

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 16 NO. 29)

Dear Readers,

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

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

The Innovator's 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 Commission conditionally approves Parker/Meggitt aerospace merger



On 11th April, the Commission conditionally approved Meggitt's \$8.65 billion acquisition by Parker. Both the undertakings are leading suppliers in the global aerospace component market. Parker, a US-based aerospace company, is active in the manufacture and supply of precision-based engineered solutions for aerospace markets. Meggitt, a UK-based company, is active in the market for components and sub-systems for aerospace and defence and energy markets. The Commission's assessment looked at the impact of the transaction on the market for design, manufacture and supply of aircraft wheels and

brakes. The merger would have created the largest supplier for these products. This, in turn, was expected to adversely impact competition for key components in the aerospace market. To address these concerns, Parker proposed the following remedies. Parker agreed to divest the "entire aircraft wheels and brakes division", including its Ohio plant. The Package also includes other supporting measures, such as supply of component parts to ensure that the prospective buyer may effectively, viably and independently manage the divested business.

Source: European Commission press release, 11 April 2022, available [here](#), The European Sting article, 12 April 2022, available [here](#), MarketWatch article, 11 April 2022, available [here](#).

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

1.2 A new Canadian competition law for the digital era

In its Federal Budget for 2022, the Canadian government promises to amend the current Competition Act to align with and swiftly respond to the digital realities.

One of the key issues addressed is anti-competitive agreements amongst competitors that negatively impact the welfare of its employees. In 2020, three leading groceries in Canada colluded to cancel the "\$2-per-hour hero pay bonuses" for its front-line workers. The case underwent uninvestigated due to a legislative gap at the time, that deems wage fixing as merely a civil offence.

To prepare itself for these upcoming reforms, the Canadian Competition Bureau (CCB) also established a "Digital Enforcement and Intelligence Branch", whose key task is to look at digital markets and business models therein. The exact nature and the content of the reformed Canadian Competition Act, at this moment remains unclear. What is certain is that the reform will indeed take place, and that this reform will touch upon anti-competitive agreements and merger control. The Canadian government's commitment to reform is evident not only from the explicit announcement in the 2022 Federal Budget, but also the additional \$27.5 million funding offered to the CCB to expand its team, undertake investigations in complex digital markets and create more awareness and advocate reform of the Canadian competition policy.



Sources: Financial Post, 8 April 2022, available [here](#). Kluwer Competition Law Blog, 22 February 2022, available [here](#).

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

1.3 Spotify spots Apple’s anti-competitive conduct again



On 11th April, Reuters reported that Apple’s App Store may face another additional antitrust charges for its restrictive practices against music streaming practices offered by third-party service providers.

In March 2019, online streaming services, including Spotify, formally lodged a complaint against Apple’s App Store Review Guidelines. On 16th June 2020, the Commission initiated formal investigations to assess whether Apple’s App Store rules failed to comply with the EU competition policy, notably Article 101 and 102 of the Treaty on the Functioning of the European

Union (TFEU). In April 2021, the Commission filed a Statement of Objections according to which Apple engaged in anti-competitive conduct in the market for music streaming services. Apple insists that these service providers must use Apple’s in-app payment system. This practice forced service-providers such as Spotify to charge \$12.99 per month on the Apple App Store as distinct from \$9.99 per month that it normally charges for the same service on other platforms. This latest additional antitrust complaint, based on the new complaint from Spotify, shall be appended to the statement of objections, and issued as “supplementary statement of objections” to Apple in the coming weeks.

Apple is currently also facing antitrust investigation for the above-referred conduct in the United States and the United Kingdom.

Source: MacRumors, 11 April 2022, available [here](#). The Indian Express, 11 April 2022, available [here](#). Cnet, 11 April 2022, available [here](#).

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

2. Copyright

2.1 Don’t parody the *Little Mermaid*: says Danish High Court

In its decision dated 9th February, Østre Landsret Danmarks Domstole, the Eastern High Court of Denmark, interpreted the scope of the parody exception in Danish copyright law. Between 2019 and 2020, a Danish newspaper, *Berlingske*, had used the Danish literary character, “Little Mermaid” without the permission of the right holders. The “Little Mermaid” or the “Den lille havfrue” is a statue located in the heart of Copenhagen, and is considered a cultural symbol of the city. Created by Edvard Eriksen, the work is copyright protected till 2029.

The successors of Eriksen argued that the work was used without their permission and was accordingly, an infringement of their rights. As per *Berlingske*, they were not required to take permission, as the use of the work was covered by the parody exception, and the larger freedom of



expression available under Article 10 of the European Convention of Human Rights (ECHR). As Danish copyright law did not implement Article 5(3)(k) of the 2001 Information Society Directive, that offers an exception for “caricature, parody or pastiche”, Østre Landsret looked at the practice of the other Member States. Following an assessment of the facts, the Court was of the opinion that the use of the work in either of the newspaper publications was “not strictly necessary”. The Court accordingly ordered the newspaper to pay the rightholders 300,000 Danish Kroner (approximately 40,300 €).

Source: Decision of the Østre Landsret (in Danish), March 2022, available [here](#).

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

2.2 Four Tet’s claims against record label on “duty to exploit” sustainable: says EWHC

On 19th January, the England and Wales High Court (EWHC) gave its judgment in the ongoing dispute between Kieran Hebden, a musical performing and recording artist who performs as “Four Tet”, and Domino Recording Company, an independent record label.

In the year 2001, Hebden and Domino had entered into an exclusive recording agreement, as per which Hebden was to provide sound recordings to Domino. The copyright in those sound recordings (“Masters”) were assigned to Domino. Hebden’s key complaint was that Domino had breached an exclusive recording agreement, as the latter had failed to offer Hebden a clear accounting record of the streaming and digital downloads. Hebden had, accordingly, requested relief and damages to the tune of £70,000. [See paras 1-6 of the judgment]

Hebden filed the above Complaint in December 2020. Domino immediately acted by removing the contracted work from all the digital platforms, including Spotify. According to Hebden, this conduct, that is the removal of the content by Domino was a breach of contract (1), a breach of duty to exploit (2) and was a restraint of trade (3).

The EWHC, on 19th January rejected all but Hebden’s amendment to add the “breach of duty to exploit” as an additional claim.

Source: TheIPKat, 19 April 2022, available [here](#). Intellectual Property Enterprise Court of London, via BAILII, 19 January 2022, available [here](#).

2.3 Geo-blocking sufficient to protect content online: says Amsterdam District Court

On 1st February, Rechtbank Amsterdam, the District Court of Amsterdam (the Court) offered its decision on geo-blocking and other technological protection measures. In 2021, Basel-based Anne Frank Fonds (AFF) filed a complaint before the Court against the Dutch Anne Frank Stichting, the Koninklijke Nederlandse Akademie van Wetenschappen (KNAW) and the Belgian Association for Research and Accessibility of Historical Texts (the Defendants). The Defendants had earlier developed a website and published several works by Anne Frank, including the “The Diary of a Young Girl”, online. The objective was to facilitate scientific research on these works. The website had also used geo-blocking measures to restrict access, particularly in territories where the said works are still copyright-protected, including the Netherlands. As per the Complaint, the publication of the works was a copyright infringement under Dutch Copyright Law. Despite the technological measures in place, AFF was of the opinion that the website’s geo-blocking measures could be easily circumnavigated, for example, with the use of a Virtual Private



Network (VPN). The Court, however, declined relief on the following two grounds. First, that the Defendants had undertaken all reasonable measures to block and discourage access to the work. Second, the publication of the works was “a necessary part of scientific research”.

Sources: *Novagraaf*, 7 April 2022, available [here](#). *Macaubusiness.com*, 2 February 2022, available [here](#).

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

3. Patent

3.1 The Federal Court of Australia reverses its decision on AI as an inventor



In 2021, the Federal Court of Australia (FCA) recognized that DABUS (Device for the Autonomous Bootstrapping of Unified Sentience), an AI system, was an eligible patentee under the Australian patent law (*cf. Friday Fortnightly Ed. 2021 Week 38 No. 15, News Item 4.1, available [here](#)*). Following an appeal by the Australian Patent Office against this decision, on 13th April, the FCA reversed its earlier decision stating that the Primary Judge was incorrect in its finding that an AI machine could be an inventor.

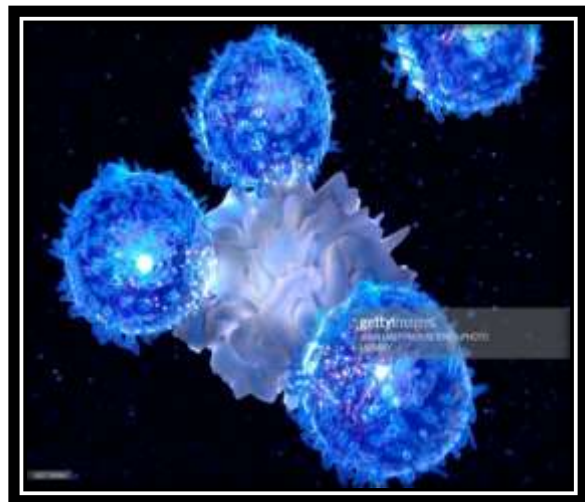
According to the Court, “identification of the inventor [in the Australian Patent law] is of central relevance and intertwined with concepts material to the validity of patent applications and patents” [FCA at para 102]. Following a perusal of the law and the facts, the FCA Appeals Panel was of the view that the decision of the Primary Judge be reversed, and DABUS, the AI-system, and Mr. Stephan Thaler, the inventor of DABUS, be refused patentability of the invention.

Sources: *IP Watch Dog*, 17 April 2022, available [here](#). *Federal Court of Australia*, 13 April 2022, available [here](#).

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

3.2 BoA affirms the patentability of antibody claims defined by epitope

In T 1964/18, the Boards of Appeal (BoA) of the European Patent Office (EPO) acknowledged for the first time, that features broadly defined in terms of the epitope were admissible. The approach is in alignment with the updated EPO Guidelines for Examination (*cf. Friday Fortnightly Ed. 2021 Week 6 No. 5 News Item 4.1, available [here](#)*). G-II 5.6 of the EPO Guidelines, introduced in 2021, specify special patentability requirements for antibody inventions. According to G-II 5.6.1.6, claims concerning antibodies, “may be defined also by its epitope”. Since features defined by epitope can cover all the antibody species that belong to a given genus, such features offer a comparatively broad scope of protection, similar to the functional features. In the case at hand, the contested patent (EP 1831258 B1) concerned monoclonal antibodies against NKG2A. In the Claim 1, the antibody or fragment was identified



as “binding the same epitope on NKG2A as the antibody produced by the cell deposited at the CNCM under accession number I-3549”. The BoA allowed this expression and acknowledged the inventive step of claim 1 mainly based on the distinguishing feature that the claimed antibody or fragment specifically binds to NKG2A but not to human NKG2C and -E.

Sources: The IPKat, 6 April 2022, available [here](#). Decision of the Boards of Appeal (T 1964/18), 22 March 2021, available [here](#).

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

3.3 EWHC partially invalidates Bristol-Myers Squibb’s European patent

Following a request from Sandoz and Teva, on 7th April, the EWHC invalidated the UK part of EP 1427415 B1 (EP 415) on grounds of lack of plausibility. EP 415 is owned by Bristol-Myers Squibb and protects its drug Eliquis® (the compound apixaban). In the UK, the right of EP 415 was extended until 19th May 2026 by the Supplementary Protection Certificate, SPC/GB11/042. EP 415 concerns lactam-containing compounds and derivatives thereof as factor Xa inhibitors. It was common ground between the parties that “apixaban has proven to be a potent factor Xa inhibitor and a useful therapeutic”. However, Sandoz and Teva claimed that EP 415 did not make it plausible.



Since a plausibility assessment is based on the original application, the EWHC tested the plausibility by reference to the application for EP 415, i.e. WO 03/026652 A1 (WO 652). Following the contents in WO 652, it was concluded that the plausibility for factor Xa binding was not demonstrated, as the useful result that have been achieved by the compounds could not be inferred from the original disclosure in WO 652. Plausibility is a vital consideration in Europe to exclude technical speculations from patent protection.

Sources: Decision of the EWHC, 7 April 2022, available [here](#). Juve-patent, 8 April 2022, available [here](#).

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

4. Trademark

4.1 Amazon’s identity crisis up for referral: marketplace or distributor?



In March 2021, the Luxembourg District Court, Tribunal d’arrondissement, referred a set of questions to the Court of Justice of the European Union (CJEU, C-148/21) in a dispute between Amazon and Christian Louboutin. A year later, the Brussels Enterprise Court, Tribunal de l’entreprise francophone, made another referral to the CJEU (C-184/21) concerning similar dispute between the same two parties.

In essence, the question asked by the national courts is, “under which

conditions is the operator of an online marketplace liable under Art 9(2) EUTMR for the display of advertisements and the delivery of infringing goods that are sold by an independent seller that avails himself of that operator's service?"

As per Art 9(2) of the European Union Trade Mark Regulation (EUTMR), use of a protected sign, in the course of trade and without the consent of the proprietor, constitutes a trademark infringement. Art 9(3) suggests a non-exhaustive list of such uses, such as use in advertising and the offering or stocking of counterfeit goods. The key questions asked are whether Amazon is an intermediary and qualifies as an operator of a marketplace, or whether it be deemed as a distributor (1); whether Amazon uses a third-party trade mark while displaying it in an advertisement (2) and while making one such determination, whether the "perception of internet users" be taken into account (3)?

Sources: IPKat, 9 April 2022, available [here](#). & DE BANDT, available [here](#). The Fashion Law (Content available on subscription), 14 April 2022, available [here](#).

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

4.2 Red colour of high-heeled shoes not an identification mark: says Tokyo District Court

On 11th March, the Tokyo District Court dismissed Louboutin's red sole trademark case in its entirety. Louboutin, a high-fashion brand, claimed that the Japan headquartered Eizo Co. Ltd. had infringed its trade mark by selling "similar red [colour] on a women's pump" on a rubber-based sole (unlike Louboutin's which is leather-based). Louboutin, accordingly requested relief and damages under Japan's Unfair Competition Prevention Law. The Court, however, dismissed the case relying on the following two grounds. First, Louboutin did not enjoy a strong right over its red high heel soles, as its application was still pending at the Appeal Stage before the Japanese Patent Office. As Louboutin started operations in Japan only 20 years ago, it was insufficient to establish a case of inherent and acquired distinctiveness. Second, the red high-heeled shoes were insufficient as an identification mark. In the opinion of the Court, the colour red was regularly used in the footwear industry to "enhance the aesthetic appearance" of ladies' footwear and other accessories.



Sources: The Fashion Law (Content available on subscription), 12 April 2022, available [here](#). Fashion United, 13 April 2022, available [here](#).

Image source: Hoogenraad & Haak, available [here](#).

5. Data

5.1 Commission introduces the Data Act

On 23rd February, the Commission introduced the "Data Act", as part of its larger Data Strategy. The Act is expected to ensure a smoother exchange of data amongst users of connected devices. A notable provision of the Act seeks to address "contractual imbalances in data sharing contracts". The Act promises to iron out the uneven bargaining position of the parties, and ensure more fair and balanced data sharing contracts.

The Act is also expected to enhance consumer mobility amongst different cloud data-processing service providers. It is hoped that these set of measures, along with the earlier Data Governance Act, shall help unlock the potential of a true digital single market.

Source: CJEU, 22 April 2022, available [here](#).

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

6. Events

6.1 Another step towards transparency: The CJEU goes online from 26th April

In its Press Release No. 63/2022, the CJEU announced that starting 26th April, it shall go online. As part of the initiative, CJEU's hearings, can henceforth, be followed online. This is to ensure access to justice. The service will begin with the cases currently assigned to the Grand Chamber. Gradually, the Court of Justice promises to offer a live broadcast of the reading of opinion by the Advocate Generals and the pronouncement of the judgments.



Source: Interested to join-in? Follow CJEU's Judicial calendar, available [here](#).

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

6.2 Celebrating World IP Day: IP and Youth join hands to innovate for a better future

26th April is celebrated worldwide as the International Day of Intellectual property. As per the World Intellectual Property Organization (WIPO), the theme for this year's International Day of Intellectual Property is "IP and Youth innovating for a Better Future". The Gen-Z and millennials are the "creators of tomorrow" and the WIPO, accordingly, wishes to put them forefront and will accordingly focus on technological challenges and issues encountered by today's youth. WIPO conducted hybrid events for the day.

As part of this special occasion, TILC has organized an event in May 2022. Please follow the following links [LinkedIn](#) and [Instagram](#) & #TILCcelebratesIPDay to know more.

Will you also like to contribute to the IP and Innovation for Youth? To know more, please email our IP Talks team (e.gschosser@student.maastrichtuniversity.nl and n.benou@student.maastrichtuniversity.nl).

Source: WIPO, 22 April 2022, available [here](#).