

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER (ED. 2020 WEEK 48 NO. 1)

Dear Readers,

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

The Innovation Legal Aid Clinic's (TILC) information initiatives - Friday Fortnightly and IP Talks - are open to contributions by students and alumni from the intellectual property law programmes offered at the Faculty of Law, Maastricht University.

We very much look forward to your feedback, inputs and suggestions.

With kind regards,

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1. Competition law

1.1 Amazon in hot water – Commission issues statement of objection for use of non-public independent seller data and commences investigation of e-com business practices

The European Commission has sent a Statement of Objections (SO) to Amazon for its use of non-public independent seller data. As a marketplace service provider, Amazon has access to non-public business data of third-party sellers operating on its platform. As per the SO, Amazon used this data to its own benefit, and thereby distorted competition in online retail markets and breached EU competition law. Armed with this data, Amazon was able to overcome many a competitor threats on its position of dominance in the relevant market.

In addition, the Commission opened a formal antitrust investigation in Amazon's e-commerce business practices. The Commission's investigation will focus on Amazon's 'Buy Box' and 'Amazon Prime' and the possible preferential treatment of its own retail offers as well as those of FBA sellers.

Source: European Commission, 10 November 2020, available [here](#).

1.2 Vestager and Big Tech companies talk new rules

The EU Competition Commissioner Margrethe Vestager and prominent big tech companies held a video conference on 24 November 2020. The meeting concerned the draft rules of the Digital Services Act (DSA) and the Digital Markets Act (DMA) - two instruments that promise to limit the powers of big tech companies.

On 9 December 2020, the DSA and the DMA are scheduled to be presented to the European Parliament. Subsequently, feedback will be collected from the European Parliament and Member States. The proposed regulations intend to address the unfair competition and unconstrained influence exercised by the big tech companies.

Source: Competition Policy International, 22 November 2020, available [here](#).

1.3 Google Ad changes focus of UK complaint

Small and medium media enterprises recently filed a complaint against Google's new advertising technology with the UK's Competition and Markets Authority (CMA). The complaint requests CMA to stop the launch of the new technology as its new features entail substantial financial hardship to the smaller media players. The new privacy sandbox feature will, among other things, severely limit its members' ability to gather information about web users.

The CMA acknowledged the seriousness of the matter and confirmed that it will assess the situation in order to determine whether the opening of a formal investigation is necessary.

In a statement issued by Google, the tech giant explained that the privacy sandbox was "an open initiative built in collaboration with the industry, to provide strong privacy for users while also supporting publishers."

Sources: CMA mulling opening investigation into Google 'privacy sandbox' adtech, 23 Nov 2020, available [here](#). Competition Policy International, 23 November 2020, available [here](#). Digital Marketing Firms Hate Google's Anti-Cookie Initiative, available [here](#).

1.4 European Court of Auditors Special Report released – shortfalls and recommendations of the Commission’s enforcement of competition rules

A Special Report recently published by the European Court of Auditors (ECA) documents a number of observations pertaining to the performance of the Commission in competition-related matters. In particular, the report discusses the Commission’s ability to ‘detect, investigate and enforce infringements of competition law, cooperate with national competition authorities (NCAs), and report on its performance’.

The ECA also provided several recommendations which the Commission could employ to remedy the foregoing concerns.

Sources: EU law live, 20 November 2020, available [here](#).

ECA Press Release, 19 November, available [here](#).

Special Report No 24/2020: The Commission’s EU Merger Control and Antitrust Proceedings: a need to scale up market oversight, available [here](#).

2. Copyright

2.1 US: Narcos under fire

The producers of the Narcos series can now be rest assured that their Netflix show does not infringe Virginia Vallejo’s copyright. Vallejo had earlier published a memoir about her interactions with Pablo Escobar. The United States 11th Circuit ruled that the Narcos series did not infringe Vallejo’s copyright because *it is (still) not possible to copyright historical facts*. Moreover, the Court opined that the tone, dialogue, mood, setting, theme and plot were not similar enough to find an infringement of Vallejo’s copyright in the memoir. For a finding of similarity, there exists a high threshold in copyright: a substantial similarity needs to be established for a finding of infringement. In the case at hand, such a similarity was missing. Vallejo also argued that there exists a difference between historical and non-historical facts - an argument, that was rejected by the Court. The 11th Circuit reaffirmed that the only accepted standard test for copyright infringement is to refer to the *substantial similarity test*.

Source: Kluwer Copyright Blog, 19 November 2020, available [here](#).

Vallejo v. Narcos Productions LLC, Lexology, 27 October 2020, available [here](#).

Virginia Vallejo v. Narcos Productions LLC, et al, No. 19-14894 (11th Circuit 2020), Justia, 27 October 2020, available [here](#).

2.2 CJEU hearing – Poland’s challenge to the Digital Single Market Directive

On 10 November 2020, the Court of Justice of the European Union (CJEU) commenced hearings in Case C-401/19. The case concerns Poland’s request to annul the filtering obligation contained in article 17(4) (b) and (c) of the 2019 Copyright in the Digital Single Market Directive. Poland’s key arguments are as follows. The provisions would mandate platforms to implement upload filters. These filters are extremely strict and block way too much information and content. This, in turn, can lead to censorship and limit the freedom of expression and freedom to access information by the users.

The hearings at the CJEU clearly indicate that the implementation and interpretation of Article 17 is far from clear. Moreover, there apparently remains a conflict between the obligations set out under article 17(4) (b) to filter infringing work and the requirement under article 17(7) to ensure that these do not hinder the availability of non-infringing work.

The European institutions argue that the Article has balancing provisions, and overall the protection of the fundamental rights of users places limits on right-holder's ability to limit the availability of their works. Moreover, only "manifestly infringing" work (and not all the potentially infringing content) needs to be filtered out.

Submissions by France and Spain vastly differed but they both converged on their disagreement with the submissions made by Poland. Further both countries argued that any over-blocking can be redressed by the balancing mechanisms in article 17(9). None of the submissions, however, managed to challenge the fact that filters are the only effective way to comply with the obligations, as submitted by Poland in its complaint.

It will take months to know the CJEU's interpretation and guidance on the provision. As the Directive needs to be implemented soon, it is highly likely that Member States may have to implement the Directive before the CJEU delivers its decision in the case.

Source: Kluwer Copyright Blog, 11 November 2020, available [here](#).

3. Designs

3.1 Unregistered design rights: Post-Brexit update

The European Union (EU) has confirmed that as of 2021, designs first disclosed in the United Kingdom (UK) will not qualify for unregistered design protection in the EU.

From the 1st of January 2021, designers can benefit from unregistered design protection only in one territory - either UK or the EU. Which one of these protection they may qualify for, will depend on the place of initial disclosure.

In the UK, existing unregistered Community designs (UCD) will be protected as "continuing unregistered designs" during the transition period of three years. Additionally, "supplementary unregistered designs" will be available to match the protection granted under the UCD for only for the UK.

With the new rules, initial disclosure in either the EU or the UK could affect the novelty of the design in the other territory for purposes of protection. Designers may, thus, want to register their designs both in the UK and the EU.

Source: DesignWrites, 13 November 2020, available [here](#).

4. Patents

4.1 Second UPCA ratification attempt in Germany

The Bundestag is set to discuss the draft ratification bill of the United Patent Court Agreement (UPCA). Recently, the German government answered parliamentary inquiries regarding the UPCA's compatibility with the German constitution and the position of the small and medium enterprises (SMEs) on the proposed Unitary European Patent System.

The current events mark Germany's second attempt at ratifying the UPCA. The earlier ratification was struck down by the German Federal Constitutional Court on account of the invalidity of parliamentary proceedings. To pass, the Bill needs to be approved by a two-thirds majority in the Bundestag.

Source: Kluwer Patent Blog, 20 November 2020, available [here](#).

4.2 United States – appeal possibilities against the PTAB

Recent refusal by the United States Patent Trial and Appeal Board (PTAB) to grant an inter partes review of a patent claim prompted a Federal appeal. The applicant Cisco filed for review, wherein it challenged the validity of two US patents owned by Israel-based Ramot. The PTAB refused the request, as it opined that before it could render its decision, US Courts may get to decide on the matter. This was in light of the fact that parallel proceedings had already been initiated in the Eastern District Court of Texas.

Following this refusal, Cisco filed for a writ of mandamus. Cisco's petition was dismissed by the Federal Court on the following three counts – first, PTAB enjoyed discretionary powers; second, no substantial evidence was offered by Cisco, and third, there remained viable alternate legal options to challenge the validity of the patent.

Source: The IP Law Blog, 13 November 2020, available [here](#).

4.3 Revision of oral opposition proceedings at the EPO

To promptly address the ever-piling backlog of opposition cases, the European Patent Office (EPO) will now hold all examinations and opposition hearings via videoconference. In-person hearings shall be restricted to exceptional circumstances only.

Earlier, the EPO had faced numerous challenges with video conferencing as parties were required to first offer their consent to an e-hearing. The move to mandatory video conference format will also reduce the costs of hearings. The EPO has also indicated its willingness to accommodate requests for flexible timings to schedule the hearings in order to better accommodate parties located in different time zones.

Source: Finnegan, 13 November 2020, available [here](#).

5. Trademarks

5.1 Did I really just eat cannabis? – Nerd Candy vs. Tops Cannabis

In the US, the producer of well-known and popular *Nerds* candy has filed a trademark infringement lawsuit against Tops Cannabis. Top Cannabis infuses their products with cannabis and markets them in a packaging and logo that looks confusingly similar to the original product. Tops Cannabis calls their product “*Medicated*” *Nerd Ropes* which - as not only the experienced trade mark attorney but also a candy enthusiast will immediately notice - can lead to confusion for consumers.

It may be useful to add that there have already been several cases whereby consumers were confused with Tops Cannabis' marketing and mistakenly purchased Cannabis-infused candy to unwittingly become reluctant cannabis consumers!

Source: IPR Helpdesk, 24 November 2020, available [here](#). Marijuana Business Daily, 13 November 2020, available [here](#).