

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 4 NO. 4)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Designs and Trademarks for January 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's clampdown on geo-blocking practices – game distributors fined

On 20 January 2021, the US-based game distributor Valve Corporation alongside five other game publishers were issued a fine of €7.8 million for blocking cross-border sales in the EU. The Commission's investigation indicated that Valve and the publishers entered into a bilateral agreement to geo-block PC video games. This anti-competitive agreement adversely impacted over 100 competing video games in the internal market.

This decision against game distributors is the result of a 4-year investigation by the Commission that seeks to clampdown on geo-blocking practices in the internal market.

*Sources: Reuters, 20 January 2021, available [here](#). European Commission, 20 January 2021, available [here](#).*

### 1.2 Amazon sues European Commission for allowing parallel Italian case

Amazon has initiated legal proceedings against the European Commission for permitting the Autorità Garante della Concorrenza e del Mercato (AGCM), the Italian competition authority, to initiate proceedings against Amazon, while the Commission is also currently investigating Amazon regarding similar anti-competitive practice of seller selection.

Amazon has requested the General Court (GC) to annul parallel investigations by the AGCM.

*Sources: Reuters, 20 January 2021, available [here](#). Amazon.com and Others v. Commission (Case T-19/21), available [here](#).*

### 1.3 Germany becomes antitrust pioneer following 10<sup>th</sup> amendment to the ARC

On 14 January 2021, the German Bundestag passed the 10<sup>th</sup> amendment to the Gesetz gegen Wettbewerbsbeschränkungen (GWB), the Act Against Restraints of Competition (ARC). The reform which focuses primarily on the regulation of the digital economy, is particularly geared towards providing the Federal Cartel Office (FCO) with the regulatory tools necessary to ensure that dominant undertakings active in digital markets do not abuse their dominant position.

The highlight of the latest amendment is the new supervision mechanism (Section 19a ARC). Following the entry into force of the Amendment, Germany becomes the first country to “introduce antitrust measures aimed at the potential abusive conduct of digital platform operators”. The amendment entered force on 19 January 2021.

*Sources: Gleiss Lutz, January 2021, available [here](#). Bird & Bird, January 2021, available [here](#).*

## 2. Copyright

### 2.1 Conflict over a silhouette print

Last August, a conflict emerged between The Great Eros (Eros), a luxury lingerie brand, and We Wore What (WWW), a fashion blog and an e-shop, over a minimalistic “black on white woman silhouette” print. The dispute triggered both unfair competition and copyright issues as the pattern used by WWW was very similar to the original work by Eros.

Eros sent a cease-and-desist letter to WWW to which the latter responded by denying the accusations. Eros subsequently threatened to file a lawsuit, against which WWW filed a counter-suit for declaration of non-infringement. On 4 January 2021, Eros filed its response to WWW's counter-suit. In its response, Eros denied WWW's claims in the 'declaratory judgment action' and also referred to a range of affirmative defenses to protect itself from WWW's "quest for a court order" for non-infringement.

*Sources: The Fashion Law, 1 and 7 January 2021, available [here](#) and [here](#).*

## **2.2 Settlement between a cheating platform and Niantic**

In June 2019, Global++, a video game cheats provider, was sued by Niantic, Pokémon Go's developer, for copying Niantic's original computer code and offering derivative versions of its mobile apps. Niantic claimed that Global++ offered an unfair advantage to the users that used its Cheating Programs when compared with the honest users of the game. This practice in turn undermined the overall gaming experience and also adversely impacted Niantic's reputation and its business model.

In January 2021, the parties reached settlement as Global++ admitted to copyright infringement and agreed to pay Niantic \$5,000,000 in damages. In addition, Global++ also agreed to immediately and permanently stop offering Cheating Programs or other such similar products.

*Source: Torrent Freak, 8 January 2021, available [here](#).*

## **2.3 Zimmerman apologises over accusation of cultural appropriation of the ancestral Mazateco tunic**

Following the release of its new resort swim 2021 collection, the famous womenswear brand Zimmerman faced accusations of cultural appropriation from the Mazateca community of the State of Oaxaca (Mexico). The designs of the brand, it was found, were substantially similar to the traditional garment's essential features, such as embroidered birds and flowers at the chest. Zimmerman also used similar colour combinations for the new collection.

In response to the foregoing accusations, Zimmerman apologised to the Community and promptly removed the disputed items from its website.

*Source: Refinery29, 14 January 2021, available [here](#). Proceso, 13 January 2021, available [here](#).*

## **2.4 Google and Facebook to pay for news in Australia**

Following Australia's ambition to implement an EU-like Press Publisher's right, digital platforms threaten to withdraw from the country, should the proposed changes enter force. Both Google and Facebook threatened to limit their services, such as user feeds, in the region.

As Australia inches ahead with its Media Bargaining Code, it emerges that Google *must* either pay or stop providing their services in the country. Payment by Google to the press publishers, in the words of Australia's Treasurer Josh Frydenberg, is now "*inevitable*" and only a matter of time before Google and other digital platforms start paying for news content.

*Sources: Bloomberg, 24 January 2021, available [here](#). 9News, 22 January 2021, available [here](#). The Guardian, 24 January 2021, available [here](#).*

### 3. Designs, Trademarks, and Patents

#### 3.1 Worldwide design and trademark filings rise, while patent applications dip

A recent report by the World Intellectual Property Indicator shows that global patent applications experienced a dip in 2019, while the number of worldwide trade mark and industrial design-related activity experienced a rise. Global patent applications dropped by 3% in 2019 - marking the first fall in a decade, largely due to reduced filings from China; while trade mark and industrial design filings rose by 5.9% and 1.3% respectively.

The report found that China still leads the world in patent applications despite a 10.8% drop in resident applications following a new regulation aimed at improving the quality of applications and optimizing the application process.

*Sources: WIPO Press Room, 7 December 2020, available [here](#). The report is available [here](#).*

### 4. Patent

#### 4.1 The new German UPC legislation faces renewed legal opposition

Last minute obstacles to the Unified Patent Court Agreement (UPCA), before it can enter force, continue unabated. Two new complaints have recently been filed against the German UPC legislation in the Federal Constitutional Court. The complaints challenge the ratification of the UPCA.

Signature of the Federal President of the country is the final hurdle before the UPCA can force. It is currently unknown who have filed the complaints and what grounds do they cite against the proposed legislation.

*Source: JUVE Patent, 22 December 2020, available [here](#).*

#### 4.2 USPTO cautions against number of patent filings as an indicator of innovation

The United States Patent and Trademark Office (USPTO) has published its report on the impact of patent and trade mark filing trends in China. The report examines the high rate of Chinese patent and trade mark filings and how these may have been guided by Government subsidies and other non-market forces.

The USPTO cautioned against using raw numbers of trade marks and patents filed in China as evidence of brand creation and innovation in the country. As per the USPTO, these numbers may be inflated by the subsidies offered to trade marks and patents. This, the USPTO considers, can lead to filing of fraudulent trade marks and low-quality patents.

In light of the burden caused by bad faith and fraudulent trade mark applications from China, the USPTO has created rules to prevent such applications from flooding its office.

*Source: IP Watchdog, 14 January 2021, available [here](#). The report can be found [here](#).*

#### 4.3 What is obvious-to-try: second medical use patents at stake

The Canadian Federal Court (FC) was recently confronted with the question of assessment of 'obvious-to-try' criteria in secondary medical use patents. The issue emerged in a case between Teva and Pharmascience. Pharmascience allegedly infringed the secondary patents of Teva on

first, its glatiramer acetate (GA) to treat CIS MS patient subgroups and second, its dosage regime patent.

Pharmascience alleged that the second medical use patent of Teva on using GA to treat CIS MS patients by delaying the onset of full MS would have been obvious-to-try. To substantiate its claim, it referred to the summary of Teva's clinical trial and journal articles predicting the success of the trial. The Federal Court agreed with the assessment holding that a skilled person at the priority date would have considered such an application citing current scientific views and the clinical trials of Teva.

As regards the patent on dosage regime of GA via injections three times a week, reducing injection-site irritation, Pharmascience argued that it was obvious to a person skilled in the art. The judge however, disagreed on this and the dosage regime patent of Teva was upheld by the Federal Court.

*Source: IPKitten, 25 January 2021, available [here](#).*

## 5. Trademark

### 5.1 Subjective intent as key determinant to assess bad faith: General Court

In March 2021, the General Court (GC) was asked to make a decision regarding the cancellation of a mark on grounds that the application was made in bad faith.

In 2018, the Cancellation Division had rejected the applicant Tehrani's attempt to register the word sign "Earnest Sewn" for Nice classes 18 and 25 on similar grounds (Blue Gene's earlier held a similar mark).

According to the GC, Tehrani's subjective intention was the key determinant to ascertain whether the application was made in bad faith. An overall assessment of the factual circumstances indicated that Tehrani was aware of and had acknowledged Blue Gene's exclusive rights in an earlier distribution agreement. It then tried to acquire the rights, and made the application following the failure of the said negotiations. According to the GC, Tehrani's only intent was to exclude Blue Gene from using its trade name, an act that is plainly contrary to honest practices in the internal market.

The application was, therefore, rejected on the ground that it was made in bad faith.

*Sources: World IP Review, 21 January 2021, available [here](#). Judgment of the General Court, 20 January 2021, available [here](#).*

### 5.2 CJEU: Husqvarna v Lidl

The CJEU was recently confronted with a case between Husqvarna and Lidl. Husqvarna is the proprietor of a three-dimensional EU mark, registered on 26 January 2000, for the goods "sprinklers for irrigation". From July 2014 until January 2015, Lidl offered for sale a spiral hose set consisting of a spiral hose, a sprinkler nozzle, and a coupling sleeve. Husqvarna alleged that with this offer for sale, Lidl committed an infringement of its trade mark.

Husqvarna brought an action for infringement against Lidl before the Landgericht Düsseldorf. In a counterclaim, Lidl requested the revocation of Husqvarna's mark, alleging non-use by the latter for a continuous period of five years.

The question addressed to the CJEU was the determination of the relevant date in case of a counterclaim for revocation, as provided for in Article 51(1)(a) of Regulation No 207/2009 and Article 58(1)(a) of Regulation 2017/1001. As per the CJEU, “*the relevant date for the purposes of determining whether the continuous five-year period referred to in that provision has ended is the date on which that counterclaim was filed.*”

*Source: Judgment of the CJEU, 17 December 2020, available [here](#).*

### 5.3 BBQLOUMI is not HALLOUMI

In a case before the General Court (GC), it was held that the figurative sign BBQLOUMI registered at the European Union Intellectual Property Office (EUIPO) for Nice Classes 29, 30 and 42, was not confusingly similar with the collective word mark HALLOUMI for Nice Class 29 products (cheese) as suggested by the Foundation for the Protection of Traditional Cheese of Cyprus. The Foundation had opposed the registration of the figurative sign before the EUIPO Board of Appeal.

The GC dismissed the appeal and decided that there was no ground to refuse registration, as there was no likelihood of confusion given the weak distinctiveness of the earlier mark, the low degree of visual similarity between the signs in question, the lack of phonetic and conceptual similarity of the two signs and the varying degrees of similarity for some of the goods covered by the marks at issue (*see paras 31,56, 65 and 73 of the judgment*).

*Source: Judgment of the General Court, 20 January 2021, available [here](#).*

## 6. Invitation to Comment

### EU Commission – Invitation to comment for proposed GI revisions

The Commission invites all interested parties to submit their views on the challenges of the current geographical indication system in the EU and offer recommendations to strengthen the existing framework.

The questionnaire is open until 9 April 2021 and can be filled in at the link below.

*Source: EU Commission, 15 January 2021, available [here](#).*

## 7. TILC’s Internal Events

*As a picture is worth a thousand words, we leave our readers with a screen shot from IP Talks, an internal discussion on the latest in the world of IP by the TILCians.*

