

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 51 NO. 21)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Designs and Trademarks for Dec'21. The Innovator's 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. The TILC team wishes you *a Merry Christmas & a happy and prosperous 2022*.

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 wastes no time to conditionally approve Derichebourg/ Ecore merger

On 17<sup>th</sup> Dec, the European Commission approved the acquisition of Luxembourg-based Groupe Ecore Holding by the French-based metal scrap recycling company Derichebourg Environment. Ecore operates across 78 sites in Europe and handles over 3.3 million metric tons of recycled and recovered materials annually. Derichebourg, formed following a merger between CFF Recycling company and the Penauille Polyservices group, operates across 300 locations in 14 countries.



The merged entity was expected to have an advantage in the recycling and recovery of materials due to its control over some of the most powerful shredders in continental Europe. The proposed acquisition, notified to the Commission on 26<sup>th</sup> Oct, raised significant competition concerns in the markets for “collection and recycling of metal scrap”, “recycling of electrical and electronic equipment scrap” and “commercialisation of shredded ferrous scrap [also known as E40]” in France and neighbouring countries.

To ensure the Commission’s approval, Derichebourg offered the following three commitments. Divestiture of four France-based recycling plants (1); an additional five collection sites situated in the vicinity of the recycling plants, available for purchase at the option of the purchaser (2) and a transitional service agreement for smooth operation of the divested business during the transition period (3).

*Source: European Commission, 17 December 2021, available [here](#). Recycling Today, 3 March 2021, available [here](#). Reuters, 17 December 2021, available [here](#).*

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

### 1.2 Italy fines Amazon €1.13B for abusing market dominance



On 9<sup>th</sup> December, l’Autorità Garante della Concorrenza e del Mercato (AGCM), the Italian competition authority, found that Amazon had abused its dominance as world’s leading e-retail platform by mandating third party sellers to use its logistic service, Fulfillment by Amazon (FBA) to ensure preferential treatment on its platform and get featured on Amazon Prime. Businesses participating in FBA are required to send across their products to Amazon’s fulfillment centres. Amazon logistic services in turn manages the entire logistics for these products. Participation in FBA ensures listing of the product on Amazon

Prime. Selling as a Prime product positively impacts sales as these products are featured on top during key occasions for sales like Prime Day, Black Friday and Cyber Monday.

In light of the foregoing conduct, the AGCM fined Amazon €1.13B for abusing its dominant position. The AGCM also required Amazon to create “fair and non-discriminatory standards” for third-party sellers, irrespective of whether or not they use Amazon’s FBA. To ensure compliance and timely monitoring of the commitments, Amazon is also required to appoint a Monitoring Trustee.

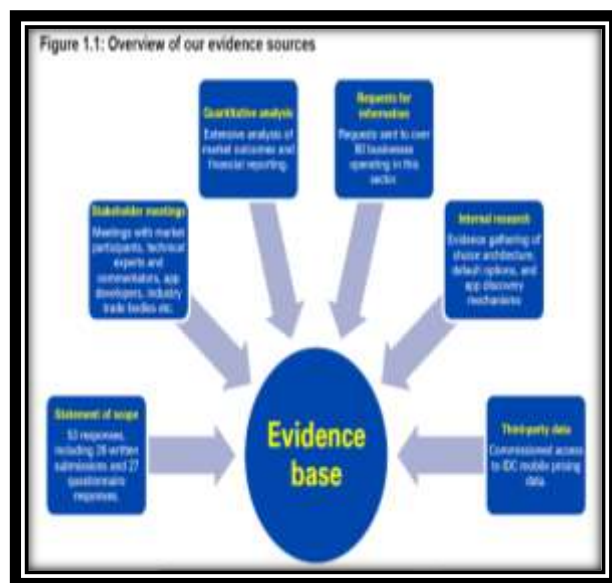
Amazon plans to appeal the AGCM's decision as it considers the decision “unjustified and disproportionate”.

*Source: AGCM, 9 December 2021, available [here](#) (in Italian). Tech Crunch, 9 December 2021, available [here](#). Politico, 9 December 2021, available [here](#).*

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

### 1.3 Competition & Markets Authority publishes interim findings on mobile ecosystems

On 15<sup>th</sup> June, the Competition and Markets Authority (CMA) issued a market study to better understand the mobile ecosystems market in the UK. On 14<sup>th</sup> December, the CMA published its interim report that summarizes its key findings on the following notable issues. The said study defines “mobile ecosystems” as referring to all the devices and services such as smart watches, home security, and lightning that communicate and coordinate with each other in real time to offer enhanced user experience. These devices generally come pre-installed with one app store and one browser. Google’s agreement with device manufacturers, for instance, ensures that its apps are pre-installed across devices (para 20, *Interim Report*)



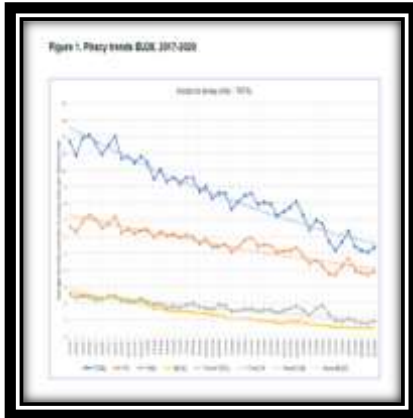
Therefore, each time a consumer makes a decision to purchase a smartphone, he also makes a decision to join one of the two mobile “ecosystems” – either Apple’s iOS operating system (OS) or Google’s Android OS. Apple and Google’s design of their respective app stores and the ranking of search results significantly impacts the probability of success of a given app (paras 9-10). The market remains dominated by these two market players, as initial purchase decision of a particular device determines subsequent purchase decisions. Moreover, “in-app payment systems” and data collected by Apple and Google are notable barriers to market entry. In other words, there exists niche markets for Apple and Google. Once a user purchases one of these OS-compatible devices, subsequent replacement devices are likely to be similar. Apple and Google use some common methods to ensure use of their browsers within their respective ecosystems. These techniques include (but are not limited to) “pre-installation, default settings and choice architecture” (para 50).

The CMA is currently inviting comments on this interim study (*see link in sources*). This will then be followed by a quantitative analysis. Final report, including conclusions and recommendations, shall be published on 14<sup>th</sup> June 2022.

*Source: CMA, 14 December 2021, available [here](#). ZDNet, 15 December 2021, available [here](#).*

## 2. Copyright

### 2.1 EUIPO updates study on copyright infringement on the internet



In December 2021, the European Union Intellectual Property Office (EUIPO) updated its 2019 Report on Online Copyright Infringement in the EU (2021 Report). The 2021 Report is an update to and complements the earlier 2019 Report on online copyright infringement. The Report, in addition, is also an improvement over the earlier report, as it benefits from much larger datasets that in turn offers more reliable insights on the nature, degree and rate of copyright infringement across the EU Member States (MS). The 2021 Study, in addition, also evaluates the impact of the COVID-19 pandemic on the consumption of pirated content.

The Report studies the degree and the drivers of “consumption of copyright infringing digital content” (pirated content in short) across the EU. One of the key objectives of the present study, as well as the earlier 2019 Report, was to “quantify digital piracy” in the EU Member States by undertaking an “econometric analysis of factors” that impact consumers’ decision to use pirated content. Overall, between 2017 to 2020, access to pirated content reduced by over 50 per cent. The quantitative analysis in the Report is based on over 240,000 aggregates for 133 billion accesses across the 28 EU MS between January 2017 to December 2020. UK was included in the study, as UK was a member of the EU, at the time of release of the 2019 Report. The consumption of pirated content varies across MS, with “Austria, Finland, France, Germany, Italy, the Netherlands, Poland, Romania, Spain and the UK” accessing the least amount of pirated content when compared to the EU-average of “5.9 times per month [in 2020]”.

*News & Image Source: EUIPO, December 2021, available [here](#). Kluwer Copyright Blog, 16 December 2021, available [here](#).*

### 2.2 Oh! Oh! Oh!!! Swift’s Shake It Off again

On 9 December, the U.S. district court judge Michael W. Fitzgerald turned down Taylor Swift’s motion to dismiss a copyright infringement lawsuit filed against her by Sean Hall and Nathan Butler, the songwriters of “Playas Gon’ Play”. The song was performed by the New Jersey-based hip hop group 3LW (also known as 3LDub and 2LW) in 2001. The songwriters alleged infringement of their copyright as the lyrics are substantially similar. Whereas, the 3LW’s soundtrack goes as “playas, they gonna play” and “haters, they gonna hate”; Swift’s “Shake It Off” has “Cause the players gonna play, play, play, play, play, and the haters gonna hate, hate, hate, hate, hate”. Swift topped many a charts, including the Billboard Hot 100 with her song “Shake It Off”. Judge Fitzgerald was of the opinion that though there were “notable differences” between the two songs, there were also “substantial similarity” between the two. The case is now set for a jury trial in 2022.



*News & Image Source: Insider, 10 December 2021, available [here](#). Billboard, 9 December 2021, available [here](#).*

## 2.3 Belgian Flemish Media Regulator releases latest protocol for content creators

The Flemish Media Regulator (FMR) recently released the Content Creator Protocol (CCP). With this, the FMR will ensure the implementation of the EU Audio-visual Media Services Directive in Flemish media law. Notable features of this new protocol include more rigorous requirements that Flemish-based online content creators must meet in order to ensure compliance with the media law. As regards “commercial communication on social media”, the content creators must clearly indicate whether s/he has received any benefits or perks from the company. This must be clearly indicated by use of complete words (no acronyms allowed) such as “*advertentie*”, “*reclama*” or “*publiciteit*” [in Flemish] or “*advertising*” or “*publicity*” [in English]. Content creators must also clearly state whether they receive any commission, following a customer’s purchase from a link recommended by them. This must, for example, be clearly stated as follows: “*\*Als je via deze link iets koopt, krig ik daar commissie op*” [in Flemish] or “*\*If you buy something through this link, I will receive a commission*” [in English]. The choice of language – whether English or Flemish or both, should be determined based on the language spoken by the target audience.

As regards communication to minors, any commercial communication targeted at them should be identified clearly. Further, the CCP refrains content creators from placing products, logos and promotions in videos targeted at minors below 12 years of age.

On the issue of hate speech, the CCP clearly forbids communication of content that may incite terrorist offence or hatred or violence based on gender, ethnicity, sexual orientation etc.

The CCP recommends either encryption of content or parental control to ensure that minors are not exposed to pornography or violent videos.

*Source: MSE Today: DLA Piper, 17 December 2021, available [here](#).*

## 3. Design

### 3.1 Arrival’s first electric car

On 16<sup>th</sup> December, Arrival, a UK-based car manufacturer established in 2015, launched its first prototype for an “affordable, purpose-built electric vehicle for ride-hailing drivers”. These cars shall be manufactured locally in micro factories, a new and transformative approach to locally manufacturing cars in factories situated across the globe.

Arrival and Uber collaborated on this project to develop electric cars, designed specifically for the ride-hailing industry. These eco-friendly cars ensure “best possible experience for both drivers and passengers” and offer more visibility and comfort,

with leg room twice as large as a regular car of the same size. Considering the average 45-50,000 kilometres (KM) per year driven on these cars, when compared with the average of 12,000 KM for a regular vehicle, the Arrival car focuses on cost, reliability, driver comfort, safety and convenience.

Following the launch of this prototype, the company is now testing the vehicle for safety and reliability. Commercial manufacturing will first commence in the third quarter of 2023.

*News & Image Source: Arrival, 4 May 2021, available [here](#). GlobeNewswire, 16 December 2021, available [here](#). Smart Transport, 20 December 2021, available [here](#).*



## 4. Patent

### 4.1 2021 review for key patent developments in Europe



This news item offers a bird's eye view of the following two notable developments in the field of patent law for the year 2021 – first, the unified patent court (UPC) and second, the status of artificial intelligence (AI) as an inventor.

First, with each passing day, the UPC, inches towards reality and is expected to become operational by mid-2022 (*cf. Friday Fortnightly Week 40 Ed. 16, News 4.3, available [here](#); Week 44 Ed. 18, News 4.1, available [here](#)*). However, obstacles remain. Examples include constitutional objections filed in Germany (*cf. Friday Fortnightly Week 4 Ed. 4, News 4.1, available [here](#)*) and the potential impact of Brexit on the UPC. Another notable issue remains the candidate judges that remain undetermined to date. Likewise, it remains unclear on how to deal with the issue of central division for the UK. From an academic perspective, questions also emerge on the legality, complexity and absence of democratic debate in the UPC.

The discussion over an AI system as an inventor gained significant attention in 2021, as Australian Federal Court elucidated that “an inventor should be interpreted to mean an agent which invents and this definition can be extend[ed] to AI”. This was in contradistinction to the decision of the US District Court for the Eastern District of Virginia that reached an opposite conclusion around the same time (*cf. Friday Fortnightly Week 38 Ed. 15, News 4.1 and 4.3, available [here](#)*). Prior to these two decisions, South Africa granted a patent to the said AI system, without a substantive examination of the merits thereof.

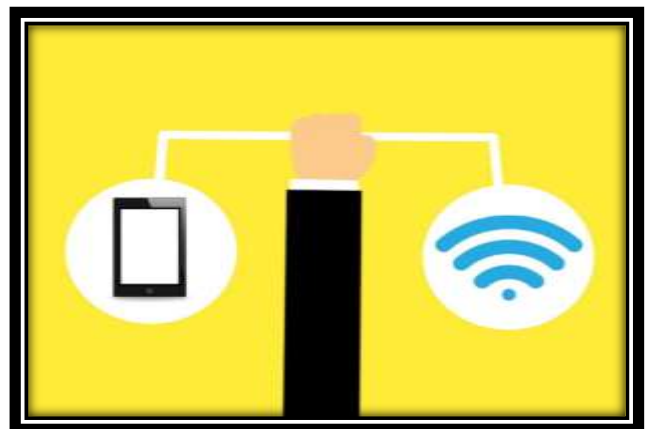
On 21<sup>st</sup> December, the Boards of Appeal (BoA) of the European Patent Office (EPO) further sparked the discussion by confirming in public oral proceedings that an inventor on patent applications must be a human being within the framework of the European Patent Convention. The BoA denied DABUS the status of an inventor on account of lack of legal capacity. The Board also refused the auxiliary request for a natural person to be indicated and to have “the right to the European Patent by virtue of being the owner and creator of” DABUS, as this, in the opinion of the BOA, failed to comply with the requirements of Article 60(1) EPC.

*Source: IPWatchdog, 17 December 2021, available [here](#). Kluwer Patent Blog, 16 December 2021, available [here](#). Press Communiqué of the European Patent Office, 21 December 2021, available [here](#).*

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

### 4.2 Caltech goes after Samsung in Texas for patent infringement

On 3<sup>rd</sup> December, the California Institute of Technology (Caltech) filed a patent infringement case against Samsung in the East Texas Federal Court. Between 2001 and 2011, Caltech filed a number of patents that solve the “Shannon Limit”. Shannon limit is the speed limit for data transfer under pre-specified frequency levels and rate of transmission. Caltech's patents helped overcome this limit by ensuring smooth data transfer through superior coding, decoding and error detection techniques. As per Caltech's complaint,



Samsung infringed these patents by incorporating them in “802.11 n, 802.11 ac and 802.11 ax WiFi standards”, currently used in Samsung’s Galaxy smartphones, tablets, watches televisions and refrigerators.

In a similar suit, filed in 2020, following a successful jury trial, the Los Angeles Federal District Court ordered Broadcom and Apple to pay a royalty of \$1.1 billion to Caltech.

Caltech’s complaint against Samsung has currently been put on hold, till the Federal Circuit rules on appeals by both Apple and Broadcom in the 2020, above-referred case.

*Source: Reuters, 3 December 2021, available [here](#) (available on subscription). Lightreading, 7 December 2021, available [here](#). Complaint, 3 December 2021, available [here](#).*

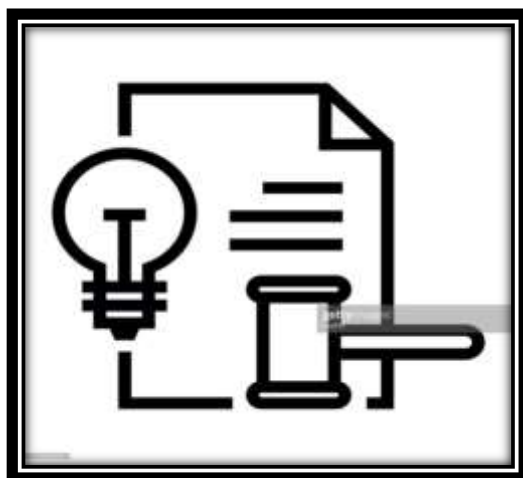
*Image Source: Pxhere, available [here](#).*

#### 4.3 US Federal Circuit turns down Teva’s request to invalidate Corcept’s patent

In its opinion dated 7 December, the US Court of Appeals for the Federal Circuit (CAFC) re-emphasized the importance of distinguishing a question of fact from that of law while assessing the non-obviousness of a patent.

Corcept is the owner of the mifepristone patent, first developed as an anti-progestin in the 1980s. Some two decades later, and following clinical trials, Corcept identified that the patent could also be used for patients with Cushing's syndrome, wherein an adjusted daily dose of 600 mg mifepristone be administered along with a strong CYP3A inhibitor. Based on the study, the U.S. Food and Drug Administration (FDA) approved Corcept’s New Drug Application (NDA). Teva sought post-grant review claiming invalidity of Corcept’s patent due to obviousness. The Patent Trial and Appeal Board (PTAB), opined that Teva failed to establish that a skilled person could have a “reasonable expectation of success for safe co-administration of more than 300 mg of mifepristone with a strong CYP3A inhibitor” (p.5 of the Opinion). Subsequently, Teva appealed before the CAFC. It argued that the PTAB committed the following two legal errors: first, it improperly applied the “reasonable-expectation-of-success analysis” and second, it disregarded the prior-art-range precedents wherein “a claimed range of values overlap the ranges disclosed in the prior art” (p.8 of the Opinion).

CAFC disagreed with Teva on both the counts and reasoned as follows. As regards the first argument, the CAFC re-confirmed that the presence or absence of a “reasonable-expectation-of-success” is a question of fact supported by substantial evidence whereas “[w]hether the Board applied *the correct standard in assessing* reasonable expectation of success” is a question



of law. In this case, the PTAB correctly “frame[d] the reasonable expectation of success analysis around th[e] specific dosage of mifepristone (for safe administration)” and Teva failed to prove such a reasonable expectation of success in achieving the claimed “600 mg dosage”. As for the second argument, the CAFC opined that “the scope and content of the prior art” is also a question of fact, “reviewed for substantial evidence”. In this regard, Teva did not prove “the general working conditions disclosed in the prior art encompass the claimed invention”. Accordingly, as the PTAB had applied the “appropriate legal standard” on both the issues, the CAFC affirmed the decision of the PTAB.

*Source: JDSUPRA, 17 December 2021, available [here](#). CAFC opinion, 7 December 2021, available [here](#).*

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

## 5. Trademark

### 5.1 Hermès asks Rothschild to stop infringing its IPRs in the metaverse

Mason Rothschild is a digital artists and entrepreneur who has created non-fungible tokens (NFT) based on Hermès' well-renowned diamond-studded and crocodile skin Birkin bags. Mason's works have traded about 700,000 euros (200 Ethereum) in sales from his Birkin's NFT collection alone.

On 10 December, Hermès reached out to Mason asking him to stop infringing its intellectual property rights, notably copyright and trade mark rights, by creating Birkin bags in the metaverse. Hermès officially stated that

it neither authorized nor permitted Mason to create the NFTs based on the Birkin bag. MetaBirkins cause the risk of confusion to the general public and believe that they are Hermès' NFTs. Moreover, the company had so far refrained from entering the NFT market as it treasures the "tangible expression of handcrafted physical objects" as distinct from a digital metaverse.

*News: The Irish Times, 10 December 2021, available [here](#). The Financial Times, 10 December 2021, available [here](#) (available on subscription).*

*Image source: Mario Anzuoni/ Reuters, available [here](#).*



### 5.2 General Court clarifies test for protection of signs of particular public interest

In its decision dated 1<sup>st</sup> December, the General Court (GC) considered the relationship between Art.7(1)(h) and Art.7(1)(i) of the European Union Trade Mark Regulation (EUTMR). Both the articles concern the registration of official symbols as trademarks. Whereas, the former protects symbols, such as flags, that are registered with the World Intellectual Property Organisation (WIPO); the latter applies to signs, like euro, that are of particular public interest, but not registered with the WIPO.

In 2011, Gabriele Schmid successfully applied at the EUIPO to register the official EU symbol for protected geographical indication (PGI) for the pumpkin seed oil (Class 29). Following an application by the Styrian Regional Chamber of Agriculture and Forestry, Austria, in 2019, the Cancellation Division declared the mark as invalid on the basis of Art.7(1)(i) EUTMR. On appeal, the Board of Appeal (BoA) found that the sign was of particular public interest as it established a distinctive link with one of the characteristics carried out by an intergovernmental organization. As Schmid's mark depicted the PGI symbol and she had not received any permission to use the same, the BoA upheld the decision of the Cancellation Division.

Schmidt then appealed before the GC. The GC elaborated on the difference between Art.7(1)(h) and Art.7(1)(i). As per the GC, to invoke Art.7(1)(h), the disputed mark must contain an identical reproduction of the protected sign and misleadingly suggest that there is some connection to the authority using





the official sign. For Art.7(1)(i) to apply, the trade mark must mislead the public as to the origin of the goods, making them believe that the goods or services originate from the authority to which the sign (or a reproduction thereof) refers to. The protection also extends to cases whereby the public is misled to believe that either the authority gave its permission for use or that they (the user and the authority) are somehow connected to each other. In the opinion of the GC, the protection for signs of public interest is not absolute and the two signs need to be examined against each other in order to determine the overall impression on the relevant public. As the BoA had failed to conduct the foregoing examination, the GC annulled its decision.

*News & Image Source: General Court, 1 December 2021, available [here](#). IPKat, December 17 2021, available [here](#).*

### 5.3 Chanel diffuses claims of genuine use before Israeli Supreme Court

The case dates back to 2019, when Chanel first sued the Israel-based company, ScentWish, a company that repackages and sells Chanel's perfumes in 8 ml package with Chanel's original brand name and a disclaimer.

Section 47 of Israeli Trademarks Ordinance allows companies, such as ScentWish, to engage in such trade as "genuine use", provided the following three criteria are met: first, the use must not be misleading; second, it must be essential and third, that it must be reasonable and fairly proportional.

In its decision dt. 31<sup>st</sup> October, the Israeli Supreme Court was of the opinion that ScentWish's use failed to meet the foregoing criteria on the following grounds. First, re-bottling is likely to change the chemical properties. The consumer may, however, be under the impression that re-bottled perfumes retain the properties of the original product, and may accordingly be misled as regards its properties, even when s/he is not misled about the source of the product. Second, as Chanel is a well-known and registered trade mark, monetary damages resulting from use by ScentWish is unfair to Chanel, the owner of the trade mark. Third, Chanel's image is adversely impacted and damaged following ScentWish's use of generic packaging.

The case is now remanded to the district court to assess whether re-packaging does indeed alter the properties of the perfume.

*News: Kluwer Trademark Blog, 2<sup>nd</sup> December 2021, available [here](#).*

*Image Source: Chanel N5, available [here](#).*

