

# FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 24 NO. 14)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and Events for June 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 Commission publishes Preliminary Report of consumer Internet of Things sector inquiry

On 9<sup>th</sup> June 2021, the European Commission published its preliminary findings of the consumer Internet of Things (IoT) sector inquiry. This Inquiry seeks to contribute to the Commission's larger digital strategy agenda.



On 16<sup>th</sup> July 2020, the Commission using its investigative powers under Article 17 of the Regulation 1/2003, launched an IoT sector inquiry.

For the purposes of this Inquiry, Commission defines consumer IoT sector to include consumer-focussed 'services, devices and technology' that 'collect and exchange real data over the internet'. Data remains central to the consumer IoT, and depending on the type of data collected, personal data may be subject to the 2016 EU General Data Protection Regulation (GDPR) and/or the rules of the 2002 ePrivacy Directive.

The main findings of the Preliminary Report elaborate on the following three dimensions of competition in the sector. First, the characteristic of consumer IoT products and services; second, the features of competition in these markets, and third, key areas of concern as identified by the respondents. 'Cost of technology investments' is identified as a key barrier to market entry and expansion in the sector. Google, Amazon and Apple retain a foothold in and even beyond the consumer IoT. Interoperability between different elements of the consumer IoT ecosystem is strategically driven by these three lead players to their advantage. Moreover, consumer IoT agreements comprise of contractual obligations that further imbalance the position of Small and Medium Enterprises (SMEs) vis-à-vis the big, vertically-integrated technology players in the market.

As a next step, the Commission has launched public consultation wherein stakeholders can comment on the initial findings of the Report until 1 September 2021. The Final Report is set to be published in the first half of 2022 and will contribute to the ongoing legislative debate over the proposed Digital Markets Act (DMA).

*Sources: European Commission, 9 June 2021, available [here](#). Report of the Commission, 9 June 2021, available [here](#).*

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

### 1.2 Sigma-Aldrich fined €7.5 million for providing misleading information during merger investigation

On 3<sup>rd</sup> May 2021, the European Commission fined Sigma-Aldrich €7.5 million for providing misleading information during its review of Merck's acquisition of Sigma-Aldrich under EU Merger Regulation 139/2004 (EUMR).



On 21<sup>st</sup> April 2015, Merck submitted Form CO to the Commission, notifying its planned acquisition of Sigma-Aldrich. On 15<sup>th</sup> June 2015, following a detailed phase-I

investigation, the Commission conditionally approved the acquisition. Conditions included the divestiture of certain Sigma-Aldrich's assets to address competition concerns in the market for specific laboratory chemicals.

At the time of the divestiture, the Commission was informed of the iCap project, which was 'closely linked and specifically developed for products included in the divestment business'. This was a rather crucial fact, that was neither disclosed in the initial merger notification nor during the Commission's investigation of the proposed concentration. Following further investigations, it was found that this piece of information regarding the project was withheld in specific requests for information raised by the Commission during the merger review. There were clear indications that 'incorrect' and 'misleading' information was offered to 'avoid the transfer of the relevant project to the purchaser of the divestment business'.

Following the issuance of a Supplementary Statement of Objections in June 2020, that highlighted Commission's preliminary view on Sigma-Aldrich's breach of obligations under the EUMR, the Commission concluded that the Company has committed three instances of infringement by providing 'deliberately or at least negligently, incorrect or misleading information in the explanatory submission describing the remedy package and in the replies to two requests for information'.

The Commission, accordingly, has imposed a fine of €7.5 Million.

*Sources: : European Commission, 3 May 2021, available [here](#).*

*Images source: IP Leaders, available [here](#).*

### 1.3 US introduces 5 Antitrust bills aimed at 'breaking up' Big Tech

On 11<sup>th</sup> June 2021, bipartisan lawmakers in the House of Representative introduced a package of five antitrust bills aimed at 'breaking up' the Big Tech companies.

The most controversial Bill amongst the five is 'Ending Platform Monopolies Act', that calls for each one of the Big Tech companies to be spilt into two. The proposed Act states that it 'shall be unlawful for a covered platform operator to own or control a line of business, other than the covered platform, when the covered platform's ownership or control of that line of business gives rise to an irreconcilable conflict of interest'.



The second Bill is aimed at preventing Big Tech companies from self-preferencing their own products and services over those of their competitors. The third Bill proposes to tighten the noose and regulate potential mergers and acquisitions to make it more difficult for dominant

firms to acquire and absorb smaller competitors. The fourth Bill is set to regulate data portability and finally, the fifth Bill further strengthens and expands the powers of the Department of Justice and Federal Trade Commission to assess the post-merger compliance with commitments by the Big Tech companies.

Shortly after the bills were introduced, the Big Tech intensified its lobbying efforts to raise concerns against the extreme measures proposed by the lawmakers.

*Sources: Competition Policy International, 11 June 2021, available [here](#). Reuters, 11 June 2021, available [here](#).*

*Image source: American Economic Liberties Project, 1 September 2020, available [here](#).*

## 2. Copyright

### 2.1 NMPA files a \$200 million copyright infringement lawsuit against Roblox

Roblox is an online gaming app with Lego-like avatars. With a market capitalisation of over \$52 billion, Roblox has a worldwide user base of over 31 million users and is particularly popular amongst young teenagers (mostly under 16 years of age).



On 9<sup>th</sup> June 2021, the National Music Publishers' Association (NMPA) filed a lawsuit against Roblox, claiming that the multiplayer game company was illegally using songs from artists such as Ariana Grande, Imagine Dragon and the Rolling Stones. Roblox offers its users access to library of copyright protected music to develop their own virtual worlds on its Roblox platform. The NMPA demanded monetary damages to the tune of \$200 million.

The following day, on 10<sup>th</sup> June 2021, Roblox released press statement suggesting its willingness to achieve a fair resolution of the dispute with the songwriters and other copyright holders, and affirming the company's policy of responding 'expeditiously' to legitimate Digital Millennium Copyright Act (DMCA) takedown requests.

*Sources: Variety, 9 June 2021, available [here](#), and 10 June 2021, available [here](#). IP Watchdog 'Barks and Bites', 11 June 2021, available [here](#). Complaint of the NMPA before US District Court for the Central District of California, 9 June 2021, available [here](#).*

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

### 2.2 Italy: Can fictional characters be copyright protected?

The 2011 computer-animated comedy 'Rango' is the story of a pet chameleon that inadvertently goes missing in the Wild West. The movie makes several references to typical 'spaghetti' style Western movies (p.13 of the decision), including the music style, intriguing characters and the movie plot.



Most notable is a particularly detailed scene whereby Rango meets the so-called ‘Spirit of the West’, a character that noticeably resembles Clint Eastwood’s character ‘Man with No Name’.

The producers of the original Trilogy brought an action before the Court of Rome against the Italian distributors of ‘Rango’, claiming that the ‘Spirit of the West’ infringed Eastwood’s character ‘Man with No Name’.

On 12<sup>th</sup> March 2021, the Court of Rome pronounced its decision. In the opinion of the Court, the two films were set in radically different contexts and intended for a different target audience; the reference to Eastwood’s character was no more than a couple of minutes in the 107 minute long ‘Rango’. Referring to the US fair use doctrine, the Court held that the use of the work was commercially insignificant (*‘commercialmente innocuo’*) (p.14). In Italian law, to be protected as creative work, a character must be ‘original and immediately

recognisable’, such as Sherlock Holmes, an English detective with an inimitable eye for detail, set up in and around London in the nineteenth century England (p.16). The Court accordingly, rejected the plaintiffs’ claim in entirety.

*Sources: The IPKat, 1<sup>st</sup> June 2021, available [here](#). Decision of the Court of Rome, 16 April 2021, available (in Italian) [here](#).*

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

### **2.3 Finally, the wait is over (!): European Commission publishes Article 17 guidance**

After many heated debates, academic articles, and the follow-on legislative confusion, the European Commission has finally released its highly anticipated guidance on Article 17 of Copyright in the Digital Single Market Directive 2019/790 (2019 CDSM Directive).

Key elements are highlighted in this news brief, but readers are requested to refer to the guidance for a complete overview.

As regards the distinction between *ex ante* and *ex post* review of potentially copyright infringing material, the guidance emphasizes a preference for the former save for manifestly infringing content.

The guidance states that Article 17, 2019 CDSM Directive does not touch upon and is distinct from the right of communication under Article 3 of the 2001 InfoSoc Directive. Member States accordingly have no room for manoeuvre around the strict requirements set forth in Article 17. Likewise ‘best efforts’ is identified as an autonomous concept of EU law and accordingly, calls for a case-by-case assessment.

The guidance however, falls short of providing answers to all the questions raised in the implementation of the Article. For instance, the guidance offers little meaningful advice on authorised uses of copyright-protected works. Nor does the guidance explicitly state the Commission’s view on the acceptability of mandatory collective and statutory licensing as models to authorize the use of works.

As the Guidance is a Commission Communication, it does not have the force of law. Likewise, it does not affect the cases pending before the Court of Justice of the European Union (CJEU).

*Sources: Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, 4 June 2021, available [here](#). Kluwer Copyright Blog, 10 June 2021, available [here](#). IP Kitten, 4 June 2021, available [here](#).*

### 3. Patent

#### 3.1 Facebook/Voxer Patent dispute reaches conclusion in the UK & the US, all eyes now on Germany

In January 2020, Voxer initiated proceedings against Facebook alleging infringement of European Patent 2393259. The said patent enables certain livestreaming features on Facebook and Instagram (cf. Friday Fortnightly Ed. 9, News 3.2, available [here](#)). In response to this initial claim of infringement by Voxer in Germany, Facebook filed for invalidity of the patent in the UK. Facebook requested that the case be tried under the Shorter Trial Scheme (STS), where in the trial outcome is reached within 12 months. The England and Wales High Court (Patent Court) found that as Voxer's patent was obvious in light of the prior art, it was invalid. Invalidity of Voxer's patent in turn, implied non-infringement by Facebook.



On the other side of the Atlantic, in May 2021, the US Patent Trial and Appeal Board in Western District of Texas found that Voxer's patents were valid.

Meanwhile, in Germany, Voxer continues with its infringement claims against Facebook. In response, Facebook has challenged Voxer's patents before the German Federal Patent Court. All eyes are now on the German Courts that are expected to pronounce their decision in the coming weeks.

*Source: Juve Patent, 10 June 2021, available [here](#).*

*Image source: Logo of the Voxer app, available [here](#).*

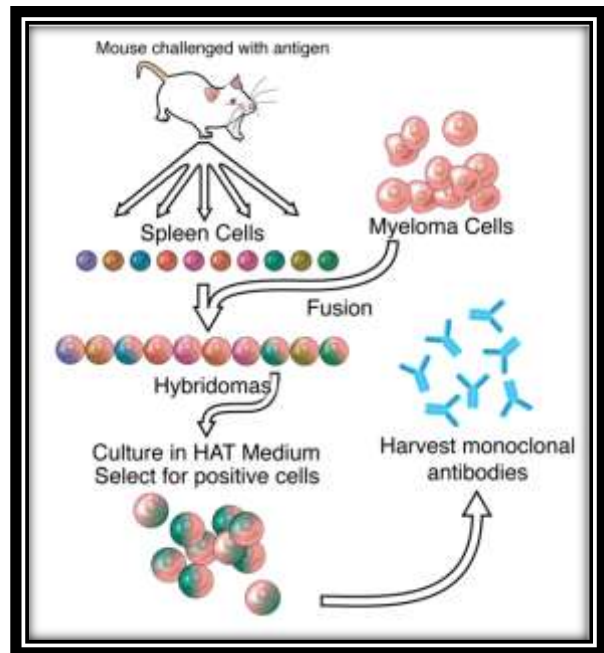
#### 3.2 Reference to hybridoma in patent application does not limit the claim to specific sequence

The latest EPO Guidelines for Examination include a section for antibody inventions. In the case T 0032/17, the Board of Appeal (BoA) had to consider whether a reference in antibody



product-by-process claim could limit the claim to antibody structure. More particularly, whether the product-by-process claim was novel considering the reference to hybridomas.

The hybridomas was deposited before the priority date of the patent. In the patent application, reference was made to the hybridomas and their deposit number. In addition, the hybridomas was also mentioned in a product catalogue prepared and circulated prior to the patent application. This was cited as an alleged prior use of the antibodies for which the patent was being claimed for. The question was whether the claim could be considered to be limited to specific sequences produced by the hybridomas. The BoA found that the prior mention of the hybridomas was novelty destroying.



The patentee also filed for a product claim on the hybridomas themselves. The opponent contested this on the grounds that the claim lacked novelty as the hybridomas was deposited prior to the filing of the application. The BoA noted that the deposited hybridomas was available to the public upon request and thus, the novelty be considered to have been destroyed.

*Sources: The IPKat, 1<sup>st</sup> June 2021, available [here](#). European Patent Convention, available [here](#).*

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

### 3.3 Nokia and Daimler reach an agreement on a patent dispute



On 1<sup>st</sup> June 2021, Nokia and Daimler announced that the parties had entered a patent licensing agreement, according to which Nokia will license its mobile telecommunication technology to Daimler in exchange for a reasonable payment. Daimler will use these patent in the manufacture of ‘connected cars’.

The parties also agreed to settle all pending litigations, including Daimler’s complaint against Nokia to the European Commission and proceedings before the Regional Court of Düsseldorf, that in turn referred a set of questions on FRAND-ly (Fair, Reasonable and Non-discriminatory) licensing to the CJEU (For more details about the Nokia/Daimler dispute, see cf. Friday Fortnightly Ed. 10 News. 5.3, available [here](#), and Friday Fortnightly Ed. 2 News 3.2, available [here](#)).

The agreement between the parties remains confidential.

*Sources: Bird & Bird, June 2021, available [here](#). Daimler, 1<sup>st</sup> June 2021, available [here](#).*

*Image Source: Daimler.com, available [here](#).*

## 4. Trademark

### 4.1 Who has got the grip on that one?



On 3<sup>rd</sup> June 2021, the Court of Justice of the European Union (CJEU) pronounced its decision in registration of a sign comprising of a shape of good ‘necessary to obtain a technical result’. The registration for the figurative sign (see image) was filed with the European Union Intellectual Property Office (EUIPO) by Pirelli Tyre in 2001 for goods of Nice Class 12 (tyres and related products). In 2012, the company Yokohoma filed an application for a declaration of invalidity of the said mark on the grounds that the said mark consisted exclusively of the shape of the goods, that are necessary to obtain a technical result (Article 7(1)(e)(ii) of the Regulation 40/94). The Cancellation Division at the EUIPO confirmed Yokohoma’s request and held the mark as invalid. Pirelli appealed this decision, but the Board of Appeal upheld the cancellation of the mark. On appeal, the

General Court (GC), however, held that the mark was valid for the goods in question considering that a single groove as presented in the mark was unlikely to produce a technical result with respect to tyres and it did not hinder the other market players from use of the said shape.

On appeal, the CJEU upheld the GC’s decision in entirety. Despite Yokohoma’s multiple procedural and substantive claims, the CJEU sided with Pirelli and found Yokohoma’s arguments unfounded. Approvingly referring to the decision of the GC, the CJEU opined that the ‘evidence examined by the BoA [did not] establish that a single groove is capable of producing, not any technical result, but “the technical result accepted in the [decision at issue]”’ (CJEU, para 75).

*News and image source: Judgment of the General Court, 3 June 2021, available [here](#).*

### 4.2 Oops! The Board of Appeal erred



On 9<sup>th</sup> June 2021, the General Court (GC) decided on an opposition proceeding concerning a figurative mark. Global Chartered Controller Institute filed said mark ‘CCA’ (see image CCA) in June 2016 for services of Nice Class 35 (advertising and business management) and 41 (education and entertainment). The application was published in the European Union Trade Marks Bulletin in

July 2016. The US-based Chartered Financial Analyst (CFA) Institute filed a notice of opposition in August 2016. The CFA based its claim on a previous registration of a figurative mark featuring the abbreviation ‘CFA’ (see image CFA) for goods and services of Nice Class 16, 41 and 42. The EUIPO’s Board of Appeal (BoA) partly upheld the request for cancellation of the said mark. The BoA identified an issue with respect to services of Class 41, as a certain degree of similarity of the goods could not be excluded.







and logistic providers' (see pp 10-23 of the Report for detailed measures) - is key to effectively address the issue of counterfeits.

*Source: International Trademark Association, available [here](#).*

*Image source: Shutterstock.*

## 6. Events

### 6.1 New date for the hearing in case G-1/21

The postponed and much awaited hearing in case G-1/21 before the Enlarged Board of Appeal at the European Patent Office has been rescheduled for 2 July (cf. Friday Fortnightly Ed. 12, News 5.3, available [here](#)). Registrations are now open.

*Source: European Patent Office, available [here](#).*

*Image source: Managing IP, 28 May 2021, available [here](#).*



### 6.2 IP Talks at Maastricht University's Law Open Air Festival

On 14<sup>th</sup> June 2021, IP Talk held its first in-person open air talk at the Faculty of Law. The event was hosted by Law Open Air Festival.

In his talk, Prof. Anselm Kamperman Sanders offered his critical overview on the nitty-gritties of the WTO patent waiver for corona vaccines. He elaborated on the scientific triumph in accelerated development of SARS-Cov-2 vaccines and why the scaling-up of production and the global distribution of vaccines remains a pressing global concern. From a scientific, technical and legal perspective, Prof Kamperman Sanders contemplated on reasons for why despite the willingness and capability of generics like Teva to mass produce vaccines, licensing of production remains a non-starter. The moot question that Prof Kamperman Sanders addressed in his lecture were the set of legislative measures at national and supra-national level that could close this alarming gap between 'capacity' and 'actual results'.



*TILC's Friday Fortnightly team wishes its readers a nice summer. Next Edition of Friday Fortnightly will now be available in Week 34, on 27<sup>th</sup> August 2021.*