

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 10 NO. 26)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks, Trade Secrets and upcoming events for the period February - March 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,

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

1. Competition law

1.1 Commission commences consultation on revised Horizontal Cooperation draft

On 1st March, the Commission published the revised drafts of the Horizontal Block Exemption Regulations - 1217/2010 Research & Development and 1218/2010 Specialisation Agreements (“R&D BER” and “Specialisation BER” respectively, together “HBERs”) and the draft revised Commission Guidelines on horizontal cooperation agreements (HGL). As the HBERs were initially valid only until 31 December 2022, the Commission initiated the evaluation phase in September 2019. These revised drafts are based on the inputs received at the evaluation phase and the impact assessment phase. The objective of these two phases was to determine whether the Commission should renew, revise or discontinue the HBERs. As the evaluation phase indicated a need for renewal and also suggested some adaptations to align the HBER and HGL with the current requirements of businesses, the Commission accordingly, presented these updated revised drafts on 1st March.



Notable changes include: provisions to facilitate cooperation in R&D and production (1); an additional chapter in the HGL on sustainability agreements, data sharing, mobile infrastructure sharing and bidding consortia (2) and simplification and streamlining of administrative supervision by the European Commission and the National Competition Authorities (3).

Interested parties may submit their comments till 26th April at the following [link](#).

The new and revised rules are expected to enter force on 1st January 2023.

*Sources: European Commission, 1 March 2022, available [here](#). Competition Policy International, 1 March 2022, available [here](#). EU Reporter, 2 March 2022, available [here](#).
Image Source: Getty Images, available [here](#).*

1.2 Commission takes UK to the CJEU over enforcement of illegal State aid

In a judgment dated 19th February 2020, the UK Supreme Court (UKSC) allowed the enforcement of an arbitral award. The award was rendered by an arbitration tribunal constituted within the framework of the International Convention for the Settlement of Investment Disputes (ICSID) to resolve a bilateral investment treaty-related (BIT) dispute between Romania and the Swedish investors, Ioan Micula and Viorel Micula. Romania had apparently infringed a BIT, that it had concluded with Sweden in 2003, and the Micula brothers were accordingly awarded damages by the Tribunal.

Following an in-depth investigation, the Commission in its decision dated 30th March 2015, reached the conclusion that any compensation paid by Romania in compliance with the above-referred award was in breach of the EU State aid rules, and that Romania should immediately recover any compensation that it had already paid to the beneficiaries, the Micula brothers.

The Micula brothers then reached out to the UK courts for a recognition and enforcement of the award. Meanwhile, an appeal on the validity of the Commission’s decision was pending



before the European Courts. Before the Court of Justice of the European Union (CJEU) could pronounce its final decision, the UKSC, in its decision dated 19th February 2020, decided that the arbitral award was enforceable in its entirety.

About two years later, the CJEU finally delivered its decision on 25th January. As per the CJEU, the Commission was correct in its assessment that the EU State aid rules were applicable to the issue under consideration, and that, the Commission was indeed the most

competent authority to assess the legality of the disputed arbitral award.

In light of the CJEU's decision, the Commission found that the UKSC's decision was in breach of the principle of sincere cooperation and the primacy of EU law. The breach occurred as the UKSC delivered its decision, while the matter was pending before the European Courts. The Commission also claims infringement of many a Treaty articles, including Articles 108 (3), 267 and 351 of the Treaty on the Functioning of the European Union (TFEU). The case is now before the CJEU to determine whether the UK did indeed breach its commitment as an erstwhile member of the European Union (EU). As per the UK/EU Withdrawal Agreement, such a dispute may be referred to the CJEU.

Sources: European Commission, 9 February 2022, available [here](#). Pinsent Masons, 11 February 2022, available [here](#). Legalpost.eu, 16 February 2022, available [here](#).

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

1.3 General Court dismisses UPS' €1.7bn damages claim against the Commission

On 23rd February, the EU General Court (GC) dismissed United Parcel Service's (UPS) claim for damages against the Commission. In 2013, the Commission had prohibited the merger between two international express delivery service providers, UPS and TNT Express. The Commission's assessment indicated that the merger would lead to significant impediment to effective competition in over 15 European Economic Area (EEA) Member States. About three years later, the Commission, however, cleared the merger between FedEx and TNT Express. Following this conditional clearance, UPS was effectively left with no choice or prospect to consolidate with the TNT Express.



In 2017, about four years later, the GC annulled the Commission's prohibition decision for serious breach of UPS' rights of defence. The GC's decision was upheld on appeal by the CJEU in January 2019. The decision was based on the fact that the Commission's economic analysis was determinative in its final decision to prohibit the said merger. The Commission had failed to share the final version of this econometric analysis, which deprived UPS of a reasonable opportunity to comment and express its dissent with the said model.

Meanwhile, UPS initiated another set of proceedings in February 2018 and claimed € 1.7 billion in damages from the Commission. In its decision dt. 23rd February, the GC rejected the UPS' request for damages. To establish non-contractual liability, the applicant must be able to demonstrate that the following three conditions are met cumulatively: there is a 'sufficiently serious breach' of the conferred right (1); this breach has resulted in actual damage (2) and there exists a 'direct casual link' between the breach incurred and the damage sustained (3). The GC, while acknowledging that individuals may seek damages following a breach of law by the Commission within the meaning of Article 340 TFEU, it nonetheless, refused UPS' request as the conditions for non-contractual liability were not effectively established in the said case.

Sources: EU General Court, 23 February 2022, available [here](#). White & Case, 3 March 2022, available [here](#).

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

2. Copyright

2.1 No copyright protection for AI generated works: says US Copyright Review Board



On 14th February, the US Copyright Review Board rejected Stephen Thaler's request to re-consider copyright protection for AI-generated works. In 2018, Thaler requested the US Copyright Office to register the work (see *image*) titled "A Recent Entrance to Paradise". The work was produced by an algorithm called the "Creative Machine". Thaler requested that as the "owner of the Creative Machine", he was the rightful claimant and could accordingly, register the work as a "work for hire". Referring to the decisions of the federal agencies and the courts, however,

the Board was of the opinion that for the registration of a work, the author must be a human author. Even the latest report by the US Patent and Trademark Office (PTO) and the public comments to the initial draft of the said report suggest that the requirement of a human author is strictly mandatory. As the work-for-hire doctrine referred only to the identity of the owner, and not its author, the doctrine was found to be inapplicable to the case at hand.

News and Image Source: IPKitten Blog, 17 February 2022, available [here](#), IP Update, 3 March 2022, available [here](#).

2.2 UK's leading ISPs ordered to block Cyberlocker

On 3rd February, the English and Wales High Court (EWHC), exercising its powers under Section 97A of the Copyright, Designs and Patents Act (CDPA), ordered relief in an application filed by the Motion Picture Association (MPA) and Sky. MPA represented leading content studios namely Columbia Pictures, Disney Enterprises, Netflix, Paramount, Universal and Warner Bros. The decision was pronounced orally, with no accompanying written decision. As per the order, UK's largest broadband internet service providers (ISPs), Sky Broadband, BT, Plusnet, Talk Talk, Virgin Media and the EE must immediately



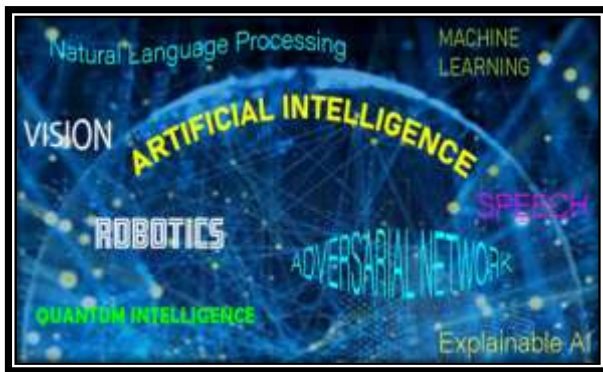
block access to the “Mixdrop” website. It may be relevant to note that the company Sky, was thus, both an applicant as well as a respondent in the case at hand.

Mixdrop was identified as a “cyberlocker”. A cyberlocker is a website, whereby users upload and store their files. These cyberlocker(s) may be used for both - legitimate or illegal purposes. It may happen sometimes, as was apparently the case with the “Mixdrop” website, that such websites may contain copyright-protected content, which can in turn be made available to the public. Section 97A of the CDPA empowers the EWHC to grant an injunction against a service provider in case of an actual knowledge of copyright infringement by another person. Even though these proceedings are very expensive, copyright-holders have regularly resorted to Section 97A CDPA proceedings and ensured blocking of hundreds of file sharing and video streaming websites.

This particular decision against the “Mixdrop” website is significant as it is probably the first ever decision targeted at a movie and TV show cyberlocker website, as distinct from music cyberlocker, that are generally the usual suspect in such infringement proceedings.

News & Image Source: Kluwer Copyright Blog, 2 March 2022, available [here](#). ISP Review, 7 March 2022, available [here](#).

2.3 EUIPO publishes study on AI, copyright and designs



In 2019, the European Union Intellectual Property Office (EUIPO) formed an Impact of Technology Expert Group (EG) (p.15 of the Report). One of the key objectives of the EG was to understand how IP may be a “double-edged sword”, meaning that intellectual property may present a “threat”, while simultaneously offering an “opportunity” in the EU’s march towards Industry 4.0. In order to holistically understand this double-edged outlook, the EUIPO also commissioned the

United Nations Interregional Crime and Justice Research Institute (UNICRI) to cooperate with the EG, and draw an Internet Organised Crime Threat Assessment Report (IOCTA). With this background, the EG finally released its “Study on the impact of Artificial Intelligence on the Infringement of Copyright and Design” on 2nd March. The Report offers a detailed analysis of the AI capacities and threat points. AI offers notable opportunities to efficiently detect and enforce copyright and design infringements. This, in turn, depends on the availability of large amounts of high-quality data. To date, in practice, enforcement agencies have made limited use of the AI capabilities in copyright and design enforcement. On the downside, AI also presents a big threat of being deployed for criminal purposes, including but not limited to copyright and design infringement. AI, in addition also raises the notable ethical and fundamental rights-related concerns. It is against this backdrop, that the Report labels AI as a “double-edged sword”, whose benefits must be wisely leveraged upon to turn the threats into opportunities.

Source: EUIPO Observatory, 2 March 2022, available [here](#).

Image source: EUIPO Observatory, 2 March 2022, available [here](#).

3. Patent

3.1 CVC divisional CRISPR patent survives EPO opposition

Following a fifteen hour-long hearing, on 21st February, the Opposition Division (OD) of the European Patent Office (EPO) decided to maintain the European patent EP3401400B1 (EP400) in the amended form Auxiliary Request 10 (AR10) filed during the oral proceedings on 1st December 2021.

EP400, owned by the University of California (US), University of Vienna (AT), and Emmanuelle Charpentier (DE) (collectively referred to as CVC, or Berkely), is a divisional application based on EP3241902B1 and EP2800811B1, and concerns a genetic modification technique using CRISPR (clustered regularly interspaced short palindromic repeats)/CRISPR-associated protein 9 (Cas9) technology. The said patent has the earliest priority date of 25 May 2012, and is a family member of the CVC's large patent portfolio of CRISPR/Cas9 system.

CRISPR is a genomic editing technique. The revolutionary technique won Emmanuelle Charpentier (Max Planck Unit for the Science of Pathogens) and Jennifer A. Doudna (University of California) the Nobel Prize for chemistry in the year 2020.

As per the amended EP400, the claimed subject-matter includes a method of modifying a target DNA, a composition, one or more nucleic acids, a kit, and a genetically modified host cell (a eukaryotic cell).



The opposition against the EP400 was filed by four opponents, three of which were commercial companies, acting as “straw men”. The AR10 submitted by CVC during oral proceedings included a disclaimer stating that “a method is not a process for modifying the germline genetic identity of human beings”, a note added to claim 1 to meet the requirement of Rule 28(1)(b) EPC. Further, claim 17 protecting a genetically modified host cell was deleted to overcome the violation of Rule 29(1) EPC. In addition, the AR10 further limited claims 12, 13, and 16 by specifying the DNA-targeting RNA as “a two-molecule DNA-targeting RNA [comprising of] two separate RNA molecules, each of which [includes] one of the two complementary stretches of nucleotides that hybridize to form the dsRNA duplex”. Based on these amendments, the amended EP400 was maintained by the OD.

For an earlier discussion on the CRISPR, kindly see [Friday Fortnightly Ed. 2021 Week 12 No. 8](#) News Item 4.2 “EPO finally addresses inventive step criteria in CRISPR patent”.

Sources: Juve-patent, 1 March 2022 available [here](#), Prosecution history of EP3401400B1, 23 February 2022, available [here](#).

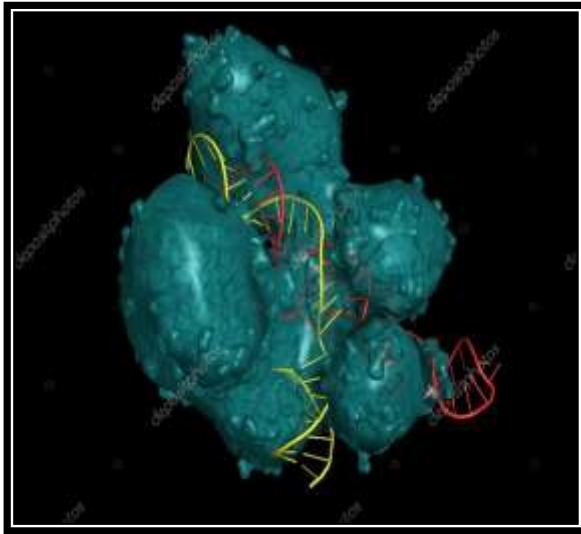
Image source: Getty Images, available [here](#).

3.2 Broad has priority on use of CRISPR in eukaryotic cells: says US PTAB

On 28th February, the Patent Trial and Appeal Board (PTAB) of the United States Patent and Trademark Office (USPTO) decided in an “interference proceeding” between CVC and Broad (the Broad Institute, Inc., Massachusetts Institute of Technology, and President and Fellows of Harvard College). An interference proceeding is a unique inter partes proceeding to determine priority. The proceeding is available for patent applications filed prior to the introduction of the first-to-file regime in 2013.

On 10th September 2018, the US Court of Appeals for the Federal Circuit decided that the CVC inventors were the “first to invent a CRISPR-Cas9 system with a single guide RNA to cleave DNA in a generic environment”. In the case at hand, the issue was more specific – that is who amongst two i.e., the CVC and Broad – was the first to “reduce to practice” the CRISPR-Cas9

system in eukaryotic cells. CVC's testimony was found insufficient, as they had failed to establish "a definite and permanent idea of an operative invention....in a eukaryotic cell".



Broad, on the other hand, managed to convince the PTAB, as it submitted a manuscript dated 5th October 2012 in support of its claim. The CVC could not counter this assertion. The PTAB, accordingly, reached the conclusion that this manuscript submitted to the Science magazine established that Board had successfully adduced relevant evidence to establish "reduction to practice". Broad was thus, found to be "the first to invent a CRISPR-Cas9 system with a single guide RNA able to cleave or edit DNA to affect gene expression in a eukaryotic cell".

*Sources: IP Watchdog, 1 March 2022, available [here](#). The PTAB decision, 28 February 2022, available [here](#). US8697359B1, 15 April 2014 available [here](#).
Image source: Deposit photos, 31 December 2021, available [here](#).*

3.3 Inauguration of the Administrative Committee of Unified Patent Court

On 22nd February, the Unified Patent Court's (UPC) Administrative Committee (the Committee) held its inaugural meeting in Luxembourg. The meeting was held in a hybrid format. At the meeting, the Committee adopted its Rules of Procedure (1), secondary legislation, such as the Rules on the European Patent Litigation Certificate and other suitable qualifications (2), UPC's Service and Staff Regulations and (3) Financial Rules and Regulations (4). The Committee also formed the Advisory Committee, that is expected to interview the candidate judges soon.



A number of Member States, including Austria, Belgium, Denmark, Germany, Italy and the Netherlands, also confirmed that they will soon set up a local or regional division of the UPC.

Sources: Kluwer Patent Blog, 23 February 2022, available [here](#), Unified Patent Court, 23 February 2022, available [here](#).

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

4. Trademark

4.1 General Court absolutely refuses the registration of mark, "Andorra"

In its decision dated 23rd February, the General Court (GC) held that "Andorra" could not be registered as a European Union Trade Mark (EUTM) as it was a "figurative sign", which is an absolute ground for refusal under Article 7(1)(c) of the European Union Trade Mark Regulation (EUTMR).

In 2017, the Government of the Principality of Andorra made an application at the EUIPO for the registration of the sign "Andorra" for a range of goods in classes 16, 34, 36, 39, 41 and 44. The said classes deal with diverse goods and services ranging from photographs to tobacco, and

from education to beauty care. As the sign “Andorra” was devoid of any distinctive character, and it only comprised of the name “Andorra”, a sign that in fact indicated a geographical origin, and not any commercial origin of the goods and services, the EUIPO, accordingly, rejected the application on the basis of Article 7(1)(b) and Article 7(1)(c) of the EUTMR. On appeal, the EUIPO Board of Appeal (Board) confirmed the decision in its entirety, as the mark would



indicate to the relevant public, only the place of manufacture of goods and provision of services. The Board, further added, that stylization of the word mark was insignificant, as it failed to overcome the descriptive character of the mark. The Government of Andorra appealed before the GC. It argued that as Andorra was not known as a country that offered the goods

and services applied for, the sign was unlikely to be seen as a designation of origin by the consumers. In its assessment, the GC considered whether the sign was recognized as a geographical indication by the relevant public and whether they associated the sign with goods and services applied for, and reached the conclusion that mark was indeed descriptive of origin.

News and Image Sources: Press Release, 23 February 2022, available [here](#). Judgment of the General Court (available in Spanish and French), 23 February 2022, available [here](#).

4.2 McDonalds enters the Metaverse

On 4th February, McDonald’s filed 10 trade mark applications to the USPTO for the registration of a virtual restaurant in the metaverse. The filings cover both the brands - McDonald’s and McCafé – owned by the group. According to the company, the objective for the registration of the marks are as follows. First, the referred trademarks shall cover both virtual food and beverage products in the form of non-fungible tokens (NFTs).



Second, they will also provide the possibility of home delivery of food and beverages covered by the said brands. Moreover, the requested registration also includes the usage of trademarks for “online actual and virtual concerts” offered by McDonald’s and McCafé.

Source: Forbes, 9 February 2022, available [here](#), Euronews.next, 11 February 2022, available [here](#).

Image Source: Euronews.next, 11 February 2022, available [here](#).

5. Trade Secrets

5.1 Cartier sues Tiffany for appropriation of trade secrets

On 28th February, Cartier, a French luxury group, filed a complaint against its renowned rival, Tiffany, owned by the LVMH group, before the Commercial Division of the Supreme Court of the State of New York.

As per the Complaint, shortly after Megan Mario left her job at Cartier, she was offered an important position in the “High Jewelry section” at Tiffany. Mario was clearly underqualified for this position. She was offered this position in light of her prior work and access to insider information at Cartier.



Cartier asserts that the event clearly illustrates a “disturbing culture of misappropriating competitive information” at Tiffany. Marino, is a co-defendant alongside Tiffany in the said Complaint. Tiffany also lured away other employees, which included the former Assistant Vice-President at Cartier. While still employed at Cartier, Marino forwarded herself highly “sensitive and valuable documents”, such as those dealing with the Company’s key business strategy for “High Jewelry” and its pricing strategy. In light of the fact, that this information was available to only a handful of employees at Cartier, this was, clearly a case of misappropriation of trade secrets and an act of

unfair competition. In light of the financial loss, loss of goodwill and irreparable loss of confidential information and trade secrets, Cartier has requested damages and permanent injunction against the Defendants.

Sources: Complaint, 28 February 2022, available [here](#). The Fashion Law, 1 March 2022, available [here](#) (content available on subscription). CTV News, 3 March 2022, available [here](#). Image Source: Reuters, available [here](#). Robb Report, available [here](#).

6. Events and programmes

7.1 Executive education programme on Trade Secret Protection

Are you working in the industry, at a law firm or as an in-house legal counsel? Will you like to avert a situation as in news item 6.1 above?

Then this executive education programme is tailor made for you!

[Trade Secret Protection | A view from the EU, UK, Germany, France, Netherlands and Industry](#) is an intensive two-day executive programme, organized by Maastricht University in cooperation with the Center for Commercial Law Studies, Queen Mary University of London. The programme promises to offer a bird’s eye view of the significance of trade secrets for businesses and the changes introduced across key European jurisdictions by the EU Trade Secrets Directive.

Why this programme?

- ✓ Emphasis on practical self-help and protective measures
- ✓ Specific focus on the Directive and its national implementation
- ✓ Emphasis on early-stage measures such as obtaining evidence; search and seizure of incriminating evidence imaging orders etc.
- ✓ Country-based expertise

When and where?: 17 and 18 May 2022 at the UM Campus Brussels

Interested?: Please register [here](#).

