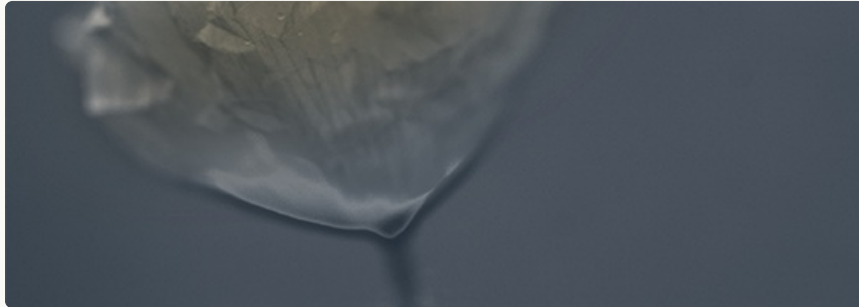


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INTELLECTUAL PROPERTY ATTORNEYS



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## News February 2023

### **Unitary Patent: the transitory measures of the EPO are already in operation, don't miss the train!**

The Unitary Patent is expected to enter into force on 1 June 2023, with unitary effects in all the Member States of the European Union participating in the system. Currently, Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Sweden are the countries that already ratified the Agreements. However, until its entry into force, the number of countries could be increased.



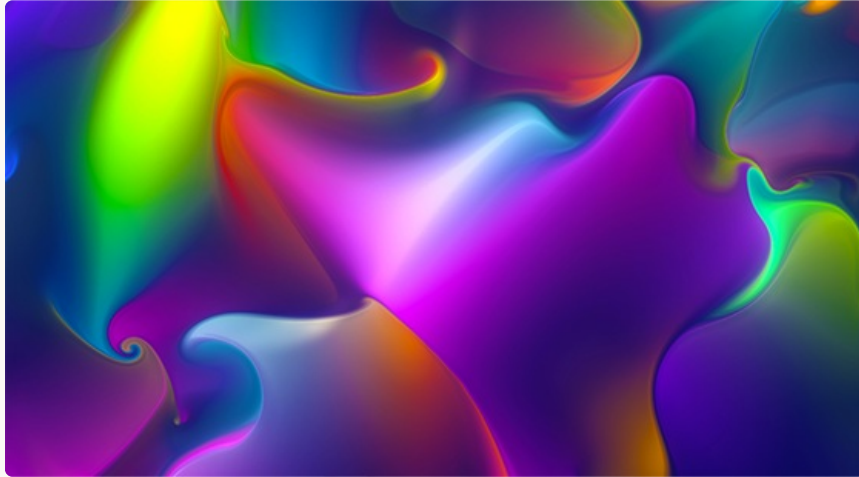
Before the entry into force of the system, the European Patent Office (EPO) has decided to introduce transitional measures to facilitate access to the system as soon as it is implemented. In this regard, European patent applicants which have already received a communication of intention to grant a European patent shall have the possibility to anticipate the entry into force of the Unitary Patent through the following transitional measures adopted by the EPO and applicable from 1 January 2023 until the date of entry into force of the Unitary Patent (1 June 2023, expected date).

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### **AI and copyright: the Stable Diffusion case**

The concept of "artificial intelligence" (AI) was coined in 1956 at the Dartmouth conference to refer to "the science and engineering of making intelligent machines, particularly intelligent computer programs", using the definition proposed by John McCarthy, one of its founders, in 2007. Along the

same lines, the Merriam Webster Dictionary defines AI as (1) “a branch of computer science dealing with the simulation of intelligent behavior in computers”, (2) “the capability of a machine to imitate intelligent human behavior”.



Although in its beginnings the use of AI was limited to applications in very specific technical fields, such as voice recognition or data analysis, in recent years we have seen a huge growth of AI applied to products intended for the public, such as, for example, autonomous vehicles by Tesla® or personal assistants such as Siri® by Apple®, or Alexa® by Amazon®. Very recently, the use of AI has become massively popular with the development of tools such as the already well-known ChatGPT, an AI system capable of interacting with a user based on questions and instructions formulated in an “almost human” way, and capable of performing, leaving aside whether better or worse, tasks ranging from gathering information to “creating” poetry, programming, and practically anything it is asked for. In the artistic field, tools such as DALL-E or Stable Diffusion stand out, and are capable of generating from instructions, images with a multitude of styles, details, and even worthy of a museum.

In this context, in addition to the debate as to whether an AI can “invent” and whether it should be listed as an inventor in a patent (see the DABUS case), the ability to “create” that current AIs already have has triggered the debate on the extent to which it is possible to attribute to them authorship of a piece of work. Added to this is the fact that AI models, to be functional, need to be “trained” with pre-existing content and that this content, whether text or images, may be subject to copyright, and therefore, its use is not permitted without prior authorization from the original author.

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**The General Court has no doubt at all: food supplements are not pharmaceutical products.**



Pharmacies have changed a lot through years and have developed into shops where consumers navigate in an avalanche of products (medicinal, dietary, hygiene, etc.) which can be easily interconnected and used in the same treatments -but with different focus-as they are all intended to improve health. So, is there a clear boundary between all these goods or are they all simply “pharmaceutical products”?

In this line, in a recent decision of the General Court, Case T-12/22 Hasco TM/EUIPO - Esi (NATURCAPS), the Court has made it clear that pharmaceutical products and food supplements fall within the field of health, as do dietetic substances adapted for medical use or nutritional or dietary supplements. However, while such a finding may be relevant in the context of the comparison of those goods for the purposes of Article 8(1)(b) of Regulation 2017/1001, that is, when examining the likelihood of confusion between two marks, the Court has considered that it is not so in the context of the examination for the purposes of Article 64(2) of Regulation 2017/1001, read in conjunction with Article 47(2) of that regulation, that is, in connection with the genuine use of a mark for the goods or services for which it was registered.

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## **Banksy’s trademarks: he who laughs last, laughs loudest**

In November 2021 we announced on Curell Suñol’s blog that Banksy lost his EU trademark number 12575155 (the flower thrower) and, subsequently, in another article in February 2022, we explained that the nightmare continued because other EU trademark registrations were declared invalid as well, all of them having been applied for in the name of Pest Control Office Limited (Pest Control). This company acts as Banksy’s legal representative to prevent his identity from becoming public. Out of 15 trademark registrations consisting of Banksy’s works that were registered before the European Union Intellectual Property Office (EUIPO) in the name of the said company, 7 have been the subject matter of invalidity actions brought by Full Colour Black Limited (Full Colour Black). We would now like to focus on the path taken by EU trademark No. 17981629 (the monkey of the highlighted picture), the only one where Pest Control appealed its declaration of invalidity.



The beginning of the story is very similar to the one we explained previously. Banksy first painted his monkey with a banner around his neck reading “Laugh now, but one day we’ll be in charge” in 2002, as the piece was originally commissioned by a Brighton nightclub. Since then, the image, which the EUIPO considers “possibly the most iconic and famous of his works”, has served as the inspiration for countless works of art, including a version that was sold for \$2.9 million.

Pest Control applied for EU trademark No. 17981629 in November 2018 and it was registered in June 2019. Full Colour Black filed an invalidity action against

it in November 2019, as it did with the “flower thrower” case, among others. The result was the same and, on 18 May 2021, the Cancellation Division upheld the invalidity claim, considering that the trademark had been filed in bad faith because, inter alia, there had never been any intention to use it and the applicant had the purpose to circumvent limitations of copyright law, i.e. the same arguments set out in our previous articles.

Why is this case worth explaining?

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## C BRIEFS



### **Santiago Jordá Petersen: 25 years at Curell Suñol**

We are pleased to announce that this January we celebrated Santiago Jordá's 25th anniversary at Curell Suñol.

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### **WIPO Global Awards for SMEs Edition 2023**

The World Intellectual Property Organization (WIPO, Geneva) is preparing for the 2023 edition of its World Intellectual Property Awards, which will reward small and medium-sized enterprises (SMEs) that make intelligent use of Intellectual Property.

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### **DesignEuropa Awards 2023**

The European Union Intellectual Property Office (EUIPO, Alicante) is holding this year the biennial DesignEuropa Awards.

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