

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 20 NO. 12)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and information about forthcoming events scheduled for May 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,

C. Schrijver, E. Verhaeghe, J. Fuchsloch,
P. Kollár, J. Lönnfors and K. Tyagi



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

1. Competition law

1.1 European Commission reviews Illumina’s acquisition of GRAIL

In September 2020, Illumina, world’s leading US-based genomics company, proposed to acquire GRAIL, a healthcare start-up, that specialises in multi-cancer early detection, for over US \$8 billion. France, Netherlands, Belgium, Greece and many other Member States recently requested the Commission to assess the transaction, even though it did not quite meet the threshold requirements under the EU Merger Regulation 139/2004 (EUMR). Article 22 of the EUMR 139/2004 allows Member States to refer any proposed transaction, whether consummated or unconsummated, to the European Commission. As per a recent communication from the Commission, the Commission may following a referral under Article 22, examine a merger, if the transaction either adversely impacts competition in the Member State that has made a request or alternatively effects trade between member states.

Commission’s preliminary concerns are that Illumina’s acquisition of GRAIL may adversely impact competition in the market for next generation sequencers and reagents.

Considering the adverse impact of the concentration in the market for identification of cancer in asymptomatic patients, the Commission will assess the merits of the transaction to ensure affordable medical therapy for consumers.



Sources: European Commission, 20 April 2021, available [here](#) in English and [here](#) in Dutch. Autorité de la Concurrence, 20 April 2021, available [here](#). Fierce Biotech, 29 April 2021, available [here](#).

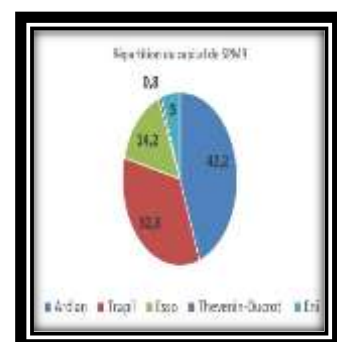
Image source: Fierce Biotech, 29 April 2021, available [here](#)

1.2 French Competition Authority blocks Ardian’s acquisition of PMR Pipeline



Following an in-depth phase-2 investigation, the French Autorité de la concurrence, the French Competition Authority (FCA), has blocked Ardian group’s proposed acquisition of Société du Pipeline Méditerranée-Rhône (SPMR). SPMR, active in the market for transport of hydrocarbons by pipeline, owns the 760 km long pipeline network, Pipeline Méditerranée-Rhône (PMR). The PMR transports an average of 9 million tons of hydrocarbons annually to south-east France.

With 47.2% per cent shareholding, Ardian is currently the majority shareholder in SPMR. The proposed transaction, if permitted, would have endowed on Ardian, an additional 5 per cent of the shares owned by Eni, and thereby given Ardian a position of complete control in the market for transport of hydrocarbons in the region. FCA’s assessment indicated that PMR is an essential infrastructure, that in light of the substantial sunk costs and other regulatory requirements, cannot possibly be duplicated by a competitor.



As the proposed commitments could not effectively address FCA’s competition concerns, and in light of the essential nature of the infrastructure injunction remained practically impossible to enforce, the FCA issued its prohibition decision.

Sources: : Autorité de la Concurrence, 12 May 2021, available [here](#) in English and [here](#) in French. Bloomberg Law, 12 May 2021, available [here](#) [subscribers only content].

Image source : Autorité de la Concurrence, 12 May 2021, available [here](#).

1.3 ACCC releases March 2021 interim report on Gatekeeper Platforms



On 28 April 2021, the Australian Competition and Consumer Commission (ACCC) released its March 2021 interim report dealing with conditions of competition in the market for digital platform services.

The Report, in addition to the digital platforms, also looks at the app marketplace. Apple App Store and Google Play Store, two notable players in the app marketplace, remain an important focus of the Report.

The Report looks at the interplay of competition and dominance in the multi-sided platform market, and how the atypical nature of the platform economy, endows on major platforms such as Google and Facebook, a position of dominance and helps them act as gatekeepers.

Sources: Australian Competition & Consumer Commission, 28 April 2021, available [here](#). Interim Report from the ACCC, March 2021, available [here](#).

Image source: Two Feet Marketing, available [here](#).

2. Copyright

2.1 EWHC awards damages in Eminem ‘Infinite’ vinyls and CDs

On 20th April 2021, the England and Wales High Court (EWHC) decided on amount of damages following a finding of copyright infringement. As a background to the case, it may be useful to



add that in April 2019, the EWHC found that Let Them Eat Vinyl Distribution (LTEVD) infringed Funky Bass Team Productions’ (FBTS) rights by making unauthorized vinyl and CDs of Eminem’s first album ‘Infinite’. FBTS’ claims flow from this 2019 finding of infringement by the EWHC.

FBTS requested a total damage of 288,209 pounds on the following grounds. First, loss of opportunity to license; second, a loss of license fees; and third, royalty for the sales made by LTEVD.

The EWHC rejected the first two grounds in their entirety as FBTS anyways did re-release the album on the 20th anniversary and also managed to make and release in time a documentary for the occasion. As regards loss of license fees, FBTS' claims were rejected, as FBTS itself admitted that had LTEVD approached it, it would have never offered a license to LTVED. Admitting FBTS's third ground, the EWHC awarded 7,452.50 pounds in damages to FBTS.

Sources: The IPKat, 14 May 2021, available [here](#). Judgment of the Court, 20 April 2021, available [here](#).

Image Source: Getty Images

2.2 PRS v. Qatar Airways: A case of Global Music Copyright Infringement?

Performing Right Society (PRS) is a UK-based collective rights management society, that manages a repertoire of over 5.5 million works. Each time the works are broadcast or performed in public or streamed on the internet, PRS collects royalties from the users, which PRS then proportionately pays to its members.



Headquartered in Doha, Qatar Airways (QA) offers its passengers an inflight entertainment system 'Oryx One'. Oryx One allows passengers to access audio and audio-visual content during the flight via individual screens in the plane, or via an app on the passengers' personal devices (laptop, mobile or tablet) in a plane without Oryx One system (such as a local flight for short distances).

In December 2019, PRS filed a claim in the UK against QA for infringement of its worldwide performing rights on QA's aircrafts. PRS argued that the EWHC was the most appropriate forum for the dispute at hand.

PRS' key complaint is that QA's system uses at least 5,800 pieces of their protected works, allows passengers to use the app 'Oryx One Play' on their personal devices to create playlists before boarding and lets them access this playlist before, during and after the flight.

Both PRS and QA agreed that above referred issues are cognizable both under UK and Qatari copyright law. In essence, the parties agree that there is a performance of work but the parties disagree whether the work is performed in public. It may be useful to bring to the attention of our readers that similar issues were raised in the TuneIn judgment. [Kindly see Friday Fortnightly edition Week 14 Ed. 9 News Item 2.3 'Post Brexit, the UK Court follows CJEU's copyright jurisprudence' to know more about the TuneIn decision by the England and Wales Court of Appeal].

It will be interesting to follow how the PRS v. Qatar case develops further before the EWHC or whether the parties reach out for a mutual out of court settlement.

Sources: IP Kat, 12 May 2021, available [here](#). Judgment of the England and Wales High Court, 13 April 2021, available [here](#). IP Kat, 23 July 2020, available [here](#).

Image Source: Shutterstock

2.3 Megaupload: Supreme Court of New Zealand on extradition of Kim Dotcom to the US



Kim Dotcom is the founder of the website Megaupload. Megaupload, since succeeded by Mega Ltd., was an online file storage website. The website amongst others, hosted digital copies of movies and offered the first 72 minutes available for free, with subsequent content available on paid subscription. In 2012, US-based movie companies initiated legal action against Megaupload. Finding that the activities of the website constituted a criminal offence under the US Digital Millennium Copyright Act (DMCA), the US Department of Justice shut down the same.

Kim Dotcom fled to New Zealand (NZ). This raised the question of extradition for criminal copyright infringement. The key issue in the case was whether extradition is possible. If it were, then copyright issues were to be adjudicated by US courts under US law (and not in NZ).

In July 2018, the NZ's Court of Appeal (CoA) held that extradition to the US was possible if the US copyright offence had an equivalent in the NZ's laws. As the 'act of facilitating the dissemination of infringing digital copies of protected works over the internet was a criminal offence under the Copyright Act 1994', the CoA accordingly ruled in favour of extradition and noted that the term 'object' under Section 131 was not limited to physical copies of the work, but also included the digital copies of the movies, as was the case with the Megaupload website.

In November 2020, the Supreme Court (SC) of NZ followed the CoA's finding and determined that the copyright causes of action amounted to criminal liability under Section 131 of NZ's Copyright Act 1994. With this, the SC paved the way for extradition of Kim Dotcom. Following an adjudication under the US laws, it seems likely that Dotcom may face a lengthy jail sentence.

Sources: Kluwer Copyright Blog, 6 May 2021, available [here](#). Judgment of the Supreme Court of New Zealand, 4 November 2020, available [here](#). IP Kat (on the CoA judgment), 19 July 2018, available [here](#).

Image Source: France24, available [here](#).

3. Patent

3.1 Swedish Court finds Swedish position consistent with Bayer Pharma (C-688/17)

In a dispute between generic drug manufacturer Orifarm and Novartis, the Swedish District Court of Attunda considered the Swedish position on liability of the patent holder for interim injunctions granted in error against products launched at risk.

Following the Court of Justice of the European Union's (CJEU) decision in Bayer Pharma (C-688/17), wherein the Court hinted at the possibility of change in 'launch at risk' concept particularly as regards reimbursement, 'launch at risk' remains a topic of interest.

The Swedish position as regards indemnification hitherto was that the patent holder had strict liability to reimburse the other party, if the latter was subject to preliminary injunction, that was subsequently found to have been granted in error. Orifam's key argument, accordingly, was that as it had suffered from the interim injunction that was granted in error, Novartis, the patent holder, should compensate it as per the traditional Swedish approach.

The Court found that neither the CJEU's decision in C-688/17 nor the Directive 2004/48/EC, barred from a finding of strict liability. Moreover, C-688/17 offers a possibility to award damages and permit courts to take all the relevant circumstances into account while deciding

upon an appropriate level of compensation. Based on the foregoing, the Swedish position was consistent with the one suggested in C-688/17 and accordingly, Novartis was required to show that either Orifam contributed to the loss or it failed to properly mitigate the same.

Unconvinced by Novartis' arguments, the Court found that Novartis was strictly liable and accordingly, awarded damages to Orifarm.

Source: Kluwer Patent Blog, 14 May 2021, available [here](#).

3.2 Brazil to amend its Compulsory Licensing

On the 29th of April 2021, the Brazilian Senate approved a bill that will allow the compulsory licensing of COVID-19 vaccines' patent. It is still subject to voting by the Brazilian House of Representatives and the approval of the President. The Bill proposes to make amendments to the provisions dealing with compulsory licensing and public interest grounds in the Brazilian Industrial Property Act (Act).

Currently, Article 71 of the Act, dealing with compulsory licensing, permits temporary and non-exclusive compulsory licensing in cases where the patent holder cannot meet situations of national emergency and public interest. With the new amendment entering force, the current approach will change as follows. Following a declaration of national emergency, public interest or calamity, the Brazilian Federal Government after consulting the public and educational institutions and representatives of the society, must publish a list of patents or patent applications that can meet the requirements of the situation at hand.

The amended rules will put an obligation on the patent holder and the applicant to disclose the licensee, all the relevant information required to make use of the patent. The rules, in addition, also create an obligation to supply the licensee with biological material necessary to make use of the patent and in case the duties are not complied with, the patent will remain subject to revocation or the application can even be denied *ab initio*.

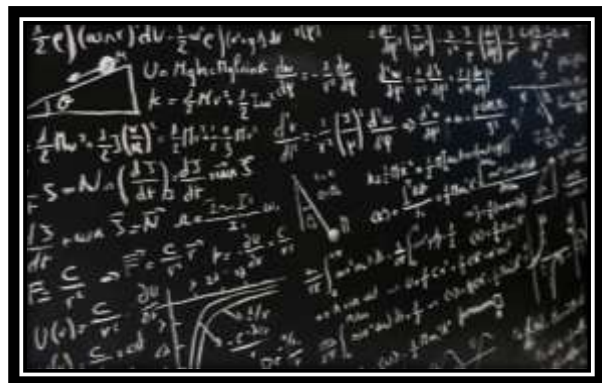
Most notably, the amendment empowers the Government to share with the licensee, sensitive information relating to the patent or biological materials, that the patent holder or the applicant otherwise did not disclose. This bit may emerge as the most debatable, as seems to run counter to the obligation to protect undisclosed information under Article 39 of the TRIPS Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights).

Source: Kluwer Patent Blog, 12 May 2021, available [here](#).

3.3 Patenting against the law of physics

On 17th March 2021, the US Federal Circuit Court of Appeals delivered its decision in an appeal dealing with utility requirements in patent application.

The patent under consideration dealt with 'quantum entanglement'. The inventor claimed that the technology could be used in diverse fields, ranging from communication on the one hand to health and medicine on the other. The inventor filed four applications,



each one of which was rejected by the examiners for various reasons, such as lack of credibility or failure to meet the utility requirement under 35 U.S.C §101. The examiners also noted that the claim failed to meet the disclosure and description requirements, and in fact, the invention as described, was incapable of functioning as claimed by the applicant. The findings of the examiners were confirmed by the Patent Trial and Appeal Board (PTAB), which noted that the claims lacked scientific proof and principles, that could satisfactorily explain how the invention could function, as claimed in the application.

The Federal Circuit Court of Appeals sided with the PTAB's decision citing the lack of scientific support for the invention and lack of data to support the appellant's claims, and accordingly upheld the decision of the PTAB in entirety.

Sources: The IP Law Blog, 14 May 2021, available [here](#). Judgment of the US Court of Appeal for the Federal Circuit, 17 March 2021, available [here](#).

Image Source: Getty Images

3.4 'Straw Man' can oppose patent proceedings

On 19 March 2021, the Boards of Appeal (BoA) in T 1839/19 opined on opposition by 'straw man'. Referring to the decision G1/06, Nestlé, the patentee and the applicant, challenged the opposition by Lui González Posada. According to Nestlé, the 'straw man' application made by Posada was an uninterested party, and according to G1/06, every act before the European Patent Office (EPO) must have a legitimate interest. Unconvinced with Nestlé's arguments, the BoA deliberated on whether the rule from case G 1/06 should take precedence over G 3/97 and G 4/97. Both G 3/97 and G 4/97 had admitted the 'straw man' opposition. The applicant, Nestlé also argued that allowing the 'straw man' application in the case at hand, was in violation of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedom. Unconvinced, the BoA rejected Nestlé's application and found that the 'straw man' opposition was admissible.



Sources: IP Kat, The IP Law Blog, 10 May 2021, available [here](#). Judgment of the Board of Appeal, 19 March 2021, available [here](#).

Image Source: Shutterstock

4. Trademark

4.1 Consumption of weed: for medical purposes only

On 12th May 2021, the General Court (GC) delivered its judgment on trade mark registration for a figurative sign featuring the words 'Bavaria Weed'. The applicant in question requested registration of the sign with the European Union Intellectual Property Office (EUIPO) for services referred to in Nice Classes 35, 39, 42, and 44.



The EUIPO and the Boards of Appeal (BoA) refused registration on absolute ground (of refusal). It was held that the sign 'Bavaria Weed' was contrary to public policy and accepted principles of public morality (Art. 7(1)(f) European Union Trade Mark Regulation, EUTMR), as the term 'weed' generally refers to recreational use of the drug cannabis, and such a use

remains illegal in many European Union (EU) Member States. Applicant's key argument was that 'Bavaria Weed' referred only to medical and therapeutical use of the product. Considering that the applicant had also made an application for Class 35, that deals with merchandising, the GC opined that this indicated that the use was not limited to medical purposes only. Assessing the mark from the perspective of the relevant public, the Court found that the EUIPO and the BoA did not err in finding an absolute ground of refusal for the registration of the mark 'Bavaria Weed' for the respective classes of services. The consumption of weed clearly remains a controversial topic in the European Union.

News and image source: Judgment of the General Court, 12 May 2021(in German) [here](#).

4.2 COBI v GOBI: this one is confusing for sure



On 5th May 2021, the General Court gave its decision on relative grounds of refusal. In 2017, the applicant registered the word mark GOBI for Nice Class 12. A third party who had previously (in 2015) registered a figurative sign featuring the word COBI for the same Class of goods, opposed registration of the word mark GOBI. He argued that the proposed word mark 'GOBI' might confuse consumers (Art. 8 (1) EUTMR). Both the EUIPO and the BoA agreed with the third party and ordered cancellation of the GOBI mark. Aggrieved, the applicant appealed these decisions and requested the GC to rule on the matter. The GC considered aspects such as similarity of goods and signs (including aural, visual, as well as conceptual similarity), distinctiveness of the COBI mark, and finally concluded that there indeed was a clear risk of confusion for the consumer, as the two marks were simply too similar.

News and image source: Judgment of the General Court, 5 May 2021 (in German) available [here](#).

4.3 An Apple a day keeps the trademark trolls at bay: abusive trademark action at the EUIPO

In 2016, Sherlock Systems (SS), a trade mark troll, requested the EUIPO to revoke Apple's mark KEYNOTE. SS is one of the many shell companies owned by Michael Gleissner.

Finding the action as abusive and failing to meet the requirements of *Kratzer* (C-423/15), the Cancellation Division turned down SS' request.

The applicant SS filed an appeal, and the matter reached the EUIPO's First Board of Appeal. The Board relied on *Sandra Pabst* (R 2445/2017-G) and *Kratzer* to reach its finding. Both subjective and objective requirements of the *Kratzer* test were met as Gleissner's companies regularly generally engaged in trolling and as regards Apple, simultaneous actions were initiated across Europe and other continents. Finding Gleissner and his company SS' action as retaliatory and abusive in nature, the Board found that SS had met the threshold of the test for a finding of abusive practice.



Sources: Kluwer Trademark Blog, 6 May 2021, available [here](#). World Trademark Review, 19 May 2019, available [here](#).

Image Source: Shutterstock

5. Events

5.1 IP Talks at Maastricht University's Law Open Air Festival

On 14th June 2021, IP Talk will hold its first in-person open air talk at the Faculty of Law. The event is hosted by Law Open Air Festival and participants will be offered complimentary drinks and snacks on the occasion.

*If you would like to present on an IP-related topic, please reach out to:
j.kokkou@student.maastrichtuniversity.nl and c.boxus@student.maastrichtuniversity.nl*

5.2 Online Conference: EU Copyright Law

On 26 May 2021, Stockholm University will host online, the book launch of 'The Routledge Handbook of EU Copyright Law' by E. Rosati (Ed.). The authors of the chapters will discuss their respective topics. Participants will have the possibility to ask questions.

Would you like to attend? Please register [here](#).

5.3 EPO enlarged Board of Appeal hearing – G 1/21

The EPO invites interested parties to attend the Enlarged Board of Appeal's hearing in case G 1/21 on 28 May 2021. The case concerns the legality of videoconferencing in cases, where not all the parties consent to the same.

Would you like to attend? Please register [here](#) until 27 May 2021. The referring decision can be found [here](#).