FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2023 WEEK 34 NO. 39)

Dear Readers,

It's been some time since you received your regular supplement of Friday Fortnightly. So, you must be wondering where are we? At TILC, we are planning some new additional events. Starting this newsletter, we will complement our top news, with detailed academic insights, and round tables, and talks. You may follow, join, and contribute to the knowledge base, on LinkedIn, Instagram and here. This will ensure that you not only read, but also hear the top stories in the world of IP & competition.

In addition, to complement all that you may have missed during this period, and step in the new academic year with upto date information, in this edition, you will find an overview of the key developments in Competition, Copyright, Patents & Trademarks for Mar'23-Aug'23. Please also find the invite to join our upcoming IPKM alumni meet in Nov'23.

The Innovator's Legal Aid Clinic's (TILC) information initiatives – Friday Fortnightly, TILC's Insights, 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.

With kind regards,

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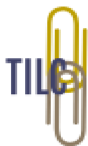


Serving innovative start-ups pro-bono with the wisdom of intellectual property laws

1. Competition law

1.1 Microsoft/Activision: EU clears, US pauses & UK delays clearance

In 2022, Microsoft proposed to acquire Activision Blizzard for $69 billion, making it Microsoft's largest acquisition till date. The merger has been subject to intense antitrust scrutiny by regulators worldwide. Between May and July 2023, three leading antitrust agencies, the European Commission, the US Federal Trade Commission (FTC) and the UK's Competition and Market's Authority (CMA) reached three diverging decisions on the matter.

Following a detailed Phase-II investigation, the European Commission found that post-merger, Microsoft did not have any incentives to refuse Activision games to Sony, a leading player in the market for video games. However, Microsoft may adversely impact competition in the "distribution of PC and console games via cloud streaming services" and further strengthen the position of MS Windows in the market for PC operating systems. To alleviate the Commission's competition concerns, Microsoft offered a decade-long licensing commitment to offer "all current and future Activision Blizzard PC and console games [across all] cloud game streaming services" to consumers and game streaming service providers.

In the US, the FTC sought to prohibit the proposed merger. As the FTC's administrative procedure, initiated in December 2022, may take long; it requested a preliminary injunction from the Northern District of California to "enjoin the merger pending … FTC's administrative action". On 10th July, the California District Court refused FTC's request as the latter could not reasonably demonstrate that "the proposed merger is likely to substantially lessen competition in the console, library subscription services, or cloud gaming markets….[and]…. a likelihood of ultimate success as to its Section 7 [Clayton Act] claim" [p.51 of the decision]. Following this decision, the FTC has put a pause to its investigations, and is currently exploring the possibility of "potential settlement talks" with Microsoft.

In the UK, the CMA proposed in its decision dated 26th April that the merger could lead "to substantial lessening of competition in the supply of cloud gaming services in the UK", and that prohibition was therefore, the most "effective and proportionate remedy". As Microsoft offered a "detailed and complex submission" in response, the CMA has extended its timeline to end-August to offer its final opinion on the matter.

News Source: Commission, 15 May 2023, available here. UK CMA, 31 July 2023, available here. US FTC, 20 July 2023, available here. The Verge, 19 July 2023, available here.
Image Source: Getty Images, available here.

1.2 Commission adopts new Horizontal Regulations and Guidelines

On 1st June, the Commission adopted revised Horizontal Block Exemption Regulations (HBERs) and Horizontal Guidelines package.

The HBER comprises of two regulations, namely, the Horizontal Block Exemption Regulation on Research and Development (R&D BER) and the Specialisation BER. The HBERs specify conditions under which R&D agreements and specialisation agreements may automatically benefit from the preview of Article 101 of the Treaty on the Functioning of the European Union (TFEU). To benefit from such an automatic exemption, the firms should have a market share of less than or equal to 25 per cent and 20 per cent for R&D BER and Specialisation BER respectively. A notable change in the R&D BER is the increased emphasis on 'innovation competition'. The HBERs also further clarify and strengthen the role of National Competition Authorities (NCAs), that are expected to play a more active role in cooperation with the Commission. The new 2023 HBERs replace the 2010 HBERs, and shall remain in force till 2035.

The 2023 Horizontal Guidelines replace the 2011 Horizontal Guidelines. These Guidelines reflect the Commission's practice as regards horizontal cooperation agreements under Article 101, Treaty on the Functioning European (TFEU). Notable changes and additions to 2023 Guidelines include a chapter on sustainability agreements (chapter 9) and an additional section on 'mobile telecommunications infrastructure sharing agreements' (chapter 3, section 6). The Guidelines also offer a more detailed guidance on joint purchasing agreements, and how they may impact upstream sellers in the market. In light of an increasingly data and information-driven economy, the new Guidelines also offer a detailed view on information exchange between competitors, and conditions, whereby they may be deemed as an object restriction or as a unilateral signaling mechanism to the competitors.

To know more about the new Horizontal Package, follow the Commission's webcast, *here*.

News Source: Commission, 1 June 2023, available here. Bird & Bird, 19 July 2023, available here. VBB, 28 June 2023, available here.

Image Source: Commission, available here.

1.3 Figma/Adobe merger: Commission commences Phase II investigation

On 7th August, the Commission commenced its Phase II investigations in Adobe's proposed acquisition of Figma. Both Figma and Adobe are US-based, digital software solutions service providers. Adobe offers, amongst its other digital offerings, software solutions to create digital content.

Figma's key offerings, FigmaDesign, an interactive design tool, and FigJam, a digital whiteboard, compete closely with Adobe's interactive design products, such as Adobe XD. In September 2022, Adobe proposed to acquire Figma for $ 20 billion. The transaction was not caught by the EU Merger Regulation (EUMR), however it was caught by national notification thresholds of various EU Member States, such as the German and the Austrian merger control laws. The Austrian and the German authorities decided to refer the transaction to the Commission as per Article 22(1), EUMR. Other Member States, such as Belgium, Bulgaria, Denmark and the Netherlands too joined the Austrian request.

Following its Phase-1 investigation, on 7th August, the Commission decided to continue with a detailed Phase-II assessment of the transaction. Commission's preliminary assessment indicates that the merger is likely to restrict competition in the global markets for the supply of interactive product design tools and digital asset creation tools, whereby both the parties, namely, Adobe and Figma, closely compete with one another. Figma, a relatively recent entrant, acts as an important competitive constraint on the more well-established Adobe, a global leader in the market for digital asset creation tools.

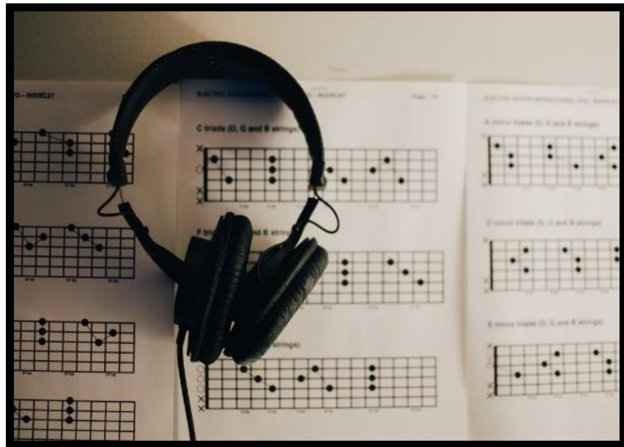
News Source: Commission, 7 August 2023, available here. CNBC Tech, 15 September 2022, available here.
Image Source: Figma, available here.

2. Copyright

2.1 US courts 'Thinking Out Loud' Ed Sheeran's victory in copyright infringement lawsuits

In May 2023, Ed Sheeran won two consecutive copyright infringement lawsuits at the US courts. Central to both these lawsuits, filed by Structured Asset Sales LLC (SAS), that owns the rights over Marvin Gaye's "Let's Get It On", was the claim that Ed Sheeran's 2014 hit, "Thinking Out Loud" had unlawfully "copied the chord progression" from Marvin Gaye's "Let's Get It On".

In the first lawsuit, the US District Court for the Southern District of New York pronounced its decision on 4th May. The case was decided by a federal jury that found that Sheeran was not in violation of any copyright infringement. The Court was of the opinion that as chord progression are a "fundamental building block" in music composition, any exclusive rights to Gaye on such a basic technique will be the equivalent of granting a monopoly. In fact, even prior to the release of Gaye's song, over 29 newly released songs had carried a similar chord progression. Further, following the release of Gaye's song, and prior to the release of Sheeran's song, another 23 songs followed a similar chord progression [as in Gaye's song], indicating overall that there was no originality in this approach, and that this method of "chord progression" was in fact, a fundamental building block of music.



The second law suit, filed on similar grounds of chord progression too, was dismissed on 16th May, on analogous foregoing grounds by the US District Court for the Southern District of New York.

News Source: Reuters, 4 May 2023, available here. Lexology, 16 May 2023, available here. The New York Times, 4 May 2023, available here.
Image source: Unsplash, available here.

2.2 Warhol's Orange Price images not a fair use: *says* SCOTUS

On 18th May, the Supreme Court of the United States (SCOTUS) pronounced its decision in the much awaited Warhol/Goldsmith case. The District Court had ruled in favour of Warhol; however, the Court of Appeal (CoA) reversed the decision of the lower court.

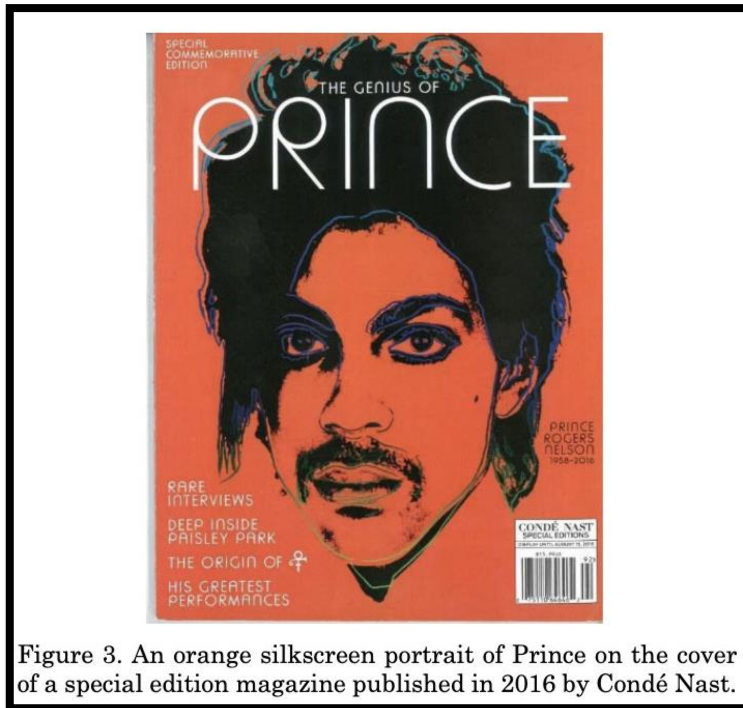


Figure 3. An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

As a background to the case, in 1981, Lynn Goldsmith took some photographs of Prince. One of these photographs were licensed in 1984 by Goldsmith to the Vanity Fair magazine for a one-time use in an article about Prince. She was given the credit for her work, and offered a license fee of $400 by Vanity Fair for this one-time use. In 2016, Condé Nast (the new owner of Vanity Fair) hired Andy Warhol to make 15 "silkscreen portraits" (*see* image) of these original Prince photographs. For these new works, Warhol was paid $10,000; while neither Condé Nast nor AWF reached out to Goldsmith for a license to use the original underlying work.

The only question raised in appeal by the Andy Warhol Foundation (AWF) before the SCOTUS was whether the "first fair use factor, [namely] the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes" (§107(1)) weighed in favour of AWF.

In its majority 7-2 decision, the Court upheld the decision of the CoA, and found that Warhol had infringed Goldsmith's copyright in Prince's photograph, and as both Goldsmith's as well as Warhol's work were targeted essentially at the same commercial purpose, namely a special edition magazine devoted to Prince, Warhol, therefore, could not benefit from the first fair use factor. In its dissenting opinion, Justice Kagan with support from Chief Justice Roberts, argued that Warhol's work was a piece of work in its own right, and that such a restrictive interpretation could "thwart the expression of news ideas [..and...] knowledge".

News Source: Supreme Court of the United States, May 18 2023, available here. The National Law Review, 2 June 2023, available here. Reuters, May 19 2023, available here. IPWatchdog, May 18 2023, available here.

Image Source: Supreme Court of the United States, May 18 2023, available here.

2.3 Alibaba must pay NetEase $7.2 million over copyright infringement: *says* Guangzhou Court

On 24th May, the Guangzhou Internet Court ordered Lingxi Games, part of Alibaba Group, to pay internet technology and video game developer, NetEase 50 million yuan ($7.2 million) in damages. This is the largest fine issued till date by a Chinese court for infringing copyright in video games.

In 2015, NetEase released one of its most successful games, Infinite Borders, that has since garnered a revenue of over $1 billion. In 2017, the Alibaba Group too entered the highly

promising and profitable gaming industry by acquiring Lingxi Games. Lingixi Games, established by a former employee of NetEase, was merged in the Guangzhou Ejoy Technology group, part of Alibaba Group, that develops and markets video games. In 2019, Alibaba launched "Three Kingdoms Tactics", that quickly climbed the charts to be amongst the top ten Chinese mobile game both in China as well as internationally. Three Kingdom Tactics has made a revenue of over $1.97 billion since its launch.

The Guangzhou Internet Court was of the opinion that Alibaba had infringed NetEase's copyright in Infinite Borders, and accordingly, ordered it to pay the fine. NetEase has, in addition, given a notice to Alibaba to stop selling or making the "Three Kingdom Tactics", currently available online across app stores worldwide. The Alibaba group has decided to appeal the Guangzhou Internet Court's decision. It has also turned down NetEase's request to stop the sales of "Three Kingdom Tactics".

News Source: Reuters, May 24 2023, available here. Yicai Global, May 24 2023, available here.
Image Source: Unsplash, available here.

3. Patents

3.1 The UPC and its jurisdiction

On 1st June, the Unitary Patent along with the Unified Patent Court (UPC) formally commenced operations. The UPC is a one-stop forum to litigate infringement and revocation of unitary patents, as well as European patents that have not been opted out of the system. The UPC shall have jurisdiction over 17 Member States (MS), including Germany, France, and Italy (EU's top three economies) – all these MS together representing three-fourth of EU's GDP (Gross Domestic Product).

The UPC comprises of three principle organs, namely, the Court of First Instance (CFI), a Court of Appeal, and a Registry Office. The CFI may hear any legal action, as listed under Article 32 of the UPC Agreement. One of the key promises of the UPC is the possibility to bring "a single action", and thereby, avoid multiple patent disputes (and differing outcomes therein) across different national courts.

To request a Unitary Patent, the patentee must first get a European Patent (EP) at the European Patent Office (EPO). Following the grant of an EP, s/he may request the EPO for a patent with a unitary effect. In addition, the patentee also retains the possibility to validate the patent in other countries not covered by the Unitary Patent.

News Source: Commission, 1 June 2023, available here. Kluwer Patent Blog, 29 May 2023, available here. EPO, available here.
Image Source: UPC, 2023, available here.

3.2 Commission proposes a new regulation for SEPs, EUIPO to play a key role

On 27th April, the Commission published its Standard Essential Patents (SEP) Regulation Proposal (COM (2023) 232). The proposed Regulation promises a more "transparent, effective and futureproof framework for intellectual property rights" and envisions a central role for the Alicante-based European Union Intellectual Property Organisation (EUIPO) in the SEP and FRAND-related (Fair, Reasonable and Non-Discriminatory) dispute resolution. Notably, Title II of the Proposal visualises the establishment of a Competence Center (CC) at the EUIPO that should, amongst others, develop a framework to ascertain whether an SEP is standard essential (1); establish a framework for the determination of FRANDly royalty rates (2) and develop a list of SEP experts working in the field (3).

To enforce an SEP, it must be registered in the EUIPO's database within a prescribed time limit, failing which it will be non-enforceable, until it has been registered therein. The UPC (see news item 3.1*supra*) and the national courts of the EU Member States are required to refer to the Database to determine the admissibility of an SEP-related dispute. This electronic Database, to be developed by the EUIPO, should include a detailed list of the SEPs, such as, patent number, country of registration, and the "name, address and contact details of the SEP holder" (Article 4, Register of SEPs).

Source: Commission, 27 April 2023, available here. BakerMcKenzie, 28 April 2023, available here. Science Business, 5 June 2023, available here. Kluwer Competition Blog, 15 May 2023, available here. For an academic commentary on FRAND Dispute Resolution, 18 May 2023, see here.
Image Source: IPEurope, here.

3.3 Commission proposes new regulation for EU-wide centralised and unitary SPCs

On 27th April, the Commission released its proposal for the regulation on the unitary supplementary protection certificates (SPC) for plant protection and medicinal products. The SPC proposal, alongside the above-referred SEP proposal (*see* news item 3.2 *supra*) and the proposed compulsory licensing regime are part of the EU's new "patent package". The proposed SPC

package comprises of four Regulations (COM(2023) 221, 222, 223 and 231) – two that will replace the current framework on medicinal and plant protection, and another two set of regulation, that will create a unitary title for medicinal and plant products. Under the present framework, patentees must individually apply for an SPC at each national patent office in the EU Member States.
This leads to fragmented, and sometimes anti-competitive outcomes (cf, for an academic discussion, *here*). It must be noted that the requirements to receive an SPC remain unchanged. The proposed SPC framework seeks to "complement the unitary patent [package] with a unitary SPC". What is new about the SPC package is that it offers the possibility to get a new unitary SPC that shall complement the Unitary Patent and the UPC that enter effect on 1st June (*see* news item 3.1 *supra*).
Other notable changes to the current SPC framework include the introduction of an opposition procedure at the central examination authority, and the possibility to in turn, appeal these at the EUIPO Boards of Appeal, and the EU Courts. The proposal also offers a formalised framework for third parties to "submit observations during examination… [as well as]… initiate an opposition against an examination opinion… [and] challenge its validity before the Office".

News Source: Commission, 27 April 2023, available here. BackerMcKenzie, 3 May 2023, available here.
Image Source: EFPIA, available here.

4. Trademark

4.1 Use of Google's Dynamic Advertising can be infringing: *says* Austrian Supreme Court

In OGH, 4 Ob 134/22t (AirButler case), the Austrian Supreme Court decided on the liability of advertisers that use Google's Dynamic Search Ads.
When someone searches for information on the internet, that closely relate to the content available on a particular website, Google uses these terms to select a landing page from the website, and automatically generate the most relevant headline. For example, if a local bakery, "Baker Bee" chooses to advertise using Google Dynamic Search; then someone looking for "Dunkin donuts" views this Baker Bee's ad with the headline "Baker Bee – Dunkin' donuts". The user clicks on Baker Bee's ad with the headline "Baker Bee – Dunkin' donuts" and directly lands on that page of Baker Bee's website, that is dedicated to Dunkin' donuts.

In the AirButler case, the plaintiff, the owner of the EU trade mark "AIRBUTLER", registered in class 11 of the Nice Classification for ventilation apparatus, initiated trademark infringement proceedings against the Defendant, a German company that manufactures and sells air purifiers, electric dehumidifiers and dryers. The Plaintiff's case was that the Defendant's use of the above-explained Google Dynamic Search Ads was trademark infringement, as users' google search for "AIRBUTLER" on "google.at and google.de", directed them to the defendant's website (*see* image).

The Court of First Instance denied the Plaintiff's claim. However, on appeal, the Court of Appeals decided in favour of the Plaintiff. The Defendant, accordingly, filed an appeal before the Austrian Supreme Court, der Oberster Gerichshof (OGH).
As per the OGH, the Defendant was liable for infringement, even if the search results under question were generated "automatically" by Google Dynamic Search Ads. This was attributed to the fact that the advertisement, misleadingly created "an impression for an average internet user" that the ads were generated by the trade mark owner.

News Source: RIS, 22 November 2022, available here. Lexology 31 May 2023 available here. IP Kitten 18 April 2023 available here. Mondaq 7 March 2023 available here.
Image Source: RIS, available here.

4.2 Jointly own the disputed trademark? Look at national laws: *says* CJEU

Case C-686/21 concerned a trade mark licensing dispute over LEGEA, an EU trade mark for sporting goods and accessories. The "LEGEA" mark, jointly owned by VW, SW, CQ & EY, was exclusively licensed "free of charge and for an indefinite period" to Legea in 1993. In 2006, VW first opposed this licensing agreement. Following a dispute between the parties, Legea initiated legal proceedings at the Tribunale di Napoli, the District Court of Naples. The Naples court decided that until December 2006, Legea had legitimately used the said mark, however, following opposition from VW, the said use could not be deemed lawful.

On appeal, the matter first reached the Court of Appeal, Naples, and finally, the Corte suprema di cassazione, the Supreme Court of Cassation, Italy, that decided to stay the proceedings, and refer the following questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The key questions raised as regards the EU Trade Mark Directive 2015/2436 (EUTMD 2015/2436) and EU Trade Mark Regulation (2017/1001) (EUTMR 2017/1001) was the determination of ownership of jointly-owned trademarks, and whether "the assignment to a third party … can be decided upon by the majority of the joint proprietors …. or if it requires their unanimous consent instead?" [Paras 16-22 of the Judgment].
In its opinion dated 27th April, the CJEU held that whereas EUTMD did not refer to the issue of "joint ownership of a national trade mark", the EUTMR only recognizes such a mark, without offering any additional guidance on the conditions for the exercise of one such right. Accordingly, the issue, both under the Directive as well as the Regulation, shall be decided "within the scope of the applicable national law" [paras 38-40 of the Judgment].

News Source: Case C-686/21, 27 April 2023, available here. Lexology 31 May 2023 available here. IP Kitten 28 April 2023 available here.
Image Source: IP Kitten available here.

4.3 No "GOOGLE CAR" mark for Harboui, as Google is a well-known mark: *says* GC

On 1st February, the EU General Court (GC) held that "Google" was a well-known trade mark, and accordingly, the EUIPO's Opposition Division and the Fifth Board of Appeal had rightly dismissed Zoubier Harboui, a French citizen's, request to register the signs, "GOOGLE CAR" and "GC Google Car". The applicant requested the registration of the said marks under class 12, that is for automobiles and other means of transport. Google raised an opposition based on grounds of its earlier registered trademarks "GOOGLE", as well as the fact that it was a well-known trade mark.

As per the GC, the fact that Google had a registered mark "WAYMO" to represent its autonomous vehicles driving unit, did not mean that an average consumer could not get confused by the applicant's suggested marks, "GOOGLE CAR" and "GC Google Car", and assume that these cars come from Google. As per the Court, "unfair advantage" referred to a situation, whereby "the image of the mark with a reputation or the characteristics" are transposable to the mark applied for, thereby, making it easier to market the latter [GC at para 39]. The GC, accordingly, also found in favour of Google, as the applicant's marks would free-ride on Google's reputation.

Sources: Case T-569/21 & T-568/21, 1 February 2023, available here and here. Lexology 31 March 2023 available here. IP Kitten 27 February 2023 available here. European Commission IP Help Desk 10 February 2023 available here.
Image Source: Case T-569/21 & T-568/21, 1 February 2023, available here and here.

5. Events

5.1 IPKM turns 15: Growing together, bigger, better & stronger each year! Come join us!

Dear IPKM alumni, with this forthcoming batch of IPKM, we turn 15. We warmly welcome all our IPKM alumni to come join us in this moment of celebration. Come join us, share your experiences, and yes! if you will like to share your knowledge and speak on your area of expertise, please let us know.

When: 1-3 November 2023
Where: Faculty of Law, Maastricht University
Will like to join? Please follow this link
For more info, email: j.vangennip@maastrichtuniversity.nl