

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 22 NO. 13)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks, and Invitation to Events for May & June 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,

C. De Schrijver, E. Verhaeghe, J. Fuchsloch,

J. Lönnfors, P. Kollár, 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 Commission publishes its evaluation of the Motor Vehicle Block Exemption Regulation

On 28th May 2021, the European Commission published its Evaluation Report and the accompanying Staff Working Document (SWD) of the Motor Vehicle Block Exemption Regulation (MVBER).

The Study evaluates the entire legal regime applicable to the automotive sector, including the MVBER and the Supplementary Guidelines, the Vertical Block Exemption and the Guidelines on vertical restraints, on the basis of the following criteria – ‘effectiveness, efficiency, relevance, coherence and EU added value’ in the motor vehicles sector.



The findings of the Report indicate that the current legal regime effectively meets the sector-specific requirements, while simultaneously retaining an inherent flexibility to adapt to diverse situations. In light of the ever-emerging challenges in the motor vehicles sector though, some changes can be expected in the upcoming MVBER.

As a next step, the Commission has until 31 May 2023 to decide whether it will review, revise, or lapse the current MVBER.

Source: European Commission, 28 May 2021, available [here](#).

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

1.2 Bundeskartellamt opens investigation against Goggle over data use

On 25th May 2021, the Federal Cartel Office of Germany, Bundeskartellamt (BKartA) opened two related proceedings against Google Germany, Google Ireland and its parent company Alphabet. The investigations concern the companies’ alleged abuse of market power through processing of customer data.



The probe is based on the new competition law provisions introduced by the 10th amendment to the Gesetz gegen Wettbewerbsbeschränkungen (GWB-Digitalisierungsgesetz – GWB Digitalisation Act), that entered force in January 2021 (*Kindly see Friday Fortnightly 2021, Week 4, Ed. 4 News item 1.3, available [here](#)*). Section 19a GWB enables the BKartA to ‘prohibit companies which are of paramount significance for competition across markets from engaging in anti-competitive practices’.

In accordance with Section 19a (2) no 4a GWB, the BKartA shall evaluate whether conditional services, such as processing of customer data without offering enough detail and choices to the users by Google and its parent company may amount to an abuse of its dominant position.

Sources: Bundeskartellamt, 25 May 2021, available [here](#). Reuters, 25 May 2021, available [here](#).

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

2. Copyright

2.1 The German implementation of Article 17, CDSM Directive: *une approche nouvelle*?

On 20 May 2021, the German Parliament passed a new Act (see draft law: Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts) to implement the 2019 Copyright in the Digital Single Market Directive (CDSM). The draft, in addition, also implements amendments based on the decision of the Court of Justice of the European Union (CJEU) in Pelham/Hütter (C-476/17).

In light of the complex and atypical nature of Article 17, a new Act ‘Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten’ (UrhDaG) will implement Article 17 of the 2019 CDSM Directive.

The German implementation largely borrows from the provisions of the said Article. The Act introduces certain permitted non-commercial uses that shall be exempt from take down or upload filtering obligations. The Online Content Sharing Service Providers (OCSSP) should first communicate and amicably address infringement issues arising therefrom. Notably, User-generated content (UGC) will benefit from a legal presumption of permissible use, provided following conditions are met – first, the UGC uses at most half of the protected work and combines it with other content, and second, it makes either *de minimis* or other permissible use of protected works. Listed in §10 of the UrhDaG, *de minimis* use of protected work may include use of up to 15 seconds from a sound track or up to 160 characters from literary work.

Sources: IPKat, 24 May 2021, available [here](#). Torrent Freak, 24 May 2021, available [here](#). Bundestag, 20 May 2021, available in German [here](#)

2.2 State liability for copyright infringement: White Paper on *Allen v. Cooper*

On 13 May 2021, the US-based Regulatory Transparency Project of the Federalist Society, a non-profit organisation, published a White Paper on State accountability in case of infringement of copyright.

The Paper sees *Allen v Cooper* as a problematic Supreme Court precedent. In the said case, the Court ruled that the State enjoyed sovereign immunity against claims of copyright infringement, and that even the Copyright Remedy Clarification Act of 1990 could not revoke this immunity. Revocation of State Immunity was identified by the Court as unconstitutional.

Overall, such a framework leads to an unfair and imbalanced system, wherein the State can not only enforce copyright and seek remedies for infringement; it can also use copyright-protected works of citizens without any fear of enforcement by right holders. Even though injunctions can be issued against State employees, this neither compensates right holders for past violation nor dissuades subsequent infringement by the State.

To reign in the current situation, the Paper recommends the Congress to constitutionally curtail sovereign immunity for copyright infringement. Alternatively, the Congress may adopt a Court-centric approach, whereby the State, just like the market players, can be held liable for copyright infringement.

Sources: Judgment of the Court, 23 March 2020, available [here](#). White Paper, 13 May 2021, available [here](#). IP Watchdog, 23 March 2020, available [here](#). IP Watchdog, 18 May 2021, available [here](#).

2.3 Balancing stakeholders' interests in copyright protection: Challenges posed by technology and the Doctrine of Implied Consent

The emergence of 'digitally available works' and 'digital streaming services' challenged the traditional notion of ownership of digital copies of the work.



In *Tom Kabinet*, the CJEU opined that the re-sale of e-books on Tom Kabinet's website was an act of communication to the public, and the platform owner, accordingly, was refused the benefit of exhaustion principle. Can one then argue that this really means the 'end of ownership' of works in a non-tangible form? Can the 'doctrine of implied consent' fill in this lacuna created by the ever-changing business models? Broadly speaking, implied consent and licenses therein may refer to a situation wherein licenses can be implied from 'contracting parties' unexpressed intent to supplement an agreement' (as in contract law) and the 'principle of copyright authorisation' (Jenkins, p.4).

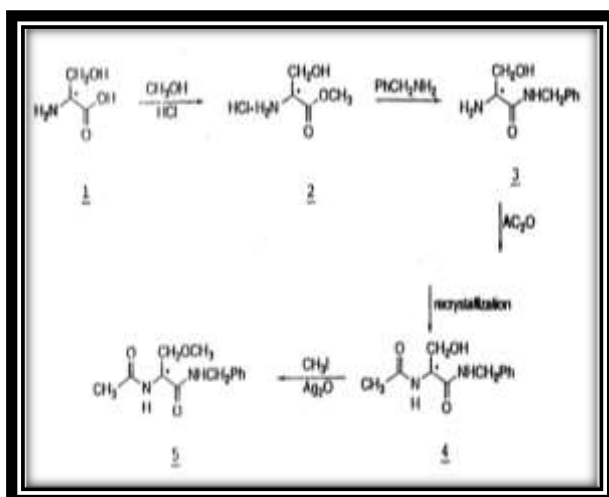
In the *TuneIn* decision, the England and Wales Court of Appeal examining the notion of communication to the public in light of the CJEU's decisions on the issue, found that there was an implied authorisation from the copyright holder to the internet radio stations in the UK (Kindly also see *Friday Fortnightly Week 14 No. 9 News. 2.3*, available [here](#), for a discussion on the *TuneIn* decision).

Sources: *Kluwer IP Law Blog*, 17 May 2021, available [here](#). Jenkins, G. *An Extended Doctrine of Implied Consent – A Digital Mediator?*. IIC (2021), available [here](#).

Image source: *The International Man*, available [here](#).

3. Patent

3.1 Barcelona Court of Appeal on threshold for crossing the line of 'threat of infringement'



In a recent counterclaim by a Spanish pharmaceuticals company for revocation of European Patent EP 888 289 and its Supplementary Protection Certificate (SPC), that protect lacosamide, an antiepileptic drug, the Barcelona Court of Appeal (CoA) had to consider what exactly amounted to a 'threat of infringement'.

Both the revocation action and the counterclaim were rejected by the Court of First Instance in April 2020, as such actions against 'threat of infringement' lacked a legal basis in Spain.

On appeal, the Barcelona CoA considered that there was a possibility to initiate action against a 'threat of infringement'. The CoA opined that market authorization was sufficient to amount to a 'threat of infringement'. The CoA added that filing for revocation could not be considered

as a ‘threat of infringement’, as the filing party would then logically wait for the Court’s decision on the revocation claim before launching the product. To add clarity to the case at hand, it may be useful to add that in Spain, a drug launch requires compliance with the following three steps: first, ‘obtaining market approval’; second ‘obtaining a price’ and third, an ‘effective marketing declaration’.

Based on the facts of the case, the Court of Appeal opined that the threat of infringement could not be established in the case at hand.

Source: Kluwer Patent Blog, 27 May 2021, available [here](#).

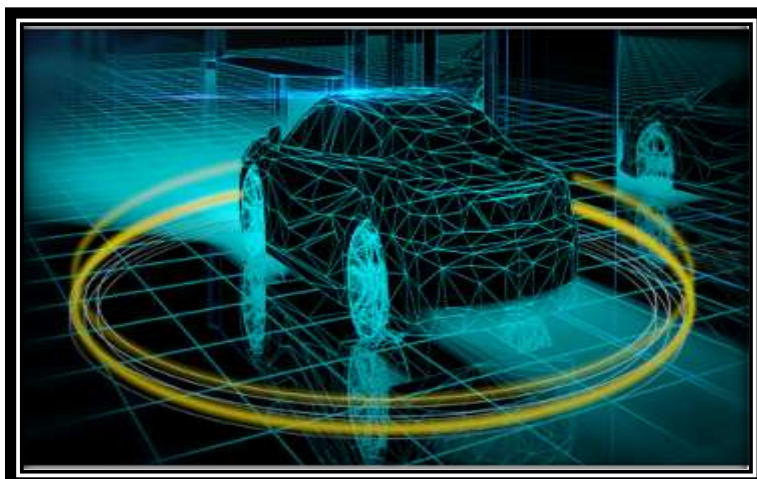
Image source: European Patent Specification for ‘Anticonvulsant Enantiomeric Amino Acid Derivatives’, available [here](#).

3.2 Last-minute compromise reached on German Patent Reform

The incumbent German coalition has finally managed to reach a compromise on a new bill that proposes stricter guidelines to granting patent injunctions. The Bill was tabled before the Bundestag, the German Federal Parliament, in the wake of the *Nokia v. Daimler* dispute, wherein Helsinki-based telecom equipment manufacturer, Nokia sought an injunction against car manufacturer Daimler, world’s leading producer of premium cars and commercial vehicles, for use of its patents in the manufacture of ‘connected cars’ (*For more details about the Nokia/Daimler dispute, kindly see Friday Fortnightly Week 16 No. 10 News. 5.3, available [here](#), and Friday Fortnightly Week 50 No. 2 News 3.2, available [here](#)*)



The first plenary discussion on the reform bill indicated bleak prospect of success. The parliamentarians were hesitant to make any disruptive changes as denial of near-automatic injunctions endangered Germany’s position as the world’s leading patent jurisdiction. Earlier this week, a last-minute compromise was reached between the ruling grand coalition (Große Koalition) comprising of the CDU/CSU (Christlich Demokratische Union/Christlich-Soziale Union in Bayern) and SPD (Sozialdemokratische Partei Deutschlands). More particularly, the Coalition agreed on injunctions, one of the most contentious issues in German patent law. The amended version proposes that in order to avoid situations of automatic injunction, courts should look at the proportionality of the measure.



In case an injunction leads to ‘disproportionate hardship’ (unverhältnismäßigen Härte) for the manufacturer or even a third party (such as in case of essential vaccines), the Court should not hesitate to refuse the patent holder’s request for an injunction. With this, the Bill, it is hoped, will keep the abuse of German patent law in general under check and the patent trolls in particular at bay.

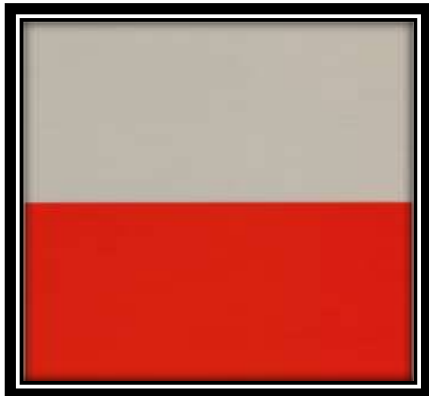
In this amended proposed form, the Bill is expected to come up for voting during the final voting weeks in June, before the upcoming German elections scheduled for September 2021.

Sources: Foss Patents, 29 May 2021, available [here](#). Foss Patents, 5 March 2021, available [here](#). Foss Patents, 25 February 2021, available [here](#). Handelsblatt, 2 June 2021, available in German [here](#) [for subscribers].

Images sources: CityNews, available [here](#). InterTraffic, available [here](#).

4. Trademark

4.1 Stihl Chainsaws with shades of Orange and Grey



In 2010, Stihl, world's leading manufacturer of chainsaws with cutting edge-innovative technology, registered a color mark combination consisting of orange and grey for different parts of a chainsaw. Subsequently Giro Travel filed for invalidity of Stihl's mark. The EUIPO's (European Union Intellectual Property Office) Board of Appeal (BoA) agreed with Giro's contention and declared Stihl's mark invalid on the grounds that the registration was neither sufficiently clear nor precise.

On appeal, the General Court (GC) held that mark and its graphical representation were sufficiently clear and precise and enabled an average consumer 'to perceive and remember a particular combination [that s/he] might use in order to repeat with certainty, a purchase experience, particularly as in the present case the public is specialist' (the GC at para 41). The GC, accordingly annulled the decision of the Second BoA of the EUIPO in its entirety, and permitted Stihl to retain its mark.

Sources: Kluwer Trademark Blog, 27 May 2021, available [here](#). Judgment of the General Court, 24 March 2021, available [here](#).

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

4.2 Banksy – If you register 'not to sell', then 'We'll Be in Charge'!, says EUIPO



The EUIPO recently annulled registration for a figurative mark for Banksy's work 'Laugh Now But One Day We'll Be In Charge', depicting a monkey with a sandwich bag hung around his neck. The annulment of the trade mark was based on a third-party opposition by 'Full Color Black', a UK-based online trader of greeting cards and posters based on renowned street art. The company argued that the trade mark was registered in bad faith.

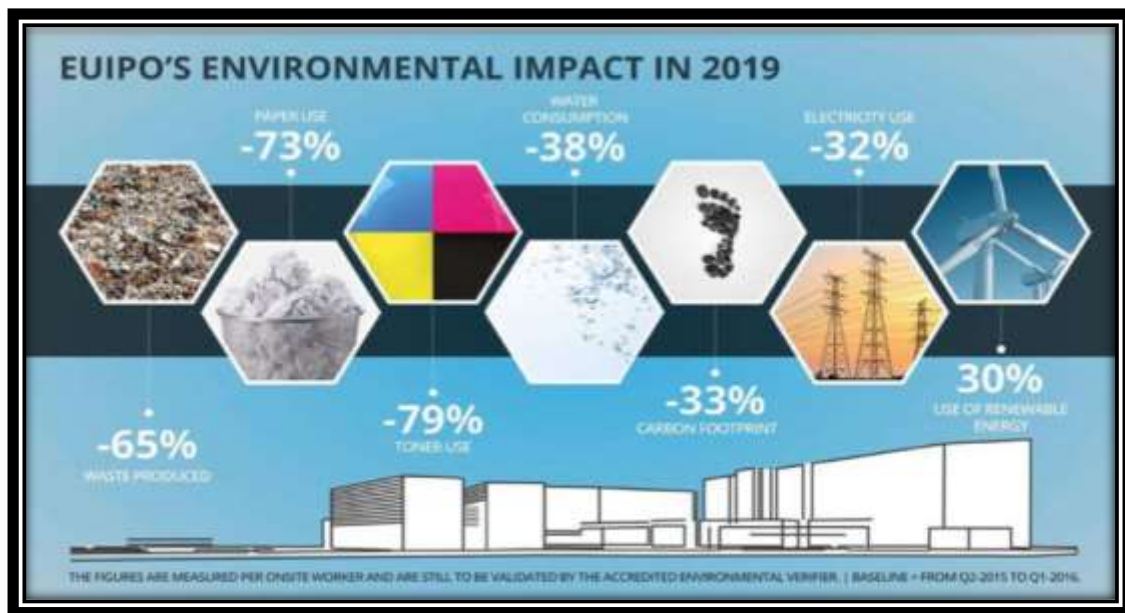
In its assessment, the EUIPO concluded yet again (earlier similar decision was reached by the EUIPO in the *Flower Thrower case*) that as Banksy had no intent to use his trade mark for goods and services, the registration, accordingly be held to have been made in bad faith. Banksy, the British artist and political activist, failed yet another opportunity to submit to the EUIPO.

To that we say: Banksy, you cannot have it both ways. Either you submit yourself to the IP system or you accept that you do not benefit from its protection.

Sources: Public Delivery, 30 January 2021, available [here](#). IPKat, 21 May 2021, available [here](#). Decision of the Cancellation Division of the EUIPO, 18 May 2021, available [here](#).

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

4.3 EUIPO goes environment-friend(-lier): Six-month pilot project launched to further minimise the use of paper



On May 15th 2021, the European Union Intellectual Property Office (EUIPO) launched a six-month long digital work pilot project. This pilot project will ensure a smooth transition to digital communication with the clients.

As part of the project, the EUIPO instead of sending across a hard copy of attachments in its official communications, will henceforth, only offer e-links for these documents. The users will have the possibility to create an EUIPO account to have secure access to the Digital User Area (DUA). The EUIPO will then offer all its communication in the digital space and replace the currently used hard-copy attachments with e-links in its official communications. The user can, in turn, securely access this DUA and download the documents.

The underlying idea of this digital project is to be more environmental-friendly by minimizing the use of paper. It is expected that the project, in its trial phase alone, will save printing of over one million pages. The move, in addition, will also make communication with clients easier and more efficient.

This pilot project, it is hoped, will facilitate a smooth transition to the newly introduced DUA and digitally-driven communications project with the clients.

Sources: EUIPO, 26 May 2021, available [here](#). EUIPO Conditions of Use of the User Area, v.4 dt. 1st October 2017, available [here](#).

Image Source: EUIPO Environmental Statement, 2019, available [here](#).

5. Events

5.1 CMA launches investigation into AstraZeneca/Alexion Pharmaceuticals merger

On 25th May 2021, the Competition and Markets Authority (CMA) initiated an investigation into the Alexion Pharmaceuticals' acquisition by AstraZeneca.

The CMA is considering whether the transaction may harm competition in the UK for healthcare and medical equipment.

When and Where? Should you like to give your feedback, kindly do so via this [link](#) until 3 June 2021.

Source: Gov.uk, 25 May 2021, available [here](#).

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



5.2 EPO hearing G-1/21 postponed

The previous edition of the newsletter (*Friday Fortnightly Week 20 No. 12 News 5.3*) shared an invitation for the upcoming European Patent Office (EPO) Enlarged Board of Appeal hearing in case G-1/21.

On the proposed day, it was announced that hearing shall now take place in July, as the Appellant received the relevant documents only two days prior to the hearing. Readers are advised to keep a watch on our Events section, should they be interested in joining the hearing in G-1/21.

Source: Juve Patent, 28 May 2021, available [here](#).