



The Innovator's Legal Aid clinic

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER

(ED.2024 WEEK 4 NO. 42)

Dear Readers,

In this edition, we're thrilled to present a comprehensive overview of the latest developments in Competition, Copyright, Patents, and Trademarks for Jan. 2024.

Beyond this newsletter, we invite you to engage with us on LinkedIn and Instagram.

Our initiatives at The Innovator's Legal Aid Clinic (TILC), including the Friday Fortnightly and IP Talks, warmly welcome contributions from students and alumni of the intellectual property law programs at the Faculty of Law, Maastricht University.

Your feedback, inputs, and suggestions are highly valued and eagerly awaited.

With warm regards,

Christina Kumanov, Wentao Li, Sonika Sel and Gabin Nathan

Competition

1.1 New Excessive and Unfair Pricing Provisions in Force in Canada's Competition Act: Risk and Compliance Considerations

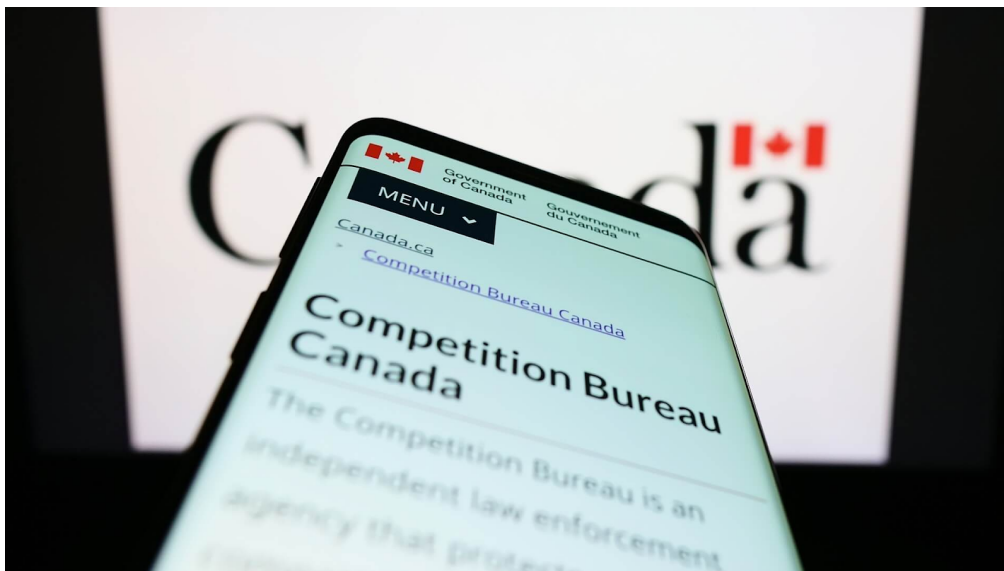


Photo by 'PACELAW' Available [here](#)

The amendments to Canada's Competition Act, effective December 15, 2023, expand the framework for tackling anti-competitive conduct by dominant firms, including a new provision against excessive and unfair pricing. Enforcement requires showing that a firm is dominant and engaged in anti-competitive acts. For remedies like penalties or actions to restore competition, proof that conduct significantly impacts competition is needed.

"Excessive and unfair pricing" is a novel aspect of Canada's Act, setting it apart from U.S. laws and aligning it with the EU, where such concepts have been controversial. The provision's quick legislative passage sparked debate about the potential for implied price controls, countered by official reassurances.

Businesses must understand this provision, especially those potentially seen as dominant. The text elucidates dominance assessment, anti-competitive acts, and the new pricing provision's application challenges. It advises on risk minimization, suggesting identifying dominance, considering pricing benchmarks, and documenting price justifications to navigate potential regulatory scrutiny effectively.

Sources: *JDSupra*, December 15, 2023, Available [here](#); *Mondaq*, December 15, 2023, Available [here](#); *Canada.ca*, December 18, 2023, Available [here](#)

1.2 Court of Appeal of The Hague rules on liability for antitrust follow on damages claims in the elevator sector



Photo by 'REUTERS/Fabian Bimmer' Available [here](#)

The Court of Appeal of The Hague, in a judgment dated January 23, 2024, ruled that elevator manufacturer Kone is liable for damages claimed by 23 parties through a litigation vehicle, Stichting Elevator Cartel Claim (SECC), stemming from antitrust violations. The decision follows a 2007 ruling by the European Commission that found Kone, along with four other elevator and escalator manufacturers, guilty of exchanging competitively sensitive information and engaging in bid rigging, thus infringing European competition law.

Key issues addressed in the court's judgment include limitation periods, the evidentiary threshold for establishing liability, umbrella pricing, lingering effects, and the pass-on defense. The court determined that for limitation purposes, the relevant start date is when claimants became aware of both the damage and the responsible party. It rejected the notion of collective knowledge for economic entities, emphasizing individual awareness.

To move forward to the damages quantification phase, claimants must demonstrate a probable loss directly linked to the defendants' antitrust violations. The court also explored umbrella pricing but required concrete evidence of its occurrence to hold Kone responsible for damages related to purchases from companies not involved in the EU Commission's decision. Claims regarding the lingering effects of the infringement similarly demanded tangible evidence beyond theoretical economic impacts.

Regarding the pass-on defense, the Court of Appeal noted this should typically be considered during the damages quantification phase unless it can be clearly established earlier that all alleged damages were passed onto subsequent buyers.

The ruling highlights the legal and factual intricacies in proving liability and quantifying damages in antitrust follow-on cases, especially the evidentiary hurdles parties face. Despite Kone's argument that evidence of damage pass-on primarily lies with the claimants, the court deemed it too early to require SECC to prove that the assignors had not passed on the alleged damages to their customers, indicating the complexity of addressing pass-

on arguments at this litigation stage. The judgment underscores the nuanced analysis required in antitrust follow-on litigation, setting a precedent for subsequent proceedings to quantify the damages.

Sources: *Stibbe*, January 29 2024, Available [here](#)

Trademarks

2.1 EUIPO deems Prada's Triangle Pattern not sufficiently distinctive



Photo by 'The Fashion Law' Available [here](#).

Recently, the distinctiveness of Prada's triangle pattern - consisting of multiple black and white triangles fitted amongst each other - was questioned in relation to a European Patent Trademark application for registration of this pattern. The central question surrounding Prada's Triangle pattern case was whether this rather well known pattern would be able to be protected as a trade mark. It is imperative to firstly emphasize that trademarks uphold the essential function of guaranteeing and indicating a commercial origin of the marked product to the corresponding consumer, by simultaneously allowing that consumer to distinguish the product or service from others with a different origin, without the possibility of confusion in the process. The range of products that can be trademarked includes colors, shapes, sounds, and even patterns. Nevertheless, the criterion of distinctiveness must be satisfied, in a sufficient manner. Distinctive character is an element that is assessed by taking certain factors into account, such as the relevant publics or consumers perception of the products concerned. The EUIPO essentially raised an objection with reference to Article 7(1)(b) EUTMR in relation to inherent distinctiveness, and eventually refused registration for a large portion of the goods claimed, including class 25. It further emphasized that "*the targeted public would merely perceive the repeating pattern as a typical design of decorative elements, as opposed to a trademark*". The application was only permitted for goods and services that

Prada deemed of little to barely any use to them, such as Class 9 for recorded and downloadable media, computer software, LED etc.

Thereafter the initiation of an appeal, EUIPO Second Board of Appeal ultimately agreed with the examiner, and further ruled that “*the triangle-shaped pattern at issue is a basic and commonplace figurative pattern*” and of which “*does not contain any notable variation in relation to the convention representation of triangle-shaped patterns and is the same as the tradition form of such a pattern.*” in its decision on 19/12/2023 (R827/2023-2). The question therefore arises as to whether this triangular pattern could have acquired distinctiveness through use, as this would typically be the next factor to consider. However, since Prada had chosen not to rely on Article 7(3) EUTMR, the Board of Appeal thus did not have the opportunity to assess such a possibility.

Sources: IP Kitten, January 07 2024, Available [here](#) ; World Intellectual Property Review, February 06 2024, Available [here](#) ; The Fashion Law, January 08 2024, Available [here](#)

2.2 Color Trademark refused for Rainbow Fruity Pebbles

Cases have time after time demonstrated that the threshold of proving that a color mark has indeed acquired distinctiveness, stands notably high, particularly due to their nature. Post Foods LLC had applied for trademark registration for its rainbow coloured ‘Fruity Pebbles’ cereal product, of which consisted of the following colors that featured on the surface of the breakfast cereals; yellow, green, light blue, purple, orange, red and pink.

The application had ultimately been refused based on the grounds that it failed to serve the fundamental purpose of a trademark as it was not inherently distinctive and had also not acquired such distinctiveness. Post Foods argued in defense that the color mark concerned was related solely to “crispy rice cereal pieces”, however it did not do so in its initial identification of goods. The United States Trademark Trial and Appeal Board (TTAB) made it clear, however, that even if such identification was given, when “breakfast cereals” are taken into account, in general the shape of the cereal pieces are not decisive in any way as they are shown in broken lines. The TTAB had emphasized that the color mark essentially entailed “*a combination of colors that may be applied to any crisp breakfast cereal, regardless of the shape of the cereal pieces*”.

Extensive evidence produced by the examining attorney in this case established that the regular consumers of this product encountered many multicolored cereal alternatives on the market with substantial similarities in relation to the physical cereals and their colors, including crispy rice cereal pieces. The TTAB essentially concluded that Post Foods extensive and long-time use of its colors was not “exclusive” and that consumers did not perceive this combination of colors as an indication of commercial origin, thus, had further failed to establish acquired distinctiveness pursuant to Section 2(f) Lanham Act.

Sources: Bloomberg Law, January 05 2024, Available [here](#); Thoward Law, January 11 2024, Available [here](#)



Photo by 'Offit Kurman Attorneys' Available [here](#).

2.3 K-Pop's BabyMonster wins Trademark case against Monster Energy Drink

Recently, the Monster Energy Company (MEC), a United States based mass producer of energy drinks, was unsuccessful in its endeavor to stop the registration of trademarks 'BabyMonster' and 'BabyMonsters' for a K-pop girl group, in relation to the South Korean YG Entertainment Company, in proceedings initiated in Singapore.

Monster Energy, hugely popular for its wide-spread energy drinks and related products and with over 33 trademarks already registered in Singapore - of which include the term Monster - brought forth quite the challenging opposition in relation to YG Entertainment's trademark applications. Ultimately, Intellectual Property Adjudicator Ravindran Muthucumarasamy, rejected Monster Energy's claims in regard to its grounds of opposition, emphasizing that after careful analysis of the marks "visually, aurally and conceptually", BabyMonster's mark was considered more dissimilar to MEC's marks than it was similar. The Adjudicator further highlighted MEC's track record of frequently initiating trademark oppositions, with instances where they would either fail to sufficiently respond or withdraw their applications entirely. Just recently in December 2023, another attempt of trademark opposition by MECC fell rather short in relation to the trademark application of 'Gentle Monster', a South Korean luxury eyewear company.

Sources: *The Straits Times*, January 13 2024, Available [here](#); *CDR News*, January 12 2024, Available [here](#); , *BNN Breaking*, January 09 2024, Available [here](#)



Photo by 'Koreaboo' Available [here](#).

Patents

3.1 Honor and Nokia cross-license for patents in 5G technology



Photo by Pexels, available [here](#)

Nokia and Honor are two giants in the field of telecommunications, respectively from Finland and China. They announced, on January 4, 2024, a cross-license agreements to avoid patent litigation.

Although the terms of the agreement are kept confidential, its scope is said to cover all essential patents to the field of 5G technology, as well as other patents in the cellular industry. Nokia has announced that around 6000 patent families of its portfolio could be considered standard essential when it comes to 5G. Both parties have used the agreement to highlight their commitment to innovation and respect for intellectual property, and it could serve as a basis of cooperation for research and development of future patents between the companies. More broadly, this practice could serve as a model for amicable dispute resolution in the 5G industry.

This new patent cross-license comes as the fourth major agreement signed by Nokia in the last 12 months. They also have agreements with other big players such as Apple, Samsung and Huawei, and are in negotiations with Vivo and Oppo despite ongoing infringement lawsuits.

Sources: JUVE Patent, 4 January 2024, available [here](#); GizChina, 4 January 2024, available [here](#); Mobile World Live, 4 January 2024, available [here](#); GSM Arena, 4 January 2024, available [here](#).

3.2 CJEU approves strict liability regime for wrongful preliminary patent injunctions

Patent owners are entitled to seek provisional relief against alleged infringers in patent infringement lawsuits. However, in case of wrongful enforcement of such injunctions, article 9(7) of the Enforcement Directive requires some form of compensation to be open to the defendant. The *Mylan v Gilead* case C-473/22 decided by the CJEU on January 11th, 2024 addressed the issue whether a strict liability regime was in accordance with the provisions of this article.



Photo by Court of Justice of the European Union, available [here](#)

In the facts of the dispute, Gilead had obtained a preliminary injunction against Mylan for alleged infringement of a Supplementary Protection Certificate (SPC) by sale of generic drugs. Gilead enforced the order, but the SPC was later found to be invalid by the courts. Mylan subsequently sought damages against Gilead, and applicable Finnish law applied. The courts referred the issue of the validity of this regime to the CJEU.

In a decision that ignored the Advocate General's opinion, the judges found that nothing in the article of the Enforcement Directive pointed to harmonization of national law for compensation. As such, Member States are free to decide whether they wish to implement a strict liability or fault-based system for compensation of wrongful preliminary patent injunctions. This decision is surprising as it seems to go against the aims for harmonization enshrined in the recitals of the Directive, and could contradict article 48 of the TRIPS Agreement which provides for more appreciation of the circumstances. Nevertheless, it is unclear whether the decision applies to strict liability regimes *per se*, since an important condition set by the court is that the judge must take into account all circumstances of the case, which on the contrary seems to point more towards fault-based compensation.

It is unclear what the effects of this decision will be, but there are worries that it will encourage forum-shopping in patent litigation. As such, it could have the effect of prompting patent owners to turn to the UPC, as compensation for wrongful preliminary injunction enforcement in this system is clearly fault-based.

Sources: IP Portal, 11 January 2024, available [here](#); Pinsent Masons, 12 January 2024, available [here](#); IP Kat, 22 January 2024, available [here](#); Kluwer Patent Blog, 15 January 2024, available [here](#).

3.3 Amended Implementing Regulations to Patent Law to Come Into Effect in China

January 20th 2024 marked the entry into force of the amended Implementing Regulations of the Chinese Patent Law, promulgated in December 2023 by the State Council. They were highly anticipated and made necessary by the 4th Revision of China's Patent Law in 2020, which came into effect in June 2021.

The amended Implementing Regulations contain new Rules aiming some to align Chinese patent law with international texts, others to increase transparency, due process and efficiency of the examination process. Concerning the first objective, the text aims to bring Chinese law closer to international patent and designs agreements. With regards to patents, the incorporation by reference and restoration by priority provided for by the PCT are now implemented into Chinese law. With regards to industrial designs, the Implementing Regulations harmonize a number of provisions with the Hague Agreement which recently entered into force in China. In addition, a new rule for partial designs has been set forth which allows the possibility of dotted lines to distinguish what is not claimed in the design, in accordance with what is already the practice in other major IP offices in the world.



Photo by Shutterstock, available [here](#)

Concerning the latter objective, the CNIPA will be required to disclose more information with regards to patent examination, such as regarding de-classification of some classified patents or applications, in national defense for

example. New procedures have also been introduced or modified, to improve both due process and efficiency of patent examination: these include delayed examination, patent term adjustment and extension, or re-examination. Finally, a good faith requirement now lies with the patent applicant or owner for their behavior during patent prosecution and open license processes, the violation of which can lead to a fine of 100,000 RMB.

The changes introduced previously under the fourth revision of the Patent Law seem to already have had a positive impact, as the examination period is now 16 months on average with the CNIPA.

Sources: IP Watchdog, 5 January 2024, available [here](#); China Daily, 26 December 2023, available [here](#); National Law Review, 21 December 2023, available [here](#); IAM Media, 10 January 2024, available [here](#).

Copyright

4.1 The New York Times sues OpenAI and Microsoft for copyright infringement



Photo by Kena Betancur/VIEWpress, available [Here](#)

In December 2023, the New York Times filed a lawsuit against OpenAI and Microsoft alleging the infringement of its copyrighted journalist content for training ChatGPT training data without authorization from the Times. In this case, the Times seeks “billions of dollars in statutory and actual damages” related to the “unlawful copying and use of The Times’s uniquely valuable works.” OpenAI asserted that “training AI models using publicly available internet materials is fair use” which is an exception under the US copyright law. However, the legal team of the Times said it is not fair use because OpenAI uses journalism data to generate its products without authorization or payment to the Times. Meanwhile, the Times also lost its subscription revenue when readers can read related New York Times articles in ChatGPT.

Source: The Verge, 27 December 2023, available [Here](#); BBC News, 27 December 2023, available [Here](#); AP, 10 January 2024, available [Here](#); CNBC, 08 January 2023, available [Here](#)

4.2 Blue Air Aviation SA - Copyright-protected Music on public transportation



Photo by Kluwer Copyright Blog, available [Here](#)

The Romanian copyright collective management organization, the UCMR — ADA filed a lawsuit before the national courts of Bucharest against Blue Air alleging the broadcasting of copyright-protected music on its airline flights without payment and authorization. The national court of Bucharest ruled that “Blue Air’s device for background music created a presumption of copyright infringement”. Blue Air appealed the decision to the Court of Appeal (Bucharest) claiming that it has not broadcasted unlicensed music on the aircraft, and the presence of physical facilities does not constitute a communication to the public.

Concerning this matter, the CJEU has issued its opinion in the joined cases *C-775/21, Blue Air Aviation SA ('Blue Air') vs. UCMR – ADA Asociația pentru Drepturi de Autor a Compozitorilor (the 'UCMR – ADA')* and *C-826/21, Uniunea Producătorilor de Fonograme din România ('UPFR') vs. Societatea Națională de Transport Feroviar de Călători (SNTFC) 'CFR Călători' SA (the 'CFR')*.

The CJEU assessed “whether playing background music on public transport constitutes a communication to the public under Article 3(1) of Directive 2001/29/EC”. To answer this question, the CJEU relied on two cumulative criteria: (i) an act of communication of a work and (ii) the communication of that work to the public. In paragraph 49 of the CJEU’s judgment, it is emphasized that broadcasting music on public transportation as background music is constituted as communication to the public when the operator intervenes, in full knowledge of the consequences of his or her action, to give his or her customer access to a protected work. In the absence of that intervention, customers would not be able to enjoy the broadcast work. Therefore, the CJEU concluded that playing background music on public transport constitutes communication to the public under Article 3(1) of Directive 2001/29/EC.

In addition, the CJEU analyzed whether installing sound equipment and software on board a means of transport constitutes a communication to the public under Directive 2001/29 and Directive 2006/115/EC. The CJEU concluded that “installation, on board a means of transport, of sound equipment, and, where appropriate, of software, enabling the broadcasting of background music, does not constitute a communication to the public.” As an outcome of this case, the mere installation of sound equipment on aircraft that enables the communication of works does not constitute communication to the public. The CJEU stated that EU law precludes national legislation that establishes a rebuttable assumption that musical work is communicated to the public due to the presence of sound equipment in public transportation.

Source: InfoCuria Case-law, available [Here](#); BDO, 22 June 2023, available [Here](#); Kluwer Copyright Blog, 12 June 2023, available [Here](#); Wiggin, 09 May 2023, available [Here](#); Bird & Bird, 26 April 2023, available [Here](#); JDSUPRA, 13 September 2023, available [Here](#)

4.3 French Montana and the Scope of Copyright Protection for Sound Recordings vs. Compositions



Photo by Frankfurt Kurnit Klein & Selz PC, available [Here](#)

French Montana has won a copyright lawsuit for “Ain’t Worried About Nothin” despite its similarity with Richardson’s instrumental track “Hood Pushin’ Weight”. In 2019, Richardson sued French Montana for adding lyrics to Richardson’s instrumental track “Hood Pushin’ Weight” and creating a remix without his consent. Richardson created the instrumental track “Hood Pushin’ Weight”, and published it on SoundClick in 2012. Six months after its publication, French Montana released his song “Ain’t Worried About Nothin”. After hearing French Montana’s song “Ain’t Worried About Nothin”, Richardson filed copyright protection for his song “Hood Pushin’ Weight” under sound recording, not a composition. Thus, the mere registration for sound recording for his instrumental track leads to an issue in this case.

In this case, Richardson did not rely on testimony from producers or creators of the song “Ain’t Worried About Nothin” for how they created music for the song, nor any expert opinion testimony. Instead, Richardson claimed that he could hear the same series of sounds presented in the song “Ain’t Worried About Nothin”, and every jury could hear the same thing. Therefore, the judge found that Richardson did not provide concrete information on how French Montana created the song “Ain’t Worried About Nothin”. Moreover, since Richardson does not have copyright protection for the composition of his instrumental track, the judge ruled that French Montana does not technically infringe Richardson’s copyright for illegal sampling of his music. The judge noted that if Richardson had registered his instrumental track for musical composition, “Richardson’s expert evidence as to the similarity of the ‘sounds’ or melodies of the songs likely would have been enough to send this case to trial”. Further, Judge Maldonado noted that this case was dismissed due to technicality, not because French Montana was found innocent of copyright infringement allegations.

Source: Digital Music News, 05 January 2024, available [Here](#); Frankfurt Kurnit Klein & Selz PC, 23 January 2024, available [Here](#); Billboard, 05 January 2024, available [Here](#); BNN, 06 January 2024, available [Here](#); mxdown.com, 06 January 2024, available [Here](#)