

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 40 NO. 16)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Design, Patents and Trademarks for the period Sep-Oct 2021. You will, in addition, also find a testimonial from our alumna on how her participation in the programme has contributed to her inching closer to realize her long-term career ambitions.

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 Commitments offered by T-Mobile CZ, CETIN & O2 CZ for Czech telecoms market

In 2016, the Commission initiated formal investigations into the network sharing agreement (NSA) between telecom operators O2 CZ, CETIN, a telecoms infrastructure provider, and T-Mobile CZ. Following the Commission's "preliminary assessment" in August 2021, the parties have submitted commitments as regards their NSA and mobile network services agreement (MNSA) to address the Commission's concerns under Article 9(1) of Regulation 1/2003. Commitments under the said article is a settlement decision (like a consent decree in the US), as the commitments are binding on the parties; however, this does not translate into a formal finding of infringement.



The Commission was of the opinion that the NSA and MNSA agreements restricted competition within the meaning of Article 101(1) Treaty on the Functioning of the EU (TFEU) as they negatively impacted parties' incentives to invest in network infrastructure and compete at retail and wholesale level in the mobile telecommunications market in the Czech Republic.

Proposed commitments include modernization of network infrastructure (1); improved financial conditions for unilateral network deployment (2); stricter contractual obligations to ensure more limited exchange of information amongst network partners in the NSA and MNSA respectively (4) and the appointment of a monitoring trustee (5).

The proposed commitments, as and when accepted, will remain in force till 2033. Interested parties are encouraged to submit their comments on the Commission's website.

Sources: Commission press release, 1 October 2021, available [here](#). Reuters, 1 October 2021, available [here](#). ET Telecom, 1 October 2021, article available [here](#).

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

1.2 Vyera cannot limit US States' claim for disgorgement in Daraprim antitrust suit

In 2015, Martin Shkreli's Turing Pharmaceuticals (now Vyera Pharmaceuticals) purchased Daraprim and overnight raised the prices of the drug from US\$ 13.50 to US \$ 750 (a 4,000 per cent price rise). In its order dated 24th September 2021, the US District Court of the Southern District Court of New York (Court) refused Vyera's request to limit the 7 US States' move on disgorgement. According to the Court, as the New York law permitted the State to seek "nationwide equitable remedy", Vyera's request for "partial summary judgment on scope of the plaintiffs' [US States] claim for disgorgement" was unsustainable.



In their antitrust suit against Vyera, the seven States sued in their capacity as *parens patriae* (meaning literary, "[the] parent of the country"). As per them, Vyera & his company entered into anti-competitive agreements with distributors

and suppliers (“exclusive supply agreements) to artificially raise and sustain high drug prices for a long duration of time.

Later this month, a pre-trial order is due (20th October 2021), which shall then be followed by a bench trial on 14th December 2021.

Meanwhile, Blue Cross and Blue Shield from Minnesota have also filed a class-action lawsuit representing itself and insurers from across 30+ states in the US and Puerto Rico. The class-action suit claims that Vyera & his company excluded generic competition for well over five years (as the first generic alternative for Daraprim entered the US market only in March 2020) by denying competitors samples of Daraprim required to launch a generic product (1); limiting access to essential ingredients to manufacture the same (2); and refusing access to sales data to determine the commercial viability of the drug (3).

Sources: Court decision, available [here](#). Medcity article, 8 March 2021, available [here](#). Reuters article, 27 September 2021, available [here](#). Images source: Getty Images, available [here](#).

1.3 Russia threatens to block Youtube

On September 29, Russia threatened to block YouTube. The move was announced in retaliation to YouTube’s decision to remove Russian state-backed broadcaster RT’s German-language channel on its platform. YouTube had removed the said channel as it allegedly violated YouTube’s “COVID-19 anti-vaccine content policy”. As per the said policy, content that alleged adverse health effects of vaccines or spread misinformation about the contents therein, shall be promptly blocked from the platform.

Roskomnadzor, Russia’s official communications regulator, immediately officially wrote to YouTube to make RT channels available on its platform. Should YouTube fail to meet the request, Russia retains the right to “partially or fully restrict access” to the platform on its territory.

Source: Competition Police International, 29 September 2021, available [here](#). Image Source: Shutterstock, available [here](#).

2. Copyright

2.1 Trump loses copyright lawsuit against reggae singer Eddy Grant

In September 2020, reggae singer Eddy Grant (the plaintiff) initiated legal proceedings against Donald J. Trump (the defendant) for using his song *Electric Avenue* in an advertisement video. The video was posted on Trump’s personal Twitter account during the 2020 Presidential Campaign. The 55-second animated video was created by a third party and was independent from the defendant. In the video, a high-speed red train displaying the phrase “Trump Pence KAG 2020” (Keep America Great, the slogan of Trump’s re-election campaign) ran against a slow-moving handcar displaying the phrase “Biden President: Your Hair Smells Terrific”, while excerpts of Biden’s speeches played over the plaintiff’s song.

The plaintiff claimed that the video was a “campaign video deriding [and attempting to denigrate] the Democratic Party’s 2020 nominee” Joseph Biden and “appear[ed] to be an endorsement of Trump’s 2020 presidential re-election campaign”. The plaintiff, in addition, also asserted two copyright infringement claims: first, infringement of the musical composition, and second, the infringement of the sound recording.

The defendant, on his part, argued fair use of the song and accordingly, requested a dismissal of the complaint. It asserted a *de minimis* use (only 40 seconds) and that the song did not have any additional market value nor did it replace the demand for the original song. Moreover, as Biden's voice dominated the video, original lyrics were neither audible nor recognizable.

The US district court decided in favour of the plaintiff on the following grounds. First, defendants' appropriation of the song by integrating it in the video, without establishing a link (in other words, a dialogue) with the song. Second, the song was at best "a wholesale copying of music" to benefit a political campaign without any satirical message. Third, the unedited and "instantly recognizable" version of the song in the video was a clear violation of plaintiff's rights. Fourth, the use of the song in the video carried a negative effect on its potential licensing market.



Sources: Reuters, 29 September 2021, available [here](#). Memorandum of Law in Support of the Defendants, available [here](#).

Image source: Yahoo!news, available [here](#).

2.2 Ratajkowski violated paparazzo's copyright on Instagram: US District Court

In 2019, paparazzo Robert O'Neil sued model Emily Ratajkowski for copyright infringement. Emily had posted a photo, that he took of her, on her Instagram story without his approval. In the disputed photograph, Emily can be seen hiding behind the flowers, with the caption "mood forever". Although the picture was available only for 24 hours, O'Neil demanded \$150,000 in addition to any profits the model made from his work.



On 28th September, US District Judge Analisa Torres issued a split opinion on the matter. Whereas on the one hand, Torres was of the opinion that from the eyes of "a reasonable observer", the Instagram photo only displayed the ambiance including Emily's clothes and body language, on the other hand, the reasonable observer could also interpret the photograph in light of the caption, namely "mood forever" – that is Emily's persistent attempt to hide from paparazzi – "a commentary on the Photograph". Overall, the judge

ruled that Emily did indeed infringe O'Neil's copyright even though the post only met the low standard for originality (in copyright). Indeed, the changes Ratajkowski made, namely the caption, did not create an original work independent from O'Neil's work.

Sources: The Wrap, 30 September 2021, available [here](#). Observer 01 October 2021, available [here](#).

Image source: The Fashion Law, available [here](#).

2.3 Nigerian Court of Appeal establishes requirements for passing-off for images

The Nigerian Court of Appeal (CoA) recently decided on the issue of determination of ownership and requirements for passing-off claim in case of images. Following Federal High Court of Abuja's refusal to award relief to Banire, the latter appealed to the CoA. NTA-Star TV Network Ltd (NTA) had used Banire's photographs on a billboard for "promotional purposes". NTA claimed that it had lawfully received the photos by entering into a "Channel License Agreement" with Virtual Media Network Limited (VMNL).

The CoA appeal confirmed the lower court on the issue of ownership, and held that Banire should have also added VMNL to the list of defendants as they were the owner of the work. On the issue of passing-off, the CoA referred to the English case law (*Irvine v. Talksport Ltd & Robyn Rihanna Fenty v. Arcadia Group*), and formulated the following test to establish a claim for passing off of images. The plaintiff must demonstrate that; "a) his image has acquired sufficient goodwill such as quantifiable goodwill which can be leveraged on in consideration for money; (b) the third party has misrepresented to the public by using the image and; (c) this misrepresentation caused or is capable of causing damages such as reduction in the value attached to their goodwill." As the appellant Banire failed to meet this threshold, her appeal was dismissed in entirety.



Sources: IPKat Blog 21 September 2021, available [here](#). LawCareNigeria, 4 August 2021, available [here](#).

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

3. Design

3.1 Australia: Designs Amendment Act 2021

On 10 September 2021, the *Designs Amendment Act 2021* (the Act) received Royal Assent. The Act is expected to significantly improve the registered design law in Australia and also help designers navigate through the legal framework more easily.

The Act introduces following seven notable changes to the current approach. First, introduction of a grace period, which is a set length of time once the designers have disclosed their design before formally filing for protection. Starting 10 March 2022, the designers can make the design available to the public up to 12 months before making a formal application.

Second is the introduction of an infringement exemption. This exemption is applicable if the third party uses a design before the priority date of a registered design, such as in case where a third party creates or copies the design following a disclosure by the owner before the priority date. Third notable change concerns design registration. The fourth key change broadens the 'innocent infringer' defense, that precludes third parties from accountability for infringement of a design. This defense is applicable for the time period between the filing date of a design application and the date of registration.

Fifth, exclusive licensees now have the right to sue following an infringement. Exclusive licensees can now assert the design rights, provided that they have paid and acquired a valid

license from the owner. Sixth, easing of the process to update the formal requirements in an application. Formal requirements specify what information must be included in an application and how drawings must be presented, amongst other things. Seventh, the Act explains different concepts in design law in a reader-friendly manner and streamlines the system with the current market realities.

Sources: Australian Government, 10 September 2021, available [here](#). Australian Government, 13 September 2021, available [here](#).

3.2 “USB-C” chargers: the new environment-friendly standard charging port for all

On 28th September, the European Commission formally proposed a revision of the Radio Equipment Directive (the Directive). The Directive proposes to make “USB-C” as the standard charging port for all electronic devices, ranging from smartphones to handheld videogame consoles. The proposal for change is part of Commission’s larger vision of a greener and more environmental friendly internal market. In addition to the standard “USB-C” port (1); the proposal will harmonise the “fast charging technology” to ensure a constant charging speed irrespective of the device and the brand (2); unbundling of the purchase of the



charger and the device, meaning that the consumer can henceforth, only purchase the device without the charger (3) and reduction of information symmetries between consumers and producers, as producers shall be required to share all the relevant information about the charging performance, power requirements of the device and whether it supports fast charging (4). Manufacturers will have two years to comply with the new requirements, provided that the mandate is “adopted by the European Parliament and the Council by ordinary legislative proposal”. The measure is expected to save the consumers an average of € 250 million per year.

Sources: Popular Science, 1 October 2021, available [here](#). European Commission, 23 September 2021, available [here](#); [here](#) & [here](#).

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

4. Patent

4.1 China aims for high-value patents & promises a more efficient IP system

On 22 September 2021, China released its 15-year roadmap for intellectual property, which calls for more high-value patents and a fairer and more effective intellectual property system. High-value patents refers to patents with high quality that have the potential of considerable value addition. However, the definition of patent value may vary from one system to another. As regards technical field, patent validity as well as economic benefits, the roadmap classifies high-value patents in the following five categories: (1) technical fields in ‘strategic emerging industries’ such as integrated circuit, bio-pharmaceuticals & artificial intelligence; (2) comprising of foreign patent(s) as family member(s); (3) kept alive for 10 years or more; (4) yield a large amount of pledge financing; and (5) have received pre-determined national awards. It is expected that China shall have about 12 high-value patents per 10,000 people by 2025.



A fair & effective intellectual property system means a system that ensures both justice and efficiency and thereby balances the conflicting interests of different stakeholders. To ensure this, the amendment introduces the following notable changes: establishment of a patent linkage system (1); introduction of punitive damages in litigation (2); empowerment of the patent office to decide nationally influential patent infringement disputes (3) and possibility to file for a partial design (4). China's 4th amendment of its patent law, entered force on 1 June 2021.

*Sources: The IPKat, 28 September 2021, available [here](#). China IP Magazine, 30 March 2021, available [here](#). Jones Day, November 2020, available [here](#).
Image source: Getty images, available [here](#).*

4.2 Japan amends its Intellectual Property legislation

Japan recently introduced the following changes to its intellectual property legislation. The changes will enter force on 1 April 2022. First, possibility to conduct “online oral hearings” before the trial board of the Japan Patent Office (JPO). Second, stricter enforcement against consignment of goods (even when in smaller quantities) sent from abroad, that infringe design and trade mark rights. Third, introduction of an “Amicus Brief System” to gather opinions from the third parties in patent infringement litigation. This will allow the parties to formally request the court to invite opinions from the public. The opinion may focus on legal issues as well as factual circumstances of the case at hand. Not only the Japanese citizens and companies, but also foreign entities can offer their opinion (in other words, submit their “Amicus Brief”). Inputs from these briefs in cases involving AI and Internet of Things (IoT) related inventions is expected to be very insightful in reaching a decision that furthers the goals of innovation at large.



*Sources: The Kluwer Patent Blog, 30 September 2021, available [here](#).
Image source: Getty images, available [here](#).*

4.3 Germany & Slovenia ratify Protocol on Unified Patent Court

On 27th September, Germany ratified the Protocol on the Provisional Application. Slovenian legislation with regard to the ratification entered force on 24th September 2021. These actions are crucial first steps in inching towards European patent reform and the Unified Patent Court. The German minister of Federal Justice stated: “With this step we have come a decisive step closer to European patent reform [...] The Unified Patent Court will come.” The ratifications of the Protocol is a pre-requisite to enter the final stage in the establishment of the Unified Patent Court.

Source: The Kluwer Patent Blog, 28 September 2021, available [here](#).

5. Trademark

5.1 UKIPO accepts Hello Fresh's opposition against Halal Fresh

HelloFresh recently successfully opposed the registration of Halal Fresh (“the contested mark”) at the United Kingdom Intellectual Property Office (UKIPO). The opposition was filed on the basis of two earlier registered EU figurative marks containing the name ‘Hello Fresh’ and the EU word mark ‘HelloFresh’ (Opponent’s marks). The contested mark covered goods in classes 29 and 31, whilst the Opponent’s marks covered classes 29, 31, 35 and 43.

The Opponent significantly relied on the acquired reputation of the earlier mark amongst the relevant public in the EU and the UK. Notably, even though the Opponent had three EU registered trademarks, he substantially relied on the earlier word mark, as it was deemed to be the strongest amongst the three marks. The UKIPO found that “visual, aural and conceptual” differences amongst the two marks were sufficient to avoid any “significant level of direct confusion [in an average consumer]” (para 82).



The claim for indirect confusion, however, was expected as the average consumer could be led to believe that there was some link between the two marks. In light of the reputation of the earlier mark and the degree of similarity between the two marks, the UKIPO opined that it could “cause a substantial proportion of the relevant public” to infer a link between them (para 89), and believe that it was a brand extension of the earlier mark. In light of the “resemblance” between the two marks, the opponent’s reputation and the indirect likelihood of confusion, customers “[may] wonder whether there [was a] connection”. In other words, they could see the contested mark as a brand extension of HelloFresh. The act was thus, seen contrary to the law of passing off.

Even though HelloFresh’s opposition was upheld, it must pay damages to the applicant (due to faults in its opposition claims, such as, incorrect reference to the relevant class of goods).

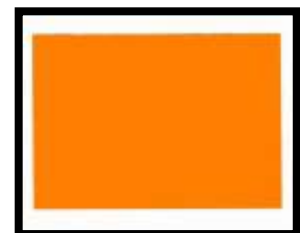
News & Image Source: Judgement of the UKIPO, 3 August 2021, available [here](#).

5.2 Orange: A figurative mark or a colour, that’s the question!

In 1998, SA Veuve Clicquot Ponsardin filed an application for registration of the trade mark as a figurative mark, accompanied by the heading “colour claimed” for goods in Class 33 (champagne wines). Following a series of rejection at the European Union Intellectual Property Office (EUIPO), the orange colour mark was eventually registered in 2006 on grounds of acquired distinctiveness “in respect of usage in champagne wines” (paras 8-10).

In 2015, Lidl Stiftung & Co. KG (the intervener) filed an application declaring the invalidity on the ground that specification of colour shade “using a scientific definition” was insufficient, and that the mark was devoid of distinctive character (paras 11-12).

At first, the Cancellation Division dismissed the application for declaration of invalidity; however, on appeal, the EUIPO’s First Board of Appeal (Board) annulled the decision and remitted the case back to the Division. As per the Board, the choice of the nature of the mark was a matter for the applicant: choosing one classification in lieu of another could not be regarded



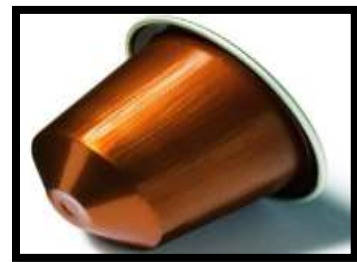
as a manifest error, since the contested mark could be considered, according to its depiction, only as a figurative mark claiming a specific colour. The Cancellation Division subsequently annulled the request and the applicant appealed before the General Court (GC).

The GC found that there was an infringement of the article 95(1) European Union Trade Mark Regulation (EUTMR) as the Board “went beyond the pleas and arguments submitted by the parties [and] in doing so exceeded its jurisdiction” (para 40). The GC also found an infringement of Article 94 EUTMR and of Article 41(2) (a) of the Charter of Fundamental Rights of the European Union as the decision infringed “the principle of sound administration, including its obligation to state reasons and the rights of the defence” (paras 26, 51). Based on the foregoing, the GC annulled the decision of the Board.

News & Image source: Judgement of the General Court, 15 September 2021, available [here](#).

5.3 The “not so distinctive” Nespresso Capsule

In its decision dated 7th September, the Swiss Federal Tribunal (SFT) rejected Nestlé’s claims of trade mark infringement against Ethical Coffee Company (ECC). ECC used vegetable fibres and amidon to develop a Nespresso machine compatible biodegradable capsule. The capsules were first introduced in “Casino” supermarket in France in 2010. The following year, they were launched in Media Market in Switzerland.



The SWT upheld the decision of the Cantonal Court of Vaud that the “shape incorporated a technical solution” and it could not be offered a “perpetual monopoly” (“monopole perpétuel” at para 6.5, p.9) through trade mark law. Nestlé’s claims were accordingly rejected in entirety. The SWT was of the opinion, that the legislature offered patents as a more viable alternative to benefit from short term exclusivity and introduce such innovations in the market. As the shape of the trade mark capsule was “technically necessary”, it be declared “null and void”. The SWT, in addition, also referred to the positive ecological footprint of the ECC capsules.

News & Image Source: Kluwer Trademark Blog, 24 September 2021, available [here](#). Judgement of the Civil Court, 7 September 2021, available [here](#).

6. From our IPKM/TILC Alumni

“After graduation from Maastricht University and completing my work for the Friday Fortnightly Newsletter, I was offered a traineeship position at the EUIPO in Alicante, Spain. I am working in the Operations Department where I am examining Trade Mark applications. I believe that working for the Newsletter prepared me well for entering the traineeship, as it allowed me to always stay up-to-date on the most recent developments in Trade Mark law and helped me to further my language skills in this specific legal context.”

Caroline De Schrijver, IPKM alumna and TILC Friday Fortnightly Team Member (2020-2021)