

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 4 NO. 23)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and Events for January 2022.

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.

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.

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 publishes Final Report on consumer IoT sector inquiry



On 20th January, the Commission published the final report on the consumer Internet of Things (IoT) sector inquiry. As a background, the Commission first launched the sector inquiry on 16th June 2020. Preliminary findings were published on 9th June 2021. Based on inputs provided by various stakeholders between June and September 2021, the Commission drafted its final report. The final report further develops and discusses the following three key concerns as identified earlier in the Preliminary Report. First, the nature and characteristics of the consumer IoT

market; second, the dynamics of competition in these markets and third, areas of concern as identified by different stakeholders [For a discussion on the Preliminary Report, kindly see [Friday Fortnightly Ed. 2021 Week 24 No. 14](#) News Item 1.1 ‘Commission publishes Preliminary Report of consumer Internet of Things sector inquiry’]. The Report discusses the following four notable areas of concern. First, the exclusivity and tying practices of voice assistants; second, the position of competitive advantage enjoyed by voice assistants and smart device manufacturers; third, data advantage of voice assistants and fourth, interoperability concerns on account of the widespread prevalence of proprietary technology, that often times leads to *de facto* standardization and limits the integration with third party service providers. As regards standards, the Report finds that the devices and services employ a combination of open standards and proprietary technology. Currently, different consumer IoT companies use diverse methods to collect and use data. The market for voice assistants is led by a handful of notable players. Barriers to this market remain particularly high, and stakeholders anticipate no entry in the market for “general purpose voice assistants” in the near future. Google, Amazon and Apple, three key players in this relevant market, largely unilaterally control the integration of other products and services with their offerings.

The Commission’s findings in this final report are expected to guide its further enforcement activities [For a discussion on initiation of proceedings against Google’s voice assistant, kindly see [Friday Fortnightly Ed. 2021 Week 38 No.15](#) News Item 1.1 ‘Google’s voice assistant receives an antitrust call from the European Commission’].

Sources: Report of the Commission IoT, 20 January 2022, available [here](#). Commission Press Release, 20 January 2022, available [here](#). Competition Policy International, 20 January 2022, available [here](#).

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

1.2 Commission prohibits merger between Daewoo and Hyundai

On 13th January, the Commission prohibited the proposed merger between Daewoo Shipbuilding & Marine Engineering Company, Ltd (DSME) and Hyundai Heavy Industries Holdings (HHIH). Both DSME and HHIH are South Korea-based and are two of three world’s leading shipbuilding companies. The Commission’s preliminary assessment indicated concerns in the market for the construction of large liquified natural gas (LNG) carriers (LLNGCs).

Large LNG’s employ complex and advanced manufacturing techniques as they carry large quantities of LNG (145,000 m³ and above) at sub-zero temperatures (minus 162° Celsius). In

the past five years, the worldwide demand for large LNGs totaled about € 40 billion. EU-based customers accounted for over half of this total worldwide demand.

The Commission's investigation indicated that the merger would have led to further concentration in the already highly concentrated market leaving customers with only one alternate supplier for large LNGs. The coronavirus pandemic did not diminish the demand for large LNGs and LNGs. In fact, the demand was expected to grow further in the near future. This "projected market demand" could not be effectively met by other existing competitors in the market. Further, in light of the highly sophisticated, advanced and complex manufacturing process for large LNG carriers, the market had high entry barriers. The buyers had limited choices as they were "generally fragmented" and made "typically small orders".



As the parties failed to formally offer any remedies, the Commission following a year and a half long in-depth investigation, finally announced its prohibition decision.

Chinese State Administration for Market Regulation (SAMR) and Singapore's Competition and Consumer Commission (CCCS) had earlier offered their approval to the deal. The merger is currently also reviewed by South Korea and Japan.

Sources: Commission Press Release, 13 January 2022, available [here](#). Gcaptain, 13 January 2022, available [here](#). Offshore Energy, 13 January 2022, available [here](#).

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

1.3 US Senate Judiciary Committee approves legislation to regulate online platforms



On 20th January, Senator Amy Klobuchar sponsored bill, American Innovation and Choice Online Act, was finally approved by the US Senate Judiciary Committee. The bill prohibits self-preferencing and other potentially anti-competitive conduct that disadvantages rivals and discriminates against competing service providers by dominant platforms, the largest online platforms. Self-preferencing refers to a conduct whereby a platform offers preference and priority to its own products and services over competing service providers, even if the latter are superior in

quality and performance. Platforms that meet one of the following criteria, shall be subject to the provisions of the Bill. The platform has one billion plus worldwide monthly users (1) or enjoys \$ 550 billion in net annual sales (2) or has a market capitalization of \$ 550 billion (3). The first two criteria were a last-minute addition to address the criticism that the legislation offered an "advantage to foreign digital firms". This new criterion is expected to bring large Chinese platforms like ByteDanceLtd's TikTok and Tencent Holdings Ltd's WeChat within the scope of the Bill.

Sources: Bloomberg, 20 January 2022, available [here](#). CNBC, 14 October 2021, available [here](#).

Source and Image Source: Asian Tech Press, 20 January 2022, available [here](#).

2. Copyright

2.1 Designer sues LEGO for copyright infringement

In December 2021, artist, James Concannon filed a lawsuit in Connecticut district court against LEGO for “intentionally cop[y]ing the Concannon Jacket [to develop] the Fab 5 Loft set”.

In 2018, Concannon designed and gifted his friend, Antoni Porowski, a “one-of-a-kind” jacket that the latter wore on “Queer Eye”. The jacket featuring his original work, and composed and arranged in “Concannon’s signature propaganda-infused aesthetic”, is registered with the United States Copyright Office.

Concannon never offered his consent, either express or implied, to LEGO or to the producers of Queer Eye to use these designer jackets. LEGO released the Fab 5 Loft set in October 2020 at a retail price of US\$99.99. The set comprises of “mini-figures of the Fab Five guys, Karamo, Jonathan, Antoni, Bobby, Tan and dog Bruley, and recreates the group’s original Atlanta loft”.

Aggrieved that LEGO neither took his permission, nor offered any credit to him as the designer of the signature jackets, Concannon filed a complaint with the US district court of Connecticut. *Sources: Out, 18 January 2022, available [here](#). The Hill, 18 January 2022, available [here](#). The Guardian, 17 January 2022, available [here](#).*

Image source: Out via Instagram, available [here](#).



2.2 Chamber of Commerce has no database right in company register: says Dutch court

On 22 December 2021, Rechtbank Midden-Nederland, the Dutch district court of Midden Netherlands, decided in favour of Vereniging voor zakelijke b2b informatie (VVZBI), Association for business-to-business information, over to access to Kamer van Koophandel’s (KvK) database. VVZBI, an Amsterdam-based association founded by six leading business information providers - Dun & Bradstreet, Credit Device, Creditsafe, Company.info, Graydon and DR3DATA - represents businesses that offer credit ratings and other commercial information to customers. KvK is an administrative body, funded by Ministerie van Economische Zaken en Klimaat, the Dutch Ministry of Economic Affairs and Climate Policy. VVZBI filed the lawsuit, as KvK updated its terms in 2020, wherein it stated that in light of the latter’s *sui generis* database rights under Article 7(1) of the 1996 Database Directive, users must first obtain a consent from it in order to commercially use the information therein.

The Dutch court referring to the Court of Justice of the European Union’s (CJEU) decision in CV-Online Latvia, was of the opinion that for database rights to arise, substantial investment may either be qualitative and/or quantitative (paras 3.13 and 3.14 of the decision).



In light of the annual investments to the tune of €100 million by the KvK to maintain this database, the requirement of substantial investment was met. However, this investment was made to fulfill a statutory mandate and it was not a result of any economic motive. As requirements for economic justification were not met, and any follow-on losses were recouped by the government, KvK failed to benefit from database rights and refrained from exercising them within the meaning of Article 5 of the 1996 Database Directive. KvK was also required to pay VVZBI's 67,000 euros as litigation costs.

Source: Dutch district court, 22nd December 2021, available [here](#). Altares, 29th December 2021, available [here](#). IPKat, 17th January 2022, available [here](#).

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

2.3 Spice DAO purchases NFT (& Copyright dilemma) for € 2.6 million

On 15th January, Spice DAO, a non-fungible token (NFT)-driven group of crypto investors officially announced on their Twitter account (@TheSPinceDAO) that they had won the auction of Alejandro Jodorowsky's adaptation of the 1965 Frank Herbert authored science fiction work, Dune for € 2.66 million.

Following this successful auction, Spice DAO announced its intentions to convert each page of the book in an NFT collection. The value of the auction apparently emerges from the fact that today there are just 20 copies of this adaptation available worldwide. Interestingly, Spice DAO did not stop here. It officially outlined three-fold objectives with this purchase. First, to make the book publicly available in a legally permissible manner. Second, to create an original limited edition animated series inspired by the book, and eventually sell it to a streaming service. Third, to create derivative projects based upon the work within the community.



Shortly following this announcement, renowned copyright scholars questioned the wisdom of Spice DAO, as purchase of a copy neither translates into ownership rights nor raises an expectation within the fair use defense on grounds that the high purchase price offers a reasonable expectation to make the work widely available.

Source: The Verge, 17th January 2022, available [here](#). Interesting Engineering, 18th January 2022, available [here](#). Slash Dot, 18th January 2022, available [here](#).

Image source: Unsplash (Daniel Olah), available [here](#).

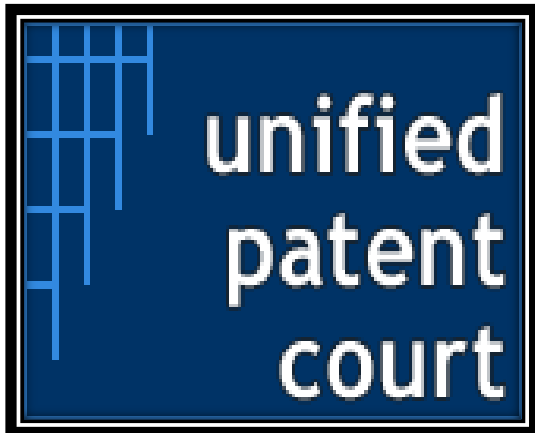
3. Patent

3.1 Green light for the Unified Patent Court, judges to be interviewed in Q2, 2022

On 19th January, Austria, also the first country to ratify the Unified Patent Court (UPC) Agreement, deposited its instrument of ratification of the Protocol on the Provisional application of the UPC Agreement. With this deposition, the Provisional Application Period (PAP) of the UPC was triggered formally, and the UPC officially comes to life.

In light of the Brexit and UK's withdrawal from the declaration, UK's ratification is not

required (though legal formalities still need to be worked out). The central division from London shall be relocated to one of UPC's Member States. Until another alternate location is decided, central divisions in Paris and Munich will temporarily deal with these transferred cases.



As a next step, preparations to start operations have commenced. The administration is currently setting up the IT system, the case management system and different governing bodies of the Court. Interview process for appointment as legal and technical judges shall commence in spring this year. A total of 90 judges will be appointed to the Court. This shall be followed by a vote to elect the president. As per the Agreement, the first president of the Court of First Instance (CFI) shall be a French, though there are no such nationality requirements for the President of the Court of Appeal.

This entire process may take up to eight months and the UPC is expected to open doors for regular business later this year (in Q3, 2022).

Source: IPKat, 20 January 2022, available [here](#). Kluwer Patent Blog, 21 January 2022, available [here](#). Unified Patent Court, 19 January 2022, available [here](#).

Image source: Unified Patent Court, available [here](#).

3.2 5G patent litigation heats up in Europe

In 2015, Apple and Ericsson signed a licensing agreement for 7 years. Following failed negotiations and parties disagreement on the renewal of the deal, Apple and Ericsson filed a series of lawsuits against one another [c.f. [Friday Fortnightly Ed. 2021 Week 10 No. 7](#) News Item 3.2 'Samsung asks court to dismiss FRANDly claims over foreign patents']. Earlier this month, the patent litigation gained full momentum in Europe, as Ericsson filed two additional lawsuits against Apple in the Netherlands and another lawsuit in Belgium. This is in addition to the already ongoing proceedings in the Netherlands whereby



the Dutch court refused an anti-anti-suit injunction (AASI) against Apple in both, the interim as well as the main proceedings [[Friday Fortnightly Ed. 2021 Week 44 No. 18](#) News Item 4.3 'Ericsson v. Apple: Dutch court lifts anti-anti-suit injunction']. Ericsson, has in addition, also filed lawsuits in Düsseldorf and Munich (in Germany) and Belgium. The courts are yet to serve notices in these cases. Apple, on its part, filed a lawsuit against Ericsson on 22nd January in Mannheim for infringement of the European patent, EP 25 45 332, that deals with network resource allocation.

Sources: Juve Patent, 21 January 2022, available [here](#). Bloomberg, 18 January 2022, available [here](#) (content available on subscription). Foss Patents, 21 January 2022, available [here](#).

Image source: iPhone in Canada, available [here](#).

3.3 SCOTUS limits the scope of assignor estoppel in invalidity proceedings

In *Minerva Surgical v Hologic* (dt. 29th June 2021), the Supreme Court of the US (SCOTUS) defined and narrowed the doctrine of assignor estoppel. The said doctrine, based in common law principle of equity, restricts the assignor from subsequently claiming the invalidity of the patent. In a 5-4 decision, the SCOTUS opined that the doctrine applies within the limits of “underlying principle of fair dealing”. More specifically, the doctrine is applicable “only when, the assignor’s claim of invalidity contradicts explicit or implicit representations” made while “assigning the patent”.

In the case at hand, Csaba Truckai, the founder of Minerva Surgical (Minerva), filed a patent application for a device used for treating abnormal uterine bleeding. The device was equipped with a “moisture-permeable head”. Following a sale, this patent was assigned to Hologic. Subsequently Csaba improved his invention by using a “moisture-impermeable head”. Aware of Minerva’s innovation, Hologic filed a continuation application that covered all kinds of applicator heads. This altered patent was issued in 2015. As per Hologic, Minerva’s improved device infringed Hologic’s altered patent. In the follow-on infringement proceedings, Minerva challenged Hologic’s assertion that the doctrine of assignor estoppel barred Minerva’s invalidity defense.



The SCOTUS stated that the doctrine of assignor estoppel demands consistency in representations about a patent’s validity. In other words, in case the assignor made “neither explicit nor implicit representations in conflict with an invalidity defense, then there is no unfairness in its assertion—and so there is no ground for applying assignor estoppel”. In the present case, as Hologic enlarged the patent’s claims and made new claims, that were materially broader in scope, it could no longer prevent Minerva from raising an invalidity defense.

Sources: JDSUPRA, 20 January 2022, available [here](#) and [here](#). Opinion of Supreme Court of the U.S., 29 June 2021, available [here](#).

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

4. Trademark

4.1 Louis Vuitton loses opposition proceedings against competing mark

On 14th January, European Union Intellectual Property Office’s (EUIPO) Opposition Division (OD) rejected Louis Vuitton Malletier’s opposition against a figurative mark depicting a sterilized version of the letters ‘N’ and ‘L’.

In September 2020, Aina Yanf, the applicant applied for a mark, depicting interlocking letters ‘N’ and ‘L’, above the phrase ‘Loves Vittorio’ (*see image*). Louis Vuitton opposed the mark on grounds of likelihood of confusion (1) and unfair advantage and detriment to its mark (2).

As regards the likelihood of confusion, the OD held that even though the class of goods was identical, the two signs displayed a low degree of similarity. The similarity stemmed from the two marks depicting two capital letters interlocking each other and both comprising of the letter



‘L’ in an italicised font. However, since the disputed mark comprised of letter ‘N’ instead of ‘V’ and also additionally used the expression ‘LOVES VITTORIO’, there was no likelihood of confusion amongst the relevant public. Even though the style was similar, different elements present in the two marks precluded the relevant public from thinking that the goods originated from the same undertaking. This was attributed to the fact that an average

consumer identified the mark by reducing it to its simple “verbal element”, in other words, the letters in the mark. As the letters were different, and the contested mark, in addition also had an additional phrase, the relevant public could distinguish between the two marks without any confusion.

As regards unfair advantage and whether the contested mark was detrimental to the reputation of Louis Vuitton (under Article 8(5), European Union Trade Mark Regulation), Louis Vuitton neither argued nor presented the required evidence. The OD accordingly rejected this ground as unfounded.

Sources: The Fashion Law (TFL), 19th January 2022, available [here](#). World Trademark Review, 21st January 2022, available [here](#) (content available on subscription).

Image source and opposition document: EUIPO ‘EUTM file information’, available [here](#).

4.2 Snap approaches US courts to claim ‘Spectacles’ trademark

In September 2016, Snap, parent company of the social networking platform, Snapchat, filed a trademark application for the word ‘Spectacles’ as referring to ‘smart glasses’ at the US Patent and Trademark Office (USPTO). Snap had developed smart sunglasses with an in-built camera, that allows users to record videos or images while wearing them. The USPTO rejected the application on the grounds that for the relevant ‘American’ public, the word ‘spectacles’ was a synonym for eyeglasses. Moreover, the mark had not acquired distinctiveness, such that the relevant public associated it with a pair of smart glasses exclusively sold by Snap.

Aggrieved with the USPTO’s decision, Snap appealed the decision to the USPTO’s Trademark Trial and Appeal Board (TTAB). In November 2021, the TTAB upheld the USPTO’s decision and the grounds therein. The TTAB went on to add that Snap’s social network platform did not enjoy a particularly large user base, and contrary to Snap’s claims, Snap’s ‘Spectacles’ had not gathered sufficient traction following the marketing of the product.

On 5th January, Snap filed an appeal against the decision before the US district court of California. As per the complaint, the mark “SPECTACLES evokes an incongruity between an 18th century term for corrective eyewear and Snap’s high-tech 21st century smart glasses”. The mark is accordingly representative of Snap’s smart glasses and that



the relevant consuming public associates the mark with a “brand of smart glasses made by Snap”.

Sources: *World Trademark Review*, 22nd January 2022, available [here](#). *The Verge*, 6th January 2022, available [here](#).

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

4.3 WTR ranks EUIPO and KIPO as world’s most innovative trademark offices



On 5th January, World Trademark Review released its fifth edition of IP Office Innovation Ranking. The project uses a number of qualitative and quantitative criteria to assess how IP offices offer innovative tools and services to their users. As per the latest ranking, the EUIPO and the Korean Intellectual Property Office (KIPO) are rated as the world’s most innovative IP agencies. The EUIPO and KIPO overtook the IP Office of Singapore (IPOS) by a slight margin. IPOS had topped the rankings in 2020. KIPO, consistently amongst the top 5 offices since the start of the Rankings,

managed to climb to the top spot this year. This can be attributed to KIPO’s use of emerging cutting-edge technologies to offer easier and quicker access to its users. Notable innovations by the Korean office include use of Artificial Intelligence and the Blockchain technology. Last year, KIPO also implemented the world’s first mobile app for its users, the first to be developed by an IP agency. Interestingly, the Brazilian IP Office (INPI) leapfrogged from 41st position in 2020 to the 6th place in 2021. Likewise, the Chinese IP Office (CNIPA) jumped from 41st position in 2017 to 18th place in 2021.

News and image source: *World Trademark Review*, 05 January 2022, available [here](#).

5. Events

5.1 TILC’s IP Talks on likelihood of confusion

On 17th January, Daria Baltag, a 3rd year bachelor and IP law student, presented her analysis of the recent trade mark decisions by the General Court. In her IP Talk, Daria explained how these recent decisions apparently contradict the earlier assessment of likelihood of confusion by the CJEU. In *Massi v Messi* and *Cyrus versus Miley Cyrus*, the Court of Justice had acknowledged that where a sign applied for registration at the EUIPO enjoyed reputation, chances of causing confusion with an earlier similar mark were rather small, as consumers could recognize the famous brand and would not confuse it with the other marks. In *AC Milan* and *Zara*, however, the GC found that only the reputation of the earlier mark mattered for a likelihood of confusion, and that the reputation of the mark applied for was irrelevant. The discussion examined whether this line of reasoning made sense or whether it was immaterial whether the earlier or the later mark enjoyed reputation.

