FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2020 WEEK 50 NO. 2)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Designs, Patents and Trademarks for December 2020.

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,

P. Kollár (ed.), J. Fuchsloch, C. De Schrijver,
J. Lönnfors, A. Assaël 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 Pharmaceutical companies found to violate EU competition law

On 26 November 2020, the European Commission fined two pharmaceutical companies € 60.5 million for breach of EU competition rules by agreeing to delay the market entry of a cheaper generic drug for several years after the relevant patent's expiry. The generic drug would have competed with Cephalon's Modafinil, a drug used to treat sleep disorders.

Teva entered into a patent settlement agreement with Cephalon. Teva offered to withhold its cheaper generic drug from the market in exchange for commercial benefit. The alleged agreement was in violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and has, by allowing Modafinil to keep its prices high, caused harm to EU-based patients and healthcare systems.

Sources: European Commission, 26 November 2020, available here. EULawLive, 27 November 2020, available here. Image source: www.shutterstock.com.

1.2 CMA publishes Brexit Guidance

The Competition and Markets Authority (CMA) has published its guidance on post-Brexit competition law enforcement in the UK. The document explains the legal changes that are to follow post-Brexit. As per the guidance, the CMA will assume responsibility for mergers, cartels, and other enforcement cases that were previously handled exclusively by the European Commission.

In addition to these new responsibilities, the CMA confirmed in its statement, that it would continue its current work of making recommendations and giving advice to the UK Government and public authorities on competition law-related issues.

The CMA's statement acknowledges the anticipated challenges and opportunities that Brexit is expected to bring about. The statement confirms the CMA's eagerness to maximise any forthcoming opportunities in terms of enforcement and its steadfast commitment to securing beneficial outcomes for UK consumers.

Source: Competition and Markets Authority (UK), 1 December 2020, available here.

2. Copyright

2.1 Sweden: Land of kottbullar, cars and communication to the public

The Court of Justice of the European Union (CJEU) recently offered its opinion on the issue of whether car rental providers, while renting cars with radio receivers, engage in an act of communication to the public and in turn may confront potential copyright infringement issues.

The CJEU stressed that the right of remuneration for communication to the public under the Rental Rights Directive and the InfoSoc Directive concern the same rights and thus, need to be interpreted in an identical manner.

The Court affirmed the non-existence of communication to the public in the above-referred situation. It considered that in accordance with European and International law, provision of physical facilities, such as in case of radio-fitted rental cars, is not an act of communication to the public within the meaning of Article 3(1) of the 2001 Information Society Directive.

Source: C-753/18, Court of Justice (EU), 2 April 2020, available here. Kluwer IP Law, 25 November 2020, available here.

2.2 Google and fair remuneration

The Spanish reproduction rights management organization (CEDRO) recently sued Google Discover for infringement of copyright. CEDRO administers and manages the rights of authors and publishers resulting from the secondary use (for example, distribution) of their work. This may take different forms, such as is the case with newspaper articles.

As per CEDRO, Google Discover did not pay a fair remuneration to right-holders of newspaper articles whose extracts it had published on its app. The Google app allows its users to get a customized overview of newspaper extracts from various newspapers. Under Spanish law, authorization to publish such extracts was not necessary, but the authors, CEDRO submitted, have the right to receive a fair remuneration for their work.

Sources: IPR Helpdesk, 17 November 2020, available here. European Publishers Council, 12 November 2020, available here.

3. Patents

3.1 Australian High Court adopts exhaustion principle

Significant differences exist across jurisdictions around the world with regard to the concept of patent exhaustion. In 1911, Australia introduced the doctrine of implied license. A legal fiction was created whereby the patentee was assumed to have granted the buyer a license for the product via sale. This was done to resolve the legal tension that may otherwise exist between the patentee who retained rights in the product following the sale and the rights of the consumer. In a recent case, the doctrine of implied license was overturned by the Australian High Court (HC). In its decision, the HC while adopting the principle of exhaustion, affirmatively referred to the use of the doctrine of exhaustion by the US Supreme Court and the Court of Justice of the European Union (CJEU).

Sources: IPKitten, 4 December 2020, available here. Calidad v Seiko, High Court of Australia, 12 November 2020, available here. Bird & Bird, November 2020, available here.

3.2 Potential FRAND-guidance on the horizon

In a dispute between Nokia and Daimler, the Regional Court of Düsseldorf recently referred to the CJEU a set of questions dealing with fair, reasonable and non-discriminatory (FRAND) licensing.

In the preliminary reference, the Regional Court requests the CJEU to clarify Standard Essential Patent (SEP) holders’ freedom in the value chain licensing practices. The Regional Court also asks the CJEU to provide guidance as regards permissible time limits to improve FRANDly offers in SEP disputes. Clarification in these matters can help SEP-holders and implementors

to work in close cooperation and also enable the national courts to determine specific license amounts.

Sources: JUVE Patent, 3 December 2020, available here. Lexology, 26 November 2020, available here.

3.3 HTC successfully nullifies LED patent

HTC recently won a case over an LED technology patent before the German Federal Patent Court. The Court nullified the patent owned by Tridonic. The patent concerns LED technology used for backlights in mobile phones. Backlight is a feature in mobile phones that helps users switch on the lights and see in dark.

HTC took action against the patent held by Tridonic in response to an infringement claim. In the Federal Patent Court, the original version as well as 14 other auxiliary requests of the patentee were rejected. The patent was nullified in its entirety. In its reasoning, the Court stated that the patent was neither new nor inventive, when compared to prior art submitted by HTC.

Source: JUVE Patent, 4 December 2020, available here.

4. Trademarks

4.1 No 3D trademark for wine bottles

The CJEU recently denied trade mark protection for the shape of a wine bottle. It confirmed that EU trade mark protection for a dark bottle with a white label and a crowned cap could not be granted as the bottle shape was not distinctive enough to warrant trade mark protection.

Even though the bottle featured a rather unusual label shape in the form of a modified triangle that widely covers the bottle, the Court found that the public was more likely to look at the words of the label itself, rather than the shape of the bottle and the position of the label. Consequently, obtaining trade mark protection under the EU trade mark regime for fairly common bottle shapes seems unlikely. Even the unusual shape of a label, it seems, will not change this position.

Sources: T-862/19, General Court (EU), 25 November 2020, available here. The image is an adapted version of the original image referred to in the GC's decision. The worldwide Trademark Review, 1 December 2020, available here.

4.2 Can speedy cars speedily lose rights? The requirement of genuine use

In a recent case, the CJEU had to rule on the question of whether the resale of vehicles and replacement parts thereof can constitute genuine use of a trade mark.

The CJEU clarified that in case the proprietor either actually uses the mark for the good or service, or uses the mark for goods or services 'directly connected' with the earlier good or service, the requirement of genuine use is fulfilled.

The Court thus emphasized that a trade mark registered for goods and replacement parts thereof is put to genuine use, even if it is only used with some of these goods, "provided that the consumer will perceive them as an independent sub-category of type of goods" for which protection is sought and granted. Taking this a step further, the CJEU also held that reselling second-hand goods on the market under the protected mark counts as genuine use. Further, there is also genuine use in a situation where the trade mark holder offers certain services in connection with the goods previously sold under that mark if these services are offered under that mark as well.

Sources: C-720/18 and C-721/18, Court of Justice (EU), 22 October 2020, available here. IPKitten, 8 December 2020, available here. Intellectual Property Magazine, 30 October 2020, available here.

4.3 Did someone say Tequila?

A Portuguese Court recently found that trade mark protection could no longer be granted for a liquor under the label "Mequila Mariachi". Based on a complaint submitted by the Tequila Regulatory Council, it was found that continuing to provide Mequila Mariachi with trade mark protection would confuse consumers as to the origin of the product.
Tequila is protected as a Denomination of Origin. This ensures that the particular link between the product and the particularities of the region in which it is produced receives special safeguarding. The Court opined that this function would be at risk, should Mequila Mariachi continue to benefit from IP protection.

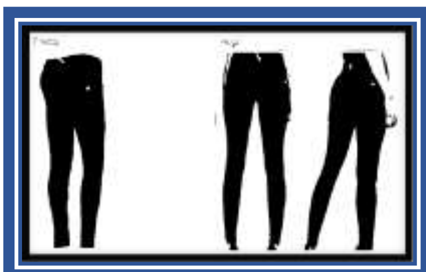
Source: IPR Helpdesk, 17 November 2020, available here.

5. Designs

5.1 UK Court rules on post-sale confusion and unregistered design law

In a recent case, the Intellectual Property Enterprise Court addressed passing off based on post-sale confusion and how the UK unregistered design protection encompasses the concept of movement.

In the case at hand, Freddy claimed that Hugz had infringed on its unregistered design right with regard to the shape of a pair of jeans when worn and the shape of the jeans when not worn. The Court found that Hugz passed off as Freddy jeans in the conventional sense. The judge also gave consideration to passing off with regard to post-sale confusion. The judge found passing off both in point-of-sale and post-sale situations. This it may be useful to add is a unique decision as this confusion post-sale has been based on similar aesthetic design elements rather than logos or brand names. The Court found that Hugz had infringed Freddy's unregistered design as the jeans were deliberately designed to either 'substantially' or 'exactly' replicate Freddy's jeans.



Sources: DesignWrites, 27 November 2020, available here. Freddy SPA v Hugz Clothing, Intellectual Property Enterprise Court (UK), 19 November 2020, available here (image source, paragraph 126 of the decision). National Law Review, 23 November 2020, available here.