

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 18 NO. 11)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks, Enforcement and an Event Report for April-May 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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J. Lönnfors, P. Kollár, M. Mtshaulana and K. Tyagi



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

1. Competition law

1.1 Russia fines Apple for Abuse of Market Position

On 26 April 2021, the Federal Antimonopoly Service of the Russian Federation (FAS) fined Apple 906 million Rubbles (approximately 10 million euros) for abusing its market position.

The fine is the result of an investigation, that was initiated following a complaint by Kaspersky, a cybersecurity firm, in 2019. FAS' investigations indicated that Apple gave its products a competitive advantage over other competing applications in its iOS operating system, and thereby violated the country's anti-monopoly legislation.

In addition to the fine, the decision also includes the following two commitments. First, Apple, will henceforth, not include any terms or conditions in its App Store, that may in any way restrict the access of third-party apps to the App Store. Second, Apple is no longer permitted to engage in self-preferencing. This means that in-house apps should in no way enjoy 'precedence over third party apps' in the App Store.

Apple has announced that it 'respectfully disagrees' with FAS' decision and that it would soon appeal the decision. In light of the upcoming appeal, Apple is, for the time being, not required to comply with the above remedies.

Sources: Federal Antimonopoly Service of the Russian Federation, 30 April 2021, available [here](#). Competition Policy International, 27 April 2021, available [here](#). Euronews, 28 April 2021, available [here](#).

1.2 Appeal backfires – CAT increases Roland's anti-competitive fine

In June 2020, the Competition and Markets Authority (CMA) fined the music instrument maker 'Roland' £4 million for 'restricting online discounting of its electronic drum kits between 2011 and 2018'. This practice, whereby a supplier requires that its products be sold at or above a minimum price, is known as resale price maintenance (RPM).

As Roland admitting to the illegal conduct and cooperated with CMA during the course of the investigation, the CMA accordingly reduced the fine under the Leniency and Settlement programme.

Despite having already agreed to pay the fine, Roland subsequently appealed the fine on the following two grounds. First, the CMA had in its findings, exaggerated the seriousness of Roland's conduct. Second, CMA's 20% reduction of fines was inadequate.

On 19th April 2021, the Competition Appeal Tribunal (CAT) upheld the CMA's decision. The CAT concluded that the CMA enjoyed a wide discretion in 'Type B' leniency cases, and it did in fact apply the Penalty Guidance correctly.

The CAT furthermore held that by appealing the CMA's decision, Roland breached its agreement with the CMA to accept lower fine and agree on the settlement as final and non-appealable. As Roland breached this undertaking, the CAT accordingly stripped Roland of its 20% settlement discount. Roland's fine has therefore, been increased from the earlier £4 million to £5 million.

Sources: Competition Appeal Tribunal (CAT), 19 April 2021, available [here](#). Competition and Markets Authority, available [here](#). Lexology, 27 April 2021, available [here](#). Ashurst, 6 May 2021, available [here](#).

1.3 EU Anti-trust Watchdog Bond Cartel

On 28 April 2021, the European Commission announced that it had fined Bank of America Merrill Lynch, Crédit Agricole and Credit Suisse €28.5 million for participating in a bond cartel. Deutsche Bank, which first brought the cartel to the notice of the Commission, benefitted from 100% leniency.

The five banks had allegedly violated Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the European Economic Area (EEA) Agreement. The Cartel effected the ‘secondary trading market within the EEA of Supra-sovereign, Sovereign and Agency (SSA) bonds denominated in US dollars’.

The banks had regularly coordinated and exchanged sensitive information on trading and pricing for a continuous period of five years. They had, in addition, colluded not to out-bid or out-compete as and when they directly competed against one another. To limit customer’s choice in the market, and thereby profitably benefit from reduced conditions of competition, the banks also agreed to partition the markets and align their offerings to the customers.

Sources: EU Commission, 28 April 2021, available [here](#). Competition Policy International, 28 April 2021, available [here](#).

2. Copyright

2.1 No trolling beyond this point

On 23 April 2021, the United States Court of Appeal for the Seventh Circuit affirmed the lower court’s decision dismissing an infringement suit by Design Basics. The appellant, Design Basics LLC, sued the defendants for infringement of its copyright in floor plans for family homes. Design Basics is a well-renowned copyright troll, known for registering and litigating copyright in floor plans for modern family homes. This case is one in a long line of similar ‘intellectual property shakedown’ actions initiated by the appellant. The company engages in strategic litigation with the sole purpose of seeking compensation by way of out-of-court settlements.



The Court considered that the copyright in floor plans owned by the appellant were ‘thin’, as the elements of the floor plan, are essentially driven by its ‘function’. In view of the foregoing, the Court added that only virtually indistinguishable copies could be held infringing, as the scope of protection conferred by ‘thin’ copyright must, accordingly, be ‘thin’. The appellant,

on his part, failed to prove that copying did in fact happen, save for one copyrighted floor plan. Even for that floor plan, however, similarity was not substantial enough to find infringement.

Sources: IP Watchdog, 30 April 2021, available [here](#). Judgment of the Court, 23 April 2021, available [here](#).

Image Source: Judgment of the Court, 23 April 2021, Appendix, available [here](#).

2.2 Did Bowser's Operating Systems take Nintendo too far?

On 16th April 2021, Nintendo filed a complaint against defendant Gary Browser in the United States District Court in Seattle. As per the complaint, Gary Browser runs and manages a company Team Xecuter, and a number of websites that manufacture Circumvention Devices and unauthorized operating system 'SX OS' for commercial gain (*see* paras 2-10 of the complaint). Using the 'SX OS' operating system and related tools, users can easily and economically circumvent Nintendo Switch consoles' technical protection measures (TPM). TPMs are anti-circumvention measures that protect copyrighted software and video games from unlawful access and copying.

Manufacture, sale, and trafficking of TPM circumvention devices, has on numerous occasions been found to be a violation of the DMCA by US courts (see for example *Nintendo v. Mathias*).

As per Nintendo's complaint, Defendant's Circumvention Devices & SX OS violate 17 U.S.C. §1201 *et seq.* of the 1998 Digital Millennium Copyright Act (DMCA). In addition, display of Nintendo Switch and Nintendo's copyright-protected games on defendant's website infringe Nintendo's rights in its audio-visual works under 17 U.S.C. § 106(5).

Defendant's Circumvention Devices allegedly put over 79 million Nintendo Switch and Nintendo Switch Lite consoles worldwide under risk of piracy. Considering the 'manifest and irreparable' harm to Nintendo, the company has requested permanent injunction prohibiting Browser and his company from manufacturing or trafficking in Circumvention Devices and the SX OS.

The Complainant, Nintendo, has also in addition, requested for an award of statutory damages.



*Sources: The TMCA, 29 April 2021, available [here](#). Complaint in *Nintendo v Gary Bowser*, 16 April 2021, available [here](#). *Nintendo v. Mathias*, United States District Court for the District of Arizona, 26 November 2018, available [here](#).*

Image Source: Complaint dt. 02.02.2021, available [here](#)

2.3 Choreographer Knight protects his renowned dance moves through copyright



JaQuel Knight, is a world-renowned choreographer known for choreographing and creating famous dance moves such as Beyoncé's 'Single Ladies (Put a Ring on It)'. Earlier last month, Knight launched two companies 'Knight Choreography' and 'Music Publishing Inc'. With this move, Knight plans to claim and register copyright in various dance moves that he has created during the course of his career.

Choreographed dance sequences can be considered work (Article 2, Berne Convention) and provided that they meet other requirements, such as 'originality', can receive protection under copyright law.

The economic significance of Knight's move and overall impact on the market for choreography cannot be underestimated. It is likely, that if Knight does manage to successfully enforce his copyright, he may, well set a precedent for other upcoming choreographers.

As for the position of the US Copyright office on copyright protection for choreography, the Copyright office issued a revised circular in March 2021. The Circular offers general information, and conditions that must be met to register choreography in the US.

Sources: Variety, 22 April 2021, available [here](#). Legal Era Online, 14 May 2021, available [here](#). LegalZoom, 26 March 2021, available [here](#). US Copyright Office, Copyright Registration of Choreography and Pantomime, Circular 52, available [here](#).

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

3. Patent

3.1 Opposition emerges to EPO's plan for compulsory video conference in oral proceedings



The COVID-19 pandemic forced the European Patent Office (EPO) to switch to an online format for the oral hearings of cases.

The EPO now faces a new procedural pandemic of sorts, as the EPO and Boards of Appeal (BoA) are increasingly confronted by situations, wherein at least one of the parties to the dispute disagrees with oral video hearings.

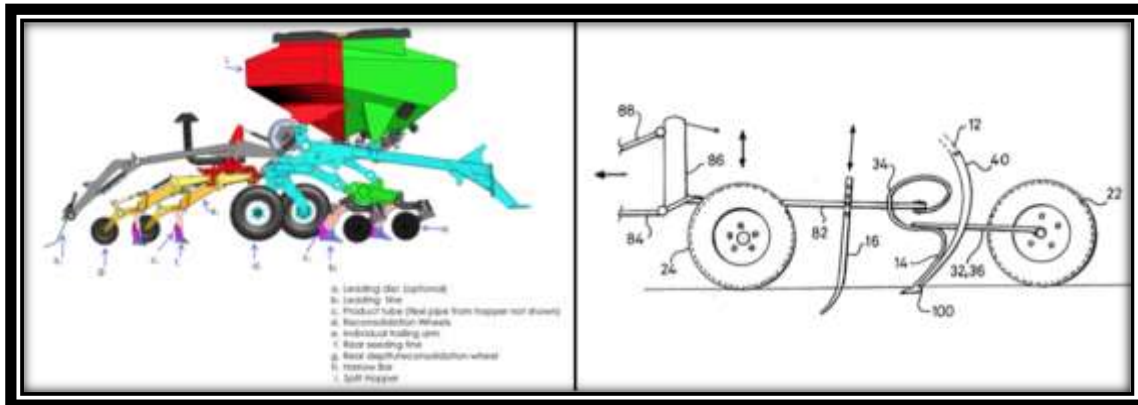
More recently, the BoA referred the case, Andrew AG v. Rohde & Schwartz, to the Enlarged Board of Appeal. The key question posed therein is whether compulsory oral hearings in the form of a video conference are in line with the European Patent Convention. In response to the referral, over 22 amicus briefs have been filed by corporations, law firms as well as other personnel interested in the outcome on the issue. The German law firms have, in a joint comment, voiced their opposition against mandatory video conferences for oral proceedings. In an expert opinion, Siegfried Broß, a former judge at the EPO, has also voiced his dissent to mandatory video conferencing. Broß

alleges that the new rule is unlawful as it violates the European Convention on Human Rights as well as the general principle on the rule of law.

Source: JUVE Patent, 28 April 2021, available [here](#).

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

3.2 Public disclosure of an invention may occur, even if no one is watching!



In *Claydon v. Mzuri*, the key issue under consideration was when can prior use be categorized as public disclosure. In the case at hand, the inventor Mr. Claydon had tested his seed drill on a field over the course of two days. While testing his seed drill, only his brother was present along with him on site. The drill was, however, visible from the edge of the field.

The key question before the England and Wales High Court (EWHC) was whether prior use could be understood as public disclosure, as there remained a possibility that a skilled person could have observed the testing of the drill in the field. The EWHC concluded that a skilled person observing the testing could have deduced certain features of construction of the drill from its appearance and the appearance of the soil left behind it. On these grounds, the Court concluded that there had been public disclosure of the seed drill on account of prior use. The patent was therefore, found to have lacked novelty, and accordingly held invalid.

Sources: IP Kitten, 27 April 2021, available [here](#). Claydon Yield-O-Meter v Mzuri Ltd & Anor [2021] EWHC 1007 (IPEC), 22 April 2021, available [here](#).

Image Source: Images as provided in the EWHC judgment, available [here](#).

3.3 French proposal to amend ex officio patent licensing to avoid public health disaster

The slow rollout of COVID-19 vaccines has directed attention to the possibility of using ex officio licensing as an answer to address the issue of public health crises. Many national legal systems already provide for an ex officio license. The license is also provided for by the TRIPS agreement. However, in practice, they have seldom been put to use. As an example, the French ex officio license has never been used to date. Foregoing considerations prompted the French senator, Ronan Le Gleut to propose on 8 April 2021, a bill for grant of compulsory licensing in cases of public health emergency before the French Senate.

As per the Bill, while France has taken steps to address the issue by adding a new article L. 3131-15 to the Public Health Code - it is insufficient to address the current situation. According to L.3131-15, following a report by the minister in charge of the health portfolio, the French

Prime Minister is allowed to issue a regulatory decree in order to ensure public health and adequate medication and thereby, avert a health disaster.

The proposed Bill goes a step further and calls for increased flexibility and even potential acceleration of the ex officio licensing system. It proposes that the conditions for ex officio license be relaxed by adding the possibility of granting such a license in cases of ‘extreme health emergency’ to Article L.3131-15. Further, the proposal calls for ensuring that inventions licensed via an ex officio license can be used effectively and practically by the authorized party. As an example, this can be ensured through temporary use authorization or ensuring that ex officio licenses are coupled with a duty on the patentee to provide all the necessary elements that may be required for the commercialization of the invention.

Sources: Kluwer Patent Blog, 28 April 2021, available [here](#). M. Le Gleut’s Proposal before the French Senate, 8 April 2021, available [here](#).

4. Trademark

4.1 How the ‘HELL’ is your coffee?

On 21 April 2021, the General Court (GC) offered its ‘HELL’ flavour in coffee. In December 2018, Hungarian soft drink producer Hell Energy Magyarország Kft (Hell Kft) had filed for the sign ‘HELL’ for coffee-related products. The European Union Intellectual Property Office (EUIPO) and the Boards of Appeal (BoA) rejected Hell Kft’s request, as in their opinion, the sign ‘HELL’ lacked distinctive character under Article 7(1)(b) European Union Trade Mark Regulation (EUMTR) and was descriptive under Article 7(1)(c) of the EUTMR. The EUIPO held that the term ‘HELL’ in relation to coffee products would be understood by the relevant public in Germany as referring to the ‘degree of roasting’ done for the coffee product and thus, be descriptive of a characteristic of the product. Hence, the sign was found to be devoid of distinctive character and accordingly refused for all classes, except malt coffee. An exception was made for malt coffee, as it required no roasting of coffee. As there was a likelihood of confusion between the two signs, Hydrovision could not be registered. The conclusion was upheld by the BoA.



The GC, on appeal, annulled the foregoing decision. According to the GC, the EUIPO had incorrectly assessed the notion of a ‘descriptive sign’, as perceived by the relevant public. ‘HELL’ was not descriptive of the characteristics of the good for the following three reasons. First, the notion ‘hell Kaffee’ in German is, grammatically speaking, an incorrect expression. Second, the notion of ‘heller Kaffee’ (read: light coffee) is not broadly used by the relevant public. Third, the word ‘HELL’ has a different meaning in English. Overall, the GC found that the sign ‘HELL’ was neither descriptive nor devoid of distinctive character.

Sources: Judgment of the General Court, 21 April 2021, available [here](#). Kluwer IP Law Blog, 27 April 2021, available [here](#).

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

4.2 All the power to the EUIPO

On 28th April 2021, the GC decided on the descriptive nature of the mark ‘REPOWER’. In June 2009, Bern-headquartered REPOWER AG applied for registration of word mark ‘REPOWER’

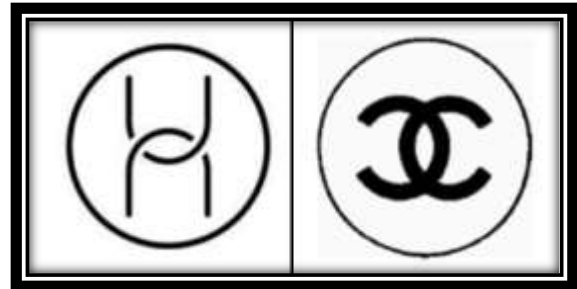
for Classes 4, 9, 37, 39, 40, 42 with the EUIPO. Repowermap.org initiated nullity proceedings on the ground that the contested sign was descriptive in nature, and therefore, void for lack of distinctive character. The Cancellation Division admitted the request for nullity for goods in Classes 37 and 42, while rejecting the request as regards other classes. Subsequently, the BoA aligned with repowermap.org's arguments and held, that the mark should in fact be cancelled with regard to all the afore-mentioned classes.

The applicant argued before the GC that the BoA had incorrectly assessed the distinctive and descriptive nature of the word mark with regard to classes 9 and 42. The GC however, sided with the findings of the BoA and held that the mark was recognizable to the relevant public, and that the BoA had, accordingly, correctly identified the notion of 'REPOWER' as an inherent characteristic of the goods and services in the said classes.

Source: Judgment of the General Court, 28 April 2021, available [here](#).

4.3 Can two semi-circles ever be the same?

In 2017, Huawei filed for application of a figurative sign displaying two oppositely arranged and intertwined U shapes for goods (*see* image on the left) in Class 9.



Chanel, world's leading French luxury and cosmetic company, filed opposition for the registration on the basis of an earlier registered sign (*see* image on the right). Chanel's opposition

was based on Article 8 (1) (b) and Article 8 (5) of the EUTMR. Both the Opposition Division and the BoA rejected Chanel's appeal, as in their opinion, the two signs were quite dissimilar.

Chanel appealed before the GC. The GC found that, based on a global visual comparison between the two marks, the two were quite distinct on account of the differing position of the U shapes, differing thickness of the lines and differing shapes of the circles. Chanel's opposition was thereby, dismissed by the GC and Huawei was permitted to retain its trade mark.

News and Image Source: Judgment of the General Court, 21 April 2021, available [here](#).

5. Enforcement

5.1 USTR releases its 2021 annual Special 301 Report



On 30th April 2021, the United State Trade Representative (USTR) released its annual Special 301 Report. Based on stakeholder inputs from across the US, on its 100+ trading partners across the globe, the Special 301 Subcommittee drew a list divided into three categories. The categories comprise of 'Priority Watch List', 'Watch List' or 'Not Listed in the Report' (p.5 of the Report). China, like last year, remains the centre of

focus for American IP concerns, and remains on USTR's 'Priority Watch' list. The Report identifies that despite repeated promises, China has successively failed to meet the commitments made under the US-China Economic and Trade Agreement (Phase One

Agreement), especially those dealing with foreign IP rights (p.22 of the Report). Amongst the EU member states, only Romania is included and mentioned in the ‘Watch’ list. The Report recognises that the upcoming implementation of the EU legislations, most notably, the 2019 EU Copyright in the Digital Single Market Directive and the EU Regulation 2019/933 dealing with supplementary protection certificates (SPCs) by Romania, may well be the ray of hope for better enforcement of IPRs in the country.

The Report also remarks on the significance of IPRs and the pharmaceuticals sector in dealing with the COVID-19 pandemic. It also clearly states that this is a scenario which ‘certainly qualifies’ as a public health emergency. The Report clearly mentions that the United States ‘respects the right of its trading partners’ to grant compulsory licences in accordance with the TRIPS agreement and the Doha Declaration.

Sources: USTR Special 301 Report 2021, available [here](#). The National Law Review, 3 May 2021, available [here](#).

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

6. Events: On World IP Day, IP Talk(s)

On 3 May 2021, IP Talks celebrated the World IP Day. The event included two presentations. The first presentation by our IPKM alumna, Florentina Grubi discussed the relevance of brand protection for small and medium enterprises (SMEs), and evaluated how investment in intellectual property may enhance the value of start-ups. The second presentation by Nensi Seferi, currently enrolled in IPKM (2020-2021 batch), discussed how trade names may help SMEs survive the hyper-competitive world of virtual reality.



Would you like to be the next presenter? Yes? Then please reach out to Jenny and Clara on: j.kokkou@student.maastrichtuniversity.nl and c.boxus@student.maastrichtuniversity.nl