

## FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2021 WEEK 16 NO. 10)

Dear Readers,

In this edition, you will find an overview of the key developments in Competition, Copyright, Patents, Designs and Trademarks for April 2021, as well as some event invitations and follow-on vlogs.

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,

E.Verhaeghe, J. Lönnfors and K. Tyagi



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

## 1. Competition law

### 1.1 Google fined by Turkey's Antitrust Watchdog

On 14th April 2021, the Turkish Competition Authority (TCA) fined Google 296 million lira (approximately €30.5 million) for abusing its dominant position. The TCA first commenced its investigations against Google in July 2018, and has since fined the tech giant over three times for abusing its position to disadvantage its competitors in the e-commerce market place. The latest fines were imposed as Google continued to interfere with organic search results and exclude its competitors. Simply put, this means that each time a user searches for a product or service, Google displays manipulated search results with text advertisements placed on top of the general results, and thereby adversely influencing competition in the market.

In addition to the imposed fine, TCA's decision also requires compliance with certain remedies. Most notably, Google will offer a compliance plan within the next six months. The commitments will ensure that Google discontinues the current practice of disadvantaging its competitors in search results. The remedy will be in effect for five years, and Google shall report annually to the TCA as regards its compliance with the proposed remedy.

*Sources: Decision by the Turkish Competition Authority, available [here](#). AA, 14 April 2021, available [here](#). Mondaq, 19 February 2020, available [here](#). BalkanInsight, 13 November 2020, available [here](#). Daily Sabah, 14 April 2021, available [here](#).*

### 1.2 Alibaba as an example! Chinese Market Regulator clamps down on internet platforms

On 9 April 2021, the Chinese e-commerce giant Alibaba was hit with a US\$2.8 billion fine (¥18.2 billion) by China's State Administration for Market Regulation (SAMR) for breach of anti-monopoly laws.

In December 2020, the SAMR initiated investigations in Alibaba's "choose one of two" policy. As per the policy, Alibaba had since 2015, required merchants to sell on one of its two online shopping platforms. Using data and algorithms, the e-commerce giant managed to gain an "improper competitive advantage" on the market.

Shortly after the record Alibaba fine, on 13 April 2021, the SAMR also announced that it had warned 34 other internet companies "to stop using banned [anti-competitive] practices". These companies have also been instructed to carry out self-inspections and warned of the "severe punishment" which may follow, should they continue to violate China's anti-monopoly law.

In February 2021, the Chinese government also introduced new anti-monopoly guidelines. The guidelines key focus is the potentially abusive and anti-competitive behaviour of internet platforms.

*Source: Reuters, 13 April 2021, available [here](#). CPI, 11 April 2021, available [here](#). Financial Times, available [here](#). CNBC, 14 April 2021, available [here](#). CNBC, 24 December 2020, available [here](#).*

### 1.3 European Commission conditionally clears merger between Suez waste and Schwarz

The European Commission on 14th April 2021, conditionally cleared the merger between Suez waste management and Schwarz Group. On 19 February 2021, the parties notified the transaction to the Commission. Commission's preliminary investigation indicated that the proposed merger adversely impacted competition in the German, Luxembourgian, Dutch and Polish market for waste management, and lightweight packaging (LWP) in the Dutch market.

The merger promised to offer the merged entity a position of dominance in the market for LWP sorting in Netherlands, and thereby make it a ‘must-have’ trading partner.



Following a phase I investigation and extension of deadline to 35 working days, the Commission conditionally cleared the merger. The commitments include divestiture of Suez’s LWP sorting business in the Netherlands along with all other supporting assets, that may be required to create effective competition in the Dutch market for LWP.

*Source: European Commission, 14 April 2021, available [here](#). Image Source: Shutterstock, available [here](#).*

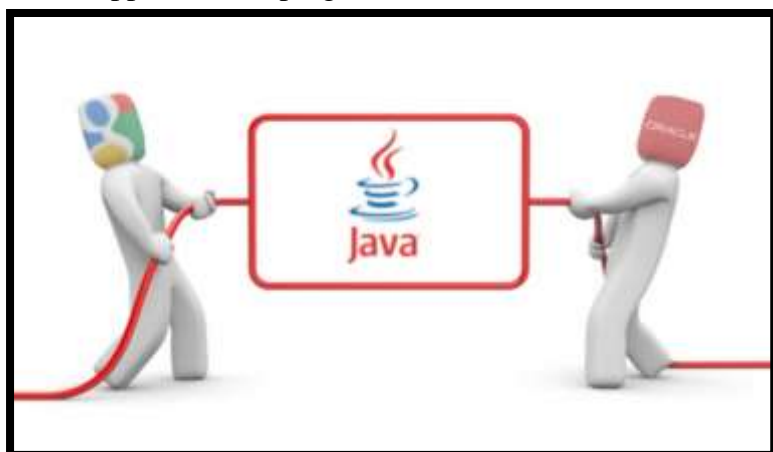
## 2. Copyright

### 2.1 Google’s use of Oracle’s Java is ‘fair use’: SCOTUS

In a six-to-two majority decision, the US Supreme Court (SCOTUS) on 5<sup>th</sup> April 2021 held that Google’s copying of 11,500 lines of Oracle’s Java programming language was fair use.

SCOTUS’ decision reverses the 2018 Federal Circuit decision and settles a decade long on-going copyright battle between the two Silicon Valley giants.

In writing for the majority opinion, Justice Breyer found that learning a new programming language required substantial sunk costs in terms of learning and also developing a new language. Considering that programmers had already made substantial investments in Sun Java API (following Oracle’s acquisition of Sun Microsystems in 2010, Sun Java is now owned by Oracle), a strict enforcement of Oracle’s copyright, it was feared, would limit the availability of the application to programmers.



*Sources: The National Law Review, 14 April 2021, available [here](#). Reuters, 5 April 2021, available [here](#). Kluwer Copyright Blog, 12 April 2021, available [here](#). IP Watchdog, 5 April 2021, available [here](#). US Supreme Court judgment, 5 April 2021, available [here](#). Image source: CFOC, available [here](#).*

### 2.2 Dirty Dancing to prevent gilet jaunes protests going viral on social media

Established on 17 November 2018, the French gilet jaunes (Yellow vests) movement is a protest movement by the working and rural populace of the country. The group has since its inception led many protests and demonstrations against rising fuel prices, economic disparities, and high rate of taxation for the working class. On 27th March 2021, gilet jaunes held a demonstration at Champs-Élysées, Paris.

In order to halt the protest and prevent demonstrators to cover the event live on social media platforms, one of the French policemen on duty played the hit number “Time of my Life” from Dirty Dancing. On being questioned by the protestors, the policeman casually responded that with this, he hoped that SACEM (the French copyright society) would come running after the protestors (!) and also ensure that demonstration could no longer be made available on social media platforms such as Twitter and Facebook.

It may be useful to add that the French police seems to be inspired from a similar act by the US police in February this year. The policeman at Beverly Hills police department played Santeria by Sublime in the (vain) hope that Instagram’s strict copyright policy would ensure that the video would not be made available to the public.

Fortunately, this time neither the Beverly Hills nor the Parisian police’s actions made the video unavailable to the public. However, what cannot go unnoticed from these incidents is the real threat of State censorship once Article 17 of the 2019 Copyright in the Digital Single Market Directive enters force.

*Sources: Kluwer Copyright Blog, 8 April 2021, available [here](#). Vice, 9 February 2021, available [here](#). Libération, 30 March 2021, available [here](#).*

### 2.3 Disney goes to court over copyright termination of the 1987 ‘Predator’ movie

In 1984, 20th Century Fox (TCF) acquired exclusive rights to the script titled ‘Hunters’ written by Jim and John Thomas. With this script, TCF produced the 1987 blockbuster ‘Predator’ movie starring Arnold Schwarzenegger. The movie was a worldwide hit and enjoyed box office collections grossing over \$100 million.

In 2016, Thomas brothers filed a suit under Section 203(a) of the Copyright Act. The brothers claimed that following the completion of the 35 year-period on 17th April 2021, the copyright in their work be returned to them.

Considering the economic interests at stake, last January, Disney (following Disney’s acquisition of TCF, Disney currently controls the franchise) contested Thomas brothers’ claim on the ground that as per Section 203(a)(3), the movie qualified for the delayed time window for book publication grants.

If Disney’s arguments are upheld, it would make Thomas Brothers’ notice for termination and claims invalid and permit Disney to retain the franchise for a longer duration.

The studio is currently eyeing the production of another film in the series.

Considering that the battle over the famous Superman franchise series lasted over ten years, fans of ‘Predators’ are for the moment advised to remain content with the 1987 hit.



*Sources: The Hollywood Reporter, 15 April 2021, available [here](#). Gamespot, 16 April 2021, available [here](#). Deadline, 15 April 2021, available [here](#). Complaint from Twentieth Century Fox Film Corporation before the US District Court, Central District of California, 15 April 2021, available [here](#). Image source: Joblo, 16 April 2021, available [here](#).*

### 3. Patents and Designs

#### 3.1 Boards of Appeal makes positive strides towards structural reforms

On 12 April 2021, the European Patent Office (EPO) released the 2020 Annual Report of the Boards of Appeal (BoA). Remarkably, despite the challenges to work and productivity resulting from the COVID-19 pandemic, the BoA managed to reduce the backlog of pending cases. Backlog of technical appeals decreased from 9,234 in 2019 to 8,280 in 2020.

Notably, the BoA managed to reduce the time gap from when the cases are first heard to the time they are finally settled. In 2019, the BoA took an average of 65 months to decide a case; in 2020, this period was reduced by over five months to an average of 60 months.



The disciplinary appeal hearings at the BoA indicate a significant downward trend with just three disciplinary appeal hearings in 2020. In 2019 alone, the BoA heard nineteen appeals. It emerges that changes in the management structure and a new approach to the appeals process may have contributed to the decline in the number of appeals. Lesser number of appeals may also be on account of the current situation,

wherein parties increasingly long for stability and certainty in the appeals process.

*News and image sources: JUVE Patent, 15 April 2021, available [here](#). EPO Annual Report of the Boards of Appeal, 12 April 2021, available [here](#).*

#### 3.2 A permanent switch to online format for EQEs and other big changes on the horizon



The COVID-19 pandemic pushed the European Qualifying Examinations (EQE) to an online format in 2020. With the 2020 experience in hindsight, the EPO inches towards its next set of reforms scheduled for 2024. Expected revisions to the current approach include retaining the 2020 online exam format in a post-pandemic environment and introducing questions that better align with the practice in the field, in

other words, making the exam questions more “fit-to-practice”. For 2022 and 2023 however, candidates should expect similar content as found in the exam current format. Minor changes may, however, be introduced to the upcoming exams to make them more fit for the digital environment. The 2024 e-EQE though, will look very different from the current format. Prospective candidates are encouraged to look at the “e:EQE – Discussion Paper” to get an overview of upcoming changes to the EQE.

*Sources: IPKitten, 13 April 2021, available [here](#). e:EQE Discussion Paper available [here](#). Image source: Shutterstock, available [here](#).*

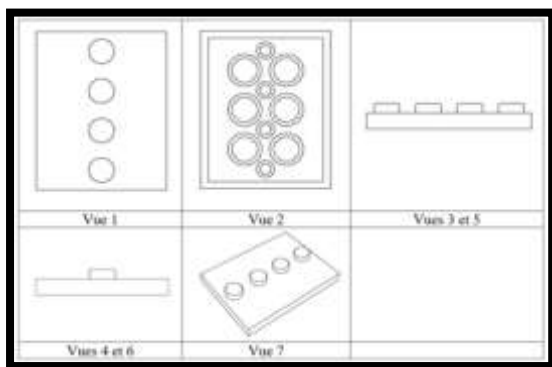
### 3.3 Comma matters in patent claims

Boeing is the proprietor of a patent dealing with the method for handling aircraft communications. The Opposition Division (OD) revoked Boeing's patents on grounds of a missing comma in its claim. The patent claim was found to be invalid as subsequent matter in the claim called for an additional comma. However, the absence of a comma meant that the text could be interpreted in two different ways. Absence of a comma made it unclear whether one of the features was a part of the list or whether it was a step on its own. As such the OD understood that the features be run jointly and as no disclosure of the attribute was offered in the application, the OD held that the patent was invalid due to 'added matter'. The case was appealed to the BoA which went on to confirm that the claim should be understood on its own merits. The key issue was whether a certain feature of the claim infringed Article 123(2) EPC. Following oral proceedings by video conferencing and its assessment of the case, the BoA on 18 February 2021, refused a referral to an Enlarged Board of Appeal and dismissed Boeing's appeal in entirety.

*Sources: Decision of the Board of Appeal, 18 February 2021, available [here](#). IPKitten, 12 April 2021, available [here](#).*

### 3.4 Lego blocks and extending the exception on designs dictated by their technical function

On 24 March 2021, the General Court (GC) delivered its decision in Case T-515/19. The case concerned a registered community design of 'building blocks from a toy building set' held by Lego (see GC decision, hereafter, referred to as the contested design, at para 3). In 2010, Lego filed an application to register the contested design under the 2002 Community Design Regulation (CDR). In 2016, Delta Sport filed an application for declaration of validity of the same. The European Intellectual Property Office's (EUIPO) Cancellation Division rejected the appeal. However, the Third Board of Appeal held that the contested design be declared invalid.



On appeal, the GC considered the following questions. Could a design be afforded protection, wherein the "features of appearance are solely dictated by its technical function" as per Art. 8(1) CDR? The GC found an infringement of Article 8(1) by the Board of Appeal as it failed to identify 'all the features of the product concerned by the contested design' and did not confirm whether those features were driven by the 'technical function of that product' (para 114).

The GC held that both Art 8(1) and 8(2) were applicable to the case, but remarkably the GC stated that Art. 8(3) CDR was applicable to both 8(1) and 8(2). More particularly, the GC at para 80 held that in order to ensure the effectiveness of Article 8(3), wherein the design falls both within Article 8(1) and Article 8(2), and owner of the design relies on Article 8(3), the EUIPO, in invalidity proceedings, "must examine whether those features are capable of benefitting from the protection of modular systems", even when the application for invalidity

of the design does not invoke Article 8(2) of the CDR. Based on the foregoing, the GC annulled the decision of the Third Board of Appeal. The GC's decision has evidently substantially broadened the reach of the said provision – an issue that is sure to invite a building block of academic commentary very soon!

*News & Image Sources: Judgment of the General Court, 24 March 2021, available [here](#). IPKitten, 11 April 2021, available [here](#).*

## 4. Trademarks

### 4.1 Χαλλούμι/Halloumi/Hellim: From now, say Cypriot Cheese!

On 12 April 2021, the European Commission adopted two sets of measures as regards registration of Halloumi cheese as a Protected Designation of Origin (PDO) in the EU. First, starting 1 October 2021, Halloumi cheese produced in Cyprus and in conformity with strict regulations specified in the PDO, can now be called Χαλλούμι/Halloumi/Hellim (hereafter, Halloumi) and receive protection as PDO.

Second, the Commission also adopted measures that allows Turkish Cypriot producers to fully benefit from the protection, provided that they adhere to the strict EU animal and public health standards.

With the registration of Halloumi cheese and the agreement for Turkish Cypriot Producers, also comes the establishment of an internationally accredited inspection body that will ensure that producers adhere to strict compliance requirements in the internal market.

Key features of Commission's new measures include recognition of Halloumi as PDO and protected geographical indication (PGI); appointment of an internationally accepted inspection body for quality control and equality of treatment for producers of cheese on "each side of the Green Line" to ensure quality Cypriot cheese for European consumers.

*Sources: European Commission, 12 April 2021, available [here](#). EC Green Line Regulation, available [here](#). EC Quality Schemes Explained, available [here](#).*

### 4.2 A Bayer v Belmora

In February of this year, the United States Court of Appeal for the Fourth Circuit decided on a decade long legal battle between Bayer and Belmora. The key legal provision under consideration was §43 (a) of the Lanham Act. The case in question arose due to a claim of unfair competition by Bayer AG against Belmora LLC for use of the mark FLANAX. Bayer contended that Belmora's use of the mark confused US consumers as regards the origin of the product bearing 'FLANAX' trade mark. FLANAX is a very popular naproxen sodium-based and best-selling pain reliever in the Mexican market. US consumers that have travelled to or lived in Mexico and Latin America are quite familiar with the brand.

The District Court of the Eastern District of Virginia (DC) held that Bayer's claims were time-barred as it had "missed the statute of limitations by almost a decade". The Court of Appeal however held that the doctrine of laches was applicable to the case at hand and sent the case back to the District Court to determine whether Bayer's claims were indeed barred by laches and whether its "related state-law claims [were] subject to tolling".

*Source: Judgment of the US Court of Appeal, 2 February 2021, available [here](#).*

### 4.3 Oh, and one more thing... Apple

On 29 March 2021, England and Wales High Court (EWHC) decided an Appeal by Swatch resulting from a decision of Hearing Officer of the Registrar of Trade Marks.

Swatch had registered marks for the following signs: “Swatch one more thing” and “One more thing” for goods of Nice classes 9 and 14.

Apple opposed this registration on the basis of “passing off” or filing in “bad faith”. Bad faith was asserted on account of the following grounds. Each time Steve Jobs, the erstwhile Chief Executive Officer (CEO) and co-founder of Apple, would close his public speech with “One more thing...”, he would launch a new Apple product right after using the iconic expression.

The Hearing Officer rejected Apple’s opposition on the basis of passing off, while admitting arguments “as to the intention of parodic use” (para 41). Swatch appealed this outcome.

Judge Purvis, sitting as Deputy judge of the EWHC, agreed with Swatch that there was scant evidence available to substantiate actual parodic use. The Judge held that the mark itself was not offensive, and that a mere likelihood that there might be parodic use was not enough to find filing in bad faith.

*Sources: Judgment of the UK High Court, 29 March 2021, available [here](#). IPKitten, 14 April 2021, available [here](#).*

## 5. Events and Blogs

### 5.1 IP Talk: An IP Discussion Initiative by The Innovation Legal Aid Clinic

IP Talks is a TILC initiative led by Dr. Anke Moerland, wherein students debate and discuss on intellectual property and innovation laws over a cup of coffee.

Dr. Moerland has kindly shared the report of April meeting of IP Talks.

IP Talks on 19th April 2021, featured a presentation on the US-based Dechert law firm report (for a discussion of the Report, see *Friday Fortnightly week 14 ed. 9*). The Report analyses emerging trends in trade mark registrations in the US. One of the striking results was that in 2020, trade marks registered by Chinese firms constituted 25% of all trade mark applications in the US. This is a significant increase as compared to previous years.

In discussion with the students, Caroline De Schrijver and Éva Murakeözy explained that many of these Chinese applications constitute words that are unpronounceable and strange, and in several cases merely represent the location of letters on a keyboard. When asked whether these marks are used on the US market, they answered that some more research is required to answer the question; however, from the report, it seemed that so far, the majority of the marks remain unused in the market. That is why a “Trade Mark Modernization Act” (hereafter, Act) has been proposed in the US, that would allow revocation of these trade marks following non-use within three years of registration. Even though the Act will ensure that certain terms become available again after the expiry of three years, it does not alleviate the pressure on the US Patent and Trade Mark Office to process the large number of trade mark applications.



## 5.2 IP Talks & World IP Day

On 3 May 2021, IP Talks will celebrate the World IP Day. The event will include some presentations on Intellectual Property and Small and Medium Enterprises.



*If you would like to participate and contribute, please reach out to Jenny and Clara on: [j.kokkou@student.maastrichtuniversity.nl](mailto:j.kokkou@student.maastrichtuniversity.nl) and [c.bokus@student.maastrichtuniversity.nl](mailto:c.bokus@student.maastrichtuniversity.nl).*

## 5.3 Follow-up from our earlier editions

In *Friday Fortnightly* week 50 ed. 2, we reported that the Regional Court of Düsseldorf, Germany referred to the Court of Justice of the European Union (CJEU), the ongoing dispute between Nokia and Daimler. The preliminary reference requests Court's guidance on a set of issues dealing with fair, reasonable and non-discriminatory (FRAND) licensing.

Li Chen, currently enrolled as master's student in our IPKM 2020-2021 programme and an Engineer by background, in the following research vlog shares his opinion on the ongoing FRANDly dispute, and potential implications of the CJEU's upcoming opinion.

*Source: Research vlog is available [here](#).*

Disclaimer: Views expressed in blogs and vlogs are personal and belong solely to respective authors and do not represent those of IGIR or Maastricht University.