

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 18 NO. 30)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks, Geographical Indications and upcoming events for the period April-May 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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## 1. Competition law

### 1.1 Swift political agreement reached on the Digital Services Act package

To effectively respond to the challenges of the platform economy, the European Commission, in December 2020, proposed the Digital Services Act package. The package comprised of two legislative measures, namely the Digital Services Act (DSA) and the Digital Markets Act (DMA). Whereas the DMA is a competition-oriented measure that seeks to reign in the gatekeepers, the DSA sets new rules for enhancing platform accountability for illegal and harmful content.



The DMA prescribes a set of rules and obligations

on the gatekeepers. These gatekeepers are firms that control and operate bottleneck or infrastructure facilities, and may include platforms such as Amazon, an online marketplace and Google, a provider of leading online search engine. In case of failure to comply with the provisions of the DMA, gatekeepers may be fined up to 20 per cent of their global turnover.

On 25<sup>th</sup> March, a political agreement was reached on the DMA.

The DSA recommends a set of obligations for online intermediary services. These rules are based on their “size, role and impact on the online ecosystem”. Intermediary services are broadly classified as: network infrastructure providers, hosting services, very large online search engines, online market places and very large online platforms.

On 23<sup>rd</sup> April, a political agreement was reached on the DSA.

As a next step, following a “formal adoption by the EU co-legislators”, these acts will be published in the Official Journal of the European Union, and shall enter force on the 20<sup>th</sup> day following its publication.

*Sources: European Commission, Press Releases: 23 April 2022 and 25 March 2022, available [here](#). CNBC, 22 April 2022, available [here](#).*

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

### 1.2 Google contests Commission’s fine on online advertising contracts



In a three-day hearing at the General Court (GC), that lasted from 2<sup>nd</sup> May to the 4<sup>th</sup> May, both Google as well as the Commission’s representatives passionately argued their case. In the appeal under consideration, the parties disputed against the Commission’s 2019 “online advertising contracts” decision. In the said decision, the Commission imposed a fine of over € 1.49 billion on Google. Commission’s key argument in the decision was that Google’s contractual clauses for its AdSense services were anti-competitive and prohibited potential market

entry. In a passionate appeal, Google argued that the fines were “quasi-criminal [and] riddled with material errors”. It went on to add that the Commission’s decision failed to “fairly or correctly characterize the clauses”. The Commission, on the other hand, retained its original line of argument, as presented in its 2019 decision, and was of the opinion, that Google enjoyed

a position of “ultra-dominance”, a claim that was further substantiated by the GC’s recent decision in the Google Shopping Case. Google used this position of super dominance and relied on “anticompetitive clauses to leverage advantage in an advertising revenue [-driven ecosystem]”. The GC is expected to announce its decision in the coming month. Interested readers may follow the latest on the case [here](#).

*Sources: Politico, 2 May 2022, available [here](#). The Japan Times, 3 May 2022, available [here](#). Head Topics, 2 May 2022, available [here](#).*

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

### 1.3 German government blocks Heyer’s acquisition over public safety concerns

In 2020, the Beijing-based Aeonmed Medical Group formally completed its takeover of the German Heyer Medical AG. Aeonmed had since also significantly invested in the languishing business of the latter. At the time of the takeover, Heyer had around 35 employees with an annual turnover of around € 42 million. Heyer was officially declared bankrupt in 2018. Shortly thereafter, Aeonmed, with an annual turnover of about € 100 million and over 1200 employees, proposed to acquire the fledgling firm. Heyer is a



key manufacturer of respiratory and other related medical equipment. On 27<sup>th</sup> April, the German Federal Ministry of Economics and Climate Protection ordered Aeonmed to unbundle the 2020 deal. This decision was grounded in a new stricter regulation passed by the German Government in 2020. As per the Regulation, the Government may prohibit or request for unbundling of an already consummated business transaction on grounds of “public order and safety”. The COVID-19 crisis highlighted the significance of health-related devices such as ventilators, and the German Government, in light of this crucial development, proposed the suggested divestiture of Heyer by Aeonmed.

*Sources: Handelsblatt, 27 April 2022, available [here](#) (in German). China economic review, 28 April 2022, available [here](#). Teller Report, 28 April 2022, available [here](#).*

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

### 1.4 FTC to investigate Musk’s proposed acquisition of Twitter



On 28<sup>th</sup> April, the U.S. Federal Trade Commission (FTC) formally commenced its review of Tesla (TSLA.O) Chief Executive Officer (CEO) Elon Musk’s \$44 billion proposed takeover of the social media platform, Twitter Inc. In early April, Musk reportedly acquired 9 per cent stake in Twitter. In his April 4 filing with the US Securities and Exchange Commission (SEC), Musk reported this as a passive investment. Social activist groups such as Open Markets, however, view this as a potential “direct threat to

democracy” as Musk’s another company, namely Starlink satellite internet service offers him control over a key communication platform. Acquisition of Twitter is expected to further strengthen Musk’s control over the communication channels.

If FTC's review indicates that Musk failed to comply with the disclosure requirements in the US antitrust law, he will be required to pay a fine of up to US\$ 46,517 per day. In addition, if the review indicates a need for further investigation, the FTC may follow this up with a more detailed investigation of the deal.

*Sources: Reuters (subscription required), 6 May 2022, available [here](#). Daily Mail, 5 May 2022, available [here](#). Reuters, 28 April 2022, available [here](#).*

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

## 2. Copyright

### 2.1 Meta faces real world class action against counterfeit ads

On 22<sup>th</sup> April, Jennifer L. Cook, a sculptor, filed a complaint against Meta Inc. (formerly, Facebook) at the US Northern District Court of California. The Complaint is a “class action seeking monetary and injunctive relief” on behalf of over 100+ creators for copyright infringement in Facebook ads involving counterfeit products, and images of the sculptor's works. As per the Complaint, Meta directly and indirectly infringes the exclusive rights of creators and “unfairly competes with the legitimate business owners” (para 12 of the Complaint). Facebook directly facilitates infringement as it stores these images on its website and displays them to its users (para 22). Even though it has full knowledge of this infringement, it continues to overlook and even actively encourage such behaviour as it profits from these infringing activities. The profit flows in as Meta's business model is ad-driven, meaning that it collects revenues from advertisers for displaying advertisements on its websites (paras 10-25 of the Complaint). The Plaintiff, accordingly, requested injunctive and monetary relief for violation of copyright and unfair competition law.



*Sources: Court Dockets via Bloomberg Law, 22 April 2022, available [here](#). Bloomberg Law, 25 April 2022, available [here](#). Plagiarism Today, 2 May 2022, available [here](#).*

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

### 2.2 Article 17 does not restrict the fundamental rights: says CJEU



On 26<sup>th</sup> April, the Grand Chamber at the CJEU in case C-401/19 ruled that the obligation imposed on content-sharing online service providers by Article 17 of the Copyright in the Digital Single Market Directive 2019/790 (2019 CDSM) was neither disproportionate nor in non-compliance with the provisions of the EU Charter of Fundamental Rights (CFR).

On 24<sup>th</sup> May 2019, the Republic of Poland filed an action for annulment of Article 17 (4)(b) and (c) of the 2019 CDSM, or in case this severability of the said provisions was not possible, to strike down Article 17 in its entirety

(Para 1 of the Decision). Article 17(4) offers a “special liability regime” for online content sharing service providers (OCSSPs) in case of non-authorized content (Paras 34 and 35 of the Decision). As per Poland, the said provision infringed Article 11 of the EU CFR - that offers to all, the right to freedom of expression.

The Grand Chamber mapped the evolution of the liability framework for intermediaries from the 2001 Information Society Directive and the safe harbour in the 2000 E-Commerce Directive to the more recent 2019 CDSM (Paras 77- 98 of the Decision). As per the Grand Chamber, while transposing Article 17 of the 2019 CDSM, Member States were required to engage in a balancing exercise taking due account of the principle of proportionality and the “various fundamental rights protected by the [CFR]” (Para 99 of the Decision). Poland’s action was, accordingly, dismissed in entirety, and it was also ordered to pay the costs.

Interestingly, this case was also the first by the CJEU to be livestreamed on its website. [c.f. Friday Fortnightly (Ed. 2022 Week 16 No.29) News Item 6.1 Another step towards transparency: The CJEU goes online from 26<sup>th</sup> April, available [here](#)].

*Sources: Case C-401/19, 26 April 2022, available [here](#). IP WatchDog, 26 April 2022, available [here](#).*

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

### 2.3 US District Court partially dismisses the case against Destiny 2 Cheating Tool

In its decision on 27<sup>th</sup> April, the US district court of the Western District of Washington at Seattle partially dismissed the case against “Aimjunkies” and “Phoenix Digital Group” (the Defendants) on grounds of insufficient evidence. The case dates back to June 2021, when the Bungie Inc., the owner of the game “Destiny 2” filed a copyright & trademark infringement complaint against the Defendants.

As the parties failed to enter amicable settlement, the Plaintiff, Bungie Inc. filed the present Complaint before the District Court of Washington.

As per the Complaint, the Defendants “created, advertised, marketed and sold online cheat software for Destiny 2 for \$34.95 per month” (p.2 of the Order). The Plaintiffs added that the Defendant’s cheat software was “identical or substantially similar to the copyrighted works [i.e., Destiny 2]”.

In its Order dated 27<sup>th</sup> April, the US District Court rejected the Complaint concerning copyright infringement on grounds of “insufficient evidence”, stating that “Bungie’s complaint must contain more than a formulaic recitation of the elements of a cause of action”. As per the Court, the Complaint failed to demonstrate how the above-referred cheat codes constituted an unauthorized copy of the game, Destiny 2.

The Court partially granted and partially denied the Plaintiff’s request. The Plaintiffs were offered time “with leave to amend” their Complaint in 30 days from the date of the Order, that is latest by 27<sup>th</sup> May, and adduce evidence to substantiate their infringement claims. Plaintiff’s request for mandatory arbitration, with the exception of false designation of origin under § 1125(a) of the Lanham Act, was also granted.

*Sources: TorrentFreak, 28 April 2022, available [here](#). Ars TECHNICA, 2 May 2022, available [here](#). Law360, 28 April 2022, available [here](#) (subscription required).*

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



## 2.4 Verstappen look-a-like can infringe his portrait rights: says Dutch Supreme Court



On 22<sup>nd</sup> April, the Dutch Supreme Court ruled that under certain circumstances “a-look-alike” can be deemed to be a ‘portrait’ and constitute an infringement of portrait rights under Dutch Copyright Act.

F1 Driver Max Verstappen brought infringement proceedings against Picnic, an online Dutch supermarket chain, for the violation of his image rights. In the original advertisement, Verstappen was shown delivering the supermarket Jumbo’s goods in his F1 car. The Defendant, Picnic quickly followed with a similar advertisement, whereby Verstappen’s look alike was wearing an identical racing outfit and hat (as in the original Jumbo advertisement) and was

shown as delivering Picnic’s groceries. As per the Dutch Copyright Act, for a violation of the image rights, the infringing image must have a clearly identifiable image and the facial appearance of the person portrayed. An aggrieved person, can initiate an action against such a portrayal, provided that they have “a reasonable interest”.

As per the Decision, under certain circumstances, a “look-a-like” could be deemed as a “portrait” of the original, provided that the look-a-like’s image can be purposefully augmented by use of accessories, such as dressing style and make-up, to closely resemble the person portrayed. Further, it was deemed irrelevant whether the target audience was aware that the image comprised of a look-a-like and not the person portrayed. The Dutch SC was of the opinion that no parody exception was available for the use of such a-look-alike.

As a next step, the case is before that the Dutch Court of Appeal that will determine whether Verstappen enjoyed a “sufficient legitimate interest” to raise an objection to the Picnic advertisement.

*Sources: The IP Kat, 3 May 2022, available [here](#). Grrenberg Traurig, 29 April 2022, available [here](#). The National Law Review, 29 Aril 2022, available [here](#).*

*Image sources: AD, available [here](#).*

## 3. Patent

### 3.1 Patents need not be challenged beforehand to seek preliminary injunction: says CJEU

In its opinion dated 28<sup>th</sup> April, the Sixth Chamber of the Court of Justice of the European Union (CJEU) categorically stated that patents need not successfully survive an “opposition or revocation proceeding” before requesting a preliminary injunction (PI). In other words, in case neither the European Patent Office (EPO) nor a patent court had already decided on the opposition or the validity of the patent, the pateentee may still successfully receive a PI against the alleged infringer. The CJEU was of the view that such an interpretation was “compatible with Article 9 of Directive 2004/48/EC”.

Directive 2004/48/EC deals with the enforcement of intellectual property rights (IPRs). Article 9 of the said Directive offers “provisional and precautionay measures”, including the possibility of “an interlocutory injunction”.

In the present case, Phoenix had initiated infringement proceedings against Harting Deutschland. The latter had, in turn, initiated invalidity proceedings against Phoenix. The dispute concerned patent EP 28 23 536 (EP 536) granted to Phoenix by the European Patent Office (EPO) in December 2020. Prior case law from the German courts limited the Munich court's discretion to offer a PI to Phoenix. German courts could offer a PI, if and only if, such a patent had already survived an opposition or a revocation proceeding. The 21<sup>st</sup> Civil Chamber of the Munich I Regional Court, led by Judge Tobias Pichlmaier, accordingly referred the following question to the CJEU.



The Munich court requested whether German higher regional courts (Oberlandesgerichte) could “refuse, in principle, to grant interim measures for patent infringement if the validity of the patent in dispute has not been confirmed in opposition or invalidity proceedings at first instance” in light of Article 9(1) of Directive 2004/48 (CJEU, at para 27)? The CJEU was of the opinion, that the grant of the patent (the EPO in this case) was sufficient for the Oberlandesgerichte to proceed in case of such a request.

*Sources: Juve-Patent, 28 April 2022, available [here](#). FossPatents, 28 April 2022, available [here](#). Phoenix Contact v HARTING Deutschland (C-44/21), 28 April 2022, available [here](#).  
Image source: WikiMedia commons, available [here](#).*

### 3.2 Hague Court rejects Novartis' PI request on grounds of pending patent application



In its decision dated 22<sup>nd</sup> March, the District Court of The Hague (The Hague Court) rejected Novartis' preliminary injunction (PI) request against Mylan, on the ground that in case of a European patent, patent holder could not enforce its patent rights until the publication of the grant. In the case at hand, the PI request was based on a pending patent application EP2959894A1 (EP 894) filed by Novartis. EP 894 is a divisional application covering Novartis' drug Gilenya, that enjoyed a period of market exclusivity till 22<sup>nd</sup> March 2022.

Given that the EP 894 was yet to be granted, Mylan listed its generic drug in the price list of G-

Standard and was planning a product launch, following the expiration of the above-referred market exclusivity.

Novartis requested a divisional patent EP 894 in 2015. This was refused by the Examination Division (ED) of the European Patent Office (EPO) in November 2020 on grounds of lack of novelty. In the appeal proceedings, the Boards of Appeal (BoA), in February 2022, decided to set aside this decision and remit the case back to the ED accompanied by instructions to grant EP 894 on the basis of a single claim, as amended on 18<sup>th</sup> November 2019. As the decisions of the BoA have a binding effect on the ED, EP 894 will probably be granted on grounds of the claim as suggested by the BoA in its decision.

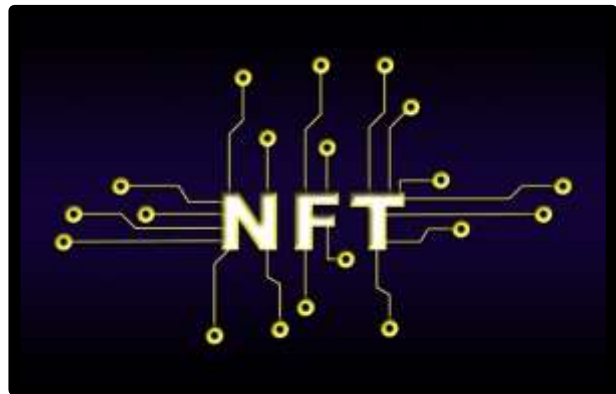
In light of the above, Novartis applied for a PI. The Hague Court was, however, unconvinced. According to the Hague Court, a patent holder is usually entitled to material patent protection for less than 20 years, and the protected period is partially relevant to the applicant's filing strategy. For a European patent, the enforcement right ("handhavingsrecht") becomes effective only after the publication of the grant. In order to fill the time gap between the publication of the application and the grant of a European patent, a right to compensation with retroactive effect is offered in law ("recht op een vergoeding"). [See para 4.12, p.9 of the Order]. Such a right is, however, limited in scope and cannot pre-empt and serve as a basis for a PI.

*Sources: Juve-patent, 26 April 2022, available [here](#). District Court of The Hague, 22 March 2022, available [here](#).*

*Image source: Wikimedia Commons, available [here](#).*

### 3.3 IBM creates a blockchain network to enable NFT-driven patent asset management

Non-fungible tokens (NFTs) are blockchain-based digital assets. A digital asset can be minted, in other words, it can be transformed into an NFT. Seeing a potential market for an NFT-based IP-protection, the technology giant IBM Inc. has developed IPwe, a blockchain-based NFT platform. IPwe is expected to commence operations in the following weeks. It is expected that the tokenization of patent assets can lead to more transparent and cost-effective transactions, as such a platform will be publicly accessible and near immutable. Tokenization of patents will also facilitate collection and easy retrieval of information on prior art. This in turn, is expected to make it easier to "license, sell and commercialize" patents, even by start-ups and universities.



*Sources: JDSupra, 28 April 2022, available [here](#). IBM NewsRoom, 20 April 2021, available [here](#).*

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

## 4. Trademark & GI

### 4.1 Wavy Baby infringes Vans' trade dress & trade mark rights: says US District Court

On 29<sup>th</sup> April, Vans, the skateboarding shoes manufacturer, received relief against MSCHF, the American-based art collective, on grounds of infringement of Vans' trade mark and trade dress rights. As per Van, MSCHF's Wavy Baby sneakers, released in collaboration with the rapper Tyga, mimicked their trade dress rights on their OLD SKOOL skate shoes, the classic "70's era shoe design". In addition, the side stripe trade mark was also infringed as Wavy Baby carried a similar mark and free-rode the brand's reputation.

Following failed negotiations and cease-and-desist orders, Vans filed a complaint for trademark infringement, unfair competition, trademark dilution, and unfair trade practices at the U.S. District Court for the Eastern District of New York.



MSCHF’s principal argument was that their shoes were primarily “intended for connoisseurs”, who were well-aware of the difference between the two brands. However, the Court was of the opinion that there was a legitimate risk of consumer confusion as an average user would not be able to detect the true origin of the shoes. Moreover, the parody, defence as raised by MSCHF failed to meet the required threshold under the Lanham Act. As the Court found no merits in MSCHF’s claim, it ordered a temporary restraining order and preliminary injunctions against MSCHF’s Wavy Baby.



*Sources: Complex, 3 March 2022, available [here](#). The Fashion Law, 15 April 2022, available [here](#). CourtHouse News, 29 April 2022, available [here](#).*

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

#### 4.2 MegHarry’s Arche-atypical trademark request



Archewell Audio LLC, Megan Markle and Prince Harry recently requested registration for the trade mark “ARCHTYPES” before the US and the Australian trade mark offices. The registration is in relation to a number of entertainment services, such as podcasts, on-demand streaming media, live stage performances and webcasts. The registration concerns a narrowly defined class of audio-visual content “in the fields of cultural treatment of women and stereotypes facing them”. This request is in light of Megan Markle’s forthcoming podcast on Spotify with the same name. The request for registration of

the mark immediately evoked critical responses from the citizens and media outlets across the UK, as they feared registration of a mark “that first appeared in the English language 470 years ago”. The ex-Royals, on their part, sought inspiration from the well-known trade mark “Apple” for computers, and requested registration in reference to a particular type of series on Spotify.

*Sources: Lexology, 6 April 2022, available [here](#). The Mercury News, 8 April 2022, available [here](#).*

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

#### 4.3 Chile joins-in as the 111<sup>th</sup> signatory to the Madrid Protocol

On 4<sup>th</sup> April, Chile became the 111<sup>st</sup> member to join the Madrid Protocol.

The Protocol, formally signed by the Government of the Republic of Chile, will enter force on June 4, 2022, i.e., on the 60<sup>th</sup> day following the deposition of the instrument of accession.

The Madrid System is an international one-stop shop for trademark protection across the world “by filling a single application”. With Chile’s accession, one single Madrid application shall, starting July 4<sup>th</sup>, formally offer protection of the applied trademark in up to 127 territories globally.



Sources: *Clarke Modet*, 2 May 2022, available [here](#). *WIPO*, 4 April 2022, available [here](#).  
Image source: *European Commission*, available [here](#).

#### 4.4 Commission proposes GI protection for Craft and Industrial Products



On 13<sup>th</sup> April, the EU Commission published a Proposal for a Regulation on Geographical Indication (GI) Protection for Craft and Industrial Products. In 2019, the EU acceded to the Geneva Act of the Lisbon Agreement on Appellation of Origins and Geographical Indications, an international agreement protecting product designations connected to their place of origin, including both agricultural and non-agricultural products. Prior to this latest proposal, EU’s GI protection was limited to agricultural products originating in the EU.

Crafts and industrial products (CIP) are products that originate in a particular geographical area and enjoy significant reputation for their quality, such as the

world-famous Italian Murano glass (*see photo*).

The Commission’s preliminary studies indicated that the absence of a formal legal framework for the protection had a negative impact on investment in traditional crafts in the EU. To address this legal vacuum, the Commission proposed the above-referred Regulation. To benefit from protection, as per Article 5, a CIP must “(i) originate in a specific place, region or country, (ii) to which their quality, reputation or other characteristic must be essentially attributed and (iii) at least one of the production steps must take place in the defined geographical area”.

Sources: *Kluwer Trademark Blog*, 25 April 2022, available [here](#). *Commission Proposal*, 13 April 2022, available [here](#).

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

### 5. Events

#### 5.1 Japan Patent Office’s online symposium on Standard Essential Patents

On Thursday, the 19<sup>th</sup> May 12.00 - 15.00 hrs (CEST), the Japan Patent Office (JPO) will hold a symposium on SEPs. Experts from Japan, Europe, and the US, will discuss the latest and emerging trends in the world of SEP. In addition, the symposium will also include a panel on JPO’s forthcoming guidelines on licensing negotiations.

A walk-up link to participate will be published on the [event page](#) on the day of the symposium.

Source: *Japan Patent Office*, 22 April 2022, available [here](#).