

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 38 NO. 15)

Dear Readers,

Hope you have had a nice summer.

We are back with the latest edition of Friday Fortnightly. To ensure that you remain updated with the legal decisions made during the summer vacations, in this edition, you will find an overview of the key developments in Competition, Copyright, Design, Patents and Trademarks for the period July-September 2021.

With this first edition of 2021-2022, we are also pleased to introduce you to our new editorial team at TILC.

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 Google's voice assistant receives an antitrust call from the European Commission

Following its preliminary findings in the consumer Internet of Things (IoT) sector inquiry, on 16th July 2021, the Commission launched an IoT sector inquiry. [Kindly see [Friday Fortnightly Week 24 No. 14](#) News Item 1.1 'Commission publishes Preliminary Report of consumer Internet of Things sector inquiry' for more details]. Preliminary results expressed respondents concerns about "exclusivity of voice assistants' presence on smart devices".



On 9th September 2021, *MLex* reported that the European Commission initiated investigations against Google for obliging device makers to use Google Assistant as the default voice assistant on Android devices. The Commission has requested device makers to share information on Google's practices and whether Google requires them to pre-install Google Assistant and exclude other players on its Android devices. The Commission is seeking more information on Google's certification process for new devices, and whether Google is using it as part of its strategy to ensure Google Play Store's continued dominance in the relevant market. Should the allegations be true, Google could receive a fine of up to 10 per cent of its global turnover.

Sources: Competition Policy International, available [here](#). Reuter, available [here](#).

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

1.2 Forthcoming UK Vertical Agreements Block Exemption Order: Key provisions

In the UK, vertical agreements meeting certain prescribed threshold (30 per cent) are currently subject to the EU Vertical Agreements Block Exemption Regulation (VABER). This EU VABER will be replaced by the UK Vertical Block Exemption Order (VABEO) in May 2022.



Though many provisions of the UK VABEO are expected to be substantially similar to the currently applicable EU VABER; the UK VABEO will, in addition, also include the following divergences from the current approach.

First, as regards hardcore restrictions, the VABEO will offer greater clarity as regards the "boundary between active and passive sales". Second, it is expected to address issues that restrict online sales. Third, the VABEO will add

wide parity obligations (most favoured nation clauses) to the list of hardcore restrictions. Fourth, it is expected to expand the definition of competing suppliers in case of non-reciprocal vertical agreements. Further, there will be a provision of one year transition period from the current VABER to the proposed VABEO.

In addition, the UK Competition and Markets Authority (CMA) is also expected to offer a VABEO Guidance. This Guidance will cover agency agreements, environmental sustainability and other issues that remain unaddressed in the VABEO.

Sources: : Competition & Markets Authority 17 June 2021, available [here](#). Pinsent Masons, 22 June 2021, available [here](#).

Images source: Shutterstock.

1.3 Ofgem’s key priorities for the EV transition

In its latest report dated 4 September 2021, Ofgem has defined a smooth transition to electric vehicles (“EVs”) as its top priority. By 2050, EVs are expected to consume 20-30 per cent more electricity annually when compared with today’s consumption levels. This in turn calls for a significant investment in the current energy systems. Upgrading the energy systems would not only benefit the EV industry but it will also contribute to significant reductions in greenhouse gas emissions.

To facilitate this transition, the report indicates the following key priority areas for the coming years. First, ensuring that the network is prepared for the EV adoption whilst minimizing the costs of new network infrastructure. Second, reduction of barriers to network connections by ensuring efficient processes and proposals to reduce EV connection charges. Third, facilitating the uptake of smart charging and removal of obstacles for the adoption of Vehicle-to-everything (V2X) technology. V2X technology is the communication system between the vehicle and its surrounding objects. Fifth, ensuring active consumer participation by supporting the advancement of consumer designed innovative products and prototypes.

Sources: CMS Law-Now, 16 September 2021, available [here](#). Ofgem, 4 September 2021, available [here](#).

2. Copyright

2.1 Jay-Z claims copyright infringement by *Reasonable Doubt’s* photographer Mannion

On 15th June 2021, singer Jay-Z (Shawn Carter) filed a complaint against photographer Jonathan Mannion and his company (collectively Mannion) for commercially exploiting Jay-Z’s name without his consent. Jay-Z one of the most influential rappers of all time, entered into contact with Mannion for the photoshoot of his hugely popular first album, *Reasonable Doubt*. Jay-Z paid the photographer for this photo shoot.

Following Jay-Z’s success, Mannion started commercializing these photographs and some of them were sold for well over thousand dollars per copy. Mannion neither ever contacted Jay-Z to obtain permission for using his name, identity and photographs, nor did he ever compensate Jay-Z for the use of these photographs.



Aggrieved, Jay-Z approached US district court of California for preliminary and permanent injunctions against Mannion.

Mannion on his part, intends to use the first amendment as a defense.

Sources: Reuters, 9 June 2021, available [here](#). Jay-Z complaint, available [here](#).

Image source: Shutterstock.

2.2 Google wants to appeal in the French Press Publishers case

In October 2019, France implemented article 15 (press publishers right) of the 2019 Copyright in the Digital Single Market Directive (CDSM). Shortly thereafter, disagreement between Google and France-based press publishers on the right started to emerge. Following a formal complaint by some of these publishers, the French Autorité de la Concurrence, the French Competition Authority (FCA) initiated formal investigations. The complaint, filed by Syndicat des éditeurs de la presse magazine (SEPM), Alliance de la presse d'information générale (Apig) and the AFP, argued that Google had failed to enter negotiations with the press publishers. In April 2020, the FCA found that Google had failed to comply with this legislative provision, and it was accordingly, required to enter into negotiations with the French publishers. The French Court of Appeal subsequently upheld the FCA's interim decision.



On 13th July, the FCA found that Google had failed to enter negotiations with the press publishers in 'good faith'. Google was accordingly required to pay a fine of over five hundred million euros, the highest fine ever imposed by the FCA. The FCA was of the opinion that Google failed to be transparent and share sufficient information with the press publishers to evaluate the total amount of remuneration due to them.

In January 2021, Apig and Google entered into an agreement, which is expected to be revised keeping the FCA's latest decision into consideration. Likewise, SEPM and many other press publishers entered into an agreement with Google, that are again subject to review.

On the 1st of September, Google announced that it plans to appeal the 13th July decision on the grounds that the fine is disproportionate and that they had negotiated in good faith.

Sources: France24, 1 September 2021 available [here](#). Reuters, 13 July 2021, available [here](#). The Economic Times, 1 September 2021, available [here](#).

Image source: Shutterstock.

2.3 Ralf Hartmann v Apple: Motion to dismiss partially denied

On 20th September 2021, the US District Court of Southern District of New York partially "granted" and partially "denied" Apple's request to dismiss Hartmann's case. Hartmann, a German citizen, claimed that Apple "reproduced and distributed After the Rain and Austin Powers via the iTunes Store in both the United States and in various other foreign countries".

On ownership, the Court was of the opinion that Hartmann had "adequately [established] ownership of valid copyrights in After the Rain and Austin Powers" to bring a claim for copyright infringement. To establish his ownership, Hartmann presented the 2001 written assignment agreement, wherein Capella International "assigned its rights to the films to

Hartmann”. Co-ownership interest of a third party did not impede Hartmann’s standing to bring a claim for infringement.

On the issue of registration, the Court was of the opinion that considering that the proceedings were at the “motion to dismiss stage”, it was sufficient that Hartmann offered copyright registration number and not the registration certificates.

The Court found that Hartmann’s claim of contributory infringement was unsustainable, as he had merely referred to Apple’s business model in general, without clearly establishing whether “Apple investigated the metadata of [his films] and discovered his ownership interest”. In other words, a general discussion on Apple’s infringement was insufficient to establish contributory infringement. Instead, what was required was “more than a general knowledge or reason”.

On Foreign Copyright Infringement, Hartmann was required to specify precisely the relevant infringing acts, relevant country and precise set of laws that were violated.

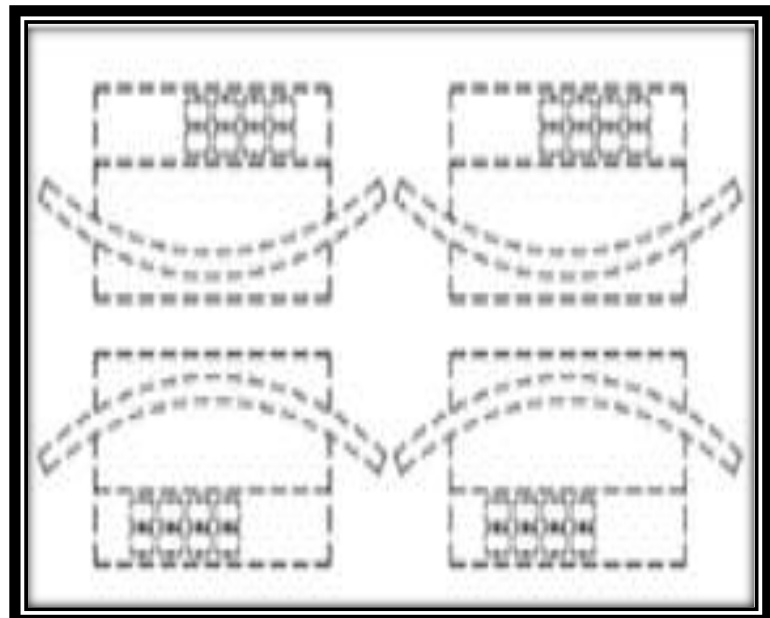
Sources: Patently Apple, 22 September 2021, available [here](#). Ralf Hartmann v Apple, Copyright Case - Judge's Opinion, 9 September 2021 available [here](#).

3. Design

3.1 Design application inconsistent with its product name not acceptable: Australia

The Australian Registrar of Designs recently refused Aristocrat Technologies Australia Pty Limited’s (*Aristocrat*) design application for a “bank of gaming machines” (*the Design*). The application was refused as the illustrations were inconsistent with the product name for the design. The illustration “bank of gaming machines” did not relate to one single product, but to four separate gaming machines.

Aristocrat claimed that the object concerned a single “complex product”. To substantiate its claim, Aristocrat also presented



expert evidence by Mr. Attwood. However, the Registrar opined that Mr. Attwood's claim was not useful since he was not independent, being an employee of Aristocrat. It was also found that the representations did not demonstrate a single product, but multiple designs. It was emphasized that a “complex product” is defined as one that is capable of disassembling and re-assembling, meaning that there must be a physical connection between the component parts. Accordingly, it was held that that the representation did not refer to a single product, and as the design bank of gaming machine was not in an assembled form, it did not meet the criteria of a complex product.

News and image source: Shelston, 14 September 2021, available [here](#).

4. Patent

4.1 AI can be eligible as an inventor: Federal Court of Australia

In its recent decision *Thaler v. Commissioner of Patents*, the Federal Court of Australia (FCA) held that broadening the definition of an inventor to include an AI system or device was not inconsistent with the Australian patent law.

The patent application stated a Device for the Autonomous Bootstrapping of Unified Sentience (DABUS) as the inventor and Dr Thaler as the owner of the DABUS' two inventions. The European Patent Office (EPO), UK Intellectual Property Office and the United States Patent and Trademark Office (USPTO) had earlier refused



patent on the grounds that AI lacked the required “legal capacity” and it was not a “natural person” as required by patent law.

In Australia, despite having received an initial setback from the Australian Commissioner of Patents, the FCA recognised that DABUS was an eligible inventor. More particularly, the FCA was of the opinion that in light of the technological developments, the word “inventor” should be interpreted to mean “[an] agent which invents” and this definition can be extended to AI. The FCA deemed this important, as absent such an approach, owners of AI systems would protect patentable inventions as trade secrets. Notably, the FCA observed that the nature of “patentable inventions and their creators” is not static, and in fact “We are both created and create. Why cannot our own creations also create?” (FCA at para 15).

Recognition of an AI system as an inventor by the FCA may spark new debates on our current understanding of an “inventor” in the patent system. As an example, the scope of the hypothetical “person skilled in the art” may accordingly be expanded, which in turn can lead to a higher standard of inventive step, particularly as regards computer-implemented inventions.

Source: Kluwer Patent Blog, 8 September 2021, available [here](#). Decision of the Federal Court of Australia, 20 July 2021, available [here](#).

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

4.2 OpenRAN does not mean open licensing

O-RAN Alliance (Open Radio Access Network) is expected to have over 10 per cent of the global RAN market share by 2025. Founded in 2018 by AT&T, China Mobile, Deutsche Telekom, NTT DOCOMO and Orange, O-RAN seeks to ensure that RAN industry is open, intelligent, virtualized and fully interoperable due to modularization of mobile network infrastructure through standardized interface.

The word “Open” in the alliance’s name suggests connection with open-source software, and not a policy of open licensing.



The O-RAN relates to the infrastructure side, which means it does not make communication between the network infrastructure and end user devices (for example 5G devices) cheaper.

The challenging aspects include the virtualisation and modularization put forward by the O-RAN alliance, as this is likely to exacerbate the problem of forum-shopping in case of a dispute. Another potential challenge concerns the availability of drop-in

replacements - these may be used by patentees as a leveraging chip in a patent injunction suit.

Sources: FOSS Patents, 17 September 2021, available [here](#).

Image source: O-ran, available [here](#).

4.3 AI cannot be recognized as an inventor: US District Court

Patent news item 4.1 *supra* suggests how the Australian FCA did not hesitate to recognize DABUS as an eligible inventor. The United States District Court for the Eastern District of Virginia (US district court), on the other hand, reached an opposite conclusion on 2nd September 2021.

Approvingly referring to the USPTO's 2019 refusal to grant a patent, the US district court opined that the Congress defined "inventor" and "joint inventor" in patent law to refer to an "individual" or "individuals". Referring to the ordinary dictionary meaning of the word "individual", the use of the term in the Patent Act "strengthens the conclusion that an inventor must be a natural person" (p.13 of the decision).



Nevertheless, the judge pointed out that technological developments in the future may help AI reach "a level of sophistication such that it might satisfy accepted meanings of ownership" in the future (pp.13 of the decision).

For the moment however, the US district court of Virginia denied AI the title of an inventor.

Sources: Techspot, 3 September 2021, available [here](#), Judgement, 2 September 2021, available [here](#).

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

5. Trademark

5.1 Not the Gran(d) Turnaround Sony had hoped for...

In its decision dated 1st September, the EU General Court (GC) dismissed Sony's appeal in a matter dealing with trademark. In 2017, Mr Wai Leong Wong filed an application with EU Intellectual Property Office (EUIPO) for the word sign "GT RACING" for goods in Class 18 of the Nice Classification. Sony filed an opposition, claiming similarity with its earlier registered figurative mark 'GT' (see image below), registered for Class 9, 16 and 28 of the Nice Classification and word mark 'GT' registered for Class 16.



Sony appealed the decision of the Board of Appeal, alleging that as regards the figurative mark, the Board erred in identifying the relevant public, in its comparison of the two marks and that of the goods in question. The GC held that since the goods at issue were not aimed at a specialised public or limited circle of people, the relevant public to consider regarding the likelihood of confusion was the general public – that had a limited level of attention. In relation to the comparison of the marks, the GC held that the figurative mark was developed on the basis

of the capital letters 'G' and 'T' and was so stylised that the general consumer was more likely to perceive it as an abstract unitary shape, rather than as two distinct capital letters. Thus, the GC agreed with the Board that the two marks were neither visually, nor phonetically similar. Regarding the similarity between the goods, the GC held that the goods for which the marks were applied, were neither of the same nature and purpose nor for same use and thus, they were not similar. Finally, the GC also dismissed Sony's claim that the Board had failed to examine other grounds of opposition based on Art.8(5), since "the applicant had not shown that the mark had acquired a reputation for the goods in Class 16 in respect of which it had been registered". The GC thus, dismissed Sony's appeal in its entirety.

News & Image Source: IPKat Blog, 13 September 2021, available [here](#). Judgement of General Court, 1 September 2021, available [here](#).

5.2 Can Microsoft prevent the rise of a new Empire?

On 15 September 2021, Microsoft filed a notice of opposition at the US Trademark Trial and Appeal Board (TTAB). Microsoft opposed the application for registration of the trade marks 'Rise of Empire' and 'Rise of Empires' filed by Long Tech Network Ltd on 27 June 2020. The application was under Class 9 (downloadable Computer game programmes) and Class 42 (Computer programming). Microsoft claimed that it has, since 1997, "continuously used the Age of Empires trade mark for medieval real-time strategy video games and board games". In particular, Microsoft claimed that the two marks are so similar that there



existed a real likelihood of confusion between Microsoft and Longtech's games.

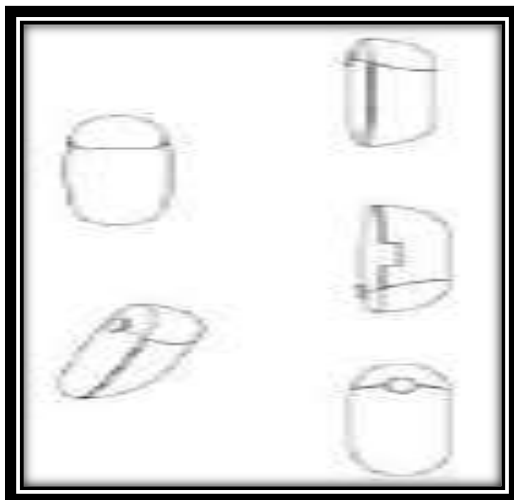
In its opposition, Microsoft cited four grounds for relief: likelihood of confusion (1), dilution (2), misrepresentation of source (3) and deception and false suggestion of connection (4). To substantiate the first claim, Microsoft claimed that the two games had substantially similar sound, appearance and commercial impression. As regards dilution, Microsoft referred to "well-known and famous" nature of its "Age of Empires" mark and how negative reviews of the "Rise of Empires", due to the poor quality of the game, were likely to negatively affect Microsoft's reputation. To prove the "misrepresentation of source", Microsoft shared links to online advertisements for the game "Rise of Empires" and how Longtech blatantly associated its game with Microsoft's "Age of Empires" to mislead clients and take advantage of the goodwill associated with Microsoft's reputation. To establish the fourth ground, Microsoft claimed that the "emphasis" on the word "Empires" in Longtech's mark led purchasers to misleadingly assume that the Longtech's products were related to Microsoft's.

Microsoft accordingly requested the TTAB to refuse Long Tech's application for registration.

Source: Law Street, 16 September 2021, available [here](#). Law 360, 16 September 2021, available [here](#). Docket Alarm, 15 September 2021, available [here](#).

Image source: Age of Empire, available [here](#).

5.3 Guerlain's 3-D lipstick mark can be registered: EU General Court



On 17th September 2018, Guerlain filed for registration of the 3-D trade mark at the EUIPO in Class 3. Both the examiner and the EUIPO Board of Appeal rejected the applicant's claims for trade mark registration of a 3-D lipstick mark for lack of "distinctive character" within the meaning of Article 7(1)(b) European Union Trademark Regulation (EUTMR).

On appeal, the GC (dated 14th July 2021) reversed the decisions of the EUIPO Board of Appeal, while making the following observations. In order to be distinctive, the 3-D sign must be substantially different from the norms of the relevant sector. This did not require that the sign be novel or original.

Further, even though the mark was aesthetic, this alone was not sufficient to determine distinctiveness. It was the "small oval embossed shape" of Guerlain that offered it an "uncommon appearance". The fact that the lipstick case could not be "placed upright" offered it an "uncommon visual" effect. This unusual and "easily memorable shape", it was believed was bound to "surprise the relevant public".

Based on the foregoing observations, the GC confirmed that the 3-D sign for lipstick was distinctive enough and could accordingly be registered as a trade mark (GC at para 58).

News & Image Source: Kluwer Patent Blog, 14 September 2021, available [here](#). Arrêt du Tribunal (available only in French), 14 July 2021, available [here](#).