

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 2 NO. 3)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for December 2020 and January 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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Serving innovative start-ups pro-bono with the wisdom of intellectual property laws

1. Competition law

1.1 AMC's new strategy to monitor the use of algorithms

The Dutch Authority for Consumers and Markets (ACM) recently published a position paper on the supervision of algorithms. The paper offers guidance on how the ACM is likely to assess the use of algorithms by businesses.

To better understand how algorithms impact business decision, and which particular categories of data may be more relevant for purposes of competition investigation, the ACM has also initiated a trial with the online music library, Muziekweb.

Source: Lexology, 6 January 2021, available [here](#). Authority for Consumers and Markets, 10 December 2020, available [here](#).

2. Copyright

2.1 Finland outlines Article 17 implementation

The Finnish implementation of the heavily debated Article 17 of the 2019 Copyright in the Digital Single Market Directive (2019 CDSM) has now been published. The proposal reflects yet another innovative approach to implement the article. The Finnish approach, while permitting the automated detection of potential infringements, 'does away with the automated blocking of user uploads'. Following this detection of potentially infringing content, rightsholders receive a prompt notification from the platform. This ensures an in-built conflict resolution mechanism, whereby the user is 'the initial arbiter of such [content-related] disputes'.

With this approach, the Finnish government, it emerges, rather than passively implement Article 17, has presented a working alternative solution to reconcile the provisions of the said Article with fundamental rights.

Source: Kluwer Copyright Blog, 23 December 2020,, available [here](#). Communia Association, 23 December 2020, available [here](#).

2.2 Unauthorised mashup of the "Star-Trek" and Dr. Seuss

The US Court of Appeal recently held that a mashup story – that creatively married Dr. Seuss' book "Oh, the Places You'll Go!" with the classic television series Star Trek – was an infringement of copyright. The defendants could not benefit from the fair use defence, as their use was neither a parody, nor transformative in nature. In addition, the defendants had also commercially exploited the original work.

Source: The TMCA, 31 December 2020, available [here](#). Judgement of the US Court of Appeal, 18 December 2020, available [here](#).

2.3 Happy Public Domain Day!

Starting 1 January 2021, copyright-protected works from 1925, such as The Great Gatsby, will be in public domain. There works were offered an additional extension period of 20 years of protection by the Congress in 2001, when the initial 75 years of protection period was first supposed to come to an end.

The year 1925 was filled with landmark creative works and even designated as the “greatest year for books ever”. In addition to books, notable films and music from the era, also enters public domain this year.

Source: Center for the Study of the Public Domain, Duke Law School, available [here](#).

3. Design

3.1 EU Commission publishes report on EU design law

On 6 November 2020, the Commission published its long-awaited evaluation of the law of design in the European Union (EU).

The evaluation indicated that although the EU design legislation is largely satisfactory and effective to meet the current requirements of the design community; there remain certain notable shortcomings (see report for details). The evaluation offers valuable insight on making the EU design regulation more responsive to the requirements of a digital and green EU, and promote small and medium enterprises in the internal market.

Source: DesignWriters, 22 December 2020, available [here](#); Commission’s evaluation, 6 November 2020, available [here](#).

4. Patents

4.1 India and South Africa request patent rights waiver under TRIPS

India and South Africa have requested the WTO to grant a temporary waiver of the patent obligation under the TRIPS Agreement for COVID-19 vaccines.

The temporary waiver is expected to put all countries on the same level in terms of accessibility and allow them to produce the vaccine either faster or in the alternative import it easily, as the situation may require.

Sources: WTO, 2 October 2020, available [here](#). IPWatchDog, 2 January 2021, available [here](#).

4.2 Inventor wins patent infringement dispute against Sony

The Higher Regional Court of Düsseldorf recently held that Sony infringed a patent protecting a “display device with an interface in the pivoting joint”, allowing devices to be opened like a book- The technology is currently used in laptops and notebooks

The Higher Regional Court, relying on the interpretation of the Federal Court, held that the scope of protection afforded to the patent does not exclude gadgets, such as laptops and notebooks, if they can be handled like a book and have an interface in the pivoting joint. The Court found that Sony had infringed the patent and accordingly, ordered it to pay damages.

Source: Juve patent, 23 December 2020 available [here](#). Frankfurter Allgemeine, 3 December 2020, available [here](#).

4.3 EU Commission project on SEP essentiality

In November 2020 European Commission's EU Science Hub released a report that addresses the assessment of essentiality of Standard Essential Patents.

The report makes notable recommendations such as the nomination of a supervisory body and the establishment of a certification scheme for organizations that make assessment of whether or not a patent is standard essential. The report also advises, though with caution, the use of AI-based processes for the assessment of essentiality of patents.

Sources: Kluwer Patent Blog, 5 January 2021, available [here](#). European Commission, 2020, available [here](#).

5. Trademarks

5.1 MARK/Q: Two similar signs

The General Court (GC) recently held that there was a likelihood of confusion between the signs 'MARK' and 'MARQ'.

Despite the GC's considerations that there was a low degree of similarity between the goods in Class 11 covered by the Applicant's sign 'MARQ' and the 'light mixers' in Class 9 covered by the earlier sign 'MARK', the GC found that when comparing the two, a 'visual similarity' was evident. This was due to the reason that the word 'MARQ' is almost identical to the word element 'MARK'. The signs were also found to be phonetically identical, as the consumer would pronounce them in the same way, despite the difference in the letters Q and K. The Court though, did not find any conceptual similarity. Overall, there was a high likelihood of confusion between the two signs.

Source: Judgment of the General Court, 2 December 2020, available [here](#). IPKitten, 31 December 2020, available [here](#).

5.2 QR codes as trademarks

The Federal Administrative Court of Switzerland (FAC) recently considered whether a QR code could be registered as trade mark for Nice Classification Classes 35, 36 and 38. The trade mark office had earlier rejected the application for lack of distinctiveness in the applied mark. It emphasized that QR codes have a technical purpose and are not even used for direct communication with the clients. The visual elements contained in the code could not remedy the foregoing facts.

On appeal, the FAC pointed out that the assessment of the code itself must stand as established by referring court. However, the little cross in the centre could help register the QR code as a trade mark, even though the technical information itself could still not be protected. The FAC confirmed that the cross did have a distinctive effect. However, as the disclaimer provided for by the applicant was too narrow and the FAC asked him to re-work his application.

Source: Judgment of the Court of Justice, 17 December 2020, available [here](#).

5.3 CJEU in Morbier: Visual elements of GIs protected

In a recent request for preliminary ruling, the CJEU considered whether reproduction by other cheese makers of a black horizontal line that runs through the cheese protected by the designation of origin (PDO) Morbier, without mention of the name, be prohibited.

The court held that Article 13(1)(d) of Regulation No 1151/2012 prohibits the reproduction of the shape or appearance of a product covered by a PDO or a protected geographical indication (PGI) “where that reproduction is liable to lead the consumer to believe that the product in question is covered by that registered name.”

In assessing whether the use of the black line might confuse the consumer, the CJEU had in mind a European consumer who is ‘normally informed and reasonably observant, and circumspect’. The judgement clarifies the reach of Article 13(1)(d) in that it also encompasses visual characteristics if the reproduction thereof could somehow confuse the above-referred consumer.

Source: Judgment of the Court of Justice, 17 December 2020, available [here](#).

6 Events and Invitations to comment

6.1 Invitation to comment on EU collective bargaining agreements for the self-employed

The European Commission has launched an inception impact assessment to facilitate collective bargaining agreements, for the employees as well as the self-employed.

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

Source: European Commission, 6 January 2021, available [here](#).

6.2 IP Talks: An IP Discussion Initiative by The Innovation Legal Aid Clinic

Would you like to exchange thoughts on Intellectual Property, and discuss and debate on current IP problems and developments?

IP Talks is an initiative to all the intellectually curious minds to discover the interplay of intellectual property rights and innovation over a cup of coffee.

No participation fee, no IP expertise required.

This week, IP Talks presents two very interesting discussions on *spare parts and trade marks* (by C. De Schrijver) and *communication to the public and copyright law* (by C. Boxus).

When? First ‘IP Talk’ scheduled for 18th January 2021 at 12 hrs (CET) via Zoom.

Where? Simply kindly click on [this](#) Zoom link on 18th Jan 2021, 12 hrs (CET) **Zoom**.

Meeting ID: 982 9231 6866 and **Passcode:** 4c866g

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