

FRIDAY FORTNIGHTLY WEEK: THE IP AND COMPETITION NEWSLETTER (ED. 2022 WEEK 44 NO. 35)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Trademarks and Events for October-November 2022. As suggested in our previous edition, this edition too may be a bit more detailed and longer than usual!

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. To know more about, and participate in our upcoming Monday Morning – IP Talks, please follow the events section.

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,

A. Haesaert, A. Lazić, P. Bentham, S. Abel and K. Tyagi

Email: a.lazic@student.maastrichtuniversity.nl & k.tyagi@maastrichtuniversity.nl



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

1. Competition law

1.1 US District Court says no to merger between publishers, Penguin & Simon

On 31st October, the US District Court for the District of Columbia (the Court) approved the US Department of Justice's (DoJ) request to prohibit the proposed merger between world's leading publishers, Penguin Random House (parent company, Bertelsmann) and Simon & Schuster (S&S). Penguin had proposed to purchase S&S for \$2.2 billion.



In November 2021, the DoJ filed a request for permanent injunction under Article 7 of the Clayton Act at the Court. As per the DoJ, the proposed merger would not only lead to substantial lessening of competition, it was also expected to adversely impact the remuneration paid to the authors, and impoverish the democratic fabric of the country. In an intensive thirteen-day trial, the Court heard both the parties. Notably, the DoJ presented world-renowned American suspense and science-fiction author, Stephen King, as one of its key witnesses. Shortly after the Court's decision, King tweeted and expressed his content and delight with the decision.

Sources: US DoJ, 31 October 2022, available [here](#). CNBC News, 31 October 2022, available [here](#). BBC News, 31 October 2022, available [here](#).

Image source: Penguin Random House, available [here](#).

1.2 CJEU on the relationship between sector-specific regulation and Article 102 TFEU



Deutsche Bahn (DB) is the incumbent German railway operator that offers access to its infrastructure based on a certain pre-determined scale. Ostdeutsche Eisenbahn (ODEG) entered into a framework contract with DB for use of infrastructure for short-distance passenger rails. DB subsequently came up with a new price list, 'SPS 05', that was disputed by the ODEG before the German courts. The matter reached by way of appeal before the Kammergericht (the Higher Regional Court, Berlin). In light of the sector-specific regulation dealing with the allocation of railway infrastructure and the levying of charges (Directive 2001/14),

the Kammergericht requested CJEU's opinion on "the relationship between the competence of the regulatory bodies [under Directive 2001/14] and the jurisdiction of the national courts [to] apply Article 102 TFEU" (CJEU, at para 27). The foregoing question emerged, as on the one hand, the decision in CTL Logistics (C-498/15) precluded action by ordinary courts prior to an action by the competent regulatory authority. However, on the other hand, Bundesgerichtshof's (the Federal Court of Justice, Germany) decision in "Trassenentgelte", dt. 29th October 2019,

underscored that civil courts could apply Article 102 Treaty on the Functioning of the European Union (TFEU) even before the regulatory authority offered its decision.

In its opinion *DB Station/Eisenbahn*, dated 27th October, as regards the nature and scope of the Directive 2001/14, the CJEU suggested that “the application of the provisions on access to railway infrastructure [are] without prejudice to [the Treaty articles including] Article 102 TFEU” (CJEU, at para 71). The CJEU however, required that in order to “obtain reimbursement of an alleged overpayment of infrastructure charges”, the railway undertaking must first approach the national regulatory body (as referred to in Directive 2001/14). As for the national courts hearing such claims, they must co-operate in good faith with the regulatory bodies. However, the court is not required to wait for the decision of the regulatory body. Further, the courts can apply Article 102, TFEU and national competition law provisions to the case at hand. *Sources: ECJ Case 721/20 DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH, 27 October 2022, available [here](#).*

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

1.3 €3.4 billion aid to Danish companies under the Temporary Crisis Framework

On 31st October, the European Commission (EC) approved a package of €3.4 billion (DKK 25.2 billion) support scheme under the Temporary Crisis Framework for Denmark. The scheme is expected to offer financial support to ensure the sustainability of companies in light of the ongoing Russia’s war against Ukraine. The loan shall be managed by the Danish Business Authority and shall offer a possibility for payment deferral by a company to the energy supplier (1) and a €29 million to energy suppliers as administrative costs to manage these payment deferrals (2).

The Commission approved the Danish scheme, as it complied with the requirements of the Temporary Crisis Framework. Notably, the loan maturity does not exceed 6 years (1); the loans concern only the working capital needs (2); annual interest rates and maximum loan amount per beneficiary align with the suggested rates in the Framework (3 & 4) and the loans shall be granted latest by 31st December 2023 (5). In light of the foregoing, the Danish scheme was found as “necessary, appropriate and proportionate to remedy a serious disturbance”, as required by Article 107(3)(b) TFEU and the Temporary Crisis Framework.

Sources: European Commission, 31 October 2022, available [here](#). WiredGov, 2 November 2022, available [here](#). Agence Europe (subscription required), 31 October 2022, available [here](#). Image source: Pixabay, available [here](#).



1.4 Harley MWE & Weber must respect customer’s right to repair: says US FTC

On 23rd June, the US Federal Trade Commission (FTC) formally initiated action against world renowned motorcycle company, Harley-Davidson and generator manufacturer, MWE Investments for restricting customers’ right to repair their lawfully purchased products. On 7th July, FTC initiated another action against Weber-Stephen Products, LLC, a US-based grill maker on similar grounds, that is limiting the buyers’ ability to repair the purchased product.

As per the FTC, consumers enjoy a right to repair their products under the Magnuson Moss Warranty Act (MMW Act). Conduct by these companies, such as the inclusion of terms, that may lead to revocation of warranties, infringed consumers' rights as prescribed in the MMW Act. As an example, in case consumers approached third party independent repairers or even procured parts for repair from them, the warranty was revoked automatically.



In its press release dated 27th October, the FTC has entered into an agreement with the three companies, namely, Harley-Davidson, MWE Investments and Weber-Stephen Products. As per the Order, the said companies shall comply with the following four conditions. First, they shall not engage in any conduct or include any provisions in their contract, that violate the above referred MMW Act. Second, they must explicitly recognise consumers' right to repair their

lawfully purchased products. Third, they must actively inform their customers that the product warranty remains valid, even when they use independent third-party repairers. Fourth, they shall actively promote fair competition amongst dealers. They may promote such fair and healthy competition by offering equal access to parts from third party dealers.

Source: Federal Trade Commission, 27 October 2022, available [here](#).

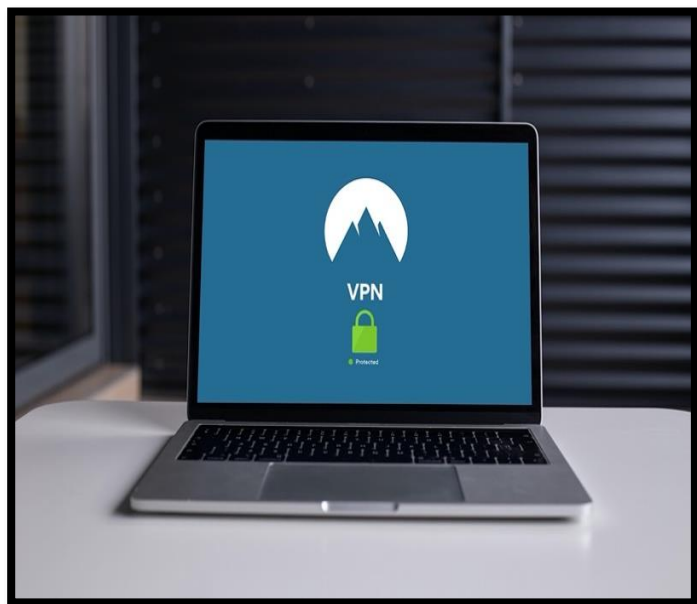
Image source: Unsplash, available [here](#).

2 Copyright

2.1 Advocate General Szpunar on geo-blocking and platform liability

On 20th October, Advocate General (AG) Maciej Szpunar, in Case C-423/21, offered his opinion on the interpretation of the right of communication to the public in Article 3(1) of the Information Society Directive (the InfoSoc Directive). The Austrian Supreme Court, Oberster Gerichtshof, had referred a set of questions dealing with geo-blocking measures to the CJEU.

The Serbian production company, Grand Production (GP) and GO4YU(MTEL), a Serbian streaming platform, entered into a licensing agreement as per which, GO4YU could make GP's programmes available in Serbia and Montenegro. Soon after the agreement, disputes emerged



between the parties, as GP's programmes could be accessed in Austria and from elsewhere across the globe, in case they were connected to a Serbian VPN service. This was despite the fact that agreement limited access to Serbia and Montenegro.

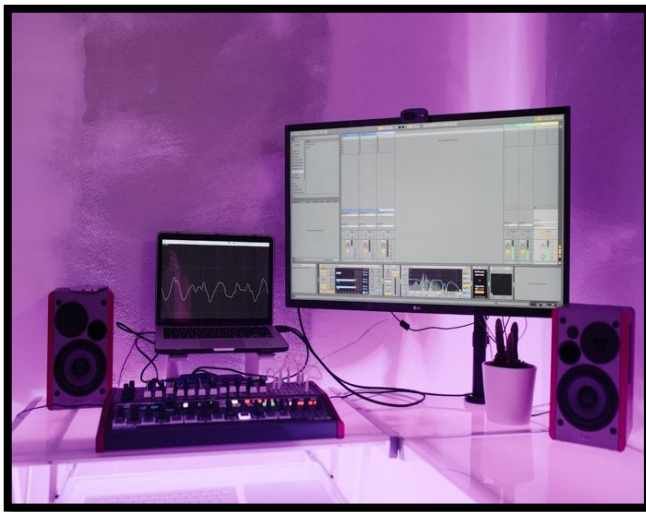
Drawing parallels with the CJEU's case law on hyperlinking, AG Spuznar was of the opinion that geo-blocking measures are the equivalent of digital rights management in the internet. He clarified at the outset that even though the internet by its very design and nature is borderless, copyright to this day remains territorial in nature. Geo-blocking content may be seen as a digital exercise to ascertain the territorial effects on the internet. He then went on to clarify that in case the platform users could only access the content from territories for which there was a valid license, in such a case, the platform operator did not perform an act of communication to the public. Further, if the platform users managed to circumvent the geo-blocking measures, it is the users and not the platform operator that should be held liable in such a case. To evade liability, the platform operator need only ensure that effective geo-blocking measures are in place. Although not binding, the AG's recommendations are followed by the CJEU in a majority of the cases.

Sources: EAPIL, 26 October 2022, available [here](#). TF, 21 October 2022, available [here](#). IPKat, 20 October 2022, available [here](#). AG Szpunar opinion in Case C-423/21, 20 October 2022, available [here](#).

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

2.2 US Record Label flags AI Music Generators as an emerging threat to copyright

Earlier this year, the United States Trade Representative (USTR) invited comments for the 2022



Review of Notorious Markets for Counterfeiting and Piracy. On 7th October, the Record Industry Association of America (RIAA), a trade organization that promotes “creative and commercial vitality of music labels in the United States” made its formal submission to the USTR. As per the submission, currently the music industry contributes over \$170 billion annually to the US GDP and supports over 2.47 million jobs.

Digitalization is a key driver of the industry, with over 90 per cent of the total sales made digitally. However,

digitalization has also contributed to a host of online websites that infringe the rights of copyright-holders and also engage in circumvention of rights management and technological protection measures, in violation of 17 USC § 1201. Notable amongst these are “over 300+ active stream-ripping sites”, such as Savefrom and Ssyoutube to name just a few. In addition, music download sites that offer “unauthorized on-demand streaming”, such as Newalbumreleases, have also significantly contributed “to diminish[-ing] the commercial value” of the works. In addition, the rise of Artificial Intelligence (AI) has also contributed to widespread copyright infringement. Notably, a large number of websites now use protected works to train the AI and create digital music. As this involves the use of copyright-protected works, without first taking a relevant license from the rightholders, RIAA identifies this not only as an act of infringement, but also a threat to human creativity, as these AI machines may also soon begin to compete with human authors. Shortly following the RIAA's submission to the USTR, AI-mixer and extractor websites, such as “acapella-extractor.com”, “remove-

vocals.com” and “songmaster.com” submitted their response to the USTR. As per their response, these services merely shared core algorithms, such as those made available by Deezer, a well-known audio streaming service provider. Interested parties had time until 7th October to submit their comments. The USTR is currently reviewing these submissions, and the counter responses filed by alleged infringers. It is expected to release its report in the coming months.

Sources: Torrent Freak, 7 October 2022, available [here](#). THE BYTE, 24 October 2022, available [here](#). VICE, 21 October 2022, available [here](#). MBW, 19 October 2022, available [here](#).

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

2.3 All [Mariah Carey] Want[s] this Christmas is [no law suit] (!)

In June, Mississippi-based songwriter Andy Stone, who performs under the name, Vince Vance, filed a lawsuit against singer, Mariah Carey and music publisher, Sony Music, at the New Orleans Federal Court. As per the Complaint, Carey’s 1994 worldwide hit, “All I want for Christmas is You” infringed his 1989 release, with the same name and title. Carey’s song has been Number 1 on Billboard Hot 100 for three consecutive holiday seasons, since 2019. The Song has crossed the magical one billion mark on Spotify. It has also earned Carey over \$ 60 million in royalties.



Interestingly, the original claim was grounded in the “identical name and single lyric” of the song. The Complaint did not allege any further similarity between the two works, such as a

similarity in music or similar lyrics. Subsequently, Stone amended his Complaint alleging “Carey’s song [as] a derivative version of [his song] in terms of lyrics, melody, harmonic language, rhythm and meter”. Stone requested \$ 20 million in damages on grounds of “copyright infringement, false association and unjust enrichment”.

Stone’s lawsuit was apparently inspired from the US Supreme Court’s 2014 decision in “Raging Bull”, wherein the Apex Court lifted the time limit for copyright owners to initiate legal proceedings against alleged infringers.

In a surprising turn of events, on 1st November, Stone withdrew his Complaint and requested the New Orleans Federal Court to dismiss his case. As the withdrawal is voluntary, Stone retains a possibility to initiate a case on the same grounds again in the future.

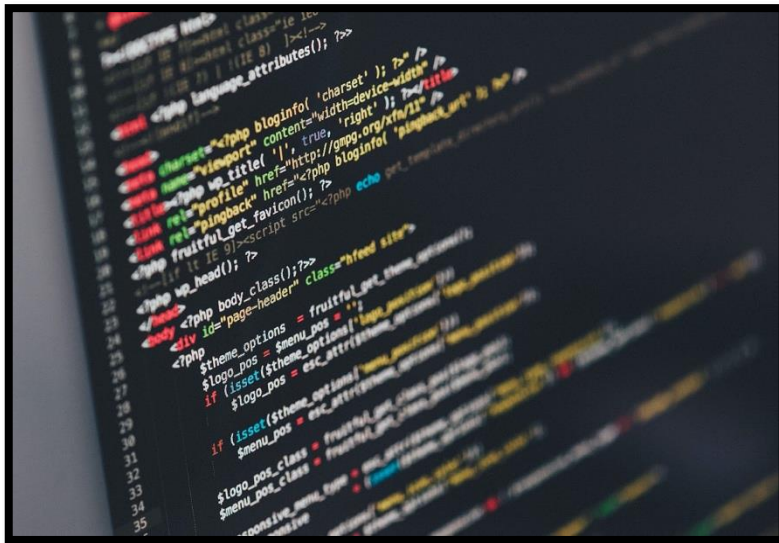
Sources: BBC News, 2 November 2022, available [here](#). Reuters, 2 November 2022, available [here](#). Variety, 2 November 2022, available [here](#). Billboard, 1 November 2022, available [here](#).

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

2.4 Copyright infringement complaint against GitHub Copilot

GitHub Copilot, owned by Microsoft, is a text-to-code auto-suggestion Artificial Intelligence (AI) tool. Copilot is trained from freely available open-source code. It gained instant popularity amongst programmers and tech enthusiasts as it “revolutionised how people code”. However, shortly following its launch, software developers discovered that Copilot created codes that includes substantial amount of copyright-protected code.

Copilot's auto-generated codes comprises of these works without either attributing the creators or taking a proper licence from them. In other words, when requested to code, Copilot generates and “repeats training data”, and that too without an accompanying open-source software license.



In light of the foregoing, on 3rd November, Joseph Saveri Law Firm and Matthew Butterick, a lawyer and programmer, filed a class action before the US District Court of the Northern District of California. As per the Complaint, GitHub, Microsoft and OpenAI (together, the Defendants) are “profiting from others’ work by disregarding the conditions of the underlying open-source licenses”. The Complaint alleges violation

of the Digital Millennium Copyright Act (DMCA), Lanham Act, Unfair Competition Law, California Consumer Privacy Act, and Breach of Contract, and accordingly, requests permanent injunctive relief and award of damages resulting from the Defendants’ foregoing conduct.

Sources: AIM, 23 October 2022, available [here](#). TechTarget, 20 October 2022, available [here](#). The Register, 19 October 2022, available [here](#).

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

3. Patent

3.1 Unified Patent Court announces appointments ahead of Spring 2023 launch

As per the Unified Patent Court (UPC) preparatory committee and its latest implementation roadmap, the UPC is expected to formally commence operations from 1st April 2023. Over 85 judges – including 34 legally-qualified and 51 technically-qualified judges – have been officially appointed for the UPC.

One of the attractive features of the UPC is the exclusive judicial set-up, comprising of the Court of First Instance, Court of Appeal and a Registry, to litigate patents. As per Article 3 of the Agreement on a UPC (Council Agreement 2013/C175/01),

the Agreement is applicable as regards “European patents, European patents with unitary effect, European patent applications, and supplementary protection certificates”. As per Article 83(1) (3) of the said Agreement, the UPC will not have jurisdiction in case patent owners decide to opt-out of the system prior to the commencement of legal proceedings at the UPC. This



provisional period shall be available for a period of seven years from the date of commencement of the UPC.

Sources: The IPKat, 21 October 2022, available [here](#). IPWatchdog, 25 October 2022, available [here](#). Bloomberg Law, 2 November 2022, available [here](#). Pinsent Masons, 7 October 2022, available [here](#).

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

3.2 Medicines Patent Pool and Novartis enter voluntary licensing agreement on Nilotinib



On 20th October, Medicines Patent Pool (MPP) and pharmaceutical company, Novartis, entered into a first ever public health-related voluntary licensing agreement on a cancer drug. As per the agreement, generics are permitted to manufacture and market the Chronic Myeloid Leukaemia (CML) treatment drug, Nilotinib. It is used for CML “that is resistant to Imatinib”. Local generics will, however, require a local market authorisation before they can market the said drug. Nilotinib is

mentioned as an essential drug in the World Health Organisation’s Model List of Essential Medicines (WHO EML). The agreement is valid for select 44 countries as mentioned in the agreement. These 44 countries include 37 low-income countries and 7 middle-income countries, namely, Egypt, Guatemala, Indonesia, Morocco, Pakistan, Philippines and Tunisia. MPP is a United Nations supported, Geneva-based organization, that seeks to ensure access to critical medicines. It facilitates through cooperation, the promotion and uptake of non-exclusive agreements between innovator companies and generics for certain critical medicines and specific geographic areas (namely, low- and middle-income countries).

Sources: The IPKat, 27 October 2022, available [here](#). PR Newswire, 20 October 2022, available [here](#). Health Policy Watch, 20 October 2022, available [here](#). Seeking Alpha (subscription required), 20 October 2022, available [here](#).

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

3.3 European Patent Office to abolish the 10-day rule

The European Patent Office (EPO) will abolish the “10-day rule” with effect from 1 November 2023. As per the “10-day rule”, the calculation of the time to respond commences on the 10th day following the date of communication.

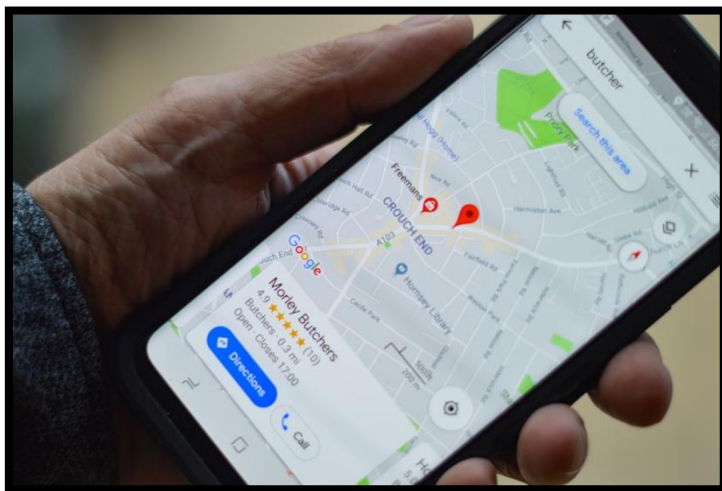
This 10-day gap - between the date of communication and the calculation of the time period – was included to account for delays in physical delivery of the post. As per Rule 126 (1) European Patent Convention (EPC), notifications were to be sent by post in the form of a registered letter. Following the digitalization of communication, there was an evident need to change this rule. The change will, accordingly, be introduced by amending the Rule 126 (2) EPC.



Sources: Mondaq, 20 October 2022, available [here](#). The IPKat, 14 October 2022, available [here](#). JD Supra, 20 October 2022, available [here](#).

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

3.4 Zillow wins, as IBM patents miss the “inventive concept”



On 17th October, the US Court of Appeals for the Federal Circuit (CAFC) (majority opinion) granted Zillow’s “motion for judgment on the pleadings”, and found that the “two of the asserted patents [by IBM] claimed ineligible subject matter under 35 U.S.C. §101”. The disputed patents, namely U.S. Patent No. 9,158,789 (’789) and No. 7,187,389 (’389) concern graphical display technology.

As a background, the dispute between IBM (International

Business Machine Corporation) and Zillow, both active in the field of information technology sector, first emerged as IBM filed a multiple patent infringement suit against Zillow. In its decision in July 2021, the U.S. District Court for Western District of Washington found in favour of Zillow. The matter reached the CAFC, as IBM appealed the said decision.

Whereas patent ’789 concerned a “method for coordinated geospatial, list-based and filter-based selection”, patent ’389 described “methods of displaying layered data on a spatially oriented object (like a map), based on nonspatial display attributes” (CAFC at pp. 2-4). The CAFC applied the Alice 2-step test to the case at hand, and reached the opinion, that neither of these patents involved “an inventive concept that transform[ed] the abstract ideas” and therefore, “the district court correctly concluded” that the said patents concerned “ineligible subject matter” (CAFC at p.17). In his dissenting opinion, Senior Judge Thomas S. Zilly dissented-in-part with the majority decision of the District Court and the CAFC. His dissent, however, was limited to “claims 9 and 13 of the ’389 patent” (CAFC at p.18).

Sources: U.S. Court of Appeals for the Federal Circuit Case: 21-2350, 17 October 2022, available [here](#). The National Law Review, 2 November 2022, available [here](#). JD Supra, 31 October 2022, available [here](#).

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

4. Trademark

4.1 “Juanita’s”, leading US-based Mexican food producer, prevails over Dominguez

Juanita’s Food, the Plaintiff, is a leading US-based producer and distributor of Mexican foods. As per an agreement between Juanita’s and Dominguez Family Enterprises Inc. (Dominguez), the latter was permitted to use the “Juanita’s” mark in the Pacific Northwest States. Further, Dominguez could not file the registration for the said mark.

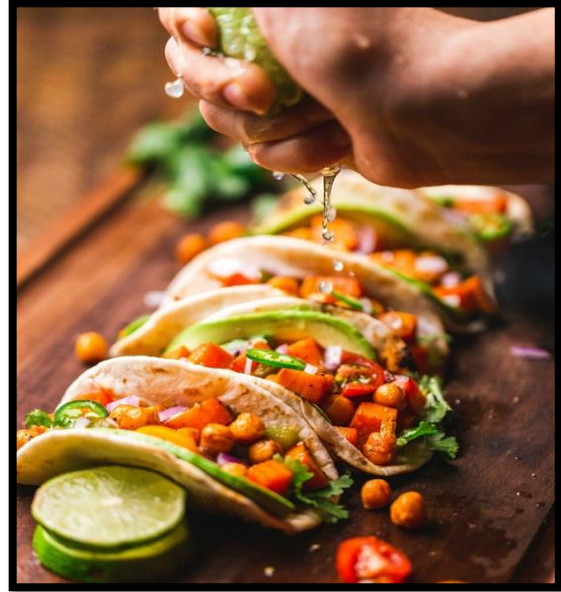
In breach of the foregoing contractual obligations, Dominguez starting selling products with “Juanita’s” mark outside the Pacific Northwest, such as California. In addition, he also requested registration of the said mark at the US Patent and Trademark Office (USPTO).

On 17th October, the US District Court of California allowed Juanita’s request for preliminary injunction against Dominguez. As

per the Court’s Order, Dominguez is refrained from selling or advertising Juanita’s product outside Pacific Northwest and/or seek registration of the “Juanita’s” trade mark in their name.

Sources: Trademark Lawyer Magazine, 20 October 2022, available [here](#). Unicourt, 2 November 2022, available [here](#). Justia, 2 November 2022, available [here](#).

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



4.2 Red Dawg & Red Bull – a case of unfair advantage: says EWHC



In its decision dated 12th August, the England and Wales High Court (Chancery Division) (EWHC) dismissed Monster’s appeal in entirety. Monster Energy and Red Bull, both manufacturers of energy drinks, sell their energy drinks under the mark “Red Dawg” and “Red Bull” respectively. When Monster requested registration of the mark “Red Dawg” at the UK Intellectual Property Office (UKIPO), Red Bull opposed the registration of the said mark on the basis of Sections 5(2)(b) and 5(3) of

the 1994 Trade Marks Act. In its decision dated 26th August 2021, the Hearing Officer (HO) rejected Red Bull’s appeal on the basis of Sec. 5(2)(b) as he found “no likelihood of direct or indirect confusion”, even though the said goods were identical in nature. The HO, however, upheld the Opposition on the basis of Sec. 5(3), as the Red Bull word mark enjoyed “a very strong reputation in the UK in relation to energy drinks”. The HO found a case of unfair advantage as the contested mark, Red Dawg, in his opinion, would remind the consumers of the Red Bull mark, and thereby, “allow the contested mark to free-ride” on the reputation of

Red Bull and take “an unfair commercial advantage”. Upholding the HO’s decision in its entirety, the EWHC was of the opinion that the HO’s decision was “a rational and properly motivated conclusion”. Monster’s appeal was, accordingly, dismissed in its entirety.

Sources: EWHC, 12 August 2022, available [here](#). Trade Mark Lawyer Magazine, October 27th 2022, available [here](#). World Intellectual Property Review (subscription required), October 22nd 2022, available [here](#). Briffa, August 18th 2022, available [here](#).

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

4.3 Gucci v Cuggl

Cuggl, a Japanese-based firm, is a manufacturer and seller of garments. It is particularly well-known for t-shirts that parody well-known and popular brands. Cuggl owns the trademarks, ‘CUGGL’ (pronounced in Japanese as “kyuguru”) and ‘GUANFI’. Both the marks comprise of a hand-painted thick pink-coloured line below these word marks. The two marks were registered for class 25 in October 2020 at the Japanese Patent Office (JPO).

On 25 May 2021, the JPO published the said mark for opposition. On 26th July 2021, Gucci filed an opposition with the JPO on the grounds that the mark was similar and that there existed a real likelihood of confusion, with well-known luxury brand, ‘GUCCI’. It also added that Cuggl registered the said mark to “free-ride [on the] goodwill and reputation of Gucci”.

In its decision dated 12th July, JPO dismissed Gucci’s opposition on the ground that ‘CUGGL’ would not mislead the consumers about the source of the goods. Moreover, based on “visual, phonetic and conceptual” similarity, the Board “did not find any resemblance [...] resulting in a low degree of similarity” between ‘CUGGL’ and ‘GUCCI’. The JPO, accordingly, rejected the opposition and found that Cuggl’s marks were valid.

Sources: Trademark Lawyer Magazine, 20 October 2022, available [here](#). Quartz, 23 August 2022, available [here](#). Marks IP Law Firm, 23 July 2022, available [here](#).

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



5. Events: Save the Date – Next Monday Morning TILC’s IP Talks (!)

This Monday Morning, Giulia Cittadini, will TILC talk about the competitive dynamics created by the General Data Protection Regulation (GDPR) and competition law in the ad tech industry. The introduction of significant restrictions on the collection and processing of personal data has produced unintended consequences. The prices of these externalities are much higher than previously anticipated. Does the market concentration experienced in the ad tech industry rely exclusively on the overwhelming nature of the GDPR? Are there other factors that one need take into account to appreciate the competitive dynamics therein?

The session shall be chaired by Dr. K. Tyagi.

Please bring your lunch. Coffee and tea shall be served.

When: 21st November 2022, 12.00-13.00 hrs

Where: KAP2 0.039

Topic for presentation: “Market concentration in the digital advertising industry: A Competition Law and GDPR perspective”