

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 12 NO. 27)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and Trade Secrets 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 unconditionally approves Amazon/MGM deal

On 15th March, the Commission unconditionally cleared Amazon's \$8.5bn acquisition of Metro-Goldwyn-Mayer Studios Inc (MGM). On 8th February, Amazon formally notified the merger to the Commission. Amazon, world's leading e-commerce platform, proposed to acquire MGM to strengthen its portfolio of audio-visual (AV) content.

The Commission assessed the impact of the merger in the market for AV content in the European Economic Area (EEA). Amazon produces and distributes its own and third-party AV content through its Amazon Prime Video. Despite its successful portfolio of film franchises such as Rocky and James Bond, MGM is "not among the top production studios". The Commission assessed the horizontal and non-horizontal overlaps between Amazon Prime Video and MGM in the AV content value chain. As the merger did not lead to substantial impediment to effective competition in any of the relevant markets under consideration, the Commission unconditionally cleared the merger following a swift phase-I merger investigation.

As a next step, the proposed merger is currently pending investigation before the US Federal Trade Commission (FTC), that is expected to announce its decision in the following weeks.

Sources: European Commission, 15 March 2022, available [here](#). Reuters, 15 March 2022, available [here](#). Deadline, 15 March 2022, available [here](#).

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



1.2 Google & Meta's agreement Jedi Blue under Commission's scanner



On 11th March, the Commission formally initiated investigations into an agreement code-named "Jedi Blue" entered in September 2018 between Google and Meta (formerly Facebook). As per the agreement, Meta's "Audience Network" (MAN) project enjoyed preferential access in Google's "Open Bidding Programme" (OBP).

Both Google and Meta's business models include provision of free services to users on the demand side. To reach these users, the two offer advertising-based services. Google's OBP offers "real time auctioning of online display advertising space on web sites and mobile apps". MAN is an active participant in these auctions. It helps publishers monetize their apps and websites by offering access to Meta's advertisers. The agreement "Jedi Blue" concerned the market for online display advertising services. The agreement was intended to "exclude ad tech services competing with Google's OBP". Commission's preliminary assessment indicates that the said agreement, code-named Jedi Blue, was in breach of Article 101 and Article 102 of the Treaty

on the Functioning of the European Union (TFEU). The two articles respectively deal with anti-competitive agreements and abuse of dominant position.

Meanwhile, UK's Competition and Markets Authority (CMA) has also initiated parallel investigations in the said Agreement. The Commission and the CMA are expected to cooperate closely on the matter. Google has so far received a fine of over € 8 billion in different antitrust cases in the European Union (EU). The Commission is now conducting an "in-depth probe in agreement Jedi Blue as a matter of priority".

*Sources: European Commission, 11 March 2022, available [here](#). European Union External Action Service, 15 March 2022, available [here](#). Politico, 11 March 2022, available [here](#).
Image Source: Pixabay, available [here](#).*

1.3 Commission invites stakeholders' comments on Agri-sustainability agreements

Article 101(1) TFEU, dealing with anti-competitive agreements, has limited applicability in the agricultural sector. The scope of the application is determined by the Parliament and the Council.

Following the implementation of the common agricultural policy (CAP) reform for the period 2023-2027, a new derogation was incorporated in 2021. As per this derogation, restrictive agreements to achieve sustainable goals in the agriculture were permitted, provided that those restrictions were indispensable to achieve the sustainability goal under consideration.



The Council and the Parliament also requested the Commission to issue guidelines concerning the conditions for the application of this derogation latest by 8th December 2023. As part of the process, the Commission has come out with draft guidelines and is currently seeking inputs from the stakeholders. With this dialogue, the Commission seeks to gather views on agreements that may seem restrictive, but are also ensured to achieve a sustainable outcome. Following a successful conclusion of this process, the Commission is expected to release its new revised guidelines by the end of this year.

Interested stakeholders may submit their comments and contribute to the dialogue on sustainability by following this [link](#).

Sources: European Commission, 28 February 2022, available [here](#). Eu reporter, 1 March 2022, available [here](#).

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

2. Copyright

2.1 "Levitating" Copyright-protected works: Did Dua Lipa do it?

Dua Lipa's "Levitating", currently at number 16 on the Billboard U.S. Hot 100, has been on the list for an impressive 70 weeks, following its release in 2020. Earlier this month, the song was hit by two simultaneous copyright infringement lawsuits.

On 1st March, the reggae band, Artikal Sound System filed a complaint against Lipa at the US District Court for the Central District of California. As per the complaint, Lipa plagiarized their 2017 song "Live Your Life". The said song featured at number 2 in the 2017 Billboard charts' reggae section (para 14 of the Complaint). The Complaint claims that the two songs are

“substantially similar” and that “given the degree of similarity, it [was] unlikely that ‘Levitating’ was created independently from ‘Live Your Life’”.



On 4th March, only three days after the first lawsuit, writers, L. Russell Brown and Sandy Linzer, brought a second lawsuit against Lipa. As per the Complaint, Lipa had borrowed substantially from the 1979 hit song “Wiggle and Giggle All Night”, that they had authored for Cory Daye, and Miguel Bosé’s 1980 “Don Diablo”. Bosé had substantially borrowed from Daye’s song. Brown and Linzer successfully claimed copyright infringement by Bosé in 1987. As per the lawsuit, the “opening melody of ‘Levitating’” is clearly inspired from their work (1), & is the reason for its success and its popularity on TikTok, “where signature melody often comprises 50% or more of these viral videos” (2).

*Sources: Slate, 17 March 2022, available [here](#). Billboard, 1 March 2022, available [here](#). The Guardian, 7 March 2022, available [here](#).
Image source: Pitchfork, available [here](#).*

2.2 Munich Regional Court’s mixed ruling on ResearchGate

On 2nd February, the Regional Court of Munich I (the Court) decided on a 2017 suit filed by the Plaintiffs, Elsevier and American Chemical Society, against Research Gate (RG). In a somewhat mixed ruling, the Court found that the academic research platform RG had hosted over 50 copyright-protected works on its website. The Court, accordingly, requested the platform to remove the infringing content, and also take more active responsibility for the content hosted on its platform. The Court also went on to question the licensing practices of the Plaintiffs. As per the Court order, they had failed to establish a transfer of copyright in even one of the fifty works under consideration. Plaintiffs’ request for an award of damages was accordingly, declined by the Court. In light of the mixed decision, both, the Plaintiffs as well as the Defendants, plan to appeal the decision of the Munich Court.



*Sources: Nature, 4 March 2022, available [here](#). The Scientist, 4 March 2022, available [here](#). Medium, 5 March 2022, available [here](#).
Image source: Medium, available [here](#).*

2.3 Italian Supreme Court on the quotation exception

In a recent decision dated 1st December 2021 (Cassazione Civile, Ordinanza N. 4038/2022), La Corte Suprema di Cassazione, Repubblica Italiana, the Italian Supreme Court interpreted the scope of “quotation exception”. The case dates back to 2003 when one of the surviving members of a foundation (Foundation A), that managed a notable deceased Italian artist’s work, parted ways to establish a new foundation (Foundation B). In 2008, Foundation A released a six-volume series containing the catalogue of works by the Italian artist. Foundation B filed for

copyright infringement before the Milan Court of First Instance, that dismissed the suit in its entirety. Foundation B appealed before the Court of Milan that partially offered relief to the appellants. Foundation B further appealed to the Italian Supreme Court for a correct interpretation of the relevant law, viz the quotation exception. Referring to the Infopaq case of the Court of Justice of the European Union (CJEU), the Court held that exceptions and limitations are a “derogation” from the exclusive rights awarded to authors, and therefore, merit a strict interpretation. To benefit from the quotation exception, reproduction must be limited to the extent that it is required for “criticism or review or teaching” and should only be “partial in nature”. Referring to Article 10 (1) of the Berne Convention, the Court was of the opinion that reproduction should not exceed “that justified by [its] purpose”.

Source: *TheIPKat*, 13 March 2022, available [here](#).

3. Patent

3.1 Wiko infringed Philips’ patents: *Hoge Raad*



On 25th February, the Hoge Raad (the Supreme Court of the Netherlands) affirmed two decisions of the Gerechtshof Den Haag (The Hague Court of Appeal). As per the decision, Wiko had infringed Philips’s two patents that concerned the Universal Mobile Telecommunications System (UMTS). Following the CJEU’s opinion in *Huawei v. ZTE* (C-170/13), these two decisions are the first time that the Hoge Raad interpreted FRAND (fair, reasonable, and non-discriminatory) licenses.

As Wiko had failed to present itself as a willing licensee in time (“*geen willing licensee heeft getoond*”); whereas Philips, as an SEP holder, performed its obligation by presenting a standard license offer to Wiko on 28th July 2015, that is prior to bringing the injunction claims before the Dutch courts, a claim for injunctive relief, accordingly, could not be deemed as an abuse of dominant position on the part of Philips. Although Wiko argued that this standard license offer was not FRANDly (in particular, it was not non-discriminatory), it failed to substantiate its claim with any evidence. As per Article 150 of the Dutch Code of Civil Procedure (DCCP) and Article 2 of the Council Regulation (EC) No. 1/2003, the burden of proof was on Wiko to substantiate this claim. Following this unsuccessful litigation, Wiko has exited the Dutch market.

Sources: *Juve-patent*, 9 March 2022, available [here](#). *Decisions of the Hoge Raad*, 25 February 2022, available [here](#) and 25 February 2022, available [here](#).
Image source: *Wikimedia Commons*, available [here](#).

3.2 Irish Apex Court calls on CJEU for interpretation of combination products in SPCs

On 21st February, the Supreme Court of Ireland (the Irish SC) referred a set of questions dealing with Article 3 (a) and Article 3 (c) of the Supplementary Protection Certificate (SPC) Regulation 469/2009 to the CJEU.

The Plaintiff, Merck’s combination product INEGY, used to lower cholesterol, comprises of two active ingredients namely, “ezetimibe” and “simvastatin”. Ezetimibe, initially sold as a single drug treatment comprised of the Irish SPC 2003/014. The said drug was then combined with simvastatin to form INEGY (Irish SPC 2005/01). The key question was the validity of SPC 2005/01 as a combination product.

As per the Irish Court of Appeal (CoA), the INEGY SPC was invalid within the meaning of Article 3 (a) as it was insufficient for the product to merely fall under the scope of protection of the basic patent. According to the CoA, even though the said patent did mention the combination of ezetimibe and simvastatin in the dependent claims of the patents, it had failed to fulfill the test of “core inventive concept”. Merck’s key argument was that the “core inventive concept” was outdated; instead, the “specifically identifiable doctrine” was the relevant test. The CoA’s interpretation had accordingly, failed to take account of recent developments, including the opinion of the CJEU in *Royalty Pharma (C-650/17)*. The Irish SC has, accordingly, requested the CJEU to clarify the more relevant test applicable in such a case.



The Irish CoA also found the INEGY combination SPC invalid under Article 3 (c). The CJEU had earlier clarified that combination of products was not permitted by Article 3 (a) and Article 3 (c), where the “core inventive concept” of a patent related to only one of the active ingredients of the monotherapy. The other questions, accordingly, request for a clarity on whether the *Royalty Pharma*’s “specifically identifiable test” is also applicable to Article 3(c).

Sources: The IPKat, 7 March 2022, available [here](#). British and Irish legal information institute, 21 February 2022, available [here](#).

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

3.3 Partial Compromise on waiver of COVID-19 vaccine-related patents



Pursuant to Article 31 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), United States, European Union, India, and South Africa have reached a tentative agreement on a waiver of COVID-19 vaccine-related patents. The agreement is subject to a formal approval of the 164 member countries of the World Trade Organization (WTO). As per the agreement, the restricted waiver is limited to the scope of “patented subject matter required for the production and supply of COVID-19 vaccines”. More specifically, the “patented subject matter” includes “ingredients and processes necessary for the manufacture of the COVID-19 vaccine”. In addition, such a TRIPs waiver can only be granted to a developing Member country that has

“exported less than 10 percent of world-wide exports of COVID-19 vaccine doses in 2021”. It remains undecided whether the waiver would “cover the production and distribution of COVID-19 diagnostics and therapeutics”. This indecision has provoked criticism from the proponents

of the waiver, as they are of the opinion that a mere waiver for the production and supply of COVID-19 vaccines is insufficient.

Sources: IPWatchdog, 16 March 2022, available [here](#). Reuters, 16 March 2022, available [here](#). Tentative agreement of TRIPS COVID-19 solution, available [here](#).

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

4. Trademark

4.1 Likelihood of confusion between marks for ‘software’ and ‘computer’: says GC

In its judgement on the 2nd March, the General Court (GC) confirmed that similarity between ‘computers’ and other software (like games software and computer programmes) was a relevant consideration to determine the likelihood of confusion under Article 8(1)(b), European Union Trade Mark Regulation (EUTMR).

In 2015, Ubisoft Entertainment, a video game company, filed an application for the registration of the figurative mark ‘FOR HONOR’, for goods in Classes 9 (computer software and games software), 16, 28 (apparatus for electronic games) and 41 (computer and telecommunications technology training).



Huawei Technologies opposed this on grounds of its earlier European Union Trade Mark (EUTM) ‘HONOR’ registered for Classes 9 (computer and telecommunications devices), 35 and 38 (communication devices). Huawei’s opposition was based on Article 8(5) EUTMR dealing with signs similar or identical to a trademark with reputation and Article 8(1)(b) EUTMR dealing with the likelihood of confusion. As Huawei did not submit evidence to prove reputation, in 2020, the Opposition Division of the EUIPO partially upheld its opposition on grounds of likelihood of confusion between the two marks for goods in Classes 9, 28 and 41. Ubisoft unsuccessfully appealed this decision first before the EUIPO Board of Appeal and subsequently at the GC. The GC was of the opinion that ‘games software’, ‘computer programs’, ‘magnetic, optical, numerical and electronic data carriers’, ‘cd rom’ in Class 9 were similar to ‘computers’ as they had the same relevant public and distribution channels, and were sold by the same undertakings. Moreover, the two were also “intrinsically linked” considering that to play a “games software”, one required access to the computer. Moreover, the two signs also enjoyed a high degree of visual, phonetic and conceptual similarity.

News and Image Source: Judgement of the General Court, 2 March 2022, available [here](#). World Trademark Review, 21 March 2022, available [here](#).

4.2 Onus on trade mark proprietor to establish genuine use: says CJEU

On 10th March, the CJEU offered its interpretation in relation to Article 19 of the EU Directive 2015/2436 concerning approximation of the laws of the Member States relating to trademarks.

The CJEU re-phrased and summarized the referring court’s question as to “whether Article 19 [...] must be interpreted as precluding a procedural rule of a Member State [dealing with revocation of a mark on grounds of non-use] requires the applicant to carry out market research” to substantiate its claims of non-use (Para 32). In the case at hand, Globus was the proprietor of the word mark and the figurative mark “MAXUS”. The said marks were registered at the Deutsches Patent- und Markenamt, the German Patent and Trade Mark Office in 1996 for goods in Nice Classes 1 to 9 and 11 to 34. In 2019, Maxxus requested the Landgericht Saarbrücken, the Regional Court of Saarbrücken for the revocation of Globus’ “MAXUS” marks on “grounds of non-use” (Para 15). To substantiate its request, Maxxus adduced evidence to establish that Globus had failed to make use “such as to preserve [Globus’] rights over [its MAXUS mark]” (Para 16).



Referring to its decision dated 22nd October 2020 in Ferrari (C-720/18), the CJEU was of the opinion that Article 19 required that burden of establishing genuine use was on the proprietor of the mark (Para 36). The Court went on to add that a national rule that put such a “burden of use, or non-use, of the trade mark ... on the applicant” would constitute an inappropriate burden on the applicant (Paras 40-43).

News and Image Source: Globus v. Maxxus case, 10 March 2022, available [here](#). The IPKat, 21 March 2022, available [here](#).

5. Trade Secrets

5.1 Samsung claims theft of Intellectual Property by its former employees

On 10th February, Samsung Electronics, South Korea-based world’s leading smartphone manufacturer, filed a complaint of misappropriation of trade secrets against two of its former employees, Ahn Seung-ho and Cho, at the US District Court of Texas. As per the Complaint, the two had entered into a civil conspiracy and violated the “principle of good faith and trust” to misappropriate trade secrets. Ahn was the head of the Samsung Electronics’ intellectual property center for over a decade before he resigned from the Company in 2019. During his tenure at Samsung, he worked on voice recognition and wearable technologies. Cho had earlier worked as Samsung’s in-house lawyer.



Apparently, Samsung’s trade secrets lawsuit is a counter-response to a lawsuit filed by Ahn against Samsung at the same Court. As per Ahn’s patent infringement lawsuit, Samsung had infringed 10 patents held by his company Statern Tekiya LLC. The lawsuit alleged that Samsung had used these patents in its GalaxyS20 and Galaxy Buds smartphones and voice assistant app, Bixby, without seeking any license from the relevant rightholders.

Sources: The Trademark Lawyer Magazine, 3 March 2022, available [here](#). Ked Global, 14 February 2022, available [here](#). Foss Patents, 23 February 2022, available [here](#).

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