

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 24 NO. 33)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for the period May-June 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 sends Statement of Objections to Czech and Austrian rail incumbents

On 10th June, the Commission sent its Statement of Objections (SO) to the Czech, České dráhy (CD) and the Austrian, Österreichische Bundesbahnen (ÖBB), both incumbent players in the rail transport market. As per the SO, the two formally colluded to prevent RegioJet's access to "ÖBB's wagons for long-distance passenger transport", with the intention of preventing RegioJet's entry in the rail passenger transport market. The Commission first initiated investigations in the alleged



anticompetitive conduct in June 2016, when it conducted unannounced raids in the rail passenger transport sector. Commission's preliminary investigation indicated that "between 2012 and 2016, CD and ÖBB engaged in a collective boycott" to impede market entry in Czechia and on the international rail route between Prague and Vienna.

RegioJet, a Czech rail company, first entered the Czech market in 2011. To ensure a successful market entry, it required access to used wagons in order to effectively compete with the incumbent players, such as CD and ÖBB. CD and ÖBB ensured that RegioJet could not get timely access to these used wagons. As a next step, if the Commission's further investigations establish this alleged collusive conduct, CD and ÖBB can face a fine of up to 10% of their annual global turnover.

Sources: European Commission, 10 June 2022, available [here](#). Reuters, 10 June 2022, available [here](#).

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

1.2 China Competition Bill to boost economic competitiveness & curb tech regulation



In early June, over 100+ top executives, including the chief executive officers of Alphabet, Amazon and Microsoft signed a letter addressed to the US House of Representatives and the Senate. The said letter calls for a China Competition Bill, that is expected to pump in \$52 billion funding by the US Government to strengthen the US semiconductor manufacturing capacity.

This proposed legislation, alongside the other recently Senate-approved

Innovation and Competition Act (S.1260) may adversely impact ongoing global legislative initiatives to regulate big tech companies. S. 1260, for instance, calls on the Office of the US Trade Representative to penalize States with broadly-worded digital governance policies that may be "deemed illegal trade policies".

Sources: Washington Post, 10 June 2022, available [here](#). Bloomberg Government, 8 June 2022, available [here](#). Days Tech, 8 June 2022, available [here](#). Reuters, 15 June 2022, available [here](#).

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

1.3 Amazon may soon offer commitments to end Commission's antitrust investigations

In 2018, the Commission initiated investigations against the world's leading e-commerce platform and cloud computing services provider, Amazon. The Commission's investigation revolved around Amazon's use of data from sellers on its platform. In its November 2020 SO, the Commission expressed concerns on Amazon's highlighted Blue Box and Prime services. Retailers were lured into these services, as it contributed to a substantial increase in their sales. Amazon and the Commission are reportedly in an advanced stage of negotiation to address the foregoing concerns. With this settlement, that may materialize before the end

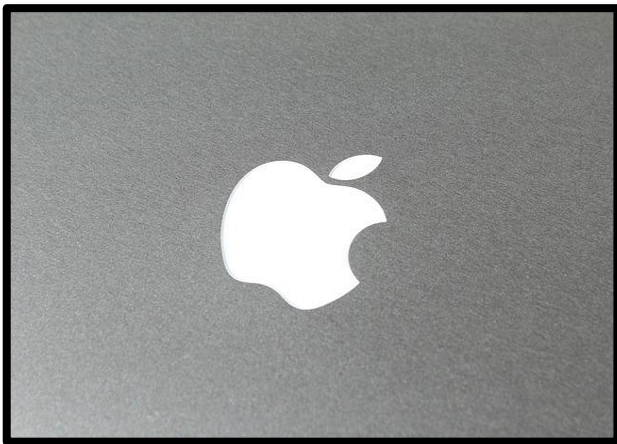


of this year, Amazon may offer sellers greater access to data (1), build a Chinese wall to stop data sharing between its retail and commercial units (2) and develop a second “buy box” to enhance competition in the e-commerce sector (3).

Sources: Politico, 10 June 2022, available [here](#). Reuters, 11 June 2022, available [here](#). TradingView, 13 June 2022, available [here](#).

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

1.4 Apple proposes changes to dating apps to woo the Dutch competition authority



On 24th December 2021, the Dutch competition authority, Authority for Consumers and Markets (ACM) ordered Apple to change the unreasonable terms and conditions imposed by it on dating-app providers on its platform. To be able to offer their services, these app providers were required to use Apple's payment system. Despite an availability of choices, they were restricted from freely choosing an alternative payment system. In light of Apple's continued non-compliance, Apple was required to pay a fine of 50 million euros.

On 11th June, the ACM accepted Apple's new alternative payment options for dating apps. As per this new policy, apps available on the Dutch Apple App Store can choose either of the following four available options: continue using Apple's in-app purchase system (1); use a third-party payment provider (2); use an in-app link directing users to its website to complete the purchase (3) or use a third-party payment system and include an in-app link directed to its website (4). With this new policy, as per the latest press release by the ACM, Apple has successfully complied with its December 2021 order.

Sources: Politico, 11 June 2022, available [here](#). Reuters, 14 June 2022, available [here](#). ACM, 11 June 2022, available [here](#).

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

2. Copyright

2.1 Paramount faces Top Gun Copyright infringement lawsuit



On 6th June, Shosh and Yuval Yonay, the legal successors of author Ehud Yonay, filed a Complaint against Paramount Motion Pictures before the US District Court for the Central District of California.

In 1983, Ehud Yonay penned a magazine story titled “Top Gun”. The story revolved around the competition and rivalry amongst two contemporary naval fighter pilots. In 1986, Paramount secured exclusive motion picture rights from Yonay and released a film with the same name.

As per the Complaint, on 24th January 2020, Paramount’s rights were terminated as Shosh and Yuval Yonay served upon them a notice of termination under 17 USC § 203(a)(3). The Applicants, in addition, also served a cease-and-desist letter to Paramount on 11th May 2022. Despite this notice,

Paramount released “Top Gun: Maverick”, the derivative 2022 sequel to the 1986 classic. In light of this explicit copyright infringement, the Complaint requests monetary relief and an injunction order against Paramount.

Source: IP WatchDog, 9 June 2022, available [here](#). NPR, 8 June 2022, available [here](#). TheIndependent (UK), 6 June 2022, available [here](#).

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

2.2 Warwick Court’s unprecedented punishment for illegal streaming

In 2019, Premier League and FACT, an anti-piracy company initiated legal proceedings against Defendants, Steven King, his accomplices and their company Dreambox. The Defendants offered illegal streaming devices (ISDs), ran profitable websites namely, “dreamboxtv.co.uk and yourfootie.com” and offered illegal access to Premier League football matches to businesses and private individuals across England and Wales. Following a four-week trial at the Warwick Crown Court, the Defendants were sentenced between three to seven years of prison.



Following this successful proceeding, Premier League initiated proceedings under the Proceeds of Crime Act, 2002. These proceedings sought to recover an estimated 5 million pounds; the illegal profits obtained by these Defendants.

On 7th June, the Warwick Crown Court ordered the Defendants to “forfeit the illegal proceeds and pay £963,000 within three months”. In case of failure to pay, the Defendants “prison sentence shall be extended by an additional six years and eight months”. King, the key Defendant, has also been ordered to surrender his passport and refrain from traveling overseas, “until the sum has been paid”. This is one of the most severe prison sentences and fine imposed ever imposed by the English courts for the supply of illegal streams in the UK.

Sources: TorrentFreak, 7 June 2022, available [here](#). Premier League, 6 June 2022, available [here](#). The Guardian, 6 June 2022 available [here](#).

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

2.3 Copyright protection for fictional characters: Not Only [for] Fools, says UK Court



On 8th June, the Intellectual Property Enterprise Court (IPEC) handed a landmark decision on the issue of copyright protection for fictional characters. The case at hand concerned “Only Fools and Horses” (OFAH), a highly popular BBC TV series from the 1980s. The said series inspired a subsequent interactive dining TV show, “Only Fools The (Cushty) Dinning Experience”. One of the key questions under consideration was whether the character, Derek “Del Boy” Trotter could be copyright protected.

The IPEC found that the atypical characteristics of Del Boy, such as his unusual use of French and hopeless optimism, offered him firmness and precision and that it was original, and could, accordingly, be copyright-protected. Referring to the jurisprudence of the European Courts, the IPEC responded to this issue in the affirmative.

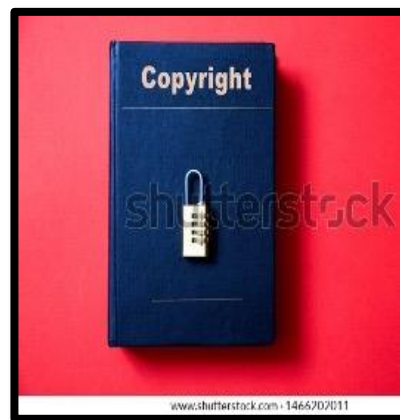
On the issue of parody and pastiche defence available under Section 30 of the Copyright, Designs and Patents Act 1988 (CDPA), the IPEC found that in light of the Court of Justice’s decision in Deckmyn, mere imitation was insufficient to benefit from one such defence.

Sources: IPKat, 9 June 2022, available [here](#). Decision of the EWHC 1379 (IPEC), 8 June 2022, available [here](#). Solicitors Journal, 8 June 2022, available [here](#).

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

2.4 UK retains pre-Brexit IPR exhaustion regime

Following Brexit, UK’s Intellectual Property Office (IPO) launched consultations on a potentially new future “Exhaustions of Rights” framework. Pre-Brexit rules ensured that “parallel importation of goods that were first sold in the European Economic Area” was permitted. Following Brexit, the IPO toyed with the idea of whether pre-existing arrangements were in the interest of UK-based rightholders. The issue was notably pertinent for the copyright industry, whose 60 per cent of revenues, approximating about £ 3.7 billion, come from global exports. With over 200,000 books published in the UK each year, UK is world’s leading publisher for English-speaking books, second only to the United States. Any change in IP exhaustion regime is also expected to significantly impact the publishing sector. IPO’s call for a rethink on the exhaustion regime was thus, immediately met by protests from leading UK-based authors, such as Kate Mosse and Philip Pullman. To express its opinion, UK’s Authors’ Licensing and Collecting Society too launched a “Save Our Books” campaign. The publishing industry plays an important role in cultural exports and reinforces “UK’s soft power and global renown”.



Following public comments, and mixed evidence, and most significantly, on “account of lack of available data”, the IPO recently announced that for the time being, it has decided to “maintain UK’s current laws on exhaustion of intellectual property rights”.

Sources: UK Government, 7 June 2021, available [here](#). Author’s Licensing and Collecting Society, available [here](#). The Guardian, 19 January 2022, available [here](#).

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

3. Patent

3.1 Raised but unadmitted grounds in opposition may be deemed new on Appeal: EPO



In its decision T 0077/18, dated 21st January, the Boards of Appeal (BoA) of the European Patent Office (EPO) held that a ground for opposition, that was raised during the opposition proceedings but not admitted by the Opposition Division (OD), could be treated as a fresh ground at the appeal stage.

In the case at hand, on 2nd June 2016, RPE GmbH (RPE) filed an opposition against EP1396254B1 (EP 254) on grounds of lack of novelty and lack of inventive step under Article 100(a) of

the European Patent Convention (EPC). EP 254 concerns a dental composite and is owned by Kerr Corporation (Kerr). During the oral proceedings before the OD, RPE requested introduction of a new ground under Article 100(c) EPC. This new ground was not considered by the OD and EP 254 was revoked on the grounds of Article 100(a) EPC.

Kerr appealed OD's decision to revoke EP 254. As per Kerr, in the appeal proceedings, the ground of added subject-matter under Article 100(c) EPC should be treated as a fresh ground as it had neither been raised in the notice of opposition nor been considered by the OD. In other words, it could not be introduced in the appeal proceedings without Kerr's consent. The BoA upheld Kerr's arguments and decided not to consider the said ground. As per the BoA, considering the purpose of the appeal procedure ("to give the losing party a possibility to challenge the decision of the opposition division on its merits") as explained by the Enlarged Board of Appeal of G 10/91, a ground for opposition should be regarded fresh in the appeal proceedings, in case of absence of "a positive decision on [its] admittance by the opposition division".

Sources: Kluwer Patent Blog, 2 June 2022, available [here](#). Decision of the Boards of Appeal (T-0077/18), 21 January 2022, available [here](#).

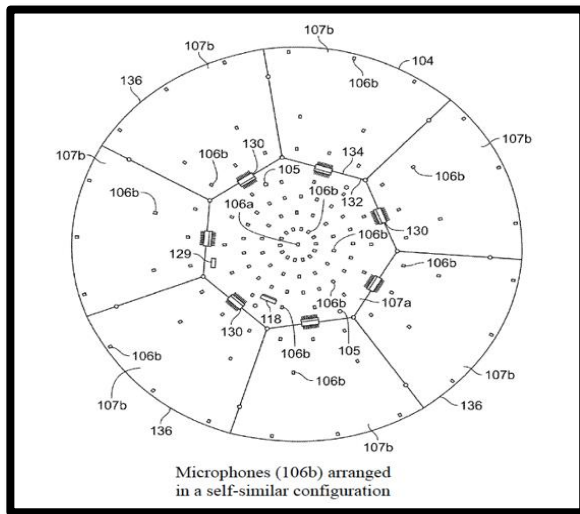
Image source: Shutterstock, available [here](#).

3.2 Multiple meanings do not necessarily render a claim unclear: says US Court

On 1st June, the US Court of Appeals for the Federal Circuit (CAFC) elucidated on the clarity issue and stated that a claim is not rendered unclear simply because "a term is susceptible to more than one meaning".

In February 2019, ClearOne, Inc. (ClearOne) filed a petition against Shure Acquisition Holdings, Inc. (Shure) for Inter Partes Review (IPR) of US9565493B2 (US 493) before the Patent Trial and Appeal Board (PTAB) of the United States Patent and Trademark Office (USPTO). US 493 concerns an array microphone system. Shure subsequently amended the claims and added an independent Claim 57, that read as follows: "A microphone assembly comprising: an array microphone comprising a plurality of microphones arranged in a self-similar configuration ...". The amendment was supported by the as-filed description, for example, "a remaining set of the microphones 106b that are arranged in a fractal, or self-similar, configuration" (Column 9, Lines 6-8 of US 493). The PTAB accepted the addition of Claim 57

and maintained US 493 in amended form. In the appeal proceedings before the CAFC, ClearOne alleged that the term “self-similar” in Claim 57 was “indefinite”. As per ClearOne, the description’s disclosure of “fractal” circles, and “self-similar” patterns created confusion for a skilled person and therefore rendered the term “self-similar” indefinite. Disagreeing with ClearOne, the CAFC was of the opinion that phrases such as “fractal, or self-similar” connote “equal self-similar to [fractal]”. Further, even if “self-similar” were deemed broader than the word “fractal”, it did not necessarily lead to any ambiguity. A mere susceptibility to multiple meanings as such, did not render the claim term undefined as “[s]uch a test would render nearly every claim term indefinite so long as a party could manufacture a plausible construction”. Based on the reasonable certainty as to the claimed scope which was supported by the intrinsic and substantial evidence, the CAFC affirmed the PTAB’s holding that the added Claim 57 was “not indefinite”.



Sources: *IP Watch Dog*, 2 June 2022, available [here](#). *CAFC Opinion*, 1 June 2022, available [here](#). *US9565493B2*, available [here](#).

Image source: *US9565493B2*, available [here](#).

3.3 Wireless Discovery trolls dating apps for patent infringement



Wireless Discovery, a Delaware-based patent troll, recently filed at least eight different Complaints in the US courts against social and dating apps for patent infringement. Most of these social and dating app providers are small and medium-sized service providers.

The key argument of these eight complaints, including the one most recently filed against Washington-based Zoosk Inc., is that all these alleged infringers infringe Wireless’ US Patent No. 9,264,875 (US 875). US 875 offers “location-based discovery based on individual’s personal attributes. The said patent, granted in 2016, is a simple description of a method of searching “like-

minded people”. As per US 875’s Abstract, user mobile devices identify each other through an ad hoc network, that reports location “through global positioning methods and cross-referencing”. In other words, the patent is a description of the basic principle used by social networking, and more particularly dating app, that is the identification and matching of people with similar tastes and preferences in a local area.

Sources: *Electronic Frontier Foundation (EFF)*, 27 May 2022, available [here](#). *US Patent No. 9264875*, available [here](#).

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

3.4 Ministerial Declaration on Pandemics at the Twelfth WTO Conference

The World Trade Organization's 12th Ministerial Conference was expected to discuss a potential waiver of intellectual property for Covid-19 vaccine technology within the framework of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Even though the TRIPS chair, Ambassador Lansana Gberie, expressed initial optimism on the outcome of a very real "negotiation mode", the 12th Ministerial Conference eventually ended with a "Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics".



The Declaration, adopted on 17th June, recognized the need to enhance "timely, equitable and global access to safe, affordable and effective COVID-19 vaccines, therapeutics, diagnostics and other essential medical goods" (at para 3). The Declaration, in addition, also underscored "the importance of global food security in resilience-building and responding to the current and future pandemics" in a timely manner (as para 21). The Declaration, however, in no way altered the rights and obligations of the WTO Members, and neither did it "create additional categories of developing country Members" (at para 29).

Sources: WTO, 17 June 2022, available [here](#). IPWatchDog, 12 June 2022, available [here](#).

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

4. Trademark

4.1 Apple, Think different(ly): says EU General Court



On 8th June, the General Court (Sixth Chamber) (GC) rejected Apple's request for annulment of the decisions dated 4th November 2020 of the Fourth Board of Appeal (BoA) of the European Union Intellectual Property Office (EUIPO) in entirety.

Between 1997 and 2005, Apple had registered the mark "THINK DIFFERENT" at the EUIPO.

In 2016, the Swiss watch maker, Swatch AG successfully filed for revocation of the said marks on grounds of Article 58(1)(a) of the 2017 European Union Trade Mark Regulation (2017 EUTMR). Request for revocation was based on the fact

that the said trade mark had not been put to genuine use between the years 2011 and 2016.

Approvingly referring to the decision of the BOA, the GC opined that as rightly pointed out by the BoA, it was not that “the words ‘think different’ [did not have] any distinctive character, [but it had] a rather weak distinctive character” (GC at para 99). Moreover, the said mark was ‘not’ put to genuine use within the suggested time period (GC at paras 100-101).

Sources: Judgment of the General Court, 8th June 2022, [here](#). IPKat, 11th June 2022, available [here](#).

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

4.2 Sam...strung by a third party?

On 20th May, the England and Wales High Court (EWHC) found that Samsung be held liable for trade mark infringement by third party apps available on its Samsung Galaxy App Store (SGA store).

The Swiss watch marker Swatch had initiated an infringement claim against Samsung before the EWHC. As per the Complaint, Swatch’s twenty-three registered trademarks were infringed by watch face applications.

Swatch’s principal argument was that even though third-party app developers infringed its trade mark, Samsung be held “liable as a primary tortfeasor” as it had played a key role in the availability of apps on its SGA store. In fact, many of these apps were exclusively designed for and made available on the SGA store. The EWHC found that in light of the evidence presented, Swatch had successfully “established infringement of its marks under Article 9(2)(a), (b) and (c) of the 2017 EUTMR” and that Samsung did not have any defence to the infringements (at paras 230-234).

Sources: EWHC, 20 May 2022, available [here](#). IPKat, 05 June 2022, available [here](#).

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



4.3 So, where is “great taste is plant-based” - at Vegadelphia or at Dunkin’?



On 28th April, Vegadelphia, a Philadelphia-based producer of plant-based foods, sued Dunkin’ Brands Inc and Beyond Meat Inc for trademark infringement. In the lawsuit brought before the US District Court for the Middle District of Florida, the Plaintiff claims that its trade mark “Where Great Taste is Plant-Based” (U.S. Reg. No. 4,698,499) federally registered in 2013 and used for meatless sausage sandwiches, was deliberately used by the Defendants as a slogan to advertise their “Beyond Sausage breakfast sandwich”. Vegadelphia claimed that this usage was “beyond coincidence” and that “the similarity extended” in relation to

not only the slogan, but was also evident throughout the entire marketing campaign, including but not limited to the “font style, stacked text, and sunray backdrop”. As per the Complaint, the mark “Where Great Taste is Plant-Based” is a well-established mark and that the Defendants’ similar marketing campaign created “an extremely high likelihood of confusion between them as to source, sponsorship and affiliation”.

The Complaint requests injunction against continued use of the mark by Dunkin, and damages for willful infringement of the mark.

Sources: The Trademark Lawyer 01 June 2022, available [here](#). GMA, 06 May 2022, available [here](#). Reuters, 29 April 2022, available [here](#).

Image sources: Twitter Dunkin’, available [here](#). Vegadelphiafoods, available [here](#).

4.4 StockX faces lawsuit for counterfeit and false advertisement

In February this year, Nike, world’s leading sports footwear and apparel manufacturer, filed a Complaint against StockX, an online marketplace and sneaker reseller, at the US District Court of New York. As per the Complaint, StockX’s launch of non-fungible token (NFT)-based Nike shoes led to likelihood of confusion and trademark infringement.

On 25th May, Nike amended its original Complaint, and added claims of counterfeiting and false designation of origin. Nike’s key complaint concerns StockX’s sale of NFTs based on its sneakers. As per the Complaint, “Vault NFTs” are a separate product, and cannot be deemed a mere digital receipt of purchase of a physical product, that is Nike sneakers.

Nike asserts that the sale of NFTs is evidently a case of trademark infringement, and accordingly requests an injunction order against StockX.

Sources: The Fashion Law (subscription required), 31 May 2022, available [here](#). The Verge, 06 June 2022, available [here](#). CNBC, 06 June 2022, available [here](#).

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



On behalf of the entire TILC team, TILC’s Friday Fortnightly team wishes all the readers a very nice summer.

The next edition of Friday Fortnightly shall be available in Week 38, on 25th September 2022.