

Faculty of Law
2019/2020

Intellectual Property in the Digital Single Market
Course book

European Law School
Rechtsgeleerdheid

Year 2 and 3
Course period 1 and 2
LAW3018

LET OP:

DEADLINE VOOR INSCHRIJVEN ONDERWIJS PERIODE 2: 1 JUNI – 15 SEPTEMBER

DEADLINE REGISTRATION EDUCATION PERIOD 2: JUNE 1 – SEPTEMBER 15

DEADLINE VOOR INSCHRIJVEN ONDERWIJS PERIODE 3: 1 JUNI – 10 NOVEMBER

DEADLINE REGISTRATION EDUCATION PERIOD 3: JUNE 1 – NOVEMBER 10

Faculty of Law – Maastricht University

Intellectual Property Law in the Digital Single Market

LAW3018

COURSE BOOK 2019-2020

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Intellectual Property in the Digital Single Market

Coordinator: Dr. Ana Ramalho, LL.M.

Elective module	Block period:	1 + 2	ECTS:	12	Language:	English
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Course description

This module covers the substantial legal aspects of EU intellectual property law and explores in-depth topics with specific relevance for the Digital Single Market and EU integration. In order to get a full grasp of IP legal entitlements and how they relate to the underlying policies of the Digital Single Market, the areas of copyright, patents, designs, trade secrets and trade mark law will be explored and seen in context with issues of EU integration.

The module will provide students with an in-depth understanding of the EU intellectual property framework through a mix of lectures and seminars. The integration of substantive intellectual property within the broader Digital Single Market policy will be ensured through specialised lectures in specific topics of that policy, a mock trial and a round table discussion, where students will participate together with invited speakers on debating a topic of current relevance. The course has strong theoretical and practical aspects, inviting students to reflect on several issues of intellectual property policy, while endowing them with skills on how to deal with intellectual property in practice.

Learning outcomes:

At the end of this course, students will be able to:

- Understand and critically reflect upon EU intellectual property as a central element of the Digital Single Market;
- Explain the different rationales of intellectual property rights;
- Have knowledge and insight of the EU regimes for trademarks, patents and rights similar to patents, trade secrets, copyright, and design, in particular of the aspects of acquisition of rights, scope of protection and infringement;
- Solve cases regarding all of the intellectual property rights listed above;
- Orally argue a case concerning any of the intellectual property rights listed above.

Recommended Reading

- Christie/Gare, Blackstone's Statutes on Intellectual Property, 14th Edition (Oxford University Press)
- A. Ramalho, Annotated IP Legislation, <https://www.anaramalho.net/digitalsinglemarket/>
- Van der Kooij/Visser, EU IP Law – A Short Introduction to European Intellectual Property Law (2015, deLex)
- A. Ramalho, Intellectual Property, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723932
- Other specific literature indicated per tutorial

Course overview

The course will combine two-hour lectures with two-hour tutorials (based on the PBL system), per week, over the course of two periods. Students are encouraged to participate actively in both lectures and tutorials. The lectures will be recorded and made available on My Student Portal shortly after they took place.

Students are required to have prepared the specific task for each tutorial. For two of the tutorials (on trademarks and designs), students will also be required to take an online course, provided by the EU Intellectual Property Office (EUIPO), which grants them a certificate.

The mock-trial and the roundtable discussion will be mainly student-lead, with the coordinator acting as a moderator. The mock trial is part of the assessment methods, and therefore it is a mandatory part of the course. Participation in the roundtable discussion is optional, but students who wish to participate will receive a certificate and a personal endorsement on LinkedIn of their legal analysis and debate skills, as well as their skills in the particular topic.

Students will have the opportunity to apply for the Indie Art Legal Clinic, where, teaming up with IP master students, they will give legal advice to independent artists (such as musicians, painters, game developers, actors, etc.), under the supervision of a member of staff and/or an IP lawyer. Students interested in applying for the Clinic should contact the course coordinator. More on the Legal Clinic can be found here: <https://www.maastrichtuniversity.nl/about-um/faculties/law/education/moot-courts-and-clinics/clinical-education/indie-art-legal-clinic>

Assessment method:

The following assessment methods will be used in this course:

- Final exam (50%) – open book
- Written mock trial brief (25%)
- Oral performance at the mock trial (25%)

Resits will be in the form of a written exam, which will replace both the grade of the first exam and the mock trial.

Topic outline

PERIOD 1

DATES	LECTURE	TUTORIAL
Week 36: 2/9 – 6/9	Introduction to IP law – theory and rationales (AR) Specialised lecture 1 – Overview Overview of the DSM Strategy (Paula Westenberger)	
Week 37: 9/9 – 13/9	Trademark Law I – Subject-matter, requirements and scope of protection, grounds for refusal (AM)	Introduction to IP law (AR)
Week 38: 16/9 – 20/9	Trademark Law II – Procedural issues; interaction of trademark law with geographical indications (AM)	Trademark Law I (AR)
Week 39: 23/9 – 27/9	Patent Law I – Subject-matter, requirements and scope of protection, exceptions to patentability (DvE)	Trademark Law II (AR)
Week 40: 30/9 – 4/10	Patent Law II - Procedural issues, software, biotechnological inventions (AKS)	Patent Law I and II (NK)
Week 41: 7/10 – 11/10	Rights similar to patents – Supplementary patent certificates, plant variety rights (AKS)	

	Specialised lecture 2 – Blockchain (Balazs Bodo, University of Amsterdam)	
Week 42: 14/10 – 18/10	Trade secrets (AR)	Rights similar to patents & Trade secrets (AR)
Week 43: 21/10 – 25/10	EXAM WEEK	

PERIOD 2

DATES	LECTURE	TUTORIAL
Week 44: 28/10 – 1/11	Design Law (AR)	Design law (AR)
Week 45: 4/11 – 8/11	Specialised lecture 3 – IP Policy (Rike Dekker, AOMB)	Special joint session: Mock trial training (MSS)
Week 46: 11/11 – 15/11	Copyright Law I – Subject-matter, requirements and scope of protection (AR)	Copyright Law I (AR)
Week 47: 18/11 – 22/11	Copyright Law II – Software; Exceptions and infringement (AR)	Copyright Law II (AR)
Week 48: 25/11 – 29/11	Specialised lecture 4 - Enforcement in the Digital Single Market (DvE)	Special joint session: IP law practice: Clinical training (DvE)
Week 49: 2/12 – 6/12	Specialised lecture 5 – Directive on Copyright in the Digital Single Market (Stef van Gompel, University of Amsterdam)	Round table: Copyright in the Digital Single Market
Week 50: 9/12 – 13/12	Q&A, office hours	Mock trial
Week 51: 17/12 – 21/12	EXAM WEEK	

AR – Dr. Ana Ramalho, LL.M.; AR – Dr. Anke Moerland; AKS – Prof. Dr. Anselm Kamperman Sanders; DvE – Prof. Dr. Dick van Engelen; MSS – Dr. Marta Santos Silva; NK: Naina Khanna.

Preparation

The tutorials are led by students, following the problem-based learning approach. Students are therefore expected to prepare for each tutorial meeting. For that purpose, students will be divided in groups already in the first tutorial, and each group will be in charge of leading the discussion in a particular tutorial meeting. The discussion leader's task is to give structure to the content of the discussions during the tutorial, and to ensure a logical discussion. Thus, all students will be required to prepare for all the tutorial meetings in advance.

Preparation for the tutorial meeting encompasses recommended readings and solving the case study or the assignment for that tutorial in advance. The recommended readings tend to be thorough. Students are expected to search for the relevant information within the indicated literature. In most tutorials, students are expected to find for themselves what the applicable law is, with the exception of a couple of sessions (namely, on copyright), where the applicable law is listed in the recommended literature as well.

Some case studies comprise direct or semi-direct questions; others do not encompass any instruction or question. In those cases, it is up to the students to identify the problems and respective solutions.

The online courses on trademarks and designs must be completed before Week 38 and Week 44, respectively. A copy of the certificates obtained with the course must be handed in to the tutor in the corresponding tutorials of Week 38 and Week 46. The online course for trademarks can be found here: <https://euipo.europa.eu/knowledge/enrol/index.php?id=3160> and the one for designs here: <https://euipo.europa.eu/knowledge/enrol/index.php?id=3124>

Mock trial

The following rules apply in relation to the mock trial:

1. Teams will be set in the first week of the course. Students are required to work in teams for the written part, but the oral part will be graded individually.
2. All groups (except for the panel of judges) must submit an outline (no more than 1500 words) to the tutor and to the opposing party, before 29 November 2019, at 18h.
3. The panel of judges will send their outline judgment to the tutor before 6 December 2019, at 18h. They are to use the legal texts, case law and the submissions of the parties as the basis for their decisions, but should feel free to seek out other materials.
4. The outline should sketch the arguments that you plan to make, the case law you will cite for support for each argument, and the relief you seek. It is not necessary to recite the facts of the case except where necessary to support your arguments. All groups may use their opponents' skeleton briefs to further revise and prepare their oral arguments. The panel of judges will base their judgment on their outline and the final presentations made by the parties.
5. During the mock trial there will be opening submissions of 15 minutes by the plaintiff and 15 minutes by the defendant; ALL parties will have 5 minutes each for rebuttals (unused time from the initial presentation may be used for rebuttal time).
6. Judges can (and are expected to) ask questions to the parties during the trial, for purposes of clarifying certain points or questions. Judges are also expected to keep time.
7. There will be a short recess and a reasoned judgment of approximately 15 minutes will be delivered by the judges.

Round table

The roundtable will be composed of 4 students, the course coordinator, and one or two invited speakers (chosen either internally within staff members or externally). The roundtable will be open to other university students and to the general public. The objective is to foster discussion on an open or controversial topic, following methods of creative problem solving. The roundtable discussion will thus involve generating ideas around a topic, filtering out the best ideas and discussing the best ways to implement the best ideas, as a solution to the problem. The format of the roundtable discussion will be informal, taking the shape of a debate where participants come together to reach a solution, in a dialogue with each other and the audience.

Participating students will get a certificate of participation and an endorsement on LinkedIn of their legal analysis and debate skills, as well as their skills in the particular area of the topic.

The students will be selected on a first come, first served basis. Interested students should contact the course coordinator.

This year's topic is "Copyright in the digital single market". The roundtable participants will discuss some provisions of the new Directive, and the impact that it may have on different stakeholders (users, content creators/right holders, internet platforms, etc).

TUTORIAL 1 –INTRODUCTION TO IP LAW

In this tutorial: Overview of the DSM Strategy; intellectual property rationales

Questions for discussion

I – Select the main IP issues within the DSM. Which IP principles are comprised therein?

II – What are the main conflicts between IP and the DSM?

III – Which solutions for that conflict have been proposed?

IV – What are the justifications to protect the following, under the main IP justification theories?

(i) Non-personal data generated by the app Waze (www.waze.com)

(ii) this painting, autonomously generated by the AI AARON:



040502, 2004. Source: <http://dada.compart-bremen.de/item/artwork/1479>

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 1)

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM (2015) 192 final, available at <https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/Digital-Single-Market/COM-2015-192-final-digital-single-market-strategy.pdf>

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy, COM (2017) 228 final, 10 May 2017, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1496330315823&uri=CELEX:52017DC0228>

- Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy - A Connected Digital Single Market for All, SWD (2017) 155 final, available at <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-mid-term-review>

- William Fisher, 'Theories of Intellectual Property', 2001, available at <https://pdfs.semanticscholar.org/173d/8747f2faaa06805dfd64a556fa2d776431f9.pdf>

TUTORIAL 2 – TRADEMARK LAW I

In this tutorial: requirements and scope of protection; grounds for refusal

Kitchen-La Frenais-Morgan (in short, KLM) is a small real estate company based in Cardiff, United Kingdom. The name is inspired by the surnames of the company owners (Joanna La Frenais and John Morgan), and by the fact that, when they started to operate, they were based in Joanna's kitchen because they could not afford renting an office.

They want to register their logo (below) and the word marks "KLM" and "KLM – Kitchen-La Frenais-Morgan" as EU marks in the EUIPO.



1. Give your legal advice regarding the registrability of the 3 signs as EU trade marks.
2. The Dutch airline company KLM (short for Koninklijke Luchtvaart Maatschappij), owner of the word mark "KLM" and of the figurative trademark below, wants to oppose this registration. Would it have grounds to do so, and if so which?



Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 2)
- EUIPO, Guidelines for Examination of European Union Trademarks, available at <https://euipo.europa.eu/ohimportal/en/trade-mark-guidelines>. Please note that you do not need all the Parts and Sections of the Guidelines. It is advised that you search for relevant information in the following parts of the Guidelines: Part B, Section 4, Chapter 2-4; Part C, Section 2, Chapter 1; Part C, Section 5.

TUTORIAL 3 – TRADEMARK LAW II

In this tutorial: online course discussion; interaction of trademark law with geographical indications

The company “The Fine Cheese Co.” is a UK-based company that sells its products all over the EU. They recently launched “Crackers with Roquefort” (depicted below) in the UK.



Roquefort Crackers

The Fine Cheese Co. now wants to start selling its product in several EU Member States, among which Italy, France, Spain and Germany. They also want to register a EU trademark for the product. They are indecisive between “Crackers with Roquefort” or “Roquefort Crackers”, but are open to suggestions.

The producers of Roquefort – a Protected Designation of Origin (PDO) – are not happy. They are particularly appalled that the selling slogan for the Roquefort Crackers is “Distinctly European with a touch of cool Britannia”.

There is also a French collective mark for Roquefort, depicted below:



Advise The Fine Cheese Co.

Recommended reading:

- Anke Moerland, 'Can ALDI sell a dessert called Champagner Sorbet?', available at <https://www.maastrichtuniversity.nl/blog/2017/11/can-aldi-sell-dessert-called-%E2%80%9Cchampagner-sorbet%E2%80%9D>
- Case C-393/16 – Comité Interprofessionnel du Vin de Champagne v. Aldi, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198044&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=73122>
- Commission Communication — Guidelines on the labelling of foodstuffs using protected designations of origin (PDOs) or protected geographical indications (PGIs) as ingredients, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC1216\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC1216(01)&from=EN)
- Regulation EU No 1169/2011 of the European Parliament and of the Council of 25 October 2011, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1169&from=EN>
- Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R1151>
- International Federation of IP Attorneys, "Geographical Indications in the new EU trademark law regime", available at http://www.ficpi.org/_uploads/files/6777/geographical_indications_in_the_new_eu_trademark_law_regime_-_report.pdf
- EUIPO, Guidelines for Examination of European Union Trademarks, available at <https://euipo.europa.eu/ohimportal/en/trade-mark-guidelines>. Please note that you do not need all the Parts and Sections of the Guidelines. It is advised that you search for relevant information in the following part of the Guidelines: Part B, Section 4, Chapter 10.

TUTORIAL 4 – PATENT LAW I AND II

In this tutorial: Subject-matter, requirements and scope of protection, exceptions to patentability; procedural issues

Company Saramago Co. develops a method for producing transgenic mice, where DNA from star-nosed moles (*Condylura cristata*) is introduced into the mice's genome. Star-nosed moles are blind and use fleshy tentacles at the end of their snout to feel food, obstacles, and any other aspect of their surroundings that they cannot perceive through vision. As a result, the transgenic mice are blind; but they lack the particular mole's snout that substitutes the sense of vision.

Saramago Co. has produced these mice to carry out medical experimentation on methods for curing blindness. They want to obtain patents in the UK, Germany, Spain, France and the Netherlands.

Discuss the likelihood of success of such patent application, and which procedural steps the company should take.

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 3)
- WIPO, 'Bioethics and patent law: the case of the oncomouse', 2006, available at http://www.wipo.int/wipo_magazine/en/2006/03/article_0006.html
- Decision from the EPO BoA T19/90 (Onco-Mouse) of 3.10.1990, available at <https://www.epo.org/law-practice/case-law-appeals/recent/t900019ep1.html>
- Decision from the EPO BoA T315/04 (Transgenic animals/Harvard) of 6.7.2004, available at <https://www.epo.org/law-practice/case-law-appeals/recent/t030315ex1.html>

TUTORIAL 5 - RIGHTS SIMILAR TO PATENTS & TRADE SECRETS

In this tutorial: Plant varieties; Trade Secret Directive

CASE 1

Zoe is the owner of a nursery in Italy, where she breeds a new variety of strawberries, the Jolien variety. She obtained a Community Plant Variety Right for the Jolien variety in 2008. In 2010, she granted BB-Bliss Berries (based in Spain) an exclusive license to grow and commercialise strawberries of the Jolien variety. According to the terms of the license, BB-Bliss Berries is not allowed to sell to farmers who operate in the Benelux, UK, and Scandinavian countries. This is because Zoe firmly believes that the climate in those countries is not good for the Jolien variety, and might in some way affect the flavour of the strawberries and give the fruit a bad reputation (even though she has no evidence of this).

In 2011, BB-Bliss Berries sold 2000 strawberry plants of the Jolien variety to Jolande, a Dutch farmer based in the south of France. Jolande indeed intended to grow the plants and sell the strawberries in France, but she meantime learned that she was the sole heir of her rich uncle's estate– including a 8-acres land in the Jeker Valley. Jolande is convinced that the strawberries will do as well there as in France, so she moves her business to Maastricht. She grows the strawberry plants of the Jolien variety in her deceased uncle's land in the Jeker Valley, and she sells the strawberries on the Maastricht market every week.

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 6)
- CJEU Case C-140/10, Greenstar v. Hustin & Goossens, ECLI:EU:C:2011:677.

CASE 2

Gelateria Candiero, the Italian ice-cream shop in Maastricht, is growing in popularity – its creamy, rich-flavoured products have become known in the city and abroad, especially in the Belgian towns of Liège and Visé, and in Aachen (Germany). Indeed, people from Liège, Visé and Aachen come to Maastricht during the weekend with the sole purpose of buying ice-cream.

Underlying Candiero's success is undoubtedly the natural and fresh ingredients used in their products; but also a secret recipe known only to the owner, Helena Sanvicente, and to two highly trained employees: Giuseppe and Giancarlo.

Giancarlo however quit his job and decided to open his own ice-cream shop in Visé. To Helena's dismay, Giancarlo is using her secret recipe, and clients from Visé and Liège have shifted to Giancarlo's shop because it is more geographically convenient.

Recommended reading:

- Wouter Pors, 'The Trade Secrets Directive', available at IE-Forum.nl, IEF 13607, <http://www.ie-forum.nl/backoffice/uploads/file/IE->

[Forum_ni%20Wouter%20Pors,%20The%20Trade%20Secrets%20Directive,%20IE-Forum_ni%20IEF%2013607_.pdf](#)

- Anselm Kamperman Sanders, 'Employees, Trade Secrets and Restrictive Covenants in the Netherlands', in Christopher Heath and Anselm Kamperman Sanders (eds), *Employees, Trade Secrets and Restrictive Covenants* (Wolters Kluwer, 2017)

- European Commission, 'Trade Secrets and Confidential Business Information', available at http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en

TUTORIAL 6 – DESIGN LAW

In this tutorial: Online course discussion; requirements for protection; grounds for invalidity

Lara Axhamn, a Swedish designer based in Paris, has created the following bottle opener:



She had this idea for a bottle opener when she visited Japan the previous year – the shop just next to her hotel in Tokyo had a bottle opener which was very similar, only the fork was golden instead of silver.

1. She comes to you for advice on how to protect the design in Europe under design law. Please explain to her the requirements for protection and which obstacles, if any, she may be faced with.

2. Melanie Rosnay, the CEO of a French retail business that sells camping gear, is also afraid that Lara's design will bring about problems for the commercialization of the outdoor tableware multi-functional screwdriver, bottle opener, spoon and fork camping tool, which looks like this:



Melanie has the tool registered as a Community design.

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 5)
- Ulrike Koschtial, 'Design law: individual character, visibility and functionality', International Review

of Intellectual Property and Competition Law 2005, 36(3), 297-313 (available in Beck Online).

- CJEU case C-395/16, DOCERAM, ECLI:EU:C:2018:172.

TUTORIAL 7 – MOCK TRIAL TRAINING

This tutorial slot will be a joint tutorial session with all the groups.

Students will receive training on five essential points:

1. Structure

How to present a structured speech, with a clear and understandable introduction, presentation of the facts, legal argumentation and conclusion.

2. Knowledge of the Law

How to make clear and accurate statements of rules of law, and how to appropriately apply the law to the facts of the case; how to present the strongest legal arguments.

3. Questions and Answers

How to display ingenuity and ability when answering questions, e.g. making strategic concessions where appropriate; how to seamlessly tie in Q&A into argument.

4. Style, Poise & Demeanor

How to convey formality, respect and professionalism; having a good posture, expressions and gestures; maintaining eye contact with the judges; how to come across as engaged and conversational.

5. Persuasiveness

How to come across as someone who clearly knows his/her case is the strongest one, and how to radiate this impression through speaking to the public as well.

TUTORIAL 8 – COPYRIGHT LAW I

In this tutorial: Subject-matter, requirements, scope of protection, exceptions

The artist Christo, known for having wrapped the entire Reichstag in Berlin and the Pont Neuf in Paris in a gigantic curtain (see pictures below), now wants to head to the UK and do the same thing to the Big Ben.

His long-term fan, the photographer Judas, is thrilled. Judas has been following Christo for quite some time, taking pictures of Christo's artwork and making quite some money every time Christo puts his creative mind at work. Every time Christo produces an artwork such as the ones depicted below, Judas takes several pictures and sells them both on the spot and later on online.

Discuss the copyright implications of the above, considering especially that Christo's next move is taking place in the UK.





Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 4).
- Lionel Bently & Brad Sherman, *Intellectual Property Law* (Oxford, 2009): Part I, Chapter 3 (or alternatively: Jennifer Davis, *Intellectual Property Law* (Oxford, 2012: Chapter 2, Section "Copyright Works").
- Anne-Catherine Lorrain & Julia Reda, 'Freedom of Panorama: a political "selfie" in Brussels', *European Intellectual Property Review* 2015, 37(12), 753-755 (available in WestlawNext).
- Deming Liu, 'Public Art, copyright, and cross-jurisdictional enforcement', *European Intellectual Property Review* 2018, 40(7), available in WestlawUK ([only pages 448-450](#)).
- Joshua Lobert et al., "The EU Public Interest Clinic and Wikimedia Present: Extending Freedom of Panorama in Europe", HEC Paris Research Paper No.LAW-2015-1092 (2015), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602683
- CJEU Case C-145/10, Painer, ECLI:EU:C:2011:79
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- Copyright, Designs and Patents Act 1988, available at <https://www.legislation.gov.uk/ukpga/1988/48/contents>

TUTORIAL 9 – COPYRIGHT LAW II

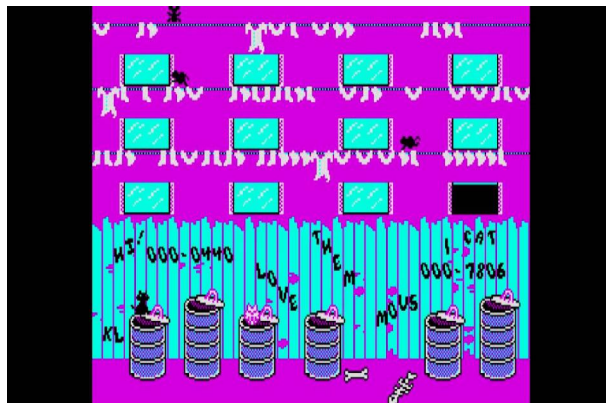
In this tutorial: Exceptions and infringement

Alley Cat was a game created in the 1980s by Bill Williams and published by Synapse Software and later by IBM (picture 1). The game depicts Freddy the cat, who, after managing to escape the dogs in an alley (picture 2), enters the windows to try and find his love, Felicia. Each window contains a different game, represented by tasks that Freddy must perform (pictures 3-5).

Picture 1



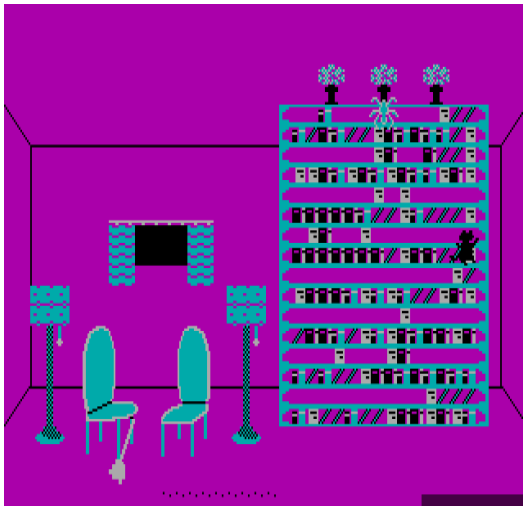
Picture 2



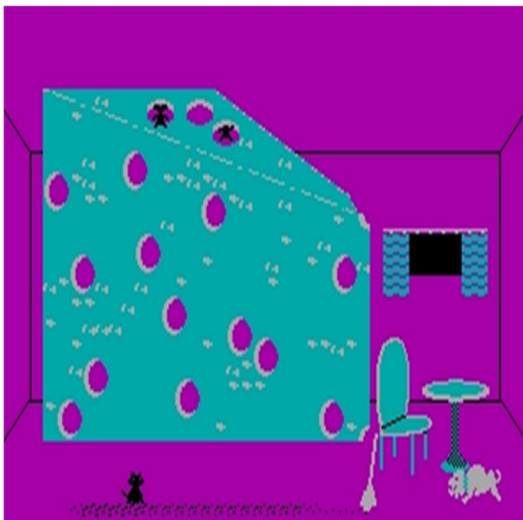
Picture 3



Picture 4



Picture 5



Sarah, a software programmer who is an enthusiast of vintage games, creates her own version of Alley Cat. Her game is called Stray Dog. The colours and graphics are the same as Alley Cat in the initial pages (pictures 1-2), and they immediately remind the user of it – only if you look closer will you be able to

see that the main character of the game is a dog and not a cat. The different games in Stray Dog are the following:

- Picture 3 game depicts dogs instead of cats as the main characters. The pink and black hearts that form the lines are substituted by white and black bones.
- Picture 4 game is set in a kitchen and not in a living room; the dog must go up the cupboards (and not a bookshelf) to get bones (and not flowers)
- Picture 5 game again depicts a dog that must collect bones from all the holes; the dog gets chased by a person while doing so (instead of a dog and a broom, as was the case in Alley Cat).

All games play the same.

Sarah shares the game with some of her friends. They are all so positive about Stray Dog that she decides to sell it online. Users can download the game for €50. The license gives them the right to download the game 5 times and to use it for an unlimited period of time. The license also reads: reselling this software is forbidden.

Stray Dog is a success that makes Sarah very wealthy. In fact, the game gets so successful that interest in vintage games – especially in Alley Cat – rises exponentially. John, a famous writer, writes a book revolving around the adventures of Freddy and Felicia. The book describes all the graphics in the game as if they were settings of the everyday life of Freddy and Felicia, and describes in detail the hurdles that Freddy must go through to find her (which corresponds to the way a user must play the game)

Discuss copyright-related implications of all of the above in light of the European Directives and the case law from the Court of Justice of the European Union.

Recommended reading:

- T. Rendas, "Lex specialis(sima): videogames and technological protection measures in EU copyright law", *European Intellectual Property Review* 2015, 37(1), p. 39-45.
- CJEU Case C-5/08, Infopaq, ECLI:EU:C:2009:465
- CJEU Case C-128/11, UsedSoft, ECLI:EU:C:2012:407
- CJEU Case C-355/12, Nintendo, ECLI:EU:C:2014:25
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version).
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

TUTORIAL 10 – IP LAW IN PRACTICE

In this tutorial: Enforcement and clinical training

An American electronics company (“Company A”) is the proprietor of European patents, design rights and copyrights (“IPRs”) on a smartphone. It is of the opinion that a Korean multinational company (“Company B”), with its European headquarters in The Netherlands, and various subsidiaries in EU member states, infringes these IPRs with its competing smartphones. Company B has its smartphones made in China and they are then imported into the EU by the European headquarters company. The phones are distributed and sold by its national European subsidiary companies both directly to the public via the international website as well as to retail companies, varying from department stores and electronics companies to internationally operating web shops.

Discuss Company A’s litigation strategy aimed at enforcing its IPRs in the EU in a cost effective manner so as to (i) stop the allegedly infringing phones from being sold in the EU as soon as possible, (ii) assess the magnitude of the infringement in terms of the number of infringing products being sold and the financial impact thereof, (iii) recover its damages and/or Company B’s profits and (iv) recover its legal expenses.

Recommended reading:

- Dick van Engelen, ‘Cross-border litigation in cases concerning Intellectual Property’, AA 2013 – informal translation (available on My Student Portal)
- Directive 2004/48 on the enforcement of intellectual property rights, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0048>
- Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215>
- Regulation 608/2013 concerning customs enforcement of intellectual property rights, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0608>

TUTORIAL 11 – MOCK TRIAL

Adam Norton is a screenplay writer, director, and producer of short films. Although he has been fairly successful in his home country (the UK) for several years now, he recently gathered critical acclaim worldwide with his latest film, *SHORT* – an original, slightly auto-biographical account of the struggles of directors of short films.

SHORT won the Palme d’Or at the Cannes Film Festival in 2015. Following that accolade, the company WOW – Watch Only Winners asked Adam if they could include *SHORT* in their online pay-per-view film database. The database run by WOW is comprised of a collection of all the films that have won prizes at Cannes so far, since the very first edition of the festival 70 years ago. WOW works on a subscription basis with its clients, who against the payment of a monthly fee are able to have unlimited access to all films included in said database. Adam accepted WOW’s proposal and receives a percentage of the fees paid by WOW’s clients. Currently, the number of WOW’s clients amount to 600.000.

Much to Adam’s dismay, however, the website CaptainPirate.com got its hands on *SHORT* and provides for its free streaming, with no access restriction or pay wall. Both the owner and the servers of CaptainPirate are located somewhere in the Caribbean and are virtually impossible to track down.

Meanwhile, another website, Movies4u.com, provides hyperlinks to *SHORT* that direct the user to both CaptainPirate and WOW. The CaptainPirate hyperlink is embedded in Movies4u.com, so that when a user clicks on it a new frame opens on Movies4u.com (instead of re-directing those users to CaptainPirate’s website), which makes it possible to watch *SHORT* on that frame. The WOW hyperlink simply directs the users to WOW’s homepage, where they are confronted with WOW’s paywall. Movies4U.com is run by volunteers and does not charge its own users to access films, nor does it have any system of paid advertisement for now (although its owners are considering getting advertisers to pay for advertising space there, due to the growing success of the website).

Neither WOW nor Adam are happy about all this and decide to join forces and sue Movies4u (which operates in the UK).

Instructions:

WOW & Adam

As an in-house lawyer of WOW:

Prepare the claims that WOW and Adam will bring before a UK court to (a) prevent Movies4u.com from continuing to provide hyperlinks to CaptainPirate, and (b) remedy the harm it has already done. Outline also what potential defences Movies4u.com may invoke and how you would address those.

Movies4u.com

As the lawyer of Movies4u.com, prepare a brief as to whether WOW and Adam have any valid claims and what counterclaims, rights and defences you may be able to assert.

Judges

You are judges in the court that has been addressed by WOW and Adam with claims being made against Movies4u.com. Prepare a draft judgment where you analyse the claims, counterclaims and defences of all the parties. You are supposed to make a preliminary decision on the merits of the case which you may follow during the mock trial in class.

You are all expected to make both legal and policy arguments. The briefs do not need to be a formal document but can be bullet points that clearly outline your argument, the legal basis and reasoning of the argument, and should include all relevant citations and references.

For the mock trial:

- Groups WOW & Adam and Movies4u should prepare an oral pleading of 15 minutes in which all group members present their main arguments. You are free to use a short but effective PowerPoint presentation to support your oral presentation of the arguments made and/or conclusions reached during the oral pleading. Most important of the oral pleading is that you are convincing, either by means of visual support or merely by rhetoric.
- Groups Judges should prepare possible questions which they will pose to the pleading counsel during or after their oral presentation. After each party has pleaded their initial pleading, there will be a rebuttal round of 5 each. After that the judges withdraw for a short recess and then deliver their final judgment during approximately 20 minutes.
- All groups are to use the EU directives for the substantive questions.

Recommended reading:

- ALAI, 'Opinion on the criterion of "New Public"', available at <http://www.alai.org/en/resolutions-and-positions.html>
- ALAI, 'Opinion on the right of making available and communication to the public', available at <http://www.alai.org/en/resolutions-and-positions.html>
- A. Ramalho, 'The Opinion of AG Wathelet in GS Media: what's in a "precedent"?', available at <http://kluwercopyrightblog.com/2016/04/26/opinion-ag-wathelet-gs-media-whats-precedent/>
- T. Rendas, 'How playboy photos compromised EU copyright law: the GS Media Judgment', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920677
- B. Jütte, 'A link too far: CJEU rules that sale equals communication and streaming from unlawful sources is illegal', available at <https://europeanlawblog.eu/2017/05/24/a-link-too-far-cjeu-rules-that-sale-equals-communication-and-streaming-from-unlawful-sources-is-illegal-c-52715-filmspeler/>
- Cases: CJEU Case C-306/05, SGAE v Rafael Hoteles SA; CJEU Joined Cases C-403/08 & C-428/08, FAPL; CJEU Case C-607/11, ITV Broadcasting and Others v TVCatchup; CJEU Case C-466/12, Nils Svensson; CJEU Case C 348/13, BestWater International; CJEU Case C-160/15, GS Media; CJEU Case C-527/15, Filmspeler; CJEU C – 610/15 Piratebay XS4ALL v Ziggo