FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2022 WEEK 8 NO. 25)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for the period January-February 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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TILC

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

1. Competition law

1.1 Competition authorities unite forces to look for unfair price hikes

On 17th February, the UK Competition and Markets Authority (CMA), the Australian Competition and Consumer Commission (ACCC), the Canadian Competition Bureau (CCB), the New Zealand Commerce Commission (NZCC) and the US Department of Justice (DoJ) joined hands to form a working group. The task of the working group is to assess the reasons for "unfair supplier price hikes" in the international supply chains. The Covid-19 pandemic has significantly impacted international supply chains with severe delays and substantial increase in shipping costs. The shipping cost for a 40 feet container increased from $1500 (in 2019) to $20,000 (in 2022).
The working group shall closely collaborate and exchange relevant information to assess the reasons for this disproportionate price hike. In case the working group finds any 'collusive anti-competitive practices' that may have contributed to this trend, they plan to follow it up with formal investigations. The formation of the working group was prompted by calls from manufacturers' organization 'Make UK' and the British Chamber of Commerce who complained about the recent steep rise in shipping costs.
In the UK, firms found in breach of competition law may be required to pay fines upto 10 per cent of their global revenue, face criminal proceedings and the disqualification of directors.

Sources: CIPS, 18 February 2022, available here. Transport Topics, 17 February 2022, available here. Financial Post, 17 February 2022, available here. Image Source: Getty Images, available here.

1.2 Lockheed Martin abandons Rocketdyne's proposed acquisition

On 13th February, Maryland-based US' global security and aerospace company Lockheed Martin formally announced its decision to abandon the proposed acquisition of rocket engine maker, Aerojet Rocketdyne. The deal worth over $4.4 billion was first formally announced in 2020. It immediately drew criticism from the US Congress. In a formal letter to the Federal Trade Commission (FTC), Senator Elizabeth Warren requested an assessment of the anti-competitive effects of the acquisition, including the effectiveness of measures such as internal firewalls currently in place. The merger was expected to give Lockheed a dominant position in the market for solid fuel rocket motors.

Following a letter from Warren, the FTC held a meeting and voted to block the proposed acquisition. In early January, the US FTC formally filed a lawsuit requesting preliminary injunction to stop the deal from proceeding further. In light of these developments, Lockheed Martin decided to abandon the deal altogether. If this matter were to go on full trial, it would have been the first litigated merger challenge by the FTC in decades.

Sources: Lockheed Martin, 13 February 2022, available here. CNN Business, 14 February 2022, available here. Competition Policy International, 13 February 2022, available here. Image Source: Getty Images, available here.

1.3 JD Sports and Footasylum fined for sharing commercially sensitive information

In 2019, UK-based sportswear retailer JD Sports proposed to acquire the British trainer retailer Footasylum for £90 million. Following an in-depth investigation, the CMA conditionally cleared the merger provided that the two businesses continued to operated separately and refrained from sharing any commercially sensitive information. Despite the CMA's order, the chief executive officers of the two companies held several clandestine meetings, wherein they discussed and exchanged commercially sensitive information including the financial position of Footasylum, closure of stores and contract negotiations. Some of the meetings were even caught on camera, including the one in a car park in Greater Manchester. When the CMA followed this up with a legally binding request for more detailed information, the parties only partially responded to the request, and the two CEOs could not recall the details of the meeting. In light of the above, on 14th February, UK's CMA fined JD Sports £4.3 million and Footasylum £3800,000 for failure to comply with CMA's 2019 merger order.

Sources: Reuter, 14 February 2022, available here. The Guardian, 14 February 2022, available here. Competition Policy International, 14 February 2022, available here. Image Source: Pixabay, available here.

2. Copyright

2.1 Apple did not copy Cub Club's racially diverse emoji: *says* US District Court

On 16th February, the US District Court for the Northern District of California (the Court) rejected in entirety Cub Club's copyright and trade dress infringement-related claims against Apple. As per the complaint, Apple copied Cub Club's "app that allowed people to send racially diverse emoji". Referring to the 9th Circuit's decisions in *Mattel v. MGA Entertainment* and *Apple Computer v. Microsoft,* the court was of the opinion that in case of a "narrow range of expression", protection afforded to the original right holder is "thin" and the two works must be "virtually identical" for a finding of infringement.

In light of the notable differences between the two sets of emojis (such as the style, nature and use of colours and skin tones), Apple's emoji did not infringe Cub Club's "protected

expression". Referring to the 2009 *Art Attacks Ink's* decision by the 9th Circuit, the court held that for a finding of finding of trade dress infringement, following three conditions must be met cumulatively. First, that trade dress is non-functional; second, that it has attained a secondary meaning and third, that there is a substantial likelihood of confusion between the two products. As the trade dress by Cub Club was functional in the utilitarian sense, and even the diverse skin tones were functional in nature, Cub Club failed to meet the first requirement of non-functionality. The complaint was devoid of meaning on the second and the third ground as well. The claim for infringement of trade dress was accordingly, dismissed.

Sources: Judgement of the US District Court of Northern District of California, 16 February 2022, available here. Reuters, 17 February 2022, available here (content available on subscription). World Trademark Review, 18 February 2022, available here.
Image source: Apple's diverse emoji characters, available here.

2.2 Google's new algorithm raises false infringement alarm

In December 2021, Google updated it automated scanning system. The new system first scans through files stored in Google Drive, and in case the algorithm detects potential copyright infringement, a red flag immediately pops up next to the filename. A user having a publicly accessible link to such a file can no longer share or access the contents therein.
The black box algorithm copyright infringement ran into troubles earlier this month as files were flagged incorrectly. This was evidently a case of false positive.
Two sets of users were notable victims of this false alarm. First, Apple's macOS users while uploading their ".DS-Store" files received a red flag suggesting that the content therein may be copyright infringing. ".DS-Store" are metafiles generated by Apple devices as users transfer folders from their macOS to other operating systems. Second sets of users to receive such a false positive notice were computer scientists and academics that had uploaded their files on Google with unusual file names. A certain user named Dr. Emily Dolson uploaded her file with the name "output04.txt". The text comprised of just one character, that is the numeral one, written as "1". She received a notice from Google for potential copyright infringement. Wittingly, Dr. Dolson took it to Twitter, and asked "Uh, @googledrive, are you doing okay?"
While macOS users' general complaint, and Dr. Dolson's issue were promptly resolved by Google, this incident in general raises concerns about freedom of speech in light of this increased uptake of automated scanning systems.

Source: The Register, 25 January 2022, available here. Apple Insider, 19 February 2022, available here. TechRadar, 19 February 2022, available here.

2.3 Kenya's new Copyright Reform Bill causes outrage

In 2019, based on the recommendations from the ICT Committee, Kenya passed its Copyright Amendment Act. The Act was a response to the new digital business models in the wake of digitalization and digitization of content. The Act, accordingly, also implemented some provisions of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT). This was seen as a progressive move as Kenya inched closer to becoming a party to the Treaty. Notably, the Amendment Act upheld the promises made in articles 11 and 40 of the Constitution of Kenya, that promise to protect and promote development by affording a higher degree of protection to intellectual property. Provisions 35B, 35C and 35D of the 2019 Kenyan Copyright Amendment Act deal with liability for internet service providers (ISPs). Just two years down the line, the Kenyan National Assembly proposed another round of amendments. Clauses 5 to 7 of the latest draft Bill, Kenyan National Assembly's Bill No. 44 of 2021 propose to repeal sections 35B, 35C and 35D of the said Act. The latest amendment also seeks to do away with earnings for rightholders from ringback tones as well as do away with the proposed establishment of National Rights Registry. In light of these regressive measures, various publishing associations, including the Geneva-based International Publishers Association (IPA) have expressed their concerns against Bill No. 44 of 2021.

The Parliament's key argument in proposing these changes is that it will enable more creative content from local creator communities. Trade associations, such as the IPA, see the latest move as regressive as it weakens the online enforcement procedure in Kenya. This weak enforcement procedure, in their opinion, has been a keen reason for Kenya's frequent appearance on international intellectual property watch lists, such as the European Union Counterfeit and Piracy Watch List and the United States Trade Representative's (USTR) Special 301 Report.

The second reading of the Bill on February 3 came as a surprise to many a Kenyan copyright scholars and trade groups. This was followed by a public hearing by the Departmental Committee for Communication, Information and Innovation on February 15.

Sources: TechEconomy.ng, 15 February 2022, available here. Publishing Perspectives, 14 February 2022, available here. Business Daily, 14 February 2022, available here.
Image source: TechEconomy.ng, available here.

3. Patent

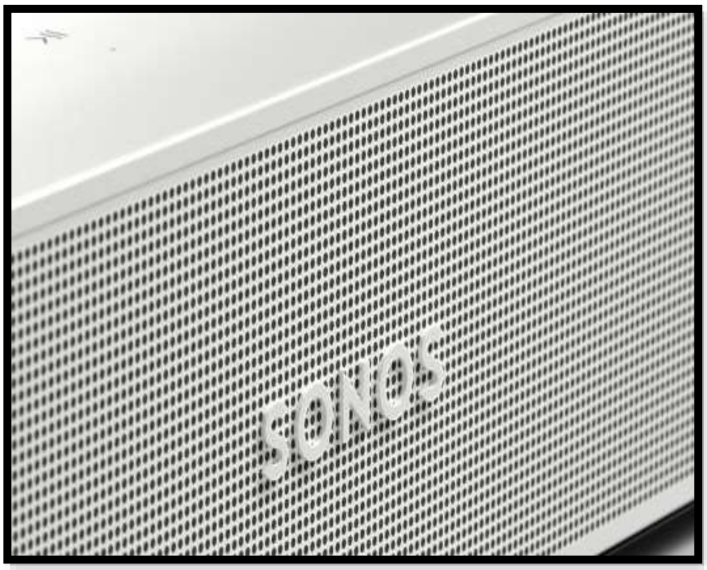
3.1 Gilead and ViiV Healthcare enter agreement to settle HIV drug dispute

Biktarvy is a blockbuster drug used as a "complete single-tablet" treatment for HIV-infected patients with special health conditions. In October 2021, a low dose formulation of the drug also received the Food and Drug Administration's (FDA) approval for pediatric patients weighing from 14 to 25 kg. Gilead, a US-based biopharmaceutical company and ViiV Healthcare (ViiV), a joint venture between GlaxoSmithKline Beecham (GSK), Pfizer and Shionogi, have been involved in one of the most high-profile pharma patent litigations in 2022 across countries ranging from Germany, France, Japan, to the UK, USA, Korea and Canada.

ViiV is the owner of the European patent EP 30 45 206. The patent is a key ingredient in the HIV drug Biktarvy. As per the Düsseldorf Regional Court (DRC), Gilead did not infringe the patent, and the dispute was in fact one of 'equivalency patent infringement'. ViiV filed an appeal against the decision of the DRC. Meanwhile, oral proceedings were scheduled for Q1 2022 in the other above-referred jurisdictions.
Biktarvy's sale in 2021 in the US alone were well over US$7.05 billion. The drug was expected to generate over $50 billion (until 2027).
On 1st February, the parties amicably settled their dispute as Gilead entered into a license agreement with ViiV. As per the agreement, Gilead shall make an upfront payment of US$ 1.25 billion to ViiV. Gilead, will in addition, also pay 3 per cent royalty on future sales of Biktarvy in the US markets. These royalties will be paid for the duration of patent protection for the US patent 8 129 385. The said US patent goes off-patent on 5 October 2027.

Sources: Juve-patent, 7 February 2022 available here. Gilead, 1 February 2022, available here.
Image source: Wikimedia Commons, available here.

3.2 Dutch District Court denies Google's request for injunction against Sonos



On 26th January, the District Court for Central Netherlands (the Dutch Court) rejected Google's request for an injunction against Sonos' smart speakers. As per the complaint, Sonos' speakers infringed Google's patent EP 15 79 621. The said patent did not cover the Netherlands, but covered other European jurisdictions namely, Finland, France, Germany, Italy and the UK. As Sonos is headquartered near Amsterdam in the Netherlands, the Dutch Court accordingly, admitted jurisdiction in the said case.
As the Court found that Sonos did not infringe the above-referred patent, the Court accordingly refused Google's request for injunction, and also ordered Google to pay a sum of €200,000 to Sonos. The Dutch Court also found that Google had failed to clearly state its claim element in its writ of summons.
According to Recast Brussels I Regulation, only the Finnish, UK and Italian courts have jurisdiction to hear validity claims in the said case. The Dutch Court according declined to hear on the issue of validity.

As a next step, Google plans to appeal the decision at the Arnhem-Leeuwarden Court of Appeal. In another ongoing patent dispute between Sonos and Google, the International Trade Commission in the US found that Google had infringed five of Sonos' patents. Google uses these patents in its speakers. Therefore, if Google wishes to continue importing these speakers to the US market, it must now first get a license from Sonos.

The German courts, on the other hand, seem more promising to the tech giant, Google. Sonos recently withdrew its requests for preliminary injunctions (PI) against Google. Sonos also withdrew its appeal against a decision from the Regional Court of Hamburg wherein the latter had refused to grant a PI against the tech giant.

Sources: Juve-patent, 11 February 2022, available here. Judgement of the Central Netherlands Court, 26 January 2022, available here. Patent EP1579621B1, available here.
Image source: Trusted Reviews, 31 December 2021, available here.

3.3 EU requests consultations against China at the WTO

On 18th February, the European Union (EU) requested consultations at the World Trade Organization (WTO) with China over the worldwide anti-suit injunctions (ASI) issued by Chinese courts in relation to standard essential patents (SEPs), and the lack of transparency therein, as China failed to publish the relevant court decisions.

The EU's request primarily involved the following four cases decided by the Wuhan and Shenzhen Intermediate People's Court (respectively the Wuhan Court and the Shenzhen Court) between September to December 2020: first, *Xiaomi v Inter Digital* (Wuhan Court), second, *ZTE v Conversant* (Shenzhen Court), third, *OPPO v Sharp* (Shenzhen Court), and fourth, *Samsung v Ericsson* (Wuhan Court). The central issue in all these cases was the licensing terms for 3G, 4G, 5G and Wi-Fi-related SEPs. The courts issued ASIs (anti-suit injunctions) which prohibited the patentees from requesting a non-Chinese court for relief in any of these afore-mentioned matters. Failure to comply was subject to a daily maximum penalty of 1 million Chinese RMB (138, 983 EUR), the maximum fine available in Chinese Civil Procedure Law.

These rulings of the Wuhan and the Shenzhen Courts were basically guided by China's Supreme People's Court's (SPC) decision in *Huawei v Conversant* (dt. 28.08.2020). In this case, the SPC stated that Article 100 of the Civil Procedure Law serves as a legal basis for such ASIs. Further, in *Sharp Corporation v. OPPO et al.* (2020), the parties referred to the UK Supreme Court's decision in *Unwired Planet v. Huawei*, and requested that the Chinese courts should set a worldwide royalty rate for SEPs, a request to which the SPC readily complied.

China neither published these decisions nor made them publicly accessible despite the fact that they dealt with a Trade-Related Aspects of Intellectual Property Rights (TRIPS)-related subject matter. Subsequently, the EU formally requested for a text of these decisions. China only briefly

responded to this request suggesting that there was no requirement under the TRIPS Agreement to comply with such a request.
In light of the fact that China's above-referred conduct contradicts the WTO Agreement on TRIPS, the EU requested consultations at the WTO. Notably, the Chinese conduct are deemed a violation to comply with the requirements under Article 63.1 and Article 63.3 of the TRIPS Agreement. These consultations have initiated the WTO dispute settlement process, which means that in case a mutually agreed solution is not achieved withing the next 60 days, this consultation process shall be followed by adjudication.

Sources: National Law Review, 25 February 2022, available here. EU Commission, 18 February 2022, available here. Request for Consultations, 18 February 2022, available here. Image source: Getty images, available here.

4. Trademark

4.1 Cosmetic brands' not so divine dispute over the word 'divine'

On 27th January, Amyris and Clean Beauty (together Plaintiffs) filed a complaint against the Defendant, Pat McGrath Cosmetics (PMC) at the US District Court for the Northern District of California.
The dispute first emerged in September 2021 when PMG sent a cease-and-desist letter to Amyris and Clean Beauty claiming that their "Blush Divine Radiant Cheek & Lip Color" mark infringed the PMC family of "DIVINE" marks. According to PMC, the mark "DIVINE" had gained an exclusive association with their brands.
As PMC's letter raised reasonable apprehension for unfair competition law and trademark infringement claims, the Plaintiffs requested a declaratory judgment of non-infringement under the Lanham Act and for unfair competition law under the Lanham Act and under the common law of California. As per the Plaintiffs, their use of the word "DIVINE" in the mark "Blush Divine Radiant Cheek & Lip Color" was protected as fair use. Additionally, the Plaintiffs requested a declaration that the PMC did not own "protectable rights to a 'DIVINE-formative' family of marks" (para 3 of the Complaint). Plaintiffs argued this on the ground that the word was not used as a trademark, rather it was a mere descriptive term.
The Plaintiffs put forward the following three additional grounds to substantiate their request. First, there was an absence of likelihood of confusion. This was on account of the widespread use of the word "DIVINE" by cosmetic products and brands such as Lilah B., Mothership VII and L'Occitane. As per the Plaintiffs, the term "DIVINE" was "incapable to uniquely identify PMC as a source identifier for blush or any other cosmetic industry product". Second, PMC falsely claimed ownership of the "DIVINE trademark family", as a trademark "family" required many years of use, before acquiring the necessary characteristics to be considered as such. As PMC was using the contested work for only a year and a half before the start of the proceedings, PMC was not in a position to make such a claim. Third, by asserting that the company owned

proprietary rights on the “DIVINE trademark family”, PMC was in fact making a misleading claim.

Sources: Judgement of the US District Court for the Northern District of California, 27 January 2022, available [here](,. The Fashion Law, 7 February 2022, available [here]) (content available on subscription). US Ralph Lauren Outlet Online, 7 February 2022, available [here].
Image Source: Blush Divine Radiant Lip & Cheek colour by Rose, Inc., available [here].

4.2 UKIPO maintains registration of Master’s Gin

On 8th February, the United Kingdom Intellectual Property Office (UKIPO) rejected a request for revocation of the Master’s Logo for “Gin, namely London Dry Gin” (see images) on the grounds that the proprietor put the mark to genuine use.
On 18th March 2021, Invers House Distillers Limited applied for revocation of the mark on grounds of non-use (S.46(1)(a) and 46(1)(b) UK Trade Marks Act 1994). The mark was originally registered at the European Union Intellectual Property Office (EUIPO) for class 33. As the mark was registered at the World Intellectual Property Organisation (WIPO) as a figurative mark (rather than a shape mark); the EUIPO maintained this classification as it admitted the “request to designate the international registration in the EU” (UKIPO at para 10). Following Brexit, as per Article 54 of the Withdrawal Agreement between the UK and the EU, the said mark was “automatically converted to a comparable UK trade mark” (UKIPO at para 2). The UKIPO accordingly treated the mark as a shape mark.
Referring to the decision of the Court of Justice of the European Union (CJEU) in *Stock v OHIM*, the UKIPO opined that to assess the distinctiveness of a 2D shape mark, the criteria is the same as for a “3D shape shown in 2D”. Accordingly, the disputed mark was assessed as “a figurative 2D mark depicting 3D bottles”.

To address the next question, that is the evidence of use, the owner of the mark submitted evidence of the use of the mark in three distinct ways (see images). Although this established genuine use, but it also indicated that use of the mark was in a form different from the one that was registered. As regards the distinctive character of the mark, the UKIPO found that “the [use of the] word ‘MASTER’S’, [the use of] the lion device and the distinct shape [such as sharply cut-off sides of the] bottles” (UKIPO at para 23) were an indicator of distinctiveness. Indistinctive text such as the words “SELECTION” and “Dry” were identified as “negligible elements” that

did not add to the distinctiveness of the mark (UKIPO at para 23).
As regards the evidence of use, the rightholders presented 17 invoices indicating a total sale of €28,563 from a sale of 7,362 bottles during the period 9th July 2014 to 16th March 2021 (UKIPO at para 35). Even though a sale of this value was negligible compared to the overall size of the market in the UK; however, as genuine use "require[d] a global assessment of the evidence as a whole" and since, the owner of the mark showed a, "consistent and repeated pattern of sales" (para 39), the UKIPO rejected the action for revocation on grounds of non-use under sections 46(1)(a) and 46 (1)(b) (UKIPO at paras 40-41).

News and Image Source: Judgement of the UKIPO, 8 February 2022, available here.
The IPKat, 17 February 2022, available here.

4.3 Tequila 512 sues Kendall Jenner's 818 Tequila

On 16th February, the Plaintiff Tequila 512 filed a lawsuit against K & Soda LLC, the owner of the mark 818 Tequila, at the U.S. District Court in Central California. Tequila 512 claims trademark infringement, false designation of origin and unfair competition by K & Soda. As per the complaint, the K & Soda literally blatantly copied its logo and the color scheme therein. Kendall Nicole Jenner is the owner of the company K& Soda, and the brand 818 Tequila.
Tequila 512, a registered trademark since 2015, depicts the numbers '512' in "black lettering inside a vertical yellow rectangle". 818 Tequila, launched in 2021, evidently uses the same branding strategy and depicts numbers '818' in exactly the same pattern that is "black lettering in a vertical yellow rectangle". As per the complaint, this choice of number as well as its representation are deliberate, as the two numbers (both 512 and 818) have "1" in the center and respectively refer to the places where the two companies are based. Whereas as 512 refers to Austin, Texas; 818 refers to Los Angeles. There exist only "immaterial tweaks" between the two logos. In light of the similarity of the two logos, an image of Tequila 512 was used instead of the originally intended 818 Tequila for an in-game purchase in "Kim Kardashian: Hollywood" mobile game. As per the complaint, this use of wrong image may be attributed to one of the following two factors: either, it was a deliberate tactic to "blur" the distinction between Tequila 512 and 818 Tequila or the owners of 818 Tequila got caught in their own trap, as they themselves got "confused" between the two brands.

Sources: NBC News, 18 February 2022, available here. Insider, 19 February 2022, available here.
Source and Image source: Fox Business, 18 February 2022, available here.