

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 8 NO. 6)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for 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 Google fined over hotel rankings by French Competition Authority

Google Ireland and Google France have been ordered to pay a fine of €1.1 million. The fine follows an investigation by the French finance ministry and the FCA. The investigation launched in 2019, found that Google's hotel ranking practices misled consumers.

Google had already corrected its misleading practices in September 2019.

Sources: Reuters, 15 February 2021, available [here](#). The original decision of 15 February 2021 is available [here](#).

1.2 Facebook fined over improper notice to users regarding data collection

The Italian Competition and Market Authority has fined Facebook €7 million for failing to comply with an earlier notice to terminate the unauthorized commercial use of user data.

In November 2018, the Authority found that Facebook was misleading its consumers by not properly informing them about its data collection practices and the subsequent use of the data collected. In addition to the fine, Facebook was also ordered to publish an amended statement on its Italian homepage as well as a statement on the personal page of each Italian user. The Authority's investigation indicated that Facebook had neither published the declaration nor did it discontinue the misleading practices.

Source: Italian Competition and Market Authority, 17 February 2021, available [here](#).

1.3 The epic Epic versus Apple grapple continues in the EU

Epic Games recently filed an antitrust complaint against Apple with the European Commission. The complaint alleges that Apple's practice of charging a 30% fee on App Store purchases is anti-competitive. Epic Games claims that Apple has "eliminated competition in app distribution and payment processes".

The complaint forms part of a series of actions initiated by Epic Games against Apple. Legal proceedings are already underway in the US and Australia, and another complaint was also filed before the UK's competition authority, which was dismissed earlier this week.

Sources: Epic Games News, 17 February 2021, available [here](#). Reuters, 17 February 2021, available [here](#).

2. Copyright

2.1 French Supreme Court: Tulip chair not copyright protected

In October 2020, the French Supreme Court ruled that the "tulip" chair created by Eero Saarinen and distributed by the US furniture company Knoll did not enjoy copyright protection in France. The chair cannot be protected under copyright law in the US. This is because utilitarian objects are excluded from such protection, unless they also contain separable artistic elements. The Court relied on Article 2(7) of the Berne Convention, the reciprocity rule, to reach its finding that the chair was ineligible for protection in France.

Sources: Cour de Cassation, 7 October 2020, available [here](#). Kluwer Copyright Blog, 8 February 2021, available [here](#).

2.2 Copyright protection of street art graffiti in Spain

On 14 February 2021, a Spanish artist painted King Emeritus Juan Carlos I on the walls of Plaça de les Tres Xemeneias in Barcelona. The graffiti depicted the King with his face surrounded by expressions of support to a rapper, who had, not long ago, been convicted of glorifying terrorism and insulting the Spanish crown. The graffiti was quickly washed away by the municipal cleaning team.

It is established law that the temporary nature of graffiti do not prevent their protection in Spain, as Spanish copyright law affords protection to all original creations irrespective of the way or type of expression.

Carlos' case reignites the debate regarding the right of integrity under Article 6bis of the Berne Convention, particularly when such works are political in expression.

Sources: El País, 9 February 2021, available [here](#). IPKitten, 17 February 2021, available [here](#).

2.3 Leaked letters raise questions of copyright over electronic drafts on private phones

In February 2019, Meghan Markle, Duchess of Sussex, brought a claim over publication in a UK tabloid of five articles including eighty-eight excerpts from a letter that she sent to her father. The letters dealt with their relationship. While hearing the claim, the judge considered that the articles interfered with the Duchess' "reasonable expectation that the contents of the Letter would not be published by the defendant". Regarding copyright infringement, the judge was of the opinion that the letter was not the result of mere mechanical recital of facts. Further, reproduction of a substantial part of the letter by the tabloid, in the opinion of the English Court, could not be considered fair dealing for the purposes of reporting current events, save for one specific paragraph that benefitted from the exception.

Sources: Judgment of the High Court of Justice of England and Wales, 11 February 2021, available [here](#). IP Watchdog, 18 February 2021, available [here](#).

3. Patents

3.1 EPO's COVID-19 deadline extension under examination

An applicant, who had filed for a European patent but had missed multiple deadlines between 2018 and 2020, attempted to rely on the deadline extension announced by the EPO in light to the COVID-19 pandemic before the Board of Appeal. The appellant had failed to state its reason for the delay in filing, while making only general reference to COVID-19.

When considering the admissibility of the application, the Board opined that the notice in the Official Journal had created legitimate expectations that the extension of the deadlines would be permitted irrespective of whether the notice was justified.

However, when it came to the substance of the case, the applicant failed to pay further processing fees in due time and the Board of Appeal thus, refused to consider the request for re-establishment.

Sources: Decision of the Board of Appeal, 22 January 2021, available [here](#). IPKitten, 15 February 2021, available [here](#).

3.2 A step towards the EPO Strategic Plan 2023

In an effort to reduce the inefficiencies and costs arising from differing standards in national patent systems and at the EPO, Member States have agreed on common practices in the area of examination of unity of invention and designation of the inventor.

Closer alignment of administrative practices is anticipated to improve foreseeability and legal certainty in the European patent system. It also promises to offer more streamlined, much simpler and cost-efficient proceedings for prospective applicants. The agreement is part of the EPO's Strategic Plan 2023 that includes convergence of selected areas of practice between EPO and the national patent offices. The harmonization of certain aspects of the patent administration procedure are expected to enable uniform service for users of patent systems across Europe.

Source: European Patent Office, 12 February 2021, available [here](#).

3.3 A heir to the Crocs dispute

In a US court battle over an infringement of a design patent on Crocs, the issue of successor-in-interest came under scrutiny. This was on account of bankruptcy of the initial challenger of the Crocs patent and the subsequent transfer of rights to a new owner including the invalidity claim asserted by the (now bankrupt) erstwhile owner in the infringement action.

The Patent Trial and Appeal Board (PTAB) rejected the appeal of the new owner. The PTAB held that it was neither a real party-in-interest nor a requester in the instant inter partes re-examination proceedings. The new owner filed a motion to substitute the Court of Appeal for the Federal Circuit, which in turn held that the PTAB had erred in failing to substitute the new owner for the old one. The Crocs patent thus stands to be challenged by a new party, and the proceedings may continue at the PTAB.

Sources: Judgment of the Federal Circuit, 11 February 2021, available [here](#). IP Watchdog, 17 February 2021, available [here](#).

4. Trademarks

4.1 Absolute grounds for refusal: Is LICHTYOGA a type of yoga?

Recently, the General Court of the European Union (GC) had to rule on the registrability of a European Union Trade Mark "LICHTYOGA" (in English: light yoga) for Nice Classes 9, 16 and 41. The mark was refused on the basis of descriptiveness of goods and services. The applicant appealed against this decision and the Board of Appeal partially annulled the decision for some goods and services in Classes 9 and 41.

As the applicant disagreed with the outcome, he appealed to the GC. Despite the applicant's submission that the word "LICHTYOGA" be interpreted as a word of fantasy and not be connected to the exercise of any particular type of yoga, the GC held that the term was descriptive. The reasoning was principally based on the finding that the word "LICHT" would suggest a yoga therapy that benefits from the use of light. The use of "LICHTYOGA" must thus be kept free and available to the public so that yoga providers can adequately define and advertise their services.

Source: Judgment of the General Court, 10 February 2021, available [here](#).

4.2 Relative grounds for refusal: SKY v Skylife

The GC was recently presented with proceedings between two registered European word marks. In October 2006, the applicant requested registration for the mark “skylife” for Nice Class 41. Sky Broadcasting, who had earlier in 2003 registered the mark “SKY” for services in the same Nice Class 41, applied for a declaration of invalidity of the “skylife” mark. The Cancellation Division at the EUIPO granted this request, with a small exception for translation services. The applicant appealed against this decision. Following dismissal by the Board of Appeal, the matter came up before the GC.



The GC examined the likelihood of confusion between the marks, including phonetic and visual similarities. It was held that there was a high degree of similarity between the marks. Since the mark referred to identical services, it was highly likely to confuse the public that the services originated from the same undertaking. The GC reiterated that while assessing validity, only description of the goods/services for which protection is sought is relevant and not, as the applicant argued, the actual or intended use of the mark.

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

4.3 E-commerce and territoriality of trade marks: Lifestyle Equity v Amazon UK

The High Court of England recently adjudicated a dispute in relation to license to sell goods of the brand BHPC based on split trade mark ownership. The US business owned the trade mark rights to sell BHPC goods in the US. It tried to sell the same by listing the products on Amazon’s US website. The claimant owned the trade mark rights to sell BHPC goods in UK and EU.

The High Court agreed with Amazon’s arguments and dismissed the claim. In its defence, Amazon argued that the US site did not infringe the rights of the claimant. This was in light of the fact that the US website was only aimed at US-based consumers, and that this was obvious as the UK/EU and US access distinct websites. Further, the EU/UK customers must pay additional delivery and importation charges for the US product. The Court stressed that the US website did not specifically target consumers in the UK/EU and highlighted that sales thereof, were finalized in the US. The Court also made reference to the following additional factors to be looked at in situations such as the one at hand: What does the website’s design aim at – In other words, who are the target audience of the website? Are consumers required to pay delivery or import fees? Where does the sales in question take place? The Court’s guidance on factors will surely be helpful in deciding similar cases in the future.

Source: Judgment of the High Court of Justice of England and Wales, 27 January 2021, available [here](#).