

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 14 NO. 9)

Dear Readers,

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



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

1. Competition law

1.1 Japan inches towards regulation of digital cartels

The Japanese Fair Trade Commission (JFTC) recently announced that it could in the near future apply antitrust laws to digital cartels that use algorithms and the artificial intelligence-based (AI) technology to distort competition in online markets.

On 31 March 2021, the JFTC officially released the Report on Algorithms/AI and Competition Policy. The Report, prepared by the Study Group on Competition Policy in Digital Markets, addresses the role of algorithms and AI in digital markets. The Report discusses various anti-competitive practices such as concerted conduct and ranking manipulations in an AI-driven digital business environment.

The use of AI pricing algorithms by companies in digital markets allows these companies, without actually physically communicating with one other, to set the prices for goods at profit maximizing levels, and thereby violate antitrust laws. The JFTC recognises that even though AI and algorithms can be very beneficial to the society at large, they nonetheless require monitoring to ensure competitive digital markets.

Sources: CPI, 31 March 2021, available [here](#). Japan Fair Trade Commission, 31 March 2021, available [here](#).

1.2 Mastercard and others admit to cartel aimed at the financially vulnerable

On 31 March 2021, the British Payment System Regulator (PSR) issued a statement alleging that Mastercard, allpay, APS, PFS and Sulion engaged in anti-competitive behaviour. The said parties entered into an agreement not to poach upon one another's client base. The cartel focussed on the 'pre-paid cards' segment. Pre-paid cards are used by authorities for welfare payments to "homeless, victims of domestic violence and asylum seekers".

The PSR alleges following two counts of infringements of the provisions of the Competition Act, 1998: the first involves all five companies between the time period 2012 and 2018, and the second concerns APS and PFS only from the year 2014 until 2016.

Recently Mastercard, allpay, and PFS agreed to cooperate with PSR. They admitted to the alleged anti-competitive conduct and have, in the event that PSR establishes wrongdoing, agreed to pay fines totalling 32 million pounds.

The parties have an opportunity to make a legal representation to the PSR, before the Regulator takes its final decision on the matter.

Sources: Payment Systems Regulator, 31 March 2021, available [here](#). Reuters, 31 March 2021, available [here](#).

1.3 Case C-857/19 Slovak Telekom – limitation of the principle of ne bis in idem

On 25 February 2021, the European Court of Justice (ECJ) ruled on the relationship between the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter of Fundamental Rights (CFR) of the European Union (EU), and Article 11(6) of Regulation 1/2003.

The case involved two proceedings against Slovak Telecoms. The first proceeding was initiated by the Protimonopolný úrad Slovenskej republiky, the Slovakian national competition authority and the second, by the European Commission. Even though both the proceedings referred to an infringement of Article 102 Treaty on the Functioning of the European Union (TFEU), both the

proceeding concerned different and completely unrelated matters. Thus, Article 11(6) of Regulation 1/2003 could not be triggered, as the provision requires that the procedures be identical.

The ECJ clarified that the principle of *ne bis in idem* remains inapplicable in the following cases – first, where there exist two independent and separate procedures by the Commission and the National Competition Authority (NCA), and the conduct concerns distinct relevant product or geographic markets, or second, whereby the NCA “is relieved of its competence” in accordance with article 11(6) of Regulation 1/2003.

Sources: Judgment of the Court, 25 February 2021, available [here](#). Kluwer Competition Law Blog, 8 March 2021, available [here](#).

2. Copyright

2.1 ‘Objectivity’ key to evaluation of fair use claims: US Second Circuit

In 1981, Lynn Goldsmith photographed Prince, one of the greatest musicians of his time. Three years later, Goldsmith licensed the said photograph to Vanity Fair magazine and Andy Warhol. The license permitted Warhol to “*create a work of art based on [the] image reference*” and publish them in the November 1984 issue of Vanity Fair, while still attributing Goldsmith as the author of the original work. Following this publication, Warhol continued to use Goldsmith’s photograph and created the ‘Prince series’. The series comprised of 15 silkscreen prints and pencil illustrations. Warhol neither informed nor approached Goldsmith for consent for this subsequent use of the work. In May 2016, Condé Nast, the parent company of Vanity Fair, in a commemorative edition on Prince used Warhol’s work. Following the publication of this edition, Goldsmith became aware of the ‘Prince Series’, and informed the Warhol Foundation of infringement of her copyright in the 1981 photograph.



To avoid injunction, the Warhol Foundation promptly approached the US District Court for the Southern District of New York (DC). The DC decided in favour of the Warhol Foundation on grounds of fair use. It opined that the series was transformative in nature.

On March 26th 2021, the US Court of Appeal for the Second Circuit (CoA) reached the conclusion that the series did not fall under the scope of fair use under US copyright law. In the opinion of the CoA, the question whether the work was transformative called for an objective assessment – a condition, that in the present case remained unfulfilled.

Sources: Pearl Cohen, 30 March 2021, available [here](#). IP Watchdog, 1 April 2021, available [here](#). The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, United States Court of Appeals, Second Circuit, 26 March 2021, available [here](#). Image sources: IP Watchdog, 1 April 2021, available [here](#). Morrison Hotel Gallery, available [here](#).

2.2 Christie's sells Beeple's digital artwork for record price

On March 11th, 2021, Mike Winkelmann, known for his digital art under pen name 'Beeple', sold a JPG-file collage called 'Everydays - The First 5000 Days' for \$69.3 million in an online auction organized by Christie's. This is record price for an artwork of this kind, and notably surpasses the selling price of many a celebrated painting sold by Christie's.

Artworks, such as Everydays, are non-fungible tokens (NFTs). NFTs are cryptocurrencies based on the Ethereum blockchain technology. The NFT's comprise of nodes with detailed information and a unique identity number. Though there exists no limit to the different use areas of the NFTs, they are particularly popular in the world of digital art.

As with the blockchain technology in general, many aspects of NFT remain unregulated. As an example, purchase of such digital pieces of art does not necessarily transfer copyright ownership. It is quite a sweet irony that when a buyer purchases an NFT-stamped artwork, what s/he essentially gets is the unique digital version of the work and not the asset itself. This, in turn, has implications for determination of infringement in such artworks.



Sources: JD Supra, 1 April 2021, available [here](#). IP Kat 23 March 2021, available [here](#). NY Times, 11 March 2021, available [here](#). Image source: Christie's, available [here](#).

2.3 Post- Brexit, the UK Court follows CJEU's copyright jurisprudence

TuneIn is a US-based technology company. It runs an online platform that not only enables users to access radio stations from all around the world, but also helps them refine their search with the help of filters (by suggesting tracks or recommendations based on their play history). Users can also record the streamed music from the radio stations onto their mobile device and replay it afterwards at their convenience.

Aggrieved by TuneIn's business model, Warner Music and Sony Music Entertainment filed a claim before the High Court (HC) in London. In 2019, the HC decided on the matter. It held that TuneIn's activities did not infringe copyright by presenting the sound recordings to a 'new public', rather TuneIn engaged in an infringing conduct as it permitted users to record the works played on the radio stations.

The matter reached the England and Wales Court of Appeal (CoA). On 26th March 2021, CoA followed the CJEU case law, even though post-Brexit it is no longer bound by its jurisprudence. The CoA examined the notion of 'communication to the public' in light of the CJEU's decisions (including the recent VG-Bild Kunst) to reach the conclusion that TuneIn did not present the

stations to a ‘new public’ as UK-based users could anyways access the stations online freely without any access restrictions or registration process. The CoA upheld the HC’s decision that TuneIn’s record function facilitated infringement by users.

Sources: IP Watchdog, 2 April 2021, available [here](#). Pinsent Masons Out-Law News, 1 April 2021, available [here](#). Pinsent Masons Out-Law News, 6 November 2019, available [here](#). Tunein Inc. v. Warner Music UK Ltd & Anor, England and Wales Court of Appeal, 26 March 2021, available [here](#).

3. Patents

3.1 Equivalent methods of dealing with equivalents in the Netherlands

In November 2020, the Hague Court of Appeals (CoA) delivered its much-awaited Pemetrexed decision, wherein it shed light on the Dutch approach to the doctrine of equivalents. As per the CoA, literal interpretation from the eyes of a person skilled in art should be the starting point to determine infringement. This should then be followed by a second step that involves a determination of whether the skilled person can identify “room for technical equivalency” in the claims, description and drawings.



Technical equivalence means that the variant can achieve the same result, and thereby, fulfil the same function as the patented invention. To answer this question, a balance must be struck between legal certainty and reasonable protection for the patentee. Consequently, the degree of contribution to the state of art is an important factor in deciding whether extra ‘room’ remains available to broaden the scope of protection. On the other hand, the principle of legal certainty dictates that a claim wording that excludes equivalents is not offered this broader protection. Finally, the CoA held that a variant that is neither new nor inventive on the date of priority cannot fall under the scope of protection through equivalents (more commonly known as the *Gillette* or *Formstein* defence).

Source: The Hague Court of Appeals decision 27 October 2020, available [here](#). Image source: FPC review, 19 June 2019, available [here](#).

3.2 Reliance on doctrine of equivalence requires express pleading: UK High Court

In a patent dispute over livestream feature available on Facebook’s platforms such as Facebook and Instagram, the applicant Voxer claimed that certain aspects of the livestreaming feature infringed on its patent. Facebook denied the alleged infringement claim and challenged Voxer, stating that its patent was invalid. Facebook brought a claim for revocation of patent in response to Voxer’s infringement claim.

The original statement in the infringement case did not state whether Voxer wished to rely on the doctrine of equivalents. Subsequently, relying on the said doctrine, Voxer amended its claim setting out an infringement case. Facebook objected to Voxer's claims in the pre-trial review. The England and Wales High Court (Patents Court), hereafter, Court, allowed Voxer to pursue the amended claim.

The Court opined that in case a patentee wished to rely on the doctrine of equivalents in its claim of infringement, it must clearly make such a claim. Further, the patentee when relying on equivalence must do so by referring to the specific features of the claim. This is to ensure that the infringer is clearly and categorically made aware of the conditions that must be met to avoid any subsequent allegations of infringement.

Source: Judgment of the High Court, 19 March 2021, available [here](#).

3.3 Online Filing Service 2.0 at the EPO

On 1st April 2021, the EPO launched its new web-based filing service 'Online Filing Service 2.0'. The service will soon be made available on EPO's website. The new online filing system promises to improve and incorporate enhanced features to facilitate easy online filing of European and international patent applications and related documents. The most notable change is the integration of WIPO's ePCT service with the EPO's new online filing system. This new feature will allow the filer to use the latest version of ePCT in its online filing application. EPO believes that better search and filter functions will facilitate easier retrieval of submissions as well as templates and address-book entries. With the introduction of the new online filing system, the EPO also plans to slowly phase out the current CMS filing system. In light of the foregoing developments, the EPO advises users to migrate to the Online Filing Service 2.0 at their earliest convenience.

Source: EPO, 1 April 2021, available [here](#).

4. Trademarks

4.1 Metal on Metal

In an appeal before the US Ninth Circuit Court between Metal Jeans, Inc. and Metal Sport, Inc., the Court held that the District Court had earlier erred in granting summary judgement on the basis of "unclean hands doctrine". The dispute concerned two parties who had both registered 'METAL' as a trade mark, one in non-stylized form (by Metal Jeans) and the other in stylized form (by Metal Sport). Metal Jeans subsequently claimed an infringement of trade mark following the registration and use of 'METAL' by Metal Sport. Metal Jeans argued that this was likely to create confusion for the consumer. In its summary judgment, the District Court concluded Metal Sport did not infringe the trade mark in question by successfully invoking the defence of unclean hands. On appeal, the Ninth Circuit Court held that the District Court had incorrectly allowed Metal Sport's motion of defence and held that such a conduct amounted to abuse of discretion. It is therefore, always wise to check the standard of review when invoking equitable defences.

Sources: The IP Law Blog, 1 April 2021, available [here](#). Judgment of the Court, 16 February 2021, available [here](#).

4.2 Something seems fishy

The Second Chamber of the General Court (GC) recently considered a request for a declaration of invalidity of a trade mark admitted by the European Union Intellectual Property Office (EUIPO).

Blink Fish Srl (BF) had registered a Union Trade Mark (figurative sign) for a fish containing the words (B)LINK for Nice Classes 35, 38, 41 in January 2018. The company Wirtschaftsgesellschaft des Kfz-Gewerbes mbH (KfZ), requested invalidity of the sign on grounds that there existed a likelihood of confusion between (B)LINK and its own registered word sign BLINKA. Kfz had registered BLINKA in 2015 for same Nice Classes. The request was denied at every appeal stage at the EUIPO and eventually brought before the GC.



The GC held that there was indeed no likelihood of confusion between the two signs and thus, BLINK's sign need not be invalidated. The GC based its judgement on the following reasons: It held that the public would likely only see a fish in the figurative sign and not associate it with something else. In addition, the two signs in question were found not to have visual similarity, or even a phonetic similarity, as pronouncing a figurative sign was not possible. Conceptual similarity was also unfounded. Consequently, as there subsisted no similarity, the GC concluded that there was no likelihood of confusion between the two signs.

News & Image Source: Judgment of the General Court, 24 March 2021, available [here](#).

4.3 US Trade Mark shows an upward trend: American dream or a nightmare?

In March 2021, US-based Dechert LLP, a global law firm, published its prediction on emerging trends in trade mark law.

The trend indicates that trade mark filings in the US are on a rise. Increase in filings are accompanied by challenges in finding untaken trade marks and domain names. This in turn means that clients now need to indicate up to three preferences, should their most preferred mark be unavailable.

A possible explanation for the rise in the number of applications is the flood of incoming applications by Chinese companies (counting up to 25% of the total number of applications) at the US Patent and Trade Mark Office (USPTO). This in turn may be due to factors such as state subsidies offered by the Chinese government and Amazon's requirement that products and services listed on its platform have a registered US trade mark.

In addition, Dechert's empirical analysis also brought to light that many a registered trade marks were actually no longer in use. The required proof of maintenance of the trade mark was in 50% of the cases either dishonest or carelessly filed. This of course presents the issue of continued registration of the mark despite non-use.

The US government aims to overcome the above challenges by introducing a new legislation.

Source: Dechert LLP, 31 March 2021, available [here](#).