FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 46 NO. 19)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Designs and Trademarks for November 2021 and an invitation to an upcoming event.

In addition to the newsletter, you can now, also connect with us on LinkedIn and Instagram.

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,

D. Kermode, C. Annani, D. Baltag, C. Coutier, M. Koci, T. Kuznetsova
Y. Lu, S. van Zuylen van Nyevelt and K. Tyagi
Email:d.kermode@student.maastrichtuniversity.nl & k.tyagi@maastrichtuniversity.nl

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

1. Competition law

1.1 Google must pay the €2.4 billion fine for self-preferencing: EU General Court

On 10th November, the General Court (GC) dismissed Google's appeal in the 2017 Google shopping decision. In June 2017, the European Commission, following a seven-year long investigation, imposed a fine of €2.42 billion on Google for its "self-preferencing practices" that demoted competing shopping services in its search results. This practice of self-preferencing worked to Google's advantage as it successfully managed to direct traffic to its shopping services.

As per the Commission's investigation, consumers almost always focus on the top ten search results displayed on the first page. As Google deliberately demoted the competing shopping services, this meant that even the best and most closely matching search results would first appear only on page 4 of Google's search results. Google failed to offer any objective justification for this conduct. This conduct overall led to a decrease in consumer welfare.

Notably the GC's approach aligns with the upcoming Digital Markets Act (DMA), as it opined that the standard in the case at hand was not refusal to supply; rather, in light of the nature of the markets, the "self-preferencing" could itself be identified as a source of harm. The GC recognized that in the digital markets, Google search offered an infrastructure, and that the diversion of traffic by the search engine to its preferred sites was anti-competitive in nature.

Source: General Court, 10 November 2021, available here. Euronews, 10 November 2021, available here. EURACTIV, 10 November 2021, available here.
Image source: Getty Images, available here.

1.2 Eefung files China's first ever antitrust lawsuit for access to platform data

Earlier this month, Changsha-based (situated in southern Hunan) "Eefung Software" (Eefung) filed an antitrust case against Shanghai-based Sina Corp "Weibo". Eefung's case is China's first ever civil antitrust lawsuit.

Eefung, a software data mining company, requested Weibo access to the latter's microblogging platform data. Even though the two have a formal "data co-operation relationship", however, Weibo, as always, allegedly turned down Eefung's request to share data. As data is central to Eefung's business model, Weibo's refusal threatened its survival in the market for data analytics.

Apparently, this is not the first time that the parties are fighting over data. In 2018, Weibo won an injunction against Eefung. At the time, Weibo had complained that Eefung crawled through its websites and illegally accessed its data. Three years down the line,

and the situation may be different this time on account of the following two reasons. First factor is more macro-economic and concerns President Xi Jinping's larger political agenda to ensure "common prosperity" of the citizens of the country in order to narrow the ever-widening wealth gap in China. Second, Eefung's antitrust suit comes at a time, when China's State Administration for Market Regulation (SAMR) has expanded its manpower and is in the process of amending the Anti-Monopoly Law (AML) to bring more effective measures against abuse of data and algorithms.

Sources: South China Morning Post, 10 November 2021, available here. GCR, 12 November 2021, available here (paid access).
Image source: Getty Images, available here.

1.3 Phhhoto files complaint against Facebook & Instagram in US District Court

On 4th November, Phhhoto Inc (Phhhoto) filed an antitrust complaint against Meta Platforms Inc (Meta) at the US District Court of New York. Meta is the parent company of Facebook and Instagram.

Phhhoto complained that Meta not only unfairly excluded Phhhoto from its Instagram platform; it also launched the "Boomerang Video App" hours before Phhhoto's launch on the Android platform.

Phhhoto was founded in 2012 and its disruptive product was launched in early 2014. It was famously labelled as the "instant animated camera" that had the potential to form the "kernel of a new social network" (para 3). Mark Zuckerberg and other top Meta executives had initially approached the Phhhoto's founders, Champ Bennett, Omar Elsayed, and Russell Armand, for a formal partnership between the two platforms. However, the two never formally managed to enter a formal contract as Phhhoto had rejected Meta's initial offer.

At the peak of its popularity, Phhhoto enjoyed an average of 3.7 million monthly users before Meta's anti-competitive conduct excluded Phhhoto completely from its platforms. This led to a rapid decline in Phhhoto's subscriber base. Coupled with Meta's "Boomerang Video App", this effectively diminished Phhhoto's potential to attract any further investment to continue its business operations.

News & Image Source: Complaint, 4 November 2021, available here. The New York Times, 4 November 2021, available here.

2. Copyright

2.1 Apple must pay $1.9 million to Chinese Online for copyright infringement: China

On 3rd November, the Tianjin Binhai District Court of China awarded Chinese Online Tianjin Cultural Development Co., Ltd. (Chinese Online) 12 million yuan ($ 1.9 million) in damages. Apple shall pay these damages to Chinese Online for infringement of the latter's "right to disseminate information" over the internet.

According to the district court, Apple was liable as it facilitated continued availability of Chinese works without a valid license on its platform. These works included notable Chinese literary works such as "Name of the People, Prosecution Nationwide, Kangxi Emperor, the Family, Spring and Autumn". As Apple failed to take reasonable care to prevent this conduct, Apple is required to pay damages to the digital publisher.

This is not the first time that Chinese Online has successfully brought a claim against Apple. Chinese Online has earlier won over 83 claims concerning 460 works and received well over $ 11 million in compensation for an infringement of its right of dissemination.

Sources: Apple Insider, 4 November 2021, available here. Pandaily.com, 3 November 2021, available here.
Image source: Getty Images, available here.

2.2 Cloudflare not liable for contributory copyright infringement: US District Court

In its decision dated 6th October, the US District Court of California denied *Mon Cheri Bridals'* motion for summary judgment against *Cloudflare*. The plaintiff, *Mon Cheri* sued *Cloudflare* to put a stop to continued infringement of its product, wedding dresses. *Mon Cheri* was aggrieved by the "proliferation of counterfeit retailers" that regularly used its copyright-protected images to sell knock-off wedding dresses. This conduct negatively impacted *Mon Cheri's* profitability and brand reputation.

As direct action against these online retailers did not solve the problem of continued infringement, *Mon Cheri* sued *Cloudflare* on the grounds that the latter provided security services and CDN (Content Delivery Network) for the infringers' websites. *Mon Cheri* argued that this was a case of "contributory copyright infringement". To establish its claim, Mon *Cheri* was required to prove the following two conditions. First, that Cloudflare was aware of the infringement and second, that it either materially contributed to or induced the infringement. As *Mon Cheri* failed to establish that *Cloudflare's* "performance-improvement services materially contributed to the infringement", its request for summary judgment was denied by the Court.

Sources: Judgement of the US District Court, 6th October 2021, available here. Cloudflare website, 7th of October 2021, available here. IP Watchdog Blog, 11th of November 2021, available here. Technology & Marketing Law Blog, 8th of October 2021, available here.
Image source: Pixaba, available here.

2.3 Steely and Clevie launch copyright infringement proceedings against Despacito

In October, Steely and Clevie Productions and the estate of Wycliffe 'Steely' Johnson filed a copyright infringement suit against Reggaeton singer Luisi Fonsi, Warner Music & others before the Central District Court of California.

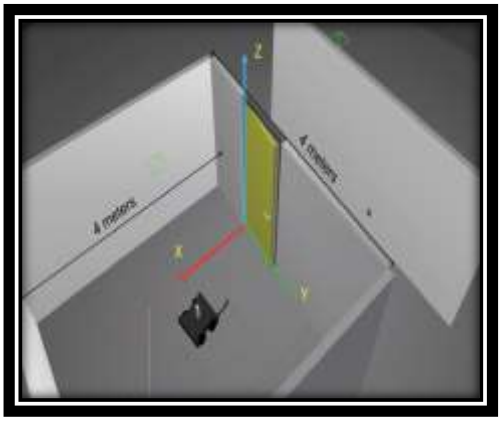
As per the complaint, "Despacito", the most-widely viewed song on YouTube and one of the best-selling Spanish songs in history, "appears to have drum pattern elements from Fish Market". Fish Market, also known as "Poco Man Jam Riddim" was written, recorded and composed by Steely and Clevie, and registered as an original recording with the US Copyright Office. Fish Market's distinctive style and its "original drum pattern" offered it a distinct flavour. In Fonsi's "Despacito", the drum patterns start at minute 1:00 and can be heard throughout the song. Although Despacito's tempo is slightly slower than that of the Fish Market, but the drum pattern is evident and recognisable throughout the song.

Sources: DanceHallMag, 31 October 2021, available here, The Gleaner, 31 October 2021, available here, Urbanislandz, 1 November 2021, available here.
Image source: Urbanislandz, available here.

3. Design

3.1 Now an autonomous robot that can open its own doors and recharge itself

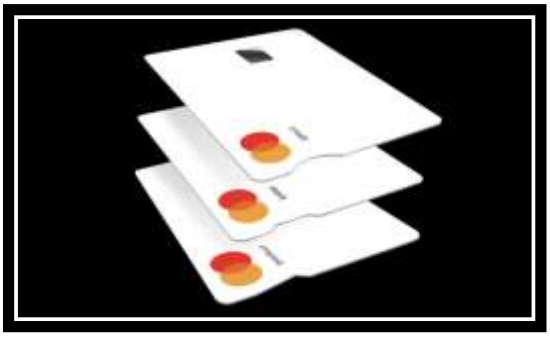
Using machine learning (ML), students at the University of Cincinnati's (UC) Intelligent Robotics and Autonomous Systems Laboratory have developed an autonomous robot that can independently navigate a room, open the doors and even recharge itself without any human intervention! The challenge of opening and closing a door though simple for an average human mind, can be quite an uphill task for robots. This is on account of the fact that the "colours, shapes and handles" of the doors vary. Absent standardization of these aspects, an automated machine, such as a robot requires substantial efforts to adjust its force for each door.



Currently in its simulation phase, the team of researchers led by doctoral student Yufeng Sun, is soon expected to come with an industrially useful and fully functional robot. These helper robots are expected to significantly impact the $27 billion robotics industry.

Sources: Science Daily, 9 November 2021, available here. IEEE Xplore, study available here. UC News, 12 November 2021, available here.
Image Source: IEEE Xplore, available here.

3.2 Mastercard's new design for its visually impaired users



Visually-impaired users find it a challenge to use credit and debit cards, as these cards have flat designs without embossed names and other details. To resolve this challenge, Master Card has introduced its new "Touch Card", a card with "notches cut into the sides". These cards will be first launched in the US in 2022. Whereas credit cards will have a circular notch, debit cards will have a broad, square notch and prepaid cards will have a triangular notch. Master Card closely collaborated with the Royal National Institute of Blind People, UK and VISIONS/Services for the Blind and Visually Impaired, US to develop these new cards.

Source and Image Source: NPR News, 2 November 2021, available here.

4. Patent

4.1 Apple's new patent that safeguards privacy

Earlier this month, Apple filed a patent with the US Patent & Trademark Office for "Privacy Eyewear". The patent is technically described as a "vision-corrected graphical outputs and standard graphical outputs on an electronic device." This patent offers users the possibility to blur the text and images on its screen. This will ensure that while the user can read and see the content on the screen, those in his vicinity are refrained seeing the same. The user can enjoy his privacy amidst a large crowd and read and/or watch the content with a special Apple eyewear. Apple, in addition, is also developing an advanced "mixed-reality headset". These patents are expected to give enhanced capabilities and features to Apple's forthcoming products and services.
Source: News article available here.
Image source: Getty Images, available here.

4.2 Nokia declares 4000 patent families essential to 5G

On 11th November, Nokia announced that it has reached the milestone of 4,000 patent families declared as essential to the 5G standard. With this, Nokia now has a total portfolio to over 20,000 patent families. According to the company, this favourable outcome is a result of its €130 billion investment in cellular technology R&D over the last two decades. With this large patent portfolio, Nokia is now a key player in the market for licensing standard essential patents (SEPs), and alongside Samsung and Qualcomm, is amongst the three lead global players in the market for SEPs.

Licensing alone contributed to a lion's share of Nokia Technologies' €285 million operating profit in quarter 3, 2021. Earlier this year, Nokia also entered into a licensing agreement with Daimler and another unnamed auto manufacturer.

Source: Official website of Nokia, 11 November 2021, available here. Managing IP, 12 November 2021, available here. Light Reading, 11 November 2021, available here.
Image source: Getty images, available here.

5. Trademark

5.1 GIs can be protected by national trademarks: German Supreme Court

Earlier this year, Bundesgerichtshof (BGH), the German Supreme Court, gave its landmark decision on the relationship between geographical indications (GI) and national trade mark law.

The case concerned two national collective trademarks, that are subject to strict quality requirements. These are: "Hohenloher Landschwein" (country pork from Hohenlohe) and "Hohenloher Weiderind" (grazing cattle from Hohenlohe), with Hohenlohe being a region in Southern Germany. A butcher's shop located in Hohenlohe sold meat using the said trademarks. It, however, failed to conform to the quality requirements of the mark. The association unsuccessfully approached the first-instance court and requested an injunction against the butcher. On appeal, the appeal court offered relief to the association. The decision was subsequently upheld by the BGH. The BGH was of the opinion that Article 14 of the GI Regulation regulated the relationship between trademarks and GI. The trademarks can accordingly be "obtained and used" alongside "registered qualified GIs". When considering whether the collective mark was infringed by the butcher shop, the Court performed a balancing exercise between the shop's interest in indicating geographical origin and the association's interest in indicating a specific quality. As the butcher shop's meat did not comply with the quality governed by the trademarks, the BGH found that the quality function of the collective mark was substantially impaired. The butcher's appeal was dismissed and the association's request for injunction was accordingly upheld.

Sources: Kluwer Trademark Blog, November 9 2021, available here. Case of German Supreme Court, available here (in German).
Image source: Getty Images, available here.

5.2 EA Sports to remove Maradona from FIFA 21 and 22

EA Sports is set to remove Diego Maradona from FIFA 21 and 22, following an Argentinian Court order earlier this month.

The games in the FIFA series include Maradona as an ICON card. The ICON cards display his likeness across different stages of his life, both on the field and for marketing and advertising

purposes. Stefano Ceci, a long-time friend and manager to the late footballer, initially approved the use of the brand Maradona. The legal challenge to the use emerged as Ceci failed to produce legal evidence that he had the power to approve the use of Maradona's image. The Federal Judge Marcelo Gota ruled that the actual proprietor of the trade mark was Satvicca. Satvicca is a company run and managed by Matias Morla, Maradona's lawyer. As per Maradona's disputed will, Morla acquired these rights in August 2020. As Satvicca had not given its permission to EA Sports to use Maradona's likeness, the Argentinian Court ordered that the contested brand be removed from the game permanently.

Sources: EUROGAMER, 6 November 2021, available here. Case (in Spanish), November 2021, available here.
Image source: Getty images, available here.

5.3 PepsiCo to rename its Rise Energy Drink

Starting 19th November, PepsiCo will rename its Mtn Dew Rise Energy drink. On 3rd November, the US District Court of New York granted preliminary injunction in favour of the New York-based Rise Brewing, that sells products such as cold brew coffees, teas and oat-milk based lattes. Rise Brewing filed a lawsuit against PepsiCo, as PepsiCo released an energy drink named "Rise". It argued that with this, PepsiCo. "threatened to wipe out" its decade-long goodwill. As per the Court's decision, PepsiCo must immediately cease the use of the mark in sale or distribution of its products. PepsiCo requested a 11-week transition period that was denied by the judge. In the preliminary injunction order, the Court stated that PepsiCo's new product line was "likely to cause confusion with [that] mark". The Court refused PepsiCo's offer to adduce evidence through consumer survey as the "survey results" in the opinion of the court "may be particularly unreliable".
News and Image source: FoodDive, 10 November 2021, available here.

6. Events

6.1 Roundtable on the Regulation of Online Platforms

On **2nd December 2021**, third year students from the Bachelor course **"Intellectual Property Law in the Digital Single Market"** and legal scholars will deliberate on the **"Regulation of Online Platforms"**. The event will be chaired by **Dr. Anke Moerland**. Attendees have the possibility to register and join online. More information is available *here*.