

Intellectual Property Law in the Digital Single Market

LAW3018

COURSE BOOK 2020-2021

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Intellectual Property in the Digital Single Market

Coordinator: Dr. Anke Moerland, 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, a round table discussion, where students will participate together with invited speakers on debating a topic of current relevance, and through research projects, in which students work together on a topic together with 4 fellow students. The result of that research will be presented in a blog, podcast or video. 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;
- Carry out research in a group on a specific topic of intellectual property law.

Recommended Reading

- Christie/Gare, Blackstone's Statutes on Intellectual Property, 14th Edition (Oxford University Press)
- A. Ramalho, Annotated IP Legislation, 2020
- Van der Kooij/Visser, EU IP Law – A Short Introduction to European Intellectual Property Law (2015, deLex)
- Pila/Torremans, European Intellectual Property Law (2019, second edition)
- 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 pre-recorded lectures (approximately 2 hours each), a live online Q&A session, followed by a pre-discussion of the weekly task and an online live one-hour tutorial (based on the PBL system), per week, over the course of two periods. Students are encouraged to participate actively in lectures, Q&A sessions, pre-discussions and tutorials.

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, roundtable discussion and the research projects will be mainly student-lead. In the mock trial and roundtable, the coordinator acts 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. For the research projects, students work together over the entire period of the course, under supervision by one staff member. The outcome of the research will be presented in a blog, podcast or vlog. The blog, podcast or vlog will be assessed, and therefore is mandatory.

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 the coordinator 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 (20%)
- Oral performance at the mock trial (10%)
- Blog, podcast or vlog about group project (20%)

Topic outline

PERIOD 1

DATES	PRE-RECORDED LECTURE	Q&A on LECTURE	PRE-DISCUSSION TUTORIAL (NK)	TUTORIALS (NK)
Week 36: 31/8 – 4/9	Introduction to IP law – theory and rationales (AM)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 37: 7/9 – 11/9	Trademark Law I – Subject-matter, requirements and scope of protection, grounds for refusal (AM)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 38: 14/9 – 18/9 Specialised lecture 1: Multi-media marks	Trademark Law II – Procedural issues; interaction of trademark law with	10 September 11.30h	10 September 12.30h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h

(online live 15 Sep, 18h, Sven Stürmann)	geographical indications (AM)			
Week 39: 21/9 – 25/9	Patent Law I – Subject-matter, requirements and scope of protection, exceptions to patentability (NK)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 40: 28/9 – 2/10	Patent Law II - Procedural issues, software, biotechnological inventions (AKS)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 41: 5/10 – 9/10	Rights similar to patents – Supplementary patent certificates, plant variety rights (AKS)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 42: 12/10 – 16/10	Trade secrets (AKS)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 43: 19/10 – 23/10	EXAM WEEK			

PERIOD 2

DATES	TOIPIC	Q&A ON LECTURE or SPECIALIZED LECTURE	PRE-DISCUSSION TUTORIAL (NK)	TUTORIALS (NK)
Week 44: 26/10 – 30/10	Copyright Law I – Subject-matter, requirements and scope of protection (KT)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 45: 2/11 – 6/11 Specialised lecture 2: Video games and IP Law (3 Nov 18h, Gaetano Dimita)	Copyright Law II – Exceptions and infringement (KT)	Tuesday 16 - 17h	Tuesday 17 - 18h	Thursday Tutorial 1: 8.30 – 9.30 Tutorial 2: 10 – 11h
Week 46: 9/11 – 13/11	Specialised lecture 3: Multi-territorial licensing (Giuseppe Mazziotti)	Tuesday 16 – 18h		Special joint session: Mock trial training (IA) Statenzaal 12/11 10.30h – 12.30
Week 47: 16/11 – 20/11	Design Law (KT)	Tuesday 16 - 17h	Tuesday 17 - 18h	Design law (NK) Pre-discussion: 17 November 17h

Week 48: 23/11 – 27/11	Specialised lecture 4: Enforcement in the Digital Single Market (DvE)	Tuesday 16 – 18h		Special joint session: IP law practice: Clinical training (DvE) Statenzaal 26/11 at 8.30 – 10.30
Week 49: 30/11 – 4/12	Specialised lecture 5: Patentability of AI-generated inventions (Yannis Skoulidakis)	Statenzaal 2/12 at 18-20h		Round table: EU policy on AI and Innovation (Yannis Skoulidakis, Stef van Gompel) Statenzaal 3/12 at 10-12h
Week 50: 7/12 – 11/12	Q&A, office hours AM	Tuesday 15 – 17h		Mock trial (NK and AM) Statenzaal Tutorial 1: 8.30 – 10.30h Tutorial 2: 11 – 13h
Week 51: 14/12 – 18/12	EXAM WEEK			

AM – Dr. Anke Moerland; **AKS** – Prof. Dr. Anselm Kamperman Sanders; **DvE** – Prof. Dr. Dick van Engelen; **KT** – Dr. Kalpana Tyagi, LL.M.; **IA** – Dr. Iveta Alexovicova, **NK** – Naina Khana

Preparation

The tutorials are led by students, following the problem-based learning approach. Students are therefore expected to prepare for each tutorial meeting. Since tutorial meetings will take place online and for only one hour, the pre-discussion is facilitated through an online session following the Q&A session. Discussion leaders will be set for each tutorial meeting in the first pre-discussion meeting. The discussion leader will then lead the pre-discussion meeting for his/her task and the actual tutorial meeting. The outcome of the pre-discussion must be sent in the form of a mindmap or document to the tutor until **Wednesdays 3:30pm** before the tutorials on Thursday. The discussion leader's task is to lead the group to agree on a structure to the content of the discussion in the pre-discussion and to agree on specific questions that students need to answer. During the tutorial, the discussion leaders ensure a logical discussion. The tutor acts as a moderator. All students are required to prepare for all tutorial meetings in advance.

Preparation for the tutorial meeting encompasses recommended readings, participating in the pre-discussion 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 in the pre-discussion.

The online certificates on trademarks and designs must be completed before Week 37 and Week 47, respectively. A copy of the certificates obtained with the course must be sent to the coordinator. 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

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. Teams should consist of 4-5 students each, representing either the applicants or respondents. We will run the mock trial twice per tutorial group.

Mock trial brief

The legal brief will contain the arguments on behalf of the party. There are two stages to that. First, both parties share their skeleton brief with the other party on the Canvas discussion board by **6pm, Friday 4 December 2020**, in order to adjust their arguments and anticipate counterarguments. This skeleton brief does not need to be a formal document but can be bullet points that outline the argument, the legal basis and reasoning of the argument.

The second stage is the final legal brief. This document should include all relevant citations and references and provide all arguments, including their legal basis, a clear reasoning of the 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 members of a group, MUST submit the briefs, individually, by **3:30pm Tuesday 8 December**, using the Canvas assignment feature. It is this latter document that will be graded collectively.

Live mock-trial session

The live mock trial session will be structured as follows.

- a) Opening statements by the parties (1 min for applicant and 1 min for respondent): introduction of pleading counsels (names), presentation of the structure of your pleading and who does which part
- b) Oral submissions by the parties (15 min for applicant and 15 min for respondent): you can use PP but it is not common to do so
- c) Break-out rooms for both parties to discuss and prepare the rebuttal (10 minutes)
- d) Rebuttals by the parties (5 min for applicant and 5 min for respondent)

We will then provide feedback to each other and the teacher will respond to any remaining questions.

The tutor will represent the Court. She will keep the time and ask questions to the pleading counsels. The pleading counsel can ask for an additional minute for finishing the argument – the same amount of time will be granted to the opposing party. Asking and answering questions count towards the submission and rebuttal time.

The pleading parties will be mainly graded based on the conviction and style with which you present your arguments, as well as on their ability to answer questions. This also includes time management skills, such as how they handle the situation when they cross their time limit.

As evident from the oral feedback form (under course material), the tutor will also pay attention to volume, speed of talking, addressing the audience (by looking into the camera), using hands and face expression to emphasize the arguments. We are aware that these issues are more difficult via teleconference – we will take that into consideration. In a court, it is important that you use adequate

language when addressing each other and the Court (honourable judge, co-counsel, counsel of respondent/applicant). If you experience difficulties with your internet connection, you can choose to submit your recorded individual pleading part via the Canvas assignment function before 3:30pm on Wednesday 9 December 2020.

For some instructions on how a case is handled in court and some of the more formal language to be used, see <http://ojen.ca/en/resources/videos/mock-trial-how-to>, and in particular the opening proceedings and opening statements. Note that this resource is targeted at criminal cases and therefore evidence and witnesses are given a lot of emphasis. You can disregard this for our mock trial.

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 streamed live, in order to reach as a broad audience as possible. 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 "The EU policy on AI and Innovation". The roundtable participants will discuss how intellectual property law affects the development and use of AI, and how AI affects intellectual property laws. In particular, the approach proposed by the EU in respect of AI and technological developments and the proposed ethical and legal framework will be assessed in the light of its impact on innovation.

Research projects

In an online environment, interaction with students may be less than in a physical format. To remedy this, we would like you to form groups of 4-5 students. You can work together with students from the other tutorial group. Signing up for the topics is possible via a google document available on Canvas, on a first come first serve basis. Each topic is supervised by a UM staff member. We expect you to:

- Determine the specific focus that you as a group will follow;
- Distribute the research among you;
- Determine the output medium (collective blog, podcast or vlog);
- Work together, without any student free-riding on the work of others and for every student sufficient room to develop his or her research ideas within the time frame. Should there be any problems in terms of collaboration, please inform your supervisor;
- Provide feedback to your group members on what you liked in the cooperation and what could have gone better.

The output of your research project can take the form of a blog (see IGIR blogs for examples of student-written blogs <https://www.maastrichtuniversity.nl/blog/author/343719>), podcast (see for example podcasts from <https://www.ipfridays.com/> or <https://www.inta.org/Programs/Pages/Podcasts.aspx>)

or an instructive video/vlog (see for example <https://www.youtube.com/watch?v=EQsZf2G4Sdc> or <https://www.youtube.com/watch?v=RQOJgEA5e1k>). You can create the output in a collective work altogether (collective grade) or collective works in pairs of 2 or 3 (collective grade for those having worked together). The output, whether in form of a collective work altogether or collective works by small groups, will be assessed in the same manner.

We will assess the output on your ability to

- Structure the content in an easy to follow way; (10% of grade)
- Target a lay-person audience; (10% of grade)
- Follow the red thread throughout the blog/podcast/video; (10% of grade)
- Present content that is legally correct; (20% of grade)
- Identify the relevance of the topic for society; (10% of grade)
- Use clear and simple language; (10% of grade)
- Present original ideas in creating the output; (20% of grade)
- Take up feedback provided by UM supervisor. (10% of grade)

The final grade will be a collective grade.

The process of creating the research output is structured in the following way:

- Week 36: determine who works on which topic
- Week 37-38: initial reading on the broad topic
- Week 39: first meeting with UM supervisor – determine specific focus of the topic
- Week 40-41: targeted research on the specific topic
- Week 42: second meeting with UM supervisor – adjust focus, distribute tasks
- Week 43-44: create first draft text/video/podcast and submit it to UM supervisor end of week 44
- Week 45: third meeting with UM supervisor – discussing points of improvement
- Week 46-47: adjust the output according to comments provided
- Week 48: submit final version to UM supervisor
- Week 49: provide feedback to your group members about the way the cooperation went

The research topics are:

1. Liability of online service providers for copyright infringements (AM)

This topic should discuss the liability regime for service providers for copyright-protected content, and how the new DSM Directive has changed the pre-existing regime.

2. Liability of online service providers for trade mark infringements (AM)

This topic addressed the liability regime for online service providers for trade mark infringing content, what the rules in the E-Commerce Directive are and whether any changes are discussed in this context.

3. Text and data mining for training Artificial Intelligence (NK)

This topic addresses text and data mining for training AI in the context of copyright. In particular, the new mandatory exceptions introduced in the recent Directive 2019/790 on Copyright in the Digital Single Market (DSM Directive) will be assessed as to how it enables EU developers of AI to train AI.

4. Press publishers' rights (NK)

Under this theme, the right for the benefit of press publishers especially in relation to the online use of their publications should be discussed and what changes has the DMS Directive brought.

5. Enforcement of IP rights – AMS Neve (DvE)

This topic addresses the international enforcement of IP rights focusing on what may constitute an infringement in which country and which courts may have jurisdiction over these acts and countries. The judgement of the EU Court of Justice of 5 September 2019, ECLI:EU:C:2019:674, AMS Neve Ltd and Others v Heritage Audio SL and Pedro Rodríguez Arribas (and the earlier cases referred therein) will be starting position.

6. Amazon's 'one-click patent': Interplay between Patent and Competition Law in the Platform Economy (KT)

It is widely believed that Amazon's 'one click patent' is a highly disruptive patent that led to the onset of what we call e-commerce. This research project addresses the interface between patent and competition law, discussing as to whether patents such as the Amazon's 'one-click patent' further innovation in the platform economy while simultaneously leading to overwhelming barriers to market entry for competitors.

7. Injunctive Relief for Standard Essential Patents (AKS)

This topic addresses the question as to whether the holder of a standard-essential patent is still entitled to injunctive relief once a FRAND commitment has been given.

8. Multi-territorial licensing and collective management of Copyright and related rights in Europe (NK)

This topic addresses the purpose and importance of the changes brought about by the adoption of the Collective Rights Management Directive and whether it serves the purpose for which it was adopted.

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, Chapter 2, Section 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:

- 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>
- A. 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>
- 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](http://www.ficpi.org/_uploads/files/6777/geographical%20indications%20in%20the%20new%20eu%20trademark%20law%20regime%20report.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

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>

TUTORIAL 5 – PATENT LAW II

In this tutorial: patent infringement

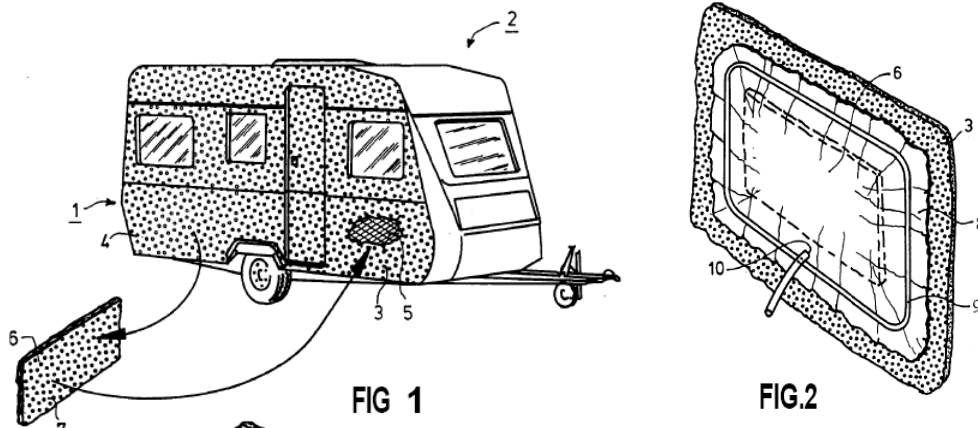
Damage repair method

(A) is the proprietor of a European patent for a method for repairing walls of, for instance, caravans. These walls usually have a dented surface with certain recurring relief pattern. Such relief patterns do recur on the wall because they are formed by using a cylindrical roller that impresses the relief pattern in the wall plates. When the wall is damaged the same relief should be again applied if one wishes to repair the damage in such a way that it cannot be seen that the wall was damaged.

Claim 1 reads as follows:

1. A method for repairing a locally damaged, dented surface (5) of a wall (1), which wall (1) is provided with a relief (4), whereby the dented surface (5) is filled with a filler after which a relief (4) is formed in the filler, **characterized in that** the wall (1) comprises a recurring relief whereby a relief (4) in an undamaged part of the surface is looked up which corresponds with the former relief (4) in the damaged surface, after which a mould(6) is made of an impression of said corresponding relief (4), subsequently the dented surface (5) is filled with a filler, after which the impression on the mould (6) is pressed into the filler and a relief (4) corresponding with the original relief (4) is formed in the filler.

The patent has these drawings:



The patent description states the following:

[0001] The invention relates to a method for repairing a locally damaged, dented surface of a wall, which wall is provided with a relief, whereby the dented surface is filled with a filler after which a relief is formed in the filler.

[0002] The invention furthermore relates to a wall comprising such a locally repaired surface.

[0003] Such a method has been described by US-A4.510.001 whereby a relief is formed in the filler by pressing a graining paper with a texture in the filler.

[0004] With this method the relief on the repaired damaged surface is only an approximation of the original relief.

[0005] The object of the present invention is to provide a method for repairing a locally damaged, dented, profiled surface of a wall, wherein a relief corresponding with the original relief can be formed in the repaired surface in a simple and efficient manner.

[0006] This object is achieved with the method according to the invention in that the wall comprises a recurring relief whereby a relief in an undamaged part of the surface is looked up which corresponds with the former relief in the damaged surface, after which a mould is

made of an impression of said corresponding relief, subsequently the dented surface is filled with a filler, after which the impression on the mould is pressed into the filler and a relief corresponding with the original relief is formed in the filler.

[0007] In this manner the original relief is formed in the damaged surface. As a result of this the repaired surface will accurately match the undamaged relief, and it is no longer necessary to finish the transition area by hand. The repaired part is substantially undistinguishable on the repaired wall.

[0008] So far the repairing of a dented, profiled surface, for example the wall of a caravan, has been effected by filling the dented with a filler, after which it is attempted to form the original relief of the undamaged surface in the filler by means of a manual cutting or engraving operation. This is relatively labourious and time-consuming. If the original relief comprises a pattern of relatively small bumps or studs having different heights and diameters, it is nearly impossible to form the relief by hand, whereby the only alternative is to replace the wall as a whole. This is relatively costly and time-consuming.

(B) uses the same method but instead of looking up the recurring relief on the damaged wall itself he uses sample plates of such relief plates. (B) knows that more than 90% of caravan wall plates use 13 different relief patterns, since these plates come from a limited number of plate suppliers.

Discuss whether (B) infringes the patent and explain how you come to your conclusion.

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 3)
- Pila/Torremans on patent infringement

TUTORIAL 6- RIGHTS SIMILAR TO PATENTS

In this tutorial: Plant varieties

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. Jolien 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. Jolien 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.

TUTORIAL 7 – TRADE SECRETS

In this tutorial: Trade Secret Directive

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.

Assess Helena's position under the Trade Secrets Directive.

Recommended reading:

- Pors, 'The Trade Secrets Directive', available at IE-Forum.nl, IEF 13607, http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum_nl%20Wouter%20Pors,%20The%20Trade%20Secrets%20Directive,%20IE-Forum_nl%20IEF%2013607_.pdf
- European Commission, 'Trade Secrets and Confidential Business Information', available at http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en

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”)
- CJEU Case C-145/10, Painer, ECLI:EU:C:2011:79
- 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), 446-459 (available in WestlawNext)
- 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

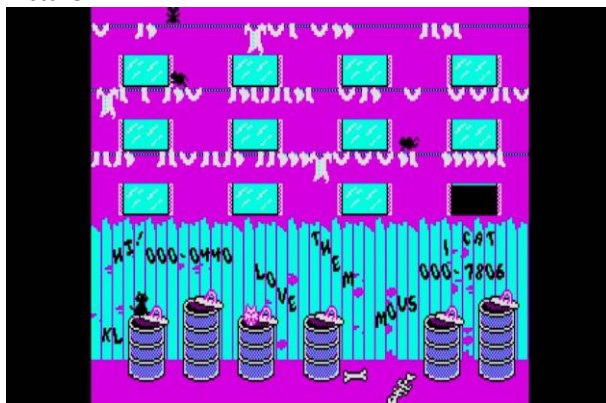
In this tutorial: Exceptions and infringement

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).

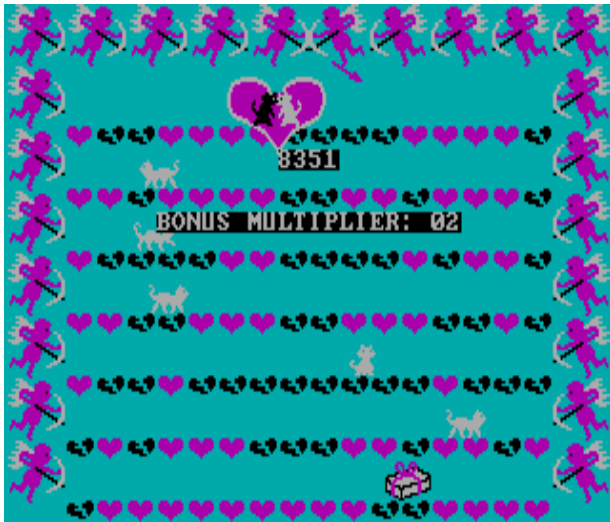
Picture 1



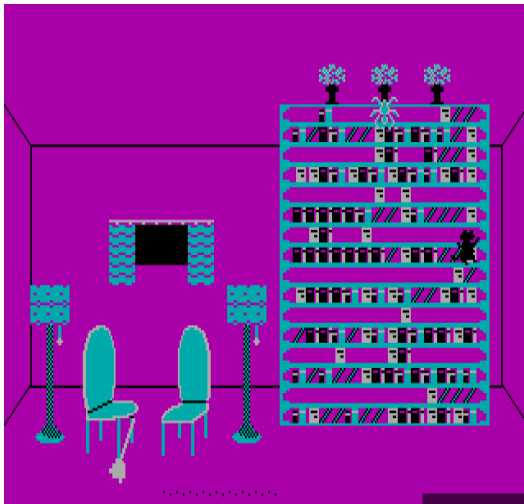
Picture 2



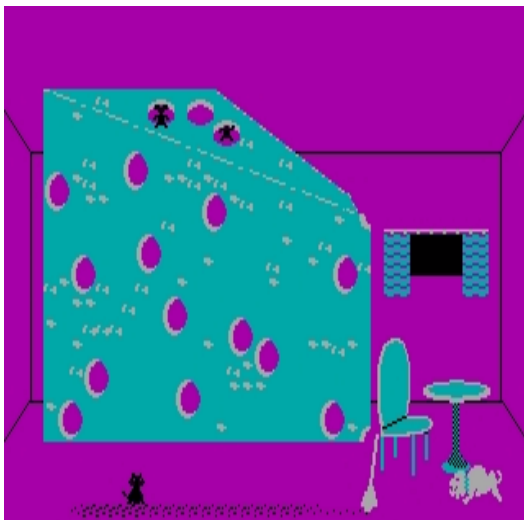
Picture 3



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:

- Thomas Dreier, The Council Directive of 14 May 1991 on the Legal Protection of Computer Programs, European Intellectual Property Review 1991, 13(9), 319-330 (available in WestlawNext)
- Noam Shemtov, Beyond the Code: Protection of Non-Textual Features of Software (Oxford, 2017), Chapter 4
- 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

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.

Tutorial 11 – DESIGN LAW

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

'Sunshine Everywhere' has created the 'Radiance' lamps (figure 1). It is established in the US where it has been selling the lamps since September 2018. The 'Radiance' lamps were first displayed before the public in October 2017 at the 'Shanghai Lamp Show', world's leading trade fair for interior designs. The show is an annual worldwide event that attracts traders from across the globe. 'Radiance Lamp' was subsequently showcased for the first time in Europe in January 2018 Interzum trade fair in Cologne.

Since January 2019, 'Sunshine Everywhere' is selling Radiance lamps in the EU. It happens that 'Super Sunny' from Maastricht has been selling similar lamps across the EU. Because of their similarity with Radiance lamps, 'Sunshine Everywhere' is not happy with the sale of 'Super Sunny' lamps. When approaching 'Super Sunny', 'Sunshine Everywhere' asks them to stop selling these lamps, relying on the protection of the lamps by means of unregistered community design protection (UCD).



Figure 1: 'Radiance' Lamp

'Super Sunny' comes to you for legal advice. Please advise 'Super Sunny' as to whether 'Sunshine Everywhere' has a valid claim as regards UCD protection in the 'Radiance' lamp (Fig.1). Kindly ignore any other issues (such as copyright) that you identify. Instead concentrate only on the design issues in the task.

Recommended reading:

- Van der Kooij/Visser, EU IP Law (Chapter 5)
- Pila and Torremans, Chapter 19, pp 461-479
- 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)

TUTORIAL 12 – 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 13 – 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.

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