongst others. This is the third time since 2019 that Nintendo took such an action against GilvaSunner, who reportedly neither monetizes nor profits from these videos. Absence of alternatives for fans to legally listen to these famous soundtracks apparently prompted GilvaSunner to make these tracks available for free on the YouTube channel.



News & Image Sources: Kotaku, 30 January 2022, available [here](#). ScreenRant, 30 January 2022, available [here](#). EuroGamer, 30 January 2022, available [here](#).

2.2 French Presidential candidate Zemmour accused of copyright infringement

On 27th January, French Presidential candidate Eric Zemmour was summoned before the Tribunal de grande instance de Paris, the Paris High Court. As per the complaint jointly filed by cinematographic companies Gaumont and EuropaCorp and leading director Luc Besson, Zemmour's launch campaign - that was posted across various social media platforms, such as YouTube and Twitter - comprises of copyright-protected content. The content includes images of cinematographic and audio-visual archives, as well as a castle (Château d'Ussé). Luc Besson's images from the film *Jeanne D'Arc* had also been used without authorisation. In addition to this complaint, other aggrieved right holders expressed their discontent on the social media. Overall, as per calculations by *Le Monde*, in the 7,28-minute-long video, 114 scenes (39 per cent) constitute *contrefaçon du droit d'auteur* (copyright infringement).



Sources: Le Journal du Dimanche, 16 January 2022, available [here](#) (in French). California 18, 16 January 2022, available [here](#). FranceInfo, 16 January 2022, available [here](#) (in French). Image source: L'Obs, available [here](#).

2.3 RCN requests music majors for reasons for removal of DRM from iTunes downloads



In 2019, US' three leading record companies - Universal Music Group, Sony Music Entertainment, Warner Music Group - filed a complaint against internet service provider RCN before the US District Court of New Jersey. As per the complaint, RCN enabled massive online infringement of sound recordings by turning a blind eye to its subscribers' conduct. In response, RCN unsuccessfully requested the court to dismiss the suit.

Subsequently, RCN requested the court to request the plaintiffs to provide more information about the big three record companies' decision to remove digital rights management (DRM) from iTunes downloads. As per RCN's request for disclosure, the big three's decision to do away with DRM from iTunes made it difficult to track illegal sharing using BitTorrent, and thereby, indirectly contributed to the rise in piracy. In their response dt. 31st January, the plaintiffs requested the Court to turn down the request as the information requested dated back to 2009, about two years *prior* to copyright infringement under consideration and over seven years before the plaintiffs first came to know about RCN's conduct. Accordingly, the request as per the response was "not proportional to the needs of the case", and was "an improper fishing expedition".

Sources: TorrentFreak, 2 February 2022, available [here](#). Plaintiff's submission via TorrentFreak, available [here](#). Medium, 5 October 2022, available [here](#). Image source: Unsplash, available [here](#).

3. Patent

3.1 Dutch Court's express willingness to resolve cross-border SEP disputes

In two recent decisions, the District Court of The Hague readily assumed cross-border jurisdiction over standard-essential patent (SEP) disputes. The basis for such jurisdiction can be found in the Dutch Code of Civil Procedure (DCCP). Article 7(1) of the DCCP provides the legal basis for cross-border jurisdiction in a multi-defendant case, in case a Dutch court has jurisdiction with respect to one of the defendants. According to this provision, a Dutch court can assume jurisdiction over all the defendants in case the following two conditions are satisfied cumulatively: first, the claims are related to each other, and second, a joint consideration is justified on grounds of efficiency.



The first case published on 18th January dealt with FRANDliness (Fair, Reasonable and Non-discriminatory) of SEP license offers. In this case, Vestel sued HEVC, Advance patent pool administrator Access Advance (US) and its pool members Philips (NL), GE Video Compression (US) and IP Bridge (JP) for the declaration of a global FRAND royalty rate to license their patents. Since Philips, as one of the defendants, is a Dutch-based entity, the District Court of The Hague confirmed its jurisdiction over all the defendants, including the US pool administrator and its non-Dutch pool members.

The second case published on 17th December 2021 concerned an Anti-Anti-Suit Injunction (AASI) filed by Ericsson against five Apple defendants, including Apple Inc. (US), two Dutch Apple entities, and two Irish Apple entities. Ericsson filed this AASI in apprehension that Apple may otherwise pre-empt and obtain an Anti-Suit Injunction (ASI) elsewhere. Once again, the District Court of The Hague affirmed that it had jurisdiction over Apple Inc.

Sources: Kluwer Patent Blog, 26 January 2022, available [here](#). Decisions of The Hague Court (in Dutch), 18 January 2022, available [here](#) and 17 December 2021, available [here](#). Image source: Getty images, available [here](#).

3.2 Düsseldorf Regional Court on Second-Medical-Use Patents



On 7th December 2021, the Düsseldorf Regional Court (DRC) issued a series of injunctions in respect of two Novartis patents (EP3351246B1 and EP3342411B1). Both these patents protect further medical use of known products. These two patents, both of which are divisional applications based on the same earlier applications, relate to Novartis Afinitor (everolimus) cancer treatment. Specifically, EP3551246B1 protects “use in combination with an aromatase inhibitor for the treatment of hormone receptor positive breast tumors”, while

EP3342411B1 protects “use as the sole active ingredient in the treatment of a solid (pancreatic) tumor”. Both the patents were granted in 2019 and are currently involved in opposition/opposition appeal proceedings. The DRC accordingly concentrated on the issue as to “whether it can be expected (with sufficient probability) that the patent will be revoked in these opposition proceedings”.

As regards EP3551246B1, the Opposition Division (OD) of the European Patent Office has decided to maintain this patent without claim amendments. As for EP3342411B1, although the opposition proceedings are still pending, the OD has issued a non-binding preliminary opinion dt. 13th April 2021, confirming the validity of the independent claim.

Based on the above facts, the DRC concluded that the two patents were unlikely to be revoked in opposition proceedings, and therefore, accordingly, granted the requested injunction.

DRC’s decision indicates that second-medical-use patents are likely to enjoy an equivalent assumption of validity as other patents in court proceedings.

Sources: The IPKat, 24 January 2022, available [here](#). Novartis European patents, EP3551246B1, available [here](#) and EP3342411B1, available [here](#).

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

3.3 USPTO introduces new patent public search tool and webpage

On 1st February, the United States Patent & Trademark Office (USPTO) launched a new version of Patent Public Search tool. This advanced tool, based on Patents End-to-End (PE2E) search tool promises to offer the following advanced features. First, it combines in one search tool, the search capabilities of currently used four distinct search tools, namely, Public-Examiner’s Automated Search Tool (PubEAST) (1), Public-Web-based Examiner’s Search Tool (PubWEST) (2), Patent Full-Text and Image Database (PatFT) (3) and Patent Application full-Text and Image Database (AppFT) (4).

Second, to use this search tool, the users need not be physically present at the USPTO. They can access this webtool from anywhere across the globe. Third, the tool offers more user-friendly interface, hitherto unavailable in earlier search tools. These include possibility to have data in multiple layouts with different tools in one result, and to highlight, index, tag and make notes while searching and browsing through claims. The USPTO plans to offer training sessions and upload a list of frequently asked questions (FAQs) to help users smoothly transition to the new search tool.

News & Image Source: USPTO, 1 February 2022, available [here](#).



4. Trademark

4.1 Moon Boot trade mark partially invalid: says General Court

In its decision dt. 19th January, the GC held that the Moon Boot-shaped trade mark lacked distinctiveness and was accordingly, partially invalid.

In 2011, Tecnica Group, applied for the registration of a 3D mark representing the shape of their Moon Boot as a European Union Trade Mark (EUTM) for classes 18, 20 and 25. The iconic design, that has since sold over 20 million pairs worldwide, was inspired by the boots that Neil Armstrong wore to walk on the moon. The mark was registered in 2012.

In 2014, Zeitneu GmbH, a German company, brought an action against Tecnica in the District Court of Venice seeking to obtain a declaration of non-infringement of the EUTM (Article 124, European Union Trade Mark Regulation, EUTMR). The Court dismissed the action on grounds of likelihood of confusion. Following this, Zeitneu filed an application to the EUIPO seeking to obtain a declaration of invalidity of the EUTM pursuant to Art. 59(1)(a) and Art.7(1)(b)-(e) EUTMR. The Cancellation Division of the EUIPO upheld the application by declaring the EUTM invalid in relation to class 25 goods (footwear). On appeal, the Board of Appeal upheld



the decision on the grounds that for the relevant public, the contested mark did not depart significantly from other after-ski boots and as such it lacked distinctive character. Tecnica filed an appeal before the GC.

As per the GC, the principle for less conventional signs, such as a 3D mark, the degree of distinctiveness required to obtain or maintain registration is no different than that required for more conventional marks. However, the perception of the average consumer when looking at a 3D mark which is the appearance of the product is not necessarily the same as when looking at a sign which is unrelated to the appearance of the goods. Thus, the GC held that consumers are not used to making assumptions about the origin of the goods on the basis of a product's shape and as such, it might be more difficult to

establish distinctiveness for a 3D mark than for a word or a figurative mark. Therefore, when a 3D mark comprises only of the appearance of the product, it must depart significantly from the norms or customs of the sector for it to be seen as distinctive. Evaluating against these criteria, the GC noted that a mark which has a similar overall shape with variants of the product on the market does not render it as significantly departing from the shapes common to that class.

The GC accordingly upheld the decision of the BoA, reiterating that the shape of the Moon Boot was common for after-ski boots and as such lacked distinctiveness for goods in class 25.

News & Image Sources: IPKat, 24 January 2022, available [here](#). Decision of the First Board of Appeal, 18 May 2020, available [here](#). General Court, 19 January 2022, available [here](#).

4.2 N°9 Flower of Story: Shaanxi Court on Unfair Competition

In its decision dated 24th August 2021, the Shaanxi Provincial People's Court (Shaanxi Court) affirmed the grant of injunctive relief by Shaanxi Intermediate People's Court. The Shaanxi Court held that the use of packaging and decoration of CHANEL N°5 was an act of unfair competition within the meaning of Article 6(1) of 2019 Chinese Anti-Unfair Competition Law (AUCL).

In the case at hand, the defendants, Yiwu Story of Love Cosmetics and its distributors, manufactured and sold the infringing product with the mark "N°9 Flower of Story". The product and its packaging evidently imitated the perfume bottle and decoration of CHANEL N°5 (see image). Particularly, N°9 copied nearly every element of Chanel N°5 including its bottle design, with the only exception being the words printed in fine on the label.

An act of unfair competition under article 6(1) of AUCL requires that the following four conditions be met: first, recognition (name, packaging or decoration with certain influence); second, similarity (identical or similar name, packaging or decoration to the product with certain influence); third, unauthorized use; and fourth, likelihood of confusion (to mislead a person into believing that a commodity is from or has a particular connection with the original product). The Shaanxi court assessed recognition and similarity and opined that Chanel N°5 bottle as such could be used as a business indicator to identify its origin. The use of similar bottle design was likely to cause consumer confusion in spite of the huge price gap between the two perfumes. Notably, while assessing unfair competition, the court weighed in the factor that the use of a similar bottle (as Chanel N°5) would entice more consumers to N°9 and damage former's image.



Even though AUCL does not have an express provision on dilution, in practice, “a particular connection” under article 6(1), as in this case, can serve as a basis for a finding of dilution.

News & Image Source: The IPKat, 14 January 2022, available [here](#).

4.3 Lil Yachty sues NFT seller for trademark infringement

On 26th January, Rapper Lil Yachty filed a suit against Opulous, a non-fungible token (NFT) driven start-up. Opulous reportedly sold the “Lil Yachty NFT Collection” with his name and image without his consent. The NFT platform promised users access to Lil Yachty’s work on its platform. Opulous reportedly attracted over \$6.5 million in investment by venture capitalists from this collection. As per Yachty, though Opulous reached out to them for partnership, no formal agreement was ever reached between the two parties. Following this unauthorized use and profits therein, Opulous did not even offer to share any proceeds thereof with Yachty.

Sources: Hyperbeast, 1 February 2022, available [here](#). CMU, 31 January 2022, available [here](#). VIBE, 1 February 2022, available [here](#).

5. Events

5.1 TILC’s IP Talks!

In her IP Talks on 8th February, *Clara Annani, a 4th year bachelor and IP law student*, discussed the issue of copyright infringement on Instagram [For a discussion on Instagram and copyright infringement, see [Friday Fortnightly Ed. 2021 Week 48 No. 20](#), News Item 2.3: Copyright Infringement on Instagram: Khloé Kardashian on the spot and [Friday Fortnightly Ed. 2021 Week 40 No. 16](#), News Item 2.2: Ratajkowski violated paparazzo’s copyright on Instagram: US District Court].

