The Innovator's Legal Aid clinic

FRIDAY FORTNIGHTLY: THE IP & COMPETITION NEWSLETTER

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Dear Readers,

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

Adrienne Maduro, Maria Kutishcheva, Margherita Macaluso, Tamara Opricovic

Competition

1.1 Apple fined €1.8 billion by EU Commission over abuse of dominant position

Photo by 'AP/Geert Vanden Wijngaert' available here

Under EU competition law, an undertaking merely enjoying a dominant position on the market is not prohibited, per se; however, abusing the privileges of this position to restrict competition, is. Following a 2019 formal complaint filed by music subscription service competitor Spotify, investigations spanning four years have revealed that Apple has been abusing the privileges of their dominant position on the market. On the 4th of March 2024, the EU Commission declared tech giant Apple responsible for abusing its dominant position by imposing anti-steering provisions on app developers. Along the course of almost ten years, app developers have been prohibited by Apple from informing iOS users of alternative, cheaper music subscription services. The harmful conduct, in the eyes of the Commission, has not only led to iOS users paying higher prices, but has also led to a degraded user experience whereby consumers cannot make an informed decision and thus suffer a limit in choice. Such conduct amounts to unfair trading conditions which are in breach of Article 102 of the TFEU. The hefty fine of €1.8 billion, the third largest antitrust fine in the Commission's history, reflects more so the Union's desire to deter repeat offences and other offenders, than it does the actual duration and gravity of the infringement. Had the latter been the sole determiner of the total sum, this would have amounted to a measly €40 million – a drop in the ocean of Apple's total turnover and market capitalisation.

Apple has since issued a statement declaring that it will appeal this decision on the grounds that the Commission failed to "uncover any credible evidence of consumer harm." The Californian tech giant went on to point fingers at

Spotify for taking advantage of Apple's services without ever paying for them, before ending on a denunciatory note: "What's clear is that this decision is not grounded in existing competition law. It's an effort by the Commission to enforce the DMA before the DMA becomes law."

Apple's remarks on the close collaboration between Sweden-based Spotify and the EU Commission in this investigation, call to mind former European Commissioner for Competition Mario Monti's statements just last week. During an OECD conference on competition policy, Senator Monti reflected on the Commission's role in competition worldwide, recalling past criticism that the EU was more interested in protecting local players than promoting competition. Whether Apple's forthcoming appeal will hold any weight is to be seen.

Sources: European Commission, 4 March 2024, available here; Lexology, 7 March 2024, available here; Politico, 4 March 2024, available here; Le Monde, 4 March 2024, available here; Reuters, 6 March 2024, available here.

Apple press release available here.

1.2 Japan's Fair Trade Commission gives clearance to first ever environmental agreement

Shuhan Factory night view; Photo by 'Guidoor' available here

Only a few weeks over a year since publishing its Green Guidelines, Japan's Fair Trade Commission (JFTC) has declared on the 15th of February that a sustainability agreement reached between five manufacturers of petrochemical products (namely, Idemitsu Kosan, Tosoh, Tokuyama, Nippon Steel, and Zeon) poses no issues pursuant to the Antimonopoly Act.

This clearance emanates from a consultation held with the companies in question regarding joint business activities. The Shunan Industrial Complex-based companies proposed the following joint carbon-neutral initiatives: purchase of raw materials, production of bio basic chemicals, installation and use of power generation equipment, development of a reception system, and collection and storage of carbon dioxide emissions resulting from the

manufacturing process. All of these activities will be carried out in coordination amongst the five companies through an exchange of information necessary for implementing these initiatives.

As the JFTC determined in the consultation procedure, the activities do not impinge on antitrust rules seeing as they pursue a carbon neutrality aim, and will not cause a substantial restraint in competition for the purchase, production, nor sales markets. However, what would be *per se* prohibited and classified as anti-competitive conduct regardless of its context, is an agreement amounting to a sales-price cartel of the products mentioned. According to the Guidelines Concerning the Activities of Enterprises, etc. Toward the Realisation of a Green Society Under the Antimonopoly Act of March 2023, business activities in pursuit of carbon-neutral initiatives must be legitimate and their means must be reasonable and appropriate.

The guidelines materialised after years-long discussion in the country regarding the role of antitrust law in achieving sustainability objectives. Interested actors like the Fair Trade Commission and the Ministry of Economy, Trade, and Industry had invited public discussion on the matter as well. With the publication of the first-ever cleared sustainability agreement, the breakdown provided by the Commission will surely motivate other companies to pursue similar agreements.

Sources: Global Competition Review, 16 February 2024, available here; Japan Fair Trade Commission, 15 February 2024, available here; Financier Worldwide, June 2023, available here; Japan Fair Trade Commission, 31 March 2023, available here.

1.3 Six gatekeepers designated under Digital Markets Act must now comply with its provisions

Photo by 'Shutterstock/Ivan Marc' available here

On the 6th of March, 2024, the European Commission announced that the six gatekeepers designated back in September of 2023 must now comply with all the DMA provisions. The six companies in question (Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft) are defined as large digital platforms providing core services like web browsers, search engines, and app stores. The obligations arising from the Act are only applicable to specific services

within these platforms - 22 total. However, some of the services not included in its scope, may at a later point be designated gatekeepers such as with an increase in users. Currently, services operated by Booking.com, ByteDance, and Twitter are being evaluated.

In its press release, the Commission did not hold back in emphasising its willingness to sanction infringements. Flexing its muscles, they warned that it will not hesitate in imposing fines of up to 10% of the infringing company's total worldwide turnover, or up to 20% for repeat offences. Systematic infringements warrant even further harsh measures. To increase transparency and ensure compliance, the designated gatekeepers are required to submit compliance reports and an independently audited description of any techniques used for profiling consumers.

For further insights into the discussion on regulating digital platforms, namely asking the imperative question "Shall we, shall we not?", see the following panel discussion: https://www.youtube.com/watch?v=uXn2mpfEBqo.

Sources: Data Guidance, 7 March 2024, available here; European Commission, 7 March 2024, available here; European Commission, 6 September 2023, available here; Copenhagen Economics, March 2024, available here.

2.1 Trademarks and the Right of Repair: The CJEU Decision in *Audi*

Source: Flickr Available here.

In light of the circular economy action plan, the right of repair within the EU has gained significant traction due to a draft repair directive. The newly proposed EU law, as part of the Green Deal strategy, aims to promote the repair of consumer goods through the reduction of cost and repairing products, mandating access to repair information to allow the consumer to have their items repaired by a 3rd party. However, in the intersection of intellectual property rights, there becomes a legal question posed on the IP rights of 3rd party repair providers. One such area of intellectual property law that is impacted by the right of repair is trademarks.

Many technologies have incorporated shape marks into the technologies themselves. In light of repair, which may include the need for replacement parts, non-authorized parts from 3rd party distributors may lead to potential trademark infringement disputes.

This topic was recently discussed by the European Court of Justice 'ECJ' in the dispute between car manufacturer Audi and GQ, a known seller of replacement parts. Audi, after learning that GQ was offering to sell a replacement car grille that closely resembled Audi's original grille, which features the trademark "rings" of Audi, requested a preliminary injunction in Warsaw. The court posed two questions to the ECJ, primarily if the marketing of the car replacement parts constitutes "use in the course of trade" liable to impair the functions of the Audi trademark and whether Article 14(2) of the EUTMR prevents Audi from prohibiting a 3rd party from using a sign that is identical/confusingly similar to its trademark, such as trade car parts.

The ECJ concludes that GQ's sale of the grill replace ment part does indeed constitute the use of the Audi mark, even though it does not directly include the trademark, which can be prohibited by national courts. In addition, when considering the repair clause in the context of the EUTMR, the ECJ found it is not applicable for the radiator

grilles that did not come from the trademark proprietor or with their consent. The fact that the car grille in of itself has the Audi shape emblem incorporated into the part, from the perspective of the 3rd party, would constitute a material link between the 3rd party part and the trademark itself.

The ruling of *Audi* suggests that, going forward, there will be further conflicts when it comes to interpreting the right of repair to existing provisions.

DigWatch, 5 February 2024, available here, Lexology, February 1 2024, available here. Curia Press Release 25 January 2024 available here, Kluwe IP Law January 26 2024 available here
Lisensable Image here

2.2 Elon Musk's Rebranding of Twitter: The Issue of "X" as a Trademark

Source: James Duncan Davidson, available here

In July of 2023, Elon Musk rebranded the social media platform previously known as Twitter into X, "the everything app." The rebranding of the widely known and utilized social media platform, from a trademark perspective, undoubtedly caused several legal issues. For one, X as a mark is used by a variety of other major brands. From the rock group Metallica, to Microsoft, to Adidas, X has been utilized as a trademark. All in all, within the EUIPO, there are already 262 registered X trademarks as of last summer, providing brands with the exclusive right to use their versions of X in a wide array of goods and services.

We have seen it go the wrong way for Musk in the United States. In October of last year, the social media company was sued in Florida Federal Court, with the plaintiff claiming that the rebranding would cause consumer confusion between their respective tech companies. The plaintiff, X Social Media, demonstrated the widespread use of X as a registered trademark owned by other tech conglomerates in the tech industry.

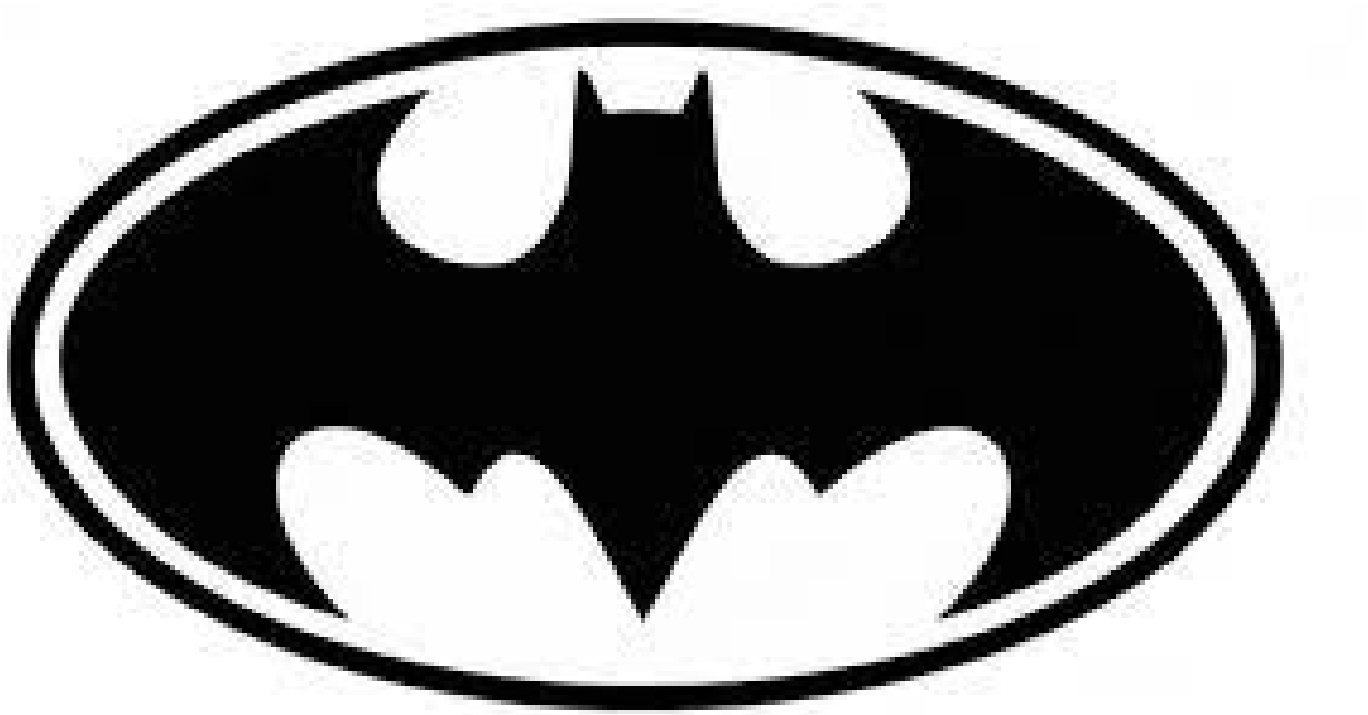
So, when it came to Elon Musk in the EU, it was evident he was faced with a similar obstacle. Upon the name change, there was no sign that Twitter or Musk was the proprietor of a registered EU trademark for X. Musk is open to damages for trademark infringement should proprietors of an X registered trademark feel that the similarity of the logos carries a risk of confusion for the EU consumer.

The timing of the potential litigation carries some issues for Musk as well, for the European Union has recently opened infringement proceedings against the social media platform over its failure to carry out the obligation to counter illegal content and false information of the platform itself, which is a violation of the Digital Services Act. In addition, Elon Musk's X has recently been sued by Agence France-Presse (AFP) on the grounds of copyright infringement, specifically because they allege that they are not receiving proper compensation for the publication of their work on the digital platform.

All this goes to show that, in addition to protection trademark litigation, Elon Musk's legal team is facing potential attacks from many sides, governmental and private actors alike. As of yet, no mention of ongoing litigation over the X mark in the European Union has been mentioned. However, given the striking prominence of previously registered marks in similar industries, it is indeed probable that some litigation can occur.

Politico July 27 2023 available here, Lexology November 6 2023 available here, Reuters October 2 2023 available here, Aljazeera December 18 2023 available here, CNBC 18 December available here, European Commission 12 September 2023 available here

2.3 Batman: Covering the Issue of Distinctiveness and Linkage of a Trademark to Fiction



Source: Euronews, available here

When it comes to who, or what, a trademark is linked to, a recent case in the European Union tackled the issue with a trademark dispute between a DC Comics trademark and Italian designer Commerciale Italiana and Luigi Aprile. In this case, the clothing in question concerned the gesture of a graphical image of a black bat inside a white oval frame. DC Comics, a comic creator popular for their fictional character Batman, has held the Batman image mark since 1988.

In 2019, Commerciale Italiana filed an application for a declaration of Invalidity of the DC Batman trademark to the EUIPO, first to the cancellation division and then to the Board of Appeal. They contended that the mark is the descriptive nature of the mark should have the mark canceled, reasoning that the mark lacked distinctive character. The EUIPO rejected their case, so the designer went to the General Court of the European Union to annul the decision.

The General Court dismissed the action, stating that the EUIPO contained sufficient reasons for their dismissal of the case due to the fact that there was a lack of evidence submitted to demonstrate that consumers associated the mark with a different origin.

When assessing the mark's descriptiveness, the general court followed the EUIPO's reasoning. Furthermore, however, they noted that in invalidity proceedings, registered marks are assumed to be valid. The General Court continued to touch on the topic of distinctiveness, reasoning that the distinctiveness of the mark makes it possible for the relevant public to associate the goods under that mark with DC Comics and Batman himself. The Court elaborated that, being a charcter made by DC Comics, that does not in of itself make it possible to rule out that the trademark serves as an indication of origin. Since Batman is associated with DC Comics, and no evidence was put forward that the mark is associated with any other commercial origin, the General Court, therefore upheld the previous decisions against the Italian designers.

Following this, the Italian company can still appeal to the European Court of Justice. However, as is evident by these proceedings, it is very unlikely that a different ruling will be made.

EuroNews, 7 June 2023 available here, Politico 7 June 2023 available here, CoJ Press Release 7 June 2023 available here, Reuters 7 June 2023 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 seeked 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' lawsuit against OpenAI and Microsoft for copyright infringement to train chatbots

Photo by Kena Betancur/VIEWpress, available Here

The New York Times is leading the charge in attempting to define the legal boundaries of AI in news media. In December 2023, the NYT sued OpenAI and Microsoft for using millions of their articles to train automated chatbots, thus infringing copyright. The AI company is now valued at over $80 billion, and Microsoft committed $13 billion to it. The media organisation states that the lawsuit followed an attempt to explore amicable solutions in April. After not reaching a resolution, the NYT made recourse to legal action. According to the media outlet, OpenAI was free-riding on substantial investments made by the newspaper and was using NYT's intellectual property without compensation or consent to develop products that compete with the outlet and divert audiences from it. NYT's concern is that it will generate answers based on their articles, and the readers, satisfied by the response, will not visit the NYT's website. This could severely reduce web traffic and, consequently, advertising and subscription revenues. In addition to its focus on copyright infringement, the lawsuit positions OpenAI and AI systems as potential competitors to news outlets. NYT also claims that the illegal use of their content may damage their brand due to AI "hallucinations," consisting of chatbots inserting incorrect information misattributed to a source.

OpenAI responded in January that the lawsuit was "without merits." The company filed a motion in February to dismiss several elements of the lawsuit. The defendants refuted the claim that ChatGPT could be a substitute for a subscription to the NYT. Although they did not dispute that they replicated the articles to develop their commercial products without permission, they accused NYT of hacking their chatbox to find evidence. OpenAI claimed it required NYT tens of thousands of attempts to generate these results. The AI system argued that they targeted and exploited a bug by employing deceptive prompts, violating OpenAI's terms of use. To these allegations, NYT replied

that they merely employed OpenAI's products to search for evidence of the reproductions of their copyrighted articles. OpenAI also contended that NYT should not be permitted to sue for reproduction, which occurred over three years ago. Moreover, they asserted that NYT's claim of violating the Digital Millennium Copyright Act by OpenAI lacked legal soundness. They further contended that incorporating copyrighted material into their system was legal, citing precedents that allowed such action in developing innovative products.

The proceedings are still underway. The New York Times has not made precise monetary demands but seeks to hold defendants accountable for "billions of dollars in statutory and actual damages."

Sources: The New York Times, 27 December 2023, available here; BBC, 27 December 2023, available here; The Guardian, 28 December 2023, available here; Reuters, 28 December 2023, available here; The New York Times, 8 January 2024, available here; CNBC, 8 January 2024, available here; The Conversation, 17 January 2024, available here; The New York Times, 27 February 2024, available here; The Guardian, 27 February 2024, available here.

4.2 ECJ ruling finds "overriding public interest" in disclosure of copyright protected harmonised standards

Photo by Biopharm International, available Here

On March 5th, 2024, the European Court of Justice delivered its ruling in Case C-588/21 P, addressing public access to the four Harmonized Standards according to Regulation 1049/2001.

The ECJ overturned a previous decision by the European Commission that refused to share these harmonised standards to the public as requested by two NGOs focused on the protection of citizens rights. In this appeal, the ECJ did not dispute the fact that Harmonised standards are subject to copyright protection. Notwithstanding, the Court established the presence of an overriding public interest in divulging the Harmonised standards under Regulation 1049/2001.

These standards are technical rules and guidelines created at the Commission's behest by accredited national entities represented at the EU level by two associations: CEN and CENELEC. The latter is responsible for the field of electrical engineering, while the former for other technical areas. The two official European Standardization Organizations (ESOs) expressed their contentment with the Court's decision to disregard the argument suggesting the exclusion of copyright protection for Harmonized Standards in general. The ruling also confirms that access to documents under Regulation 1049/2001 does not undermine existing copyright regulations, which potentially restricted third parties' rights to reproduce or use the disclosed documents.
Although initially related to harmonised standards for toys, the decision is predicted to have far greater implications. The ruling will probably impact the funding model of the two organisations that are partially financially dependent on the selling of standards to fund their standardisation activities.

Source: bsi, 5 March 2024, available here; CEN-CENELEC, 5 March 2024, available here; VDE, 5 March 2024, available here; Euronews, 7 March 2024, available here; Ingenio, 8 March 2024, available here.

4.3 "Legal Battle Over LOTR Sequel: Fanfiction Author's Copyright Claim Against Tolkien Estate and Amazon Dismissed"

Photo from IMDb, available Here

In 2017, Demetrious Polychron, an American enthusiast of the Lord of the Rings saga, wrote a fanfiction sequel called The Fellowship of the King. Despite numerous attempts to share the manuscript with the Tolkien estate, they declined to grant the rights to a third-party publication, citing their policy against licensing other authors to produce sequels of Tolkien's work following his passing in 1973. Notwithstanding, in September 2022, Polychron independently published the book, purportedly the first of a seven-part series inspired by the LOTR franchise. Around the same time, "The Rings of Power", a spin-off TV series authorised by the Tolkien estate, made its debut. The Tolkien estate first caught notice of the book's publication in March 2023 due to its sale on Amazon and Barnes & Noble. Upon discovery, the estate unsuccessfully attempted to contact Polychron by telephone and sent him a cease-and-desist letter.

Polychron filed a lawsuit against the Tolkien estate and Amazon the following month, alleging that the TV series violated the copyright of his book and seeking damages totalling $250,000,000. The case was dismissed by a Californian court in August 2023, following the judge's ruling that Polychron's text was instead infringing upon Amazon's prequel released the previous year.

The estate then filed a separate lawsuit against the claimant, seeking the destruction of all copies of his manuscript and a permanent injunction prohibiting any further distribution of the fanfiction series. They accused him of "willful and blatant" copyright infringement in creating and profiting from derivative works. They pointed out that the book included several characters from the trilogy, such as Aragorn, Samwise Gamgee, and Sauron. Furthermore, the publication contained no less than fifteen poems or excerpts from the saga, as well as dozens of

settings presented in the original book and the replication of the main plot. Ultimately, the US court sided with the estate and even granted them reimbursement of legal fees amounting to $134,000.

Source: BBC, 18th December 2023, available here; The Guardian, 18th December 2023, available here; Euronews, 20th December 2023, available here; The New York Times, 21st December 2023, available here.