

# FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 10 NO. 7)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for February and March 2021.

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.

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

With kind regards,

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

## 1. Competition law

### 1.1 EU Commission opens investigation against Teva

On 4<sup>th</sup> March 2021, the European Commission initiated formal investigations under Article 102 Treaty on the Functioning of the European Union (TFEU) against the pharmaceuticals company Teva for alleged abuse of its dominance. Following its glatiramer acetate going off-patent in 2015, Teva strategically abused the patent process and artificially extended its market exclusivity. Glatiramer acetate is the key active ingredient in Teva's blockbuster multiple sclerosis drug Copaxone. The Commission will assess whether the Company has abused its dominance by delaying the market entry of competitors. The Commission will, in particular, investigate whether Teva abused the patent process and spread false information about competing products, even though the latter had received the relevant regulatory approval.

*Source: EU Commission, 4 March 2021, available [here](#).*

### 1.2 Aspen's Cancer medicine prices plummet following Commission's investigations

In 2017, the European Commission initiated an investigation into Aspen's excessive price increases in six critical off-patent cancer medications. The Commission's investigation revealed that Aspen's products had been off-patent for over fifty years. Absence of competing drugs ensured that the Company could leverage its position of strength to consistently negotiate high prices across the European Economic Area (EEA). To address the Commission's concerns, Aspen proposed a set of commitments that were then subject to market test.

Following some adjustments, these commitments have now been accepted by the Commission. Commitments include over 73% reduction of prices for six cancer medicines in the EEA. Starting October 2019, the new prices shall remain in effect for a period of ten years. Furthermore, Aspen guarantees to supply these medicines for the next 5 years; and either supply or offer market authorization to competitors for another five years.

*Source: EU Commission, 10 February 2021, available [here](#).*

### 1.3 UK competition watchdog investigates AppStore

Following its inquiry in the digital sector and complaints by application developers, on 3 March 2021, UK's Competition and Markets Authority's (CMA) formally opened an investigation under Chapter II, Competition Act 1998, into Apple's suspected abuse of dominance. App developers' key complaint is that they require access to Apple App Store to make their app available to iPhone and iPad users. Moreover, in case the apps have certain additional features, such as in-app purchases, developers are mandatorily required to use Apple's payment system. This in turn means payment of high royalty rates (up to 30%) per transaction to Apple. The CMA will investigate whether Apple engages in unfair and anti-competitive practices in relation to its App Store's business model.

*Source: UK Competition and Markets Authority, 4 March 2021, available [here](#).*

## 2. Copyright

### 2.1 Corrida cannot be protected under copyright law: Spanish Supreme Court

Corrida is a type of bullfight comprising of several distinct stages. Some bullfighters consider this activity an artistic performance. In 2014, Miguel Díaz, a famous matador tried to register the audio-visual recording of one of his bullfights accompanied by a description of the same with Extremadura, the Spanish Copyright Registry. This marked the beginning of a long legal battle as the Registry and subsequent courts refused the matador any copyright protection. Díaz's key arguments were that bullfighting was an art, and bullfighter's work was an expression of art, and therefore, eligible for copyright protection.

On 16 February 2021, the Spanish Supreme Court (SC) ruled that audio-visual recording of the matador's bull fight could not be registered. Referring to the CJEU's decisions such as Cofemel and Levola Hengelo, the SC was of the opinion that for copyright protection in the European Union, two requirements be met – (1) first, there exists a work and (2) second, it is original. Even if a bullfight could be deemed original, it still could not qualify as work, considering that it could not be identified with 'sufficient precision and objectivity' (C-310/17 Levola Hengelo).

*Sources: IPKitten, 6 March 2021, available [here](#). Judgment of the Spanish Supreme Court, 16 February 2021, available [here](#).*

### 2.2 No implied license by using RSS feed

ThriveAP is an educational website for healthcare professionals. The website also has a medical blog that publishes regular articles on the subject. The website contains a copyright notice on its RSS feed; but not on its individual articles.

ThriveAP approached the US courts for infringement of copyright by Newstex. Newstex, an aggregator website has re-published 43 of ThriveAP's articles without its authorisation. On 3 March 2021, the U.S. Court of Appeal of the 11th Circuit rejected Newstex's defence that using an RSS feed created an 'implied licence' to copy and re-distribute the articles. The Court held that copying of the articles by Newstex was an infringement of ThriveAP's copyright. The Court also rejected the fair use defence as the use was not transformative in nature. Newstex has been ordered to pay statutory damages worth \$202,500 to ThriveAP.

*Sources: U.S. Court of Appeals, 3 March 2021, available [here](#). Court House News, 5 March 2021, available [here](#). IP Watchdog, 5 March 2021, available [here](#).*

### 2.3 Cultural appropriation of Alaskan Ravenstail

In April 2020, the Sealaska Heritage Institute (SHI) filed a federal lawsuit against Neiman Marcus, a luxury retailer.

The retailer was selling robes under the label 'Ravenstail knitted coat', which is an Alaskan Native term referring to an ancient art practice. The SHI sought recognition of its indigenous ownership rights. As per SHI, it was a case of cultural appropriation and copyright infringement of the Ravenstail pattern.

The SHI and Neiman Marcus agreed to settle the dispute using U.S. and Tlingit law as well as cultural protocols. The settlement acknowledges the cultural significance of the matter and the importance of Native laws and cultural requirements.

*Sources: Sealaska Heritage original claims from 20 April 2020 available [here](#), and settlement from 3 March 2021 available [here](#). KTOO, 3 March 2021, available [here](#). AP News, 5 March 2021, available [here](#).*

### 3. Patents

#### 3.1 Arnold LJ limits Vodafone's Crown use defence

In a recent proceeding before the UK Patents Court, IPCOM alleged that Vodafone had infringed its patent relating to the method of controlling when and which mobile device is granted authorization to access a given telecommunications channel. The Court ruled that the patent was partially infringed, but Vodafone could rely on the defense of Crown use.

IPCOM appealed the decision arguing that the Court of First Instance had erred in its selection of grounds for the service for the application of Crown defense. In other words, the Court erred in the test applied for the assessment of whether an action is authorized by a government department in writing.

On appeal, Arnold LJ agreed that the basis was indeed selected incorrectly by the Court of First Instance. He noted that resort to the Crown exception in the past was only allowed, if an express or necessary implied approval therefor could be identified. He further ruled that a different choice of basis for the exception was correct than had been held at first instance. In that regard, he held that the correct basis was that authorisation "requires either an express authorisation to work the patent or an authorisation to do a particular act in circumstances where that act necessarily infringes the patent."

Arnold LJ also evaluated whether the *de minimis rule* was applicable to Vodafone's actions. Arnold LJ was of the opinion that it was not right to assess each infringing conduct as an isolated action, rather the correct approach was to assess them as one in the sequence of Vodafone's chain of conduct.

*Sources: Judgment of the High Court, 19 February 2021, available [here](#). Kluwer Patent Blog, 1 March 2021, available [here](#).*

#### 3.2 Samsung asks court to dismiss FRAND claims over foreign patents

In December 2020, Ericsson initiated a Fair, Reasonable and Non-discriminatory (FRAND) action and Standard Essential Patent (SEP) infringement claim against Samsung in Texas (U.S.A.). Samsung had earlier pre-empted Ericsson's action by filing antisuit injunction in Wuhan. In the Texas court, Samsung motioned to dismiss the FRAND action, at least for foreign patents, on the lack of subject-matter jurisdiction rather than on the fact that Ericsson had brought claims in Texas in contravention of the Wuhan antisuit injunction.

Last week, Samsung asserted that the U.S. Court did not have jurisdiction, at least for the majority of the foreign patents. This it argued, was on account of the fact, that during the earlier (unsuccessful) licensing negotiations, the parties were negotiating a global license, and not a license specific only to the U.S. patents. Samsung further claimed that the objective of Ericsson's suit in Texas was to eliminate any obligations that it owed to Samsung. This in turn

would offer Ericsson the possibility to have worldwide injunction on its SEPs and damages, free of any promised FRANDly commitments. This could come to fruition if Ericsson manages to neutralize the antisuit injunction in Wuhan and obtain the declaratory judgement it seeks in Texas.

*Source: FOSS Patents, 3 March 2021, available [here](#).*

### **3.3 New rules: Implementers of SEPs face even higher requirements in Germany**

In a Standard Essential Patent (SEP) dispute between Sisvel and Haier, the highest German patent court set new doctrine in SEP and Fair, Reasonable and Non-discriminatory (FRAND) disputes.

Earlier the Federal Court put on the implementer an obligation to seek a license in good time which meant that patent users were required to examine the patent portfolio on a short notice.

In its most recent ruling, the Federal Court yet again raised the requirements for implementers in SEP disputes. The Court held that it was insufficient for a party to express the will to conclude a license with the SEP holder only once, thus creating an obligation to act in a way that avoids ‘patent hold-outs’. The implementers must now clearly and unambiguously declare an interest in a FRANDly license and participate in the negotiations in a purposeful manner. It is still on the SEP holder to make the first move by informing the implementer of his use of the SEP and make him an offer to license.

The Federal Court stated that what is decisive in terms of FRAND compliance is the overall behaviour. Abuse of market position is determined by seeing whether SEP holder refuses to grant a FRAND license throughout negotiations with an aim to eventually sue for injunctive relief.

*Source: JUVE Patent, 2 March 2021, available [here](#).*

## **4. Trademarks**

### **4.1 New Guidelines for the examination of EU Trade Marks**

On 1 March 2021, the European Union Intellectual Property Office (EUIPO) published its revised Guidelines for the examination of European Trade Marks. The Guidelines pay particular attention to the assessment of acquired distinctiveness through use, as laid down under art. 7(3) of the EU Trade Mark Regulation (EUTMR).

Following three interesting points are notable.

First, the EUIPO writes that “Acquired distinctiveness through use must now be shown, in principle, with respect to all those Member States/territories in which the EUTM applied for is objected to because: [...] it is in a language understood by a non-negligible part of the relevant public in at least part of the EU.” This arguably lowers the threshold for assessing non-distinctiveness from the previously accepted “significant part of the public” requirement.

Second, in practice, the EUIPO will accept evidence that demonstrates distinctiveness based on use of an insignificant variation of the mark.

Third, the EUIPO has also clarified the definition of an ‘average consumer’ with regards to the assessment of distinctiveness for collective and certification marks. For the examination of the

average consumer, the functions of the respective categories of trade marks must be into account.

*Sources: EUIPO Guidelines for Examination, 1 March 2021, available [here](#). Kluwer Trademark Blog, 5 March 2021, available [here](#).*

#### **4.2 VROOM (VROOM)**

In February 2021, the General Court (GC) was asked to rule upon a conflict that arose between the applicant Bezos Family Foundation and the EUIPO over the registration of a word mark.

The Bezos Foundation had requested to register the word mark ‘VROOM’ for Nice Class 9 (Computer Software etc.) in December 2017. This registration, however, was opposed by the proprietor of the French word mark ‘POP & VROOM’ for, among others, the same Class. Following a series of appeals, the matter reached the GC. The Court found that “the goods in question were identical, the marks at issue had an average degree of visual and phonetic similarity and the earlier mark had an average degree of distinctiveness. Furthermore, [...] it must be considered that those marks also have at least an average degree of conceptual similarity.”

Hence, opposition to the registration of ‘VROOM’ was justified on the basis of art. 8.1.b) of the EUTMR due to a high likelihood of confusion of the signs in relation to the goods and services for which registration was sought. Thus, the trade mark ‘VROOM’ cannot be registered. The GC thus, upheld the EUIPO’s decision.

*Ne Source: Judgment of the General Court, 24 February 2021, available [here](#).*

#### **4.3 El Clasico: This one’s a classic**

In February 2021, the GC was confronted with yet another appeal for refusal of registration of a trade mark. Per request of the applicant, the EUIPO had considered registration of the figurative mark for ‘El Clasico’ in 2017. The registration was rejected by the EUIPO, its Board of Appeal, and now the General Court.

The decision of the GC was based on absolute grounds of refusal as mentioned under art. 7.1.b) and c) of the EUTMR. These grounds provide that no trade mark will be registered if it is void of distinctive character or is descriptive of the goods’ characteristics.

In the case at hand, the GC agreed with the assessment conducted by the EUIPO that the sign ‘El Clasico’ could not be registered as the word itself refers to either a) the Spanish word clasico (which translates to classic) or b) a sport match between two rivalling teams (in multiple languages of the Union).

This decision is less than surprising. It seems to be common sense that the everyday words are non-registrable as trade marks.

*Source: Judgment of the General Court, 24 February 2021, available [here](#).*