

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 14 NO. 28)

Dear Readers,

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

A. Dubois, C. Annani, C. Vander Velde, D. Baltag, D. Kermode,
S. Tosi, S. Van Zuylen van Nyevelt, Y. Lu and K. Tyagi

Email: s.tosi@student.maastrichtuniversity.nl & k.tyagi@maastrichtuniversity.nl



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

1. Competition law

1.1 Google maps the US antitrust maze

On 30th March, the United States' Department of Justice (DoJ) formally announced its renewed interest to formally investigate Google's practice of tying and bundling its Google maps with other Google software services. The 2020 Big Tech Staff Report expressed its anti-competitive concerns over "Google's All or none mapping services offer". Following on this Report, the DoJ's investigation will concentrate on two aspects of Google's business practices. The first part of the investigation will deal with the "Android Automotive" software (AA). This includes the entire package of Google apps, including navigation and infotainment services for automobiles. As per this practice, Google requires that car manufacturers bundle and use the entire package of apps offered by Google, including its apps such as Google Assistant and the Playstore. The second part of the investigation shall concentrate on Google's terms of services (ToS), and how those terms limit developers' ability to use data and innovate further. Notably, Article 3.2.3 of the ToS prohibit third party developers to develop any Google-like features. Following this investigation, if DoJ is of the opinion that Google's conduct is indeed anti-competitive, it may then proceed to recommend and file a lawsuit before the US courts.



Sources: Reuters, 30 March 2022, available [here](#). Ars Technica, 30 March 2022, available [here](#). Techspot, 1 April 2022, available [here](#).

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

1.2 Commission dawn raids gas companies in Germany



On 29th March, the European Commission, along with colleagues from the Bundeskartellamt (BKartA), the German competition authority, conducted surprise inspections on the premises of companies active in the gas sector. The Commission undertook these investigations to assess whether they may be engaged in anti-competitive activities. Commission's investigations were particularly targeted at

Gazprom, a state-owned Russian gas company, that is believed to deliberately withhold gas supplies in order to profit from the prevailing situation. These inspections do not establish anti-competitive behaviour as such. Based on the evidence gathered at these surprise inspections, the Commission must first build a case that the companies did engage in some form of anti-competitive conduct, before it can impose any obligations on these firms.

Sources: European Commission, 31 March 2022, available [here](#). FXempire, 31 March 2022, available [here](#). Independent.ie, 31 March 2022, available [here](#).

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

1.3 Commission partially refers McKesson/Phoenix merger to France

On 9th February, Phoenix submitted Form CO to the Commission, expressing its intention to acquire McKesson. The two companies are active in the wholesale and retail distribution of pharmaceutical goods across the European Economic Area (EEA).

On 24th February, Autorité de la concurrence, the French Competition Authority (FCA), requested that the matter be referred to it, as the merger was expected to significantly impede effective competition in the French market for wholesale pharmaceutical distribution.



On 30th March, following a timely phase-I review, the Commission unconditionally cleared the proposed transaction. The Commission assessed the merger within the framework of Regulation 139/2004. As regards the effect of the merger in the French pharmaceuticals market, the FCA is currently assessing the proposed transaction, and is expected to offer its view in the coming month. Commission's unconditional clearance decision remains valid for the entire EEA. The FCA's assessment and decision will be limited to the French markets.

Sources: European Commission, 30 March 2022, available [here](#). Post Online Media, 1 April 2022, available [here](#). Zumbul, 31 March 2022, available [here](#).

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

2. Copyright

2.1 Art. 5 (2b) of the InfoSoc applicable to cloud computer services: says CJEU



In its decision dated 24th March, the Court of Justice of the European Union (CJEU) interpreted that the scope of “reproductions on any medium” in Article 5 (2)(b) of the 2001 Information Society Directive extended to cloud computing services as well. Following a preliminary reference from the Oberlandesgericht Wien, the Higher Regional Court (HRC) of Vienna, the CJEU decided on the scope of the quotation exception in the

context of cloud services. The matter reached the Austrian courts, as the Austrian copyright collective rights management society, Austro-Mechana and the hosting internet service provider, Strato disagreed over compensation for ‘storage media’ available on Strato’s cloud. As per Strato, considering that it had already paid the relevant fees in Germany, no further remuneration was due in Austria. Moreover, users were also required to pay an equipment fee. This meant that Strato was absolved of any further outstanding dues (CJEU, at para 10).

The HRC Vienna decided to stay proceedings and request CJEU’s opinion on whether Article 5(2)(b) was available to natural persons for private purposes in the context of cloud computing? The CJEU was of the opinion, that the expression “reproduction on any medium” under Article 5(2)(b) included “saving for private purposes, of copies of [original works] on a server on which storage space is [..... provided] by a cloud computing service [provider]” (CJEU, at para 33).

Sources: CJEU, 24 March 2022 available [here](#). TheIP Kat, 6 April 2022, available [here](#).

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

2.2 No Trace of Infringement in Sheeran's Shape of You: says EWHC

On 6th April, the England and Wales High Court (EWHC) absolved Ed Sheeran of claims of infringement made by the English singer, Sami Chokri. Chokri claimed that Sheeran's repeated singing of "'Oh, I,' in a rising pentatonic melody" resembled his 2015 work "Oh Why". To convince the Court of his innocence, Sheeran performed parts of his own song, as well those of others like Nina Simone's "Feeling Good" and Blackstreet's "No Diggity". Following a 11-day long intensive trial in London, the EWHC finally decided in favour of Sheeran.



Sources: EWHC, 6 April 2022, available [here](#). The New York Times, 6 April 2022, available [here](#).

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

2.3 American's SMART approach to copyright infringement



On 18th March, the US Senators, Thom Tillis and Patrick Leahy, introduced the Tillis-Leahy SMART Copyright Bill (SMART). The acronym SMART refers to "Strengthening Measures to Advance Rights Technology". The Bill, if successfully passed, seeks to cover the gap in legislation and the rise in digital copyright infringement. SMART would enable the Librarian of Congress to implement regulatory measures for platforms that currently benefit from the Digital Millennium Copyright Act's (DMCA) safe harbour provisions. There exist standard technical measures (STMs) that

copyright owners use to "identify and protect" their works. To benefit from this safe harbour, platforms "must not interfere with" these STMs. To foster trust in the platforms, SMART enhances the "accountability of the platforms" and requires "adoption of widely available measures", without fearing that this may deprive them of the safe harbour immunity. The principle aim of this provision is to foster measures through "an open, fair, voluntary, multi-industry, standards process" equally available to all the market players, irrespective of their size and turnover.

Sources: Digital Music News, 18 March 2022, available [here](#). Thom Tillis, 18 March 2022, available [here](#). Copyright Alliance, 24 March 2022, available [here](#).

Image source: Digital Music News, available [here](#).

3. Patent

3.1 Federal Court of Australia on Patent Term extensions for pharma products

In two recent two decisions, the Full Federal Court of Australia (FCA) offered clarity on grounds for a valid patent term extension (PTE) for pharmaceutical products. The relevant legal framework on PTEs is found in sections 70, 71 and 77 of the Australian Patents Act. Whereas Sec. 70 concerns the patentee's eligibility to apply for a PTE; Sec. 71 deals with the form and timing of the application, and Sec. 77 offers guidance on the duration of the PTE.

The first case, *Commissioner of Patents v Ono Pharmaceutical Co. Ltd* concerned the prior registration of a pharmaceutical substance by a third party on the Australian Register of Therapeutic Goods (ARTG). The Full Bench at the FCA overruled the first instance decision as per which, only the goods of the patentee could be used for obtaining a PTE. The FCA held that a PTE could be granted irrespective of whether the goods comprising of the substance are those of the patentee, or are the goods of a competitor or those of a third party.



In the second case, *Merck Sharp & Dohme Corp. v Sandoz Pty Ltd*, the FCA offered further insight on the calculation of the duration of a PTE where the patent covers two or more pharmaceutical substances, contained in two or more products listed on the ARTG, and where both the products are owned by the same patentee. The FCA was of the opinion that where the patentee is also the sponsor of the two products disclosed and claimed in the patent, then only the first product listed in the ARTG is relevant to calculate the duration of the PTE.

In both the decisions, the FCA affirmed that sections 70, 71 and 77 were designed to balance competing interests, and shall not be used to solely ensure a certain commercial outcome for the patentee. These competing interests include the interests of the patentee (1), and the larger public interest to freely enjoy the invention, once it is off-patent (2), as well as the interests of the competitors (3).

Sources: Kluwer Ip Law, 30 March 2022, available [here](#). Commissioner of Patents v Ono Pharmaceutical Co. Ltd [2022] FCAFC 39, available [here](#). Merck Sharp & Dohme Corp. v Sandoz Pty Ltd [2022] FCAFC 40, available [here](#).

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

3.2 Consider both, the willing licensee and licensor: says Munich Regional Court

On 23rd March, the 21st Civil Chamber, one of the three patent chambers of the Munich Regional Court (MRC), heard Nokia's global SEP (standard essential patent) FRANDly (Fair, Reasonable and Non-discriminatory) dispute. The Presiding Judge, Georg Werner's introductory speech at the hearing clearly indicated the MRC's intention to renew its FRANDly approach in light of the German Federal Court of Justice, the Bundesgerichtshof's decisions in *Sisvel v Haier I* and *II* (KZR 36/17 and KZR 35/17).

In the case at hand, both Nokia and Oppo own major 5G SEPs, a factor that has added its grain of complexity to the FRANDly interpretation.

According to Werner, apart from the concept of a willing licensee within the *Huawei v ZTE* framework set by the CJEU (C-170/13), the SEP holder should also unambiguously express its willingness to conclude a FRAND licensing agreement.

In addition, this willingness to license should exist "over a long period of time". In other words, greater emphasis is given to a conduct-oriented FRAND negotiation rather than a content-oriented approach. It is encouraged that the parties extend all the reasonable efforts to settle the dispute. In the case at hand, following the completion of the three-year license agreement, Nokia immediately sued Oppo, without first making any reasonable effort to re-negotiate the license. This factor is expected to be an important determinant in the outcome of the case.

Save for a 30-minute introduction by Werner, the remaining hearing was closed to the public on account of confidential business information.

Sources: Juve-patent, 28 March 2022, available [here](#). FOSS Patents, 30 March 2022, available [here](#).

3.3 Philips/Xiaomi confidential settlement leaves issue of ETSI's legal role unresolved



In 2020, Philips and Xiaomi entered into a fierce FRANDly battle. On 11th March, the two parties quietly entered into a confidential settlement agreement. The settlement meant that the following three pertinent legal issues raised by Xiaomi in the legal dispute remain unresolved. First issue concerns the considerations within which an implementer can be deemed to be a willing licensee. In other words, can a license agreement available in French law, in light of the European Telecommunications Standards Institute (ETSI) pledge, with blanks that can be filled out by judicial determination, be considered as a FRANDly

license? Second, whether in such a situation, it is possible to name the ETSI as a co-defendant in the matter? Third issue concerns transparency requirement to meet the “non-discriminatory” obligation in FRAND. In the dispute between Philips and Xiaomi, Philips refused Xiaomi’s in-house litigators to inspect comparable license agreements.

Sources: FOSS Patents, 31 March 2022, available [here](#). FOSS Patents, 30 March 2022, available [here](#).

Source image: Iconscout, available [here](#).

4. Trademark

4.1 “Off-White red Zip-Tie” as a registered trade mark

On 29th March, the high-end fashion brand, Off-White, was finally granted registration for its famous red-zip tie. In 2016, Off-White started using the zip tie on its products, and subsequently applied for the registration of the mark in June 2018.

Initial applications requested broader scope of protection. This included the “zip-tie” in distinct colours for classes 18 and 25. The United States Patent and Trademark Office (USPTO) rejected the earlier applications on the grounds that the “ties [were] functional and not distinctive”. Following an advice from the examining attorney, Off-White narrowed the scope of the application to limit it to a “closed red zip-tie attached to the upper shoelace to be used only for footwear” (*see image*). In this revised application, Off-White argued that zip-tie was an indicator of source, a fact indicated by customer behaviour of keeping these marks following the purchase of the product. Finally, after a four-year long ping-pong with the USPTO, the latter agreed to register the mark.



Sources: The Fashion Law, 30 March 2022, available [here](#). Input, 3 March 2022, available [here](#). Footwear News, 30 March 2022, available [here](#).

Image source: Input, available [here](#). The Fashion Law, available [here](#).

4.2 Tinder’s Unsuccessful “Love At First Swipe”

Match Group LLC, the owner of the largest dating apps “Tinder” and “Hinge”, recently unsuccessfully brought opposition actions against a pending UK Trade Mark Application for the registration of the mark “LOVE AT FIRST SWIPE” by the renown rival dating app “Love At First Swipe Limited”.

Tinder’s opposition claim was based on the company’s earlier registered UK Trade Mark, “SWIPE” for dating services and the European Union Trade Mark (EUTM), “SWIPE”.

On 14th January, the UK Intellectual Property Office (UKIPO) rejected Match Group’s opposition on the grounds that even though the goods and services were identical, the term swipe held a descriptive function in regard to dating services and, more broadly, to touch screen technology at large. This implied that there was no apparent risk of confusion between “Love At First Swipe” and the Match app. The UKIPO, has accordingly, permitted “Love At First Swipe Limited” to continue with its application for the registration of the mark.

Sources: PR News Wire, 09 March 2022, available [here](#). The Trademark Lawyer, 24 March 2022, available [here](#). UKIPO Opposition Decision, 14 January 2022, available [here](#).

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



4.3 ‘Wonder Mum’ creates no confusion with ‘Wonder Woman’: says EWHC



On 2nd March, the EWHC dismissed DC Comics’ appeal against an earlier decision by the UKIPO. The UKIPO had allowed registration of Unilever’s mark “WONDER MUM”.

In December 2019, Unilever applied for registration of the mark “WONDER MUM” for goods in Class 3 (soaps, perfumery, essential oils, deodorants and hair care products). In July 2020, DC Comics filed an opposition against the registration of the mark. The opposition

was based on grounds of likelihood of confusion (Sec. 5(2)(b)), trademark similar to one with a reputation (Sec. 5(3)) and passing off (Sec. 5(4)(a)). The UKIPO rejected all these grounds, stating that the marks were not similar and that DC Comics had failed to show sufficient evidence of reputation of the mark within the UK (1) and establish goodwill to confirm a case of passing off (2).

DC Comics appealed the said decision before the EWHC on the grounds that the UKIPO had failed to limit their assessment to the issue of similarity between the two marks. The EWHC rejected these arguments on the grounds that a finding of “low degree of conceptual similarity between the marks” was sufficient to meet the requirements of Sec. 5(2)(b).

In the remaining grounds of appeal, DC Comics stated that the UKIPO had erred in its assessment that the “WONDER WOMAN” mark enjoyed no reputation in the UK for comics (Class 16) and entertainment services and goods (Classes 9 and 41), and thus, the grounds in Sec. 5(3) were incorrectly assessed. The EWHC found that DC Comics’ evidence to support their claim “WONDER WOMAN” as the most famous female comic book in the world was

not specific enough to the UK market. To substantiate their claim, they should have instead adduced evidence from the UK.

Claims of passing off too were rejected as DC Comics had failed to establish that consumers may be misled into believing that the goods with the mark “WONDER MUM” were in any way linked to the mark “WONDER WOMAN”.

Sources: The IPKat, 25 March 2022, available [here](#). Bloomberg Law (restricted access), 3 March 2022, available [here](#). Decision of the High Court of England and Wales, 2 March 2022, available [here](#).

Image source: World Trademark Review, 1 April 2022, available [here](#).

5. Trade Secrets

5.1 Valentino’s not so secret ‘Intarsia’ stitching technique

On 25th March, Mrinalini Inc. a New York-based fashion house, filed a lawsuit against the Italian luxury fashion house, Valentino S.p.A at a New York federal court. As per the lawsuit, Valentino misappropriated and unjustly enriched itself by using Mrinalini’s copyright-protected fabrics and secret stitching techniques, including but not limited to the “Intarsia” stitching technique. On many an occasions, Valentino had used these designs without Mrinalini’s permission, and in return, they neither offered the firm a due compensation nor an attribution that the designs had been created by Mrinalini.



As per the Complaint, Mrinalini pioneered the “Intarsia” sewing technique, which is a “way of joining several pieces of fabric into a rich and textured whole”. Right after their launch, Intarsia designs became an instant hit in the fashion world, and were in particularly high demand amongst the high-end customers.

Further, contrary to its contractual obligation to keep some other designs by Mrinalini as confidential, Valentino not only misrepresented them as their own in leading fashion shows and across top retail outlets, it also wooed away many an employee from the firm to learn about and profit from Mrinalini’s new sewing technique, “Intarsia”.

The Complaint, accordingly, asserts a case of copyright infringement, trade secret misappropriation, unfair competition, unjust enrichment, conversion and breach of contract against Valentino.

Sources: The Fashion Law, 28 March 2022 available [here](#).

Image source: Life News, 28 March 2022, available [here](#).