



The Innovator's Legal Aid Clinic

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER
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Dear Readers,

In this edition, as always, you will find an overview of the key developments in Competition, Copyright, Patents and Trademarks for November 2023.

In addition to the newsletter, you can also connect with us on [LinkedIn](#) and [Instagram](#). The Innovator's 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,

A. Grima, R. Jargeac, F. Gomez Renneberg and H. Karapici.

1. Competition Law

1.1. Apple files legal challenge to EU's Digital Markets Act

According to a post shared by the Court of Justice of the European Union on X, Apple has filed a legal case contesting decisions taken by the European Commission under its recently-introduced Digital Markets Act.

Other tech giants such as Meta and TikTok have already filed appeals disputing the Commission's decision to include their services in the DMA. Meta disagreed with the Commission's decision to designate its Messenger and Marketplace services under the DMA, but did not challenge the inclusion of Facebook, WhatsApp, or Instagram. Meanwhile, TikTok said its designation risked entrenching the power of dominant tech companies. *"Far from being a gatekeeper, our platform, which has been operating in Europe for just over five years, is arguably the most capable challenger to more entrenched platform businesses,"* it said. The social media platform argued that such regulatory actions risk entrenching the power of a few industry players, hindering healthy competition and innovation.

According to Reuters, the primary objective of the DMA is to facilitate user freedom by allowing easier transitions between competing services.

The Digital Markets Act (DMA) introduced by the EU imposes strict regulations on major digital firms, enhancing the powers of the European Commission as the region's primary antitrust enforcer. The new rules make it illegal for certain platforms to prioritize their services over rivals, prohibit the amalgamation of personal data across different services, and bar the use of

data collected from third-party merchants to compete against them. Furthermore, the DMA mandates that users must be allowed to download apps from competing platforms.

The legislation aims to make it easier for people to move between competing services, requiring them to inter-operate their messaging apps with rivals and let users decide which apps to pre-install on their devices. The new legislation targets 22 "gatekeeper" services, run by six tech companies - Microsoft, Apple, Alphabet's Google, Amazon, Meta and ByteDance's TikTok.



Photo by Laurenz Heymann, 2020 on [Unsplash](#).

The details of Apple's legal challenge have not been made public, but Bloomberg News reported that the company would challenge the inclusion of its App Store on the list of gatekeepers. Apple's App Store has been a focal point of contention, with the company asserting that the DMA's classification may have far-reaching implications for its business model. This is set to be the first of potentially several appeals against the Digital Markets Act.

Apple's appeal will likely not be limited to the App Store alone. The company will also argue against subjecting its iMessage service to closer scrutiny by regulators. The details of the appeal are still in draft form and may undergo changes before the November 16 deadline to file challenges at the EU's General Court.

Sources: Reuters, November 17, 2023, available [here](#). European Commission, September 6, 2023, available [here](#). Competition Policy International, November 19, 2023, available [here](#).

1.2 US wraps up antitrust case against Google in historic trial



Photo by Alex Dudar, 2020 on [Unsplash](#)

The Justice Department, along with the Attorneys General of California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act.

The complaint alleges that Google monopolizes key digital advertising technologies, collectively referred to as the “ad tech stack,” that website publishers depend on to sell ads and that advertisers rely on to buy ads and reach potential customers. Website publishers use ad tech tools to generate advertising revenue that supports the creation and maintenance of a vibrant open web, providing the public with unprecedented access to ideas, artistic expression, information, goods, and services. Through this monopolization lawsuit, the Justice Department and state Attorneys General seek to restore competition in these important markets and obtain equitable and monetary relief on behalf of the American public.

“Today’s lawsuit seeks to hold Google to account for its longstanding monopolies in digital advertising technologies that content creators use to sell ads and advertisers use to buy ads on

the open internet,” said Assistant Attorney General Jonathan Kanter of the Justice Department’s Antitrust Division. “Our complaint sets forth detailed allegations explaining how Google engaged in 15 years of sustained conduct that had — and continues to have — the effect of driving out rivals, diminishing competition, inflating advertising costs, reducing revenues for news publishers and content creators, snuffing out innovation, and harming the exchange of information and ideas in the public sphere.”

In the complaint it is alleged that, over the past 15 years, Google has engaged in a course of anticompetitive and exclusionary conduct that consisted of neutralizing or eliminating ad tech competitors through acquisitions; wielding its dominance across digital advertising markets to force more publishers and advertisers to use its products; and thwarting the ability to use competing products.

“Today’s complaint alleges that Google has used anticompetitive, exclusionary, and unlawful conduct to eliminate or severely diminish any threat to its dominance over digital advertising technologies,” said Attorney General Merrick B. Garland. “No matter the industry and no matter the company, the Justice Department will vigorously enforce our antitrust laws to protect consumers, safeguard competition, and ensure economic fairness and opportunity for all.”

Google now controls the digital tool that nearly every major website publisher uses to sell ads on their websites (publisher ad server); it controls the dominant advertiser tool that helps millions of large and small advertisers buy ad inventory (advertiser ad network); and it controls the largest advertising exchange (ad exchange), a technology that runs real-time auctions to match buyers and sellers of online advertising.

Google’s anticompetitive conduct has included: acquiring Competitors, forcing Adoption of Google’s Tools, distorting Auction Competition, auction Manipulation.

So what exactly is Google accused of? Federal prosecutors have accused Google of using its deep pockets and status as the dominant internet search engine to shut out rivals and stifle meaningful competition. “Google will argue that these defaults make the user experience more seamless and less full of friction.” Does this case have potential ramifications for the technology industry as a whole?

This issue about defaults has shown up in other cases where firms develop monopoly power. The Big Five, they all worry about the legality of their default settings.

Judge Amit Mehta of the U.S. District Court for the District of Columbia said he was undecided on which way to rule. *"I have no idea what I'm going to do,"* he said after setting closing arguments for early May. Judge Amit Mehta of the U.S. District Court for the District of Columbia. No matter who prevails when Mehta issues his ruling, experts say there will be an appeal. The lawsuit was filed in 2020, and it could be mid-2026 before all appeals are exhausted, experts said.

Sources: Reuters, November 16 2023, available [here](#). Reuters November 16 2023, available [here](#). US department of Justice, January 24 2023, available [here](#). The Harvard Gazette, September 14 2023, available [here](#).

1.3 Coca-Cola faces abuse of dominance probe in Germany

Nine months after the European Commission closed its own abuse of dominance investigation into similar suspected conduct, Germany's Federal Cartel Office (Bundeskartellamt) has begun probing the world's largest bottler and seller of Coca-Cola products over its pricing practices in the country.

Andreas Mundt, President of the Bundeskartellamt said: *"There are indications of CocaCola possibly restricting the opportunities of other companies to compete based on how it structures its terms offered to German food retailers, in particular its rebate structure. We will now take a closer look at this ».*

The cartel office said it would look at whether Coca-Cola had a dominant position and would therefore be subject to special competition rules. It would also look at whether terms imposed by Coca-Cola on German food retailers, in particular its rebate structure, conformed to those rules.

In the administrative proceedings, the Bundeskartellamt will first scrutinise whether Coca-Cola has a dominant position or relative market power in a possible market for cola beverages or carbonated soft drinks and is therefore subject to special competition law rules for dominant companies. The authority will also investigate whether the terms imposed by Coca-Cola on

German food retailers are in line with these rules. In particular, the authority will investigate whether Coca-Cola's rebate structure legitimately or illegitimately creates incentives for food retailers to buy, display and advertise the full range of beverages offered by Coca-Cola (e.g. Fanta, Sprite, Mezzo Mix, ViO, fuzetea, Powerade) and not just cola beverages. The terms in question could have the effect of restricting other beverage producers competing with Coca-Cola in their opportunities to compete in neighbouring markets as well.

"We are convinced that the business model of Coca-Cola Europacific Partners in Germany, with a balanced pricing and conditions concept, is legally compliant," Andrea Weckwert, Vice President Legal at the company said in a statement.

The company said it was aware of the investigation and was cooperating fully with the authorities.



Photo by Taras Chernus, 2019 on [Unsplash](#)

Sources: Global Competition Review, November 14 2023, available [here](#). Reuters, November 14 2023, available [here](#). Concurrences, November 14 2023, available [here](#).



2. Copyright

2.1 Copyright Lawsuits against users of Large Language Models

Google, Microsoft, and OpenAI have called for users of generative AI tools to be held responsible for the results produced. In comments to the US Copyright Office, OpenAI wrote: "In evaluating claims of infringement relating to outputs, the analysis starts with the user. After all, there is no output without a prompt from a user, and the nature of the output is directly influenced by what was asked for." Google, which owns ChatGPT, told the US Copyright Office: "Any resulting liability should attach to the user".



Photo by Ali Shab Lakhani, 2019 on [Unsplash](#)

OpenAI has launched a new program called Copyright Shield, which offers legal protection to users of its ChatGPT Enterprise and API services who face copyright infringement suits. The program is designed to protect users from lawsuits related to the use of copyrighted material in the training of AI models. OpenAI has faced several lawsuits from authors who claim that the company used their copyrighted work without permission to train its chatbot. The company has argued that its use of training data is protected under the "fair use" exemption of US copyright law. The Copyright Shield

program is aimed at reducing consumer anxiety sparked by unresolved copyright claims against generative AI systems.

Under the Copyright Shield program, OpenAI will pay the legal fees of any business customer who is sued over copyright claims. The pledge does not apply to anyone using the free version of ChatGPT. In a statement posted to the company's website, OpenAI stated that the policy would be in place only for 'Enterprise users'. The move is most likely intended to reduce consumer anxiety caused by unresolved copyright claims against generative AI systems.

Sources: The Guardian, 6 November 2023, available [here](#). Business Insider, 7 November 2023, available [here](#). Forbes, 6 November 2023, available [here](#).

2.2 Russia retaliates against sanctions by legislatively enabling CR infringement



Photo by billow926, 2019 on [Unsplash](#)

After Russia invaded Ukraine in February 2022, certain members of the international community, the most prominent of which was the United States, established an array of economic sanctions originally intended to apply pressure to Russia to desist from their so called 'special military operation'. One of the ways in which this was set out to be achieved was by

causing economic repercussions that would affect mainly the network of oligarchs that are closely connected to the Kremlin.

As a response to international pressure, besides not budging on the relentless advancement of troops in the occupied territory, Russia has retaliated against intellectual property rights holders in a series of ways:

- Reduced compensation granted to Patent Holders when they are subjected to Compulsory Licensing to a royalty rate of 0%. - Decree No. 299 (March 6, 2022)
- Proposal to legalize software piracy was drafted. Such a proposal would have removed any liabilities stemming from infringing on foreign CR holders, although such a proposal was not adopted. - March 14
- Certain categories of goods, most prominently those in the automotives, clothing, and computer sectors, are being exempted from TM protection, essentially legislating in favor of parallel importation of such goods. - Order No. 68421 (May 6, 2022)
- Proposal to outlaw canceling contracts with foreign rights holders when the subject matter of the contract relates to or contains IPRs. - Draft Federal Law No. 92282-8 (March 22, 2022)
- Courts dismiss claims of IP infringement by virtue of ‘abuse of right’. This means that foreign firms with their main statutory seat in a country that Russia deems as ‘having adopted restrictive measures’ (sanctions) are deprived of enforcing their IPRs in court. - *Entertainment One UK v Koykova* (March 2, 2022)
- Following their withdrawal from the Russian market, there have been bad faith TM applications copying well known foreign brands such as Apple, McDonalds, and Nike. - Rospatent’s official bulletin

Sources: USPTO, June 2022, available [here](#). DeBrauw, 17 March 2022, available [here](#). IP Helpdesk, 17 March 2022, available [here](#).

2.3 CR Protection of French Publishers when their content is reshared on ISPs



Photo by Brett Jordan, 2020 on [Unsplash](#)

Facebook has agreed to pay French media outlets for their content. The agreement was reached after months of talks between Facebook and the media groups, represented by France's Alliance de la Presse d'Information Générale lobby. Facebook said it would negotiate individual licenses with members of the alliance that cover related rights.

In a similar move, Google has also agreed to pay French publishers for news content in a major digital copyright deal. The agreement comes after several months of talks between Google France and the media groups, which are represented by France's Alliance de la Presse d'Information Générale lobby. Google said it would negotiate individual licenses with members of the alliance that cover related rights.

The court decision in Paris could also have repercussions in foreign jurisdictions, as France was the first EU country to apply "neighboring rights" regulations. Google and Facebook are also facing pressure in Australia, where regulators want companies to pay for using news content. Facebook has threatened to block publishers and users from sharing news in the country over the proposed law.

Sources: [CNBC](#), 21 January 2021, available [here](#). [Euronews](#), 8 October 2020, available [here](#). [Euronews](#), 21 October 2021, available [here](#).

3. Patents

3.1. Offshore wind energy patent insight report for November 2023- innovation surging



Photo by IRENA, 2023 on IRENA.org

Offshore wind energy is a critical contribution to climate change prevention, in line with UN Sustainable Development Goals by aiming to provide affordable, reliable, and sustainable electricity to all by 2030. The Offshore Wind Energy Patent Insight Report, a joint effort of the European Patent Office (EPO) and the International Renewable Energy Agency (IRENA), examines global patent filings in the offshore wind energy sector from 2002 to 2022. Based on roughly 17,000 patents from the EPO's database, the report's goal is to provide insights into innovation, commercialization, and knowledge transfer patterns while addressing important technological problems.

Key Findings and Trends:

1. Geographical Distribution: According to patent data, there was a boom in global filings from 2006 to 2012, followed by a revival in 2017. Seven European countries are among the top ten in International Patent Families (IPFs), with Germany and Denmark leading the way. The United States is ranked third, with China and Japan close behind.
2. Innovation Focus: Offshore wind innovation is centered on floating foundations, transportation, and mechanical transmission. Furthermore, coupling offshore wind with electrolyzers for green hydrogen production is becoming more popular.
3. Floating Foundations: There is a lot of interest in constructing floating foundations, which indicates a trend towards locating turbines in deeper oceans with lots of wind potential.
4. Efforts to Improve Sustainability: The offshore wind industry is investigating alternate designs for towers and blades in order to minimize steel consumption and improve sustainability. A focus is also placed on modular blade assembly and recyclable blades.
5. Rare Earth elements: The move towards direct-drive systems may increase the use of permanent magnets, increasing demand for rare earth elements.
6. Energy Storage and Hydrogen generation: There is an increasing interest in on-site energy storage, particularly when combined with hydrogen generation, to balance power systems and create additional value.
7. Submarine Electrical Infrastructure: The requirement for transmission infrastructure is driving undersea cabling innovation in order to connect supply and demand cost-effectively.
8. Hybridization: While there is some interest in combining offshore wind with other energy sources such as PV or ocean energy, the complexity of management and maintenance may be a hindrance.

Sources: SDG Resource Document 2023, available [here](#). IRENA 2023, available [here](#). EPO, 9 November 2023, available [here](#)

3.2. EPO: Processing of oppositions where an infringement has been instituted before the Unified Patent Court, a national court or competent authority can be accelerated



Photo by EPO, 2023 on EPO.org

On November 7, 2023, the EPO released a notification explaining the accelerated processing of oppositions when there are concurrent infringement or revocation procedures against a European or Unitary Patent before the Unified Patent Court or a national court of a contracting state. In such circumstances, where simultaneous opposition processes are underway, the EPO's prompt determination is judged necessary for legal certainty, procedural efficiency, and preserving high quality and uniformity in the European patent system, which benefits all parties concerned.

The EPO's opposition division seeks to issue the next procedural action, such as communication or summons to oral proceedings, within three months of receiving the required information or the party's request under this rapid processing. If the information or request arrives before the patent proprietor's answer to the notice of objection, the opposition division makes every effort to issue the next procedural action within three months of receiving the latter. Furthermore, any oral proceedings shall be scheduled or rescheduled as soon as practicable.

The notification emphasizes that petitions from parties to extend time restrictions beyond the usual or to postpone oral proceedings will be allowed only in exceptional and adequately proven circumstances. Overall, the goal is to streamline and accelerate the settlement of concurrent

opposition procedures, aligning with the interests of the parties involved and adding to the European patent system's efficacy and coherence.

Sources: Official Journal EPO 2023, available [here](#)

3.3. EPO's AI-powered CPC text categorizer is now available



Photo by EPO, 2023 on EPO.org

The EPO has introduced a new AI-powered text categorizer to make it easier to discover relevant phrases in the large Cooperative Patent Classification (CPC). This online symbol predictor makes the CPC system more accessible: it delivers suitable CPC symbols in a fraction of a second from text inputs in English, French, or German.

The CPC is a patent categorization scheme created jointly by the EPO and USPTO over a decade ago that is now utilized by thirty-eight national or regional patent offices for classification. The vast majority of patents issued today are indexed on this approach, which includes approximately 250 000 classifying symbols. The correct application of these symbols can considerably improve the accuracy of patent searches.

In the CPC scheme, the predicted CPC symbols are presented beside their respective parents. Users are directed to Espacenet after clicking on the suggested symbols, where they can search for any papers classified accordingly. Furthermore, advanced options allow users to change the desired confidence level and view the revision dates of the anticipated symbols.

Sources: EPO News 2023, available [here](#)

4. Trademarks

4.1. EUIPO Recognises Distinctiveness of Haribo's Gummy Bear



Photo by Amit Lahav, 2020 on [Unsplash](#).

In a recent decision (R 872/2023-4), the Fourth Board of Appeal of the EUIPO recognized the distinctiveness of a figurative mark representing Haribo's gummy bear, marking a significant development in the protection of 3D marks in the EU.

In 2021, Haribo applied for an international registration under the Madrid Protocol for a gummy bear figurative mark. Initially, the EUIPO examiner partially refused the application, citing lack of distinctive character. The refusal was based on the grounds that the shape of a gummy bear is commonly used and the features of the gummy bear did not depart significantly from the norm of how gummy bears appear; amongst other grounds

However, in 2023, the Board of Appeal withdrew the partial refusal of the trademark and emphasized that a minimum degree of distinctive character is sufficient to overcome the absolute ground of refusal found in Article 7(1)(b) of the EUTMR, concerning lack of distinctive character. The Board of Appeal concluded that Haribo's gummy bear mark notably diverged from the norm in the confectionary sector; and the mark included distinct characteristics, such as the ear, nose and smile of the bear, thus creating a visual impact on the consumers.

Sources: IP Helpdesk, 31 October 2023, available [here](#). IP Kat, 27 October 2023, available [here](#). World Trade Mark Review, 16 November 2023, available [here](#).

4.2. The Trademark Chronicles of Wagatha Christie



Photo by Clem Onojeghuo, 2018 on [Unsplash](#).

The term WAGATHA CHRISTIE (a combination of the term WAG, given to footballers' wives, and famed crime novelist Agatha Christie) originated after Coleen Rooney, wife of football player Wayne Rooney, conducted an investigation into the leaking of stories from her private Instagram account. This investigation led Mrs. Rooney to conclude that Rebekah Vardy, wife of football player Jamie

Vardy, was behind the leaking of the stories. After a libel action in 2022, Mrs. Vardy was the unsuccessful claimant.

Less than a month after the judgment, Mrs. Vardy filed an application to secure a UK trade mark registration of the term WAGATHA CHRISTIE for a wide range of goods and services. However, jurists were quick to point out some issues, these being that:

- The moniker WAGATHA CHRISTIE was given to Mrs. Rooney and not Mrs. Vardy
- The similarity to the AGATHA CHRISTIE trade marks

The UKIPO seemingly did not have an issue with the above, as it considered that the mark is sufficiently distinctive and is capable of being represented with sufficient clarity and precision, thus proceeding to register the mark in April 2023.

Although it is yet to be seen whether an action on the validity of the mark will be made, this mark may be attacked on the basis that it takes unfair advantage of or is detrimental to the distinctive character of the AGATHA CHRISTIE mark. Moreover, jurists have expressed the possibility of Mrs. Rooney seeking to invalidate the registration on the ground of bad faith, given that the UK Courts have interpreted this to mean that at the time of the application there existed a dishonest intention of undermining the interests of third parties.

We will just have to wait and see what the future holds in the next chapter of the Wagatha Christie chronicles!

Sources: Fieldfisher, 26 April 2023, available [here](#). IP Kat, 3 May 2023, available [here](#). World IP Preview, 9 May 2023, available [here](#).

4.3. The EUIPO doesn't love emojis as Trade Marks



Photo by Wu Yi, 2021 on [Unsplash](#).

A German company, Käselow Holding GmbH, sought to register the internationally known ‘I Love You’ hand gesture emoji as a figurative EUTM, for various financial, real estate and construction related services in Classes 36 and 37. However, the examiner rejected the application and decided that, as a general rule, emojis lack distinctive character and are not eligible for trademark protection.

This was confirmed by the EUIPO’s Second Board of Appeal, who asserted that emojis, being common in private communication, are perceived by the relevant public as general advertising or decorative elements, and are thus devoid of distinctive character.

Sources: Lexology, 21 July 2023, available [here](#). IP Kat, 14 July 2023, available [here](#). Kluwer IP Law, available [here](#).