

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 12 NO. 8)

Dear Readers,

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

P. Kollár (ed.), J. Fuchsloch, C. De Schrijver, E. Verhaeghe,

J. Lönnfors, M. Mtshaulana and K. Tyagi

Email: p.kollar@student.maastrichtuniversity.nl and k.tyagi@maastrichtuniversity.nl



Serving innovative start-ups pro-bono with the wisdom of intellectual property laws

1. Competition law

1.1 Greek Public Power Corporation in Competition Hot Water

On 16 March 2021, the European Commission opened formal investigations against state-owned Public Power Corporation (PPC).

In 2019, the Greek government undertook to phase out lignite by 2028. The Government's action apparently has had a negative impact on the PPC, as it controls all of lignite and hydro power plants in Greece.

As per the Commission's press release, PPC's dominance in both the wholesale and retail electricity markets, helped it implement 'predatory pricing strategies' and adversely impact competition in wholesale electricity markets. The anti-competitive conduct, in addition also threatens to retard investment in green energy.

PPC's exclusionary pricing strategy, if proven, will constitute an abuse of a dominant market position under Article 102 TFEU (Treaty on the Functioning of the European Union).

Source: European Commission, 16 March 2021, available [here](#).

1.2 World's leading competition authorities join hands to reign in Pharma Mergers

In March 2021, a Multilateral Working Group led by the US Federal Trade Commission (FTC), was launched to facilitate closer inter-agency cooperation for the review of pharmaceutical mergers. Led by the FTC, the working group also includes the European Competition Commission, the Canadian Competition Bureau, the UK's Competition and Markets Authority (CMA) and the US Department of Justice (DOJ).

In light of the so-called killer acquisitions, the Group, in the words of FTC's Acting Chair Rebecca Kelly Slaughter, will take "an aggressive approach" to handle anti-competitive pharma mergers.

The Group seeks to jointly address issues such as theories of harm and remedies in pharma mergers. It will also study the ex-post impact of divestiture remedy on competition in the relevant markets.

Source: Federal Trade Commission, 16 March 2021, available [here](#).

2. Copyright

2.1 Fait d'Hiver: Jeff Koons condemned for Copyright Infringement

In 2014, Franck Davidovici, a photographer accused Jeff Koons, a world-renowned American artist, of plagiarising his 1985 advertising campaign 'Fait d'Hiver'.

The porcelain sculpture by Koons displayed elements very similar to Davidovici's original work. Koon's work also shared the same title as the original and was on display at Centre Georges Pompidou in Paris.

Koons argued that his work was a parody of Davidovici's advertising campaign. The Paris Tribunal, however, rejected his claims on all accounts (including lack of originality).

Last month, the Paris' Court of Appeal (CoA) upheld the decision of the Tribunal. Koons raised many interesting arguments - such as the US law (as the work was created in the US) and not the French law was the relevant law; lack of originality in Davidovici's work (as female models

are normally seen in clothing advertisements) and parody and freedom of artistic expression – each one of which were rejected in their entirety by the CoA.

Relying on the CJEU’s Deckmyn (C-201/13) case, the CoA was of the opinion that for a work to benefit from the parody exception, it must meet two requirements, namely first, it is “an expression of humour and mockery” and second, it “evokes an existing work while being noticeably different from it”. As Koons’ work incorporated Davidovici’s original elements, it could not meet the second requirement, and therefore, failed to benefit from the said exception. On the freedom of expression, the CoA said that such a freedom was not unfettered and must be balanced against the interests of different parties, including those of the right holder.



Sources: IP Kat, 11 March 2021, available [here](#). Judgment of the French Supreme Court, 23 February 2021, available [here](#). Image Source: RTS, 9 November 2018, available [here](#).

2.2 CJEU: Copyright holders can restrict the technique of framing

On 9th March 2021, the CJEU’s Grand Chamber delivered its opinion in VG Kunst (C-392/19). VG Kunst concerned a dispute between VG Bild-Kunst (VBK), a visual arts copyright collecting society and Stiftung Preußischer Kulturbesitz (SPK), a cultural heritage foundation.

The dispute arose as VBK refused to conclude a license agreement with SPK, unless the agreement also included provisions obliging SPK to implement effective technological measures to prevent framing. The CJEU, thus, explicitly addressed an important issue – whether it is possible to impose contractual, and not just technical restrictions on access. The German Bundegerichtshof (Federal Court of Justice) asked the CJEU whether embedding of an otherwise freely available work (with the consent of the right holder), in the “website of a third party by way of framing constitute communication to the public of that work” (para 18).

The CJEU held that framing is an “act of communication to the public” within the meaning of Article 3(1) of the 2001 InfoSoc Directive, as it allows a third-party website to connect directly the users of the website with the said frame. The Court found that making available by framing and making available on the original website are two different acts of communications to the public – each one of which needs to be explicitly authorised by the copyright holder and that such a consent cannot be presumed.

Sources: IP Watchdog, 3 March 2021, available [here](#). IP Kitten, 15 March 2021, available [here](#). CJEU decision (C-392/19), available [here](#).

2.3 YouTube introduces a new “Check” feature to scan for Copyright

Article 17 of 2019 EU Copyright in the Digital Single Market Directive (CDSM) made an unprecedented increase in the responsibility of platforms like YouTube to monitor infringing content. As an immediate response to the regulatory developments, in July 2019, Google updated its copyright claim mechanism. The creators criticized the update and called it ‘unclear’. At the time, YouTube’s CEO, Susan Wojcicki, publicly expressed her concerns regarding the vague requirements of the 2019 EU CDSM Directive and how it would adversely impact creativity on Youtube, a Google platform.

On 15th March 2021, Youtube further updated its claim mechanism. The latest version has new features that balance the interests of various stakeholders. The scan takes place before the video is published. It highlights the infringing content pre-upload, and thereby helps creators avoid copyright and monetisation issues and also ensure transparency and agility in the process.

Sources: World Intellectual Property Review, 19 March 2021, available [here](#). Google’s “Check” system available [here](#).

3. Patents

3.1 Danish court decides on dispute over transfer declaration of patent

JolTech, the initial owner of the patent under consideration, sold the disputed patent to GoDevelopment. In 2018, GoDevelopment went bankrupt. As part of the bankruptcy proceedings, the bankruptcy trustee sold the disputed patent to a third party. This sale was contested by JolTech on grounds that the patent was re-transferred to it by GoDevelopment in 2016. A request was also made to enter this re-transfer in the Register of Patents at the Danish Patent and Trademark Office (PTO). Danish law requires such an entry be made in the register upon request. As the PTO turned down the request, JolTech appealed the decision to the Appeal Board. Documentation offered by JolTech as evidence to substantiate its claims of re-transfer raised concerns about the validity of the transfer. Both the PTO and the Appeal Board concluded that there remained reasonable doubt whether the transfer declaration was sufficient evidence to substantiate JolTech’s claim, and thus, once again, rejected JolTech’s request. Aggrieved by the decision of the PTO and the Appeal Board, JolTech then initiated the present proceedings before the Danish Maritime and Commercial High Court (Danish MCHC). Finding the Board’s concerns reasonable, the Danish MCHC upheld the decision of the Board in its entirety.

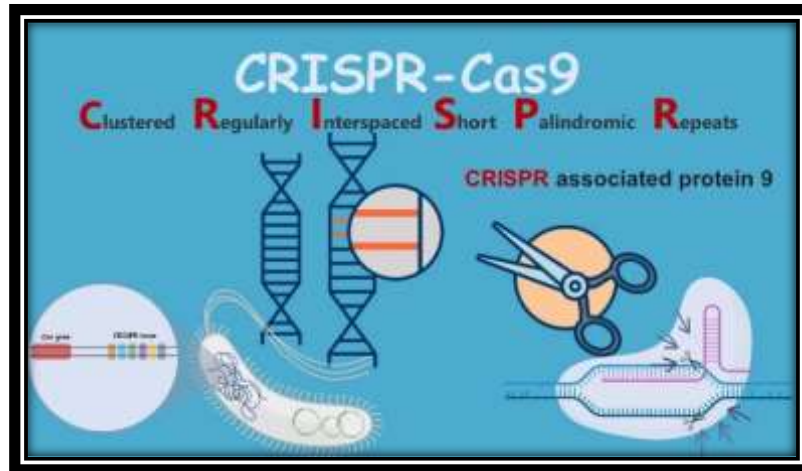
Source: Kluwer Patent Blog, 20 March 2021, available [here](#).

3.2 EPO finally addresses inventive step criteria in CRISPR patent

The European Patent Office (EPO) has lately been flooded with patent applications dealing with the CRISPR (Clustered regularly interspaced short palindromic repeats) gene. CRISPR is a family of DNA sequences that can be used to alter DNA sequences and modify gene function. Their use in medicine and the creation of genetically modified crops has garnered significant interest both from the academia as well as the industry.

In the proceedings under consideration, the EPO Opposition Division refused a patent on a CRISPR gene to the US based Sigma-Aldrich for lack of inventive step. A large number of parties were present to oppose Sigma-Aldrich’s application.

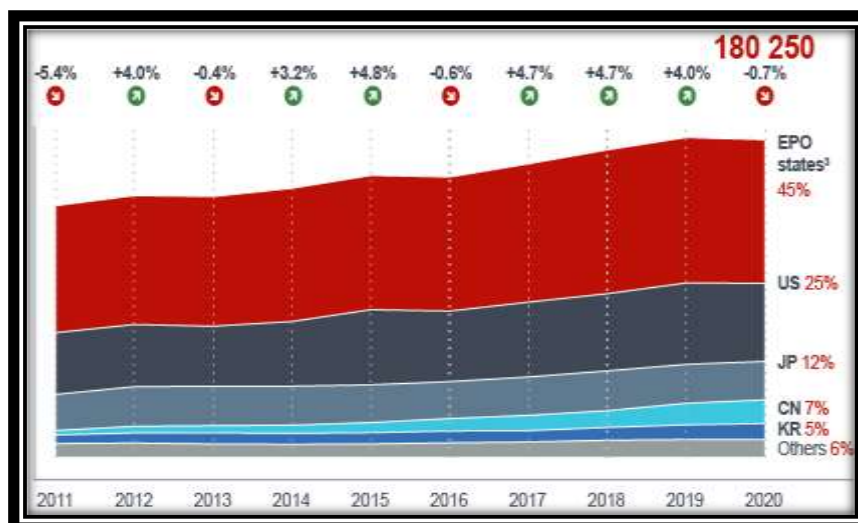
The EPO Opposition Division denied Sigma-Aldrich a new patent for their development and revoked the already existing patent for lack of inventive step. Sigma-Aldrich's patent was part of a larger patent portfolio comprising of a total of six CRISPR patents. The decision is significant as it marks a departure from earlier proceedings, that had focused for the most part on the issue of priority.



Source: Juve patent, 19 March 2021 available [here](#). Image Source and Introduction Video, available [here](#).

3.3 Demand for European patents steady despite the pandemic, healthcare leads again

A recent study by the EPO shows that innovations in the area of healthcare continue to remain the main driving force behind patenting activity in 2020 at the EPO. Medical technology remains the leading field in terms of volume of applications, closely followed by digital communication; while pharmaceuticals and biotechnology remain the fastest-growing areas. The pandemic did not seem to hinder the patent applications. The number of applications in 2020 experienced only a marginal decline of 0.7% from the previous year. Applications from EPO member states declined by 1.3%. In the top 10, US and Germany remain the top applicants, while the largest increase in the number of applications came from China and South Korea.



News & Image Source: EPO, 16 March 2021, available [here](#).

4. Trademarks

4.1 You reap what you sew

In March 2021, the General Court (GC) delivered its 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, as Tehrani was aware of Blue Gene's holding a similar mark.

According to the GC, Tehrani's subjective intent was the key determinant in deciding whether the application was in bad faith. An overall assessment of the factual circumstances showed that Tehrani was aware of and had also acknowledged Blue Gene's exclusive rights on the trade mark in an earlier distribution agreement. Tehrani then tried to acquire the rights, and made the application after negotiations between the two had broken down. According to the GC, Tehrani's only intent was to exclude Blue Gene from using the trade name, an act that is contrary to honest practices in the internal market. The application was therefore rejected on the grounds of it having been made in bad faith.



News & Image Source: Judgment of the General Court, 17 March 2021, available [here](#).

4.2 A mark Maid of Gold

The proprietors of the reputable 'Kerrygold' visual mark for dairy products recently tried to prevent the registration of the 'Kerrymaid' word mark for the sale of both dairy as well as snacks. Earlier, the European Union Intellectual Property Office (EUIPO) rejected Kerrymaid's application for Nice classes 29 and 30, covering respectively dairy products and premade food items, on the basis of likelihood of confusion. Kerrymaid contested confusion and appealed this rejection.

In light of the fact that level of attention of the relevant public is low, and the goods in question are very similar (or identical), the GC was of the opinion that the key important question as regards confusion is the similarity between the two signs.

Kerrymaid's argument was that 'Kerry', which is the core of the similarity, is descriptive in nature as it describes a geographical location. The General Court disagreed with Kerrymaid's argument considering that the region of Kerry is not known to the general population. Only those who either live in or nearby, or have visited Kerry, are aware of the region. This group is insignificant when compared with the relevant European public at large. The term Kerry, therefore, cannot be considered as descriptive outside of Ireland. On the other hand, Kerry remains the distinctive dominant element in the 'Kerrygold' and 'Kerrymaid' marks. This in turn may inevitably lead to a likelihood of confusion on the part of the general public. This

makes similarity, and a subsequent likelihood of confusion between the two inevitable. In light of the foregoing, the GC upheld the rejection of the registration of ‘Kerrygold’ word mark.



News & Image Source: Judgment of the General Court, 10 March 2021, available [here](#).

4.3 Puma fails to establish unfair advantage

In March 2021, the GC elaborated upon the boundaries of taking unfair advantage of a mark with a reputation. The mark under consideration was ‘Puma’, owned by Bavaria-based Puma SE, world’s leading sportswear manufacturer.

CAMäleon tried to register the word mark ‘PUMA-systems’ for Nice classes 7, 9, 16 and 42. The said classes concern the sale of computers and related accessories. The EUIPO allowed the registration of the said mark. Puma SE opposed the registration. The request was however, rejected by the Board of Appeal. Puma SE appealed the Board’s decision before the GC.

The GC held that in the word mark ‘PUMA-systems’, the term ‘systems’ has a very low degree of distinctiveness, whereas the term ‘PUMA’ is the dominant feature. This rendered the two marks – ‘Puma’ and ‘PUMA-systems’ - almost identical. The markets for the two categories of goods, though, are entirely different. However, Puma’s (the sportswear company) reputation is ‘exceptional’ that transgresses well beyond the relevant public. The GC concluded that there was thus, a ‘partial overlap’ between the public for the two categories of goods – sports apparel and computer & computer-related accessories.

The GC, accordingly, reversed the decision of the EUIPO’s First Board of Appeal ‘to the extent’ the latter dismissed Puma’s request in respect of the trade mark ‘PUMA-systems’ for Class 7, 9, 16 and 42.



News & Image Source: Judgment of the General Court, 10 March 2021, available [here](#).