

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 6 NO. 5)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for January and February 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 Bundeskartellamt fines steel forging cartel

The German Bundeskartellamt (Federal Cartel Office, FCO), has fined three steel forging companies and two senior staff members over €35 million for exchange of sensitive information. As the companies extensively co-operated during the FCO's proceedings, the BKA entered a settlement agreement with the parties and significantly reduced the fines.

The FCO's investigation indicated that senior staff of the companies met regularly to exchange commercially sensitive information. The anti-competitive exchange of information, which took place between October 2002 and December 2016, was aimed at allowing the companies to increase the cost of their steel products without fearing an undercut by their competitors.

*Source: Bundeskartellamt, 4 February 2021, available [here](#).*

### 1.2 Latvian competition watchdog fines Latvian Rails for abuse of dominance

The Competition Council of Latvia (CCL) has fined the state-owned company Latvijas Dzeleceļi (LDz) €5.7 million for abuse of its dominant position. At the time of the alleged conduct, LDz was a dominant player in the Latvian freight transport market with a market share ranging between 70 and 80 per cent. LDz's practices included unjustified charges for wagon downtime and price discrimination between its competitors' and its own customers.

*Source: Competition Council of Latvia, 3 February 2021, available [here](#).*

## 2. Copyright

### 2.1 Japan: Goldfish in public telephone boxes

In December 2000, N. Yamamoto, a Japanese contemporary artist, created an artwork comprising of a goldfish in a phone booth. Yamamoto's work, in turn, inspired the "Goldfish Club" at Kyoto University of Art and Design to create its own version of the artwork in October 2011. Between 2014 and 2018, the University's work was installed in the shopping street Yamatokoriyama. Yamamoto filed a copyright infringement suit in 2018 demanding that the students and the University pay him 3.3 million ¥ (€ 26.000 app.), as their work was inspired



by his original work. This, he said, was evident in light of the undeniable similarity between the two creations.

In January 2021, the Osaka High Court, reversing the decision of the Nara District Court, awarded monetary damages worth 550.000¥ (€ 5.200) to Yamamoto.

The second work was taken down from the shopping street in 2018, prior to the initiation of the legal action.

*Sources: IPKitten, 27 January 2021, available [here](#). IPStork, 27 January 2021, available [here](#).  
Image Source: The Japan Times, 14 January 2021, available [here](#).*

## 2.2 Activision sued over a Call of Duty character

Photographer-writer Clayton Haugen recently filed a suit in Texas District Court. As per Haugen, his character “Cade Janus” was copied by the video game giant Activision Blizzard in 2019 to create “Mara”, a character in the Call of Duty: Modern Warfare. As per the Complaint, Activision hired the same model, same makeup artist and same costume to create the character.

The disputed 2019 game is one of the most popular of the Call of Duty series and has sold over 30 million copies worldwide.



*Sources: The complaint filed with the Court on 2 February 2021, available [here](#). World IP Review, 5 February 2021, available [here](#). EuroGamer, 4 February 2021, available [here](#).  
Image Source : Complaint dt. 02.02.2021, available [here](#).*

## 2.3 Viral sea shanties on TikTok: when public domain aids contemporary creativity

In January 2021, a sea shanty (popular song format amongst merchant vessels in the 18th and 19th centuries) got extremely popular on the social platform TikTok, thanks to a 26-year-old Scottish tik toker, Nathan Evans.

While some argue that the popular song, “the Wellerman”, is not really a sea shanty, but rather a whaling ballad; others focus on the collaborative creativity of public domain works. Remarkably, the TikTok trend led to thousands of interactions and millions of views, with each contributor providing their own original and creative input.

This phenomenon serves to remind us that creativity need not be expensive or inaccessible; and public domain can well foster contemporary creativity.

*Sources: Business Insider, 31 January 2021, available [here](#). Business Insider, 15 January 2021, available [here](#). The New York Times, 13 January 2021, available [here](#).*

# 3. Patent

## 3.1 Concerns over weakening automatic injunctions in Germany alarm industrial giants

As amendments to the patent law of Germany - such as weakening of the automatic injunction procedure - are debated in the Bundestag, a group of large technology corporations penned down their concerns in an open letter.

The Open Letter expresses fear over the proposed legislation stating that it can weaken the patent system by limiting the injunctive relief available to patentees.

The German Federal Government in turn, has assured the industry that it does not intend to amend the injunction; rather, it only wishes to clarify the existing case law.

The companies have presented additional demands, including monetary compensation to the patentees without reservation. This, in the opinion of the companies, will be pro-innovation, should the proposed amendments, such as restriction of automatic injunctions, enter force.

*Source: JUVE Patent, 4 February 2021, available [here](#).*

### 3.2 2021 Changes to the EPO Guidelines for examination

The European Patent Office (EPO) has published its amended Guidelines, that enter force on 1st March 2021. One notable change is the change of language to a more gender-neutral form.

To add speed and efficiency, the updated Guidelines call for informal online discussions with the EPO examiners, should there be a subsequent need for amendment of an application's description. Earlier, the examiners could propose such amendments only in writing.

The Guidelines also seek to re-structure the framework assessment of unity by reorganizing the section on grouping inventions. They now offer a section that details the minimum reasoning that examiners are expected to provide, should lack of unity be asserted.

A newly introduced section sets out in-depth issues dealing with antibody patentability.

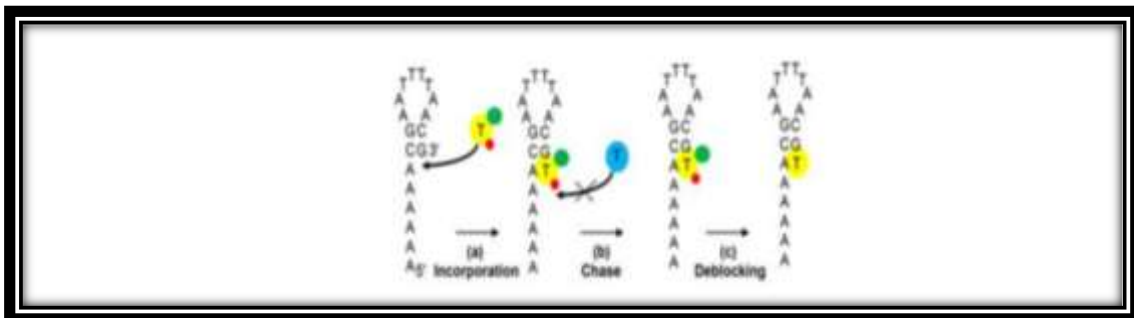
Other interesting additions include the possibility of remote oral proceedings and the patentability of database management systems.

*Sources: Amended EPO Guidelines, in force from 1 March 2021, available [here](#). Kluwer Patent Blog, 2 February 2021, available [here](#).*

### 3.3 Questions of sufficiency and chocolate teapots

In a patent dispute between Illumina and MGI, the English High Court was required to interpret the issue of sufficiency. MGI argued that Illumina's patents were obvious and thus, invalid. The key contention was whether the common general knowledge of a skilled person would also include reversible chain terminators ("RCT"), which had earlier been disclosed in a journal article, to improve Sanger sequencing. The Court evaluated the evidence on record, and reached the conclusion that the use of RCTs in Sanger sequencing was not obvious to a skilled person on the priority date.

The judge also rejected MGI's claim of insufficiency referring to the earlier case law of *Regeneron* which held that patent could extend to a range of products, that can be achieved via manipulation but without any further inventive step. The judge added that even if the range could be improved by a future invention, that still would not make the patent specification insufficient. The decision offered an analogy to a patent on a teapot with a non-drip spout, describing how the claim was on the shape of the spout with the material of the teapot being irrelevant. Applying this analogy to the case at hand, the judge concluded that based on the *Regeneron* principle, the claims of Illumina were not invalid.



*News & Image Source: Judgment of the High Court of Justice of England and Wales, 20 January 2021, available [here](#). IPKitten, 5 February 2021, available [here](#).*

## 4. Trademark

### 4.1 Who could have (fore)seen this?

In a recent case before the General Court (GC), two signs registered for Nice Class 5 (pharmaceutical preparations etc.) were under consideration. In 2017, Olimp Laboratories filed for registration of the figurative sign “Hydrovision” with the European Union Intellectual Property Office (EUIPO). This was opposed by Omnivision on grounds that an earlier word mark for “Hylo-Vision” had already been registered earlier in 2016.

The Opposition Division held that as there was a likelihood of confusion between the two signs, Hydrovision could not be registered. The Board of Appeal’s upheld the decision of the division.

On appeal, the GC, made a standard assessment for the following aspects: the relevant public, a comparison of the goods as well as a comparison of the signs (visual, phonetic, and conceptual), the distinctive character of the earlier mark and an overall assessment of the likelihood of confusion between the marks. The GC held that the assessment indicated that the registration be rejected, as there remained a likelihood of confusion between the two marks for the relevant public.

*Source: Judgment of the General Court, 27 January 2021, available [here](#).*

### 4.2 “Eggy Food” – It’s in the name

In January, the GC had to assess the registration of the figurative mark “Eggy Food” for Nice Classes 5, 29, 30, 32 (roughly: egg-containing products), as requested by the company Eggy Food. Earlier, the EUIPO had refused to register the mark on the basis of absolute grounds for refusal, such as the descriptive nature of the mark and a lack of distinctiveness.



The applicant appealed the decision of the EUIPO arguing that the shape of a half-oval did not quite refer to an egg, but instead, be read as a “C” or “looked at” as a curve. Moreover, as per the applicant, the mark left room for several interpretations, based on the different meanings of “eggy” in the English language.

The court disagreed, and held that the mark cannot be registered not only on grounds of lack of distinctiveness as held by the EUIPO, but also on account of the descriptiveness of the mark with respect to the product. Since “Eggy Food” was to be registered for categories of foodstuff containing egg, it was considered vital that the mark’s description of qualities of the product were an absolute ground for refusal for registration of the said mark.

*News & Image Source: Judgment of the General Court, 27 January 2021, available [here](#).*

### 4.3 Fleet Feet v Nike: US case

The athletic sportswear companies Fleet Feet and Nike contested the infringement of Fleet Feet’s registered trademarks - “Change Everything” and “Running Changes Everything” - as used in several advertising campaigns. Fleet Feet argued before the United States Court of Appeal (CoA) that Nike infringed these trademarks by using “Sport Changes Everything” in its

campaigns. Following Fleet Feet's request for injunctions against Nike, the latter promptly discontinued the infringing action. Nike, however, argued that the following two issues remained unaddressed: *first*, the "continued restraint on Nike's speech" from the order's prohibition of any designation "confusingly similar" to Fleet Feet's trademarks; and *second*, Nike's potential recovery on the injunction bond. As per the Court, there "simply isn't any injury for a court to redress", as Nike had failed to identify any curtailment to the freedom of speech following the preliminary injunction. The CoA also held that in case the District Court subsequently found that Nike's campaign did in fact infringe the mark, the injunction nonetheless, was to be considered harmless. Hence, the CoA confirmed that it need not vacate the preliminary injunction order in a case pending before the District Court.

*Source: Judgment of the United States Court of Appeal, 26 January 2021, available [here](#).*

## 5. Events and Invitations to comment

### 5.1 CMA – Call for information concerning algorithms

The Competition and Markets Authority (CMA), the competition regulator in the United Kingdom (UK), has opened a consultation into harms caused by algorithms. CMA's preliminary position is outlined in its recent paper 'Algorithms: How they can reduce competition and harm consumers'.

**When and where?** You may comment via the email address provided on the link below until 16 March 2021.

*Source: Competition and Markets Authority, 19 January 2021, available [here](#).*

### 5.2 IP Talk: An IP Discussion Initiative by the Innovation Legal Aid Clinic

**The topic this month:** Conflict over a silhouette print, Eros vs We Wore What

**When and where?** Second 'IP Talk' scheduled for **24.Feb.21 at 11:30hrs (CET) via Zoom**

**Zoom Meeting ID:** 970 7027 8005 **Password:** 991940

To know more, kindly email to:

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