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Plenary Session II:
Current Developments in IP & Antitrust Law

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PROF. HANSEN: We are ready to begin our second session.

Suzanne Munck is here from the Federal Trade Commission (FTC). She has two positions, Chief Counsel for IP and Deputy Director, Office of Policy Planning.

Which do you like better?

MS. MUNCK: Hi. Thank you very much for including me here today.

Before I answer that, I have to say that these are my own views and not necessarily the views of the Commission or any Commissioner.

I think I have one of the best jobs at the FTC because I focus on all intellectual property issues that arise in our enforcement and policy mission, but then, because I have the policy role, I also get to work on efforts that the FTC engages in to reexamine our antitrust work in total.

I have twins. I can't choose my favorite twin, so I can't choose my favorite title.

PROF. HANSEN: On a day-to-day basis, whom do you work with the most at the FTC?

MS. MUNCK: I probably work equally with the Commission and the Commission staff; the Bureau of Competition, the Office of Policy Planning staff, slightly less frequently with the Bureau of Economics, although quite often; and then the third group that I interact with less regularly would be the Bureau of Consumer Protection.

PROF. HANSEN: Years ago, when I was in law school, I worked part-time in the Antitrust Division. Then the Antitrust Division was basically anti-IP and they made no bones about it. That has since changed.

MS. MUNCK: Was that during the "Nine No-Nos"?[1] Was that the mid-1970s?

PROF. HANSEN: Yes. The "Nine No-Nos," which, of course, they were very proud of.

The FTC for some has a reputation as not being that fond of IP; is that correct?

MS. MUNCK: No, I think that's incorrect. The FTC recognizes the strong role of intellectual property in promoting innovation, and we have for more than twenty years. We like to say that intellectual property and antitrust work together to promote innovation, and I would say that the FTC has a strong view of intellectual property rights, and has had for more than twenty years.

PROF. HANSEN: Is there a difference between the FTC's view of the interplay between antitrust and IP and the view of the Antitrust Division at the Department of Justice (DOJ)?

MS. MUNCK: I don't like to comment for DOJ, but I would say that when you're looking at intellectual property issues, there are a few things you can look

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[1] In the 1970s the Antitrust Division of the Department of Justice announced a "watch list" of nine specified licensing practices that the Division viewed as anticompetitive restraints of trade in licensing agreements: (1) royalties not reasonably related to sales of the patented products; (2) restraints on licensees' commerce outside the scope of the patent (tie-outs); (3) requiring the licensee to purchase unpatented materials from the licensor (tie-ins); (4) mandatory package licensing; (5) requiring the licensee to assign to the patentee patents that may be issued to the licensee after the licensing arrangement is executed (exclusive grantbacks); (6) licensee veto power over grants of further licenses; (7) restraints on sales of unpatented products made with a patented process; (8) post-sale restraints on resale; and (9) setting minimum prices on resale of the patent products. The list soon came to be known as the "Nine No-Nos." See Bruce B. Wilson, Dep. Ass't Att'y Gen., *Patent and Know-how License Agreements: Field of Use, Territorial, Price and Quantity Restrictions*, Remarks before the Fourth New England Antitrust Conference (Boston, MA, Nov. 6, 1970).

at. One is the DOJ-FTC IP Licensing Guidelines[2] that were jointly issued by both agencies early last year. They take the view that intellectual property generally is procompetitive and that we don't presume market power. That was a little more exciting in the mid-1990s than it is today because now it's a pretty common view. If you look at those issues, there is commonality between the agencies.

PROF. HANSEN: Makan Delrahim, the new Assistant Attorney General for the Antitrust Division, has made it clear that he thinks IP has an important role. Is that a change for them?

MS. MUNCK: I'm not the right person to comment on DOJ.

PROF. HANSEN: Okay.

In the next five years what's going to be happening in this interrelationship between IP and competition?

MS. MUNCK: The number-one thing that everyone is thinking about is the Fourth Industrial Revolution, and a lot of people are talking about the Internet of Things (IoT) and what's going to happen with the move into 5G. One thing that we will see in the move into 5G is a growth in what has traditionally been telecom players and telecom standards to include other market participants. So if you're looking at connected cars, you're going to see the automobile industry; if you're looking at other connected devices, those players will be involved. I don't know whether that will necessarily raise antitrust issues, but it's certainly something to be thinking about in the competition/IP space.

PROF. HANSEN: When you decide whether to bring a case are you a part of that analysis?

MS. MUNCK: Yes.

PROF. HANSEN: When you look at precedent, is it FTC precedent? Is it just going through all the law in the district courts, the courts of appeals? Is it mostly the Supreme Court? Is there any particular type of precedent that has more importance for you?

MS. MUNCK: I think you are looking at three things: you are looking at precedent, you are looking at economic analysis, and you are looking at the facts of the individual case. So I wouldn't say that you are excluding anything in that analysis.

If you are looking at an antitrust case, you are looking at primarily Sherman Act Section 2 case law to determine whether or not you can move forward, or Clayton Act Section 7 case law in merger analysis, but you are looking at all of those issues in combination.

PROF. HANSEN: What about Section 5 of the FTC Act, which basically lets you do whatever you want to do, right?

MS. MUNCK: I don't think so. I think some people would like us to do more.

Section 5 of the FTC Act allows us to enforce in the competition and consumer protection space. We bring Section 1 and Section 2 and Section 7 cases

[2] U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of. Intellectual Property (revised Jan. 12, 2017).

under Section 5. So you have the Section 1, Section 2, and Section 7 case law, and then you have what is known as "independent" Section 5 authority.

We have a Section 5 Policy Statement[3] that says that we will be guided by the rule of reason in Section 5 analysis. For folks who are not familiar with the antitrust law, that essentially means we will balance the procompetitive benefits and the anticompetitive effects to determine whether to move forward. Our Policy Statement says in Section 5 cases we will generally use the rule of reason and we will be guided by Sections 1, 2, and 7 as much as possible. So it's not "this is unfair, so we're going to go after it" type behavior.

PROF. HANSEN: Final question: Is part of FTC's thinking, *Well, maybe we need to make new law in this area*, or are you basically vigorously enforcing the law that is already out there?

MS. MUNCK: I think it's more of the second. The FTC takes an economic- and fact-based approach to antitrust law. Antitrust law is generally all about the facts, so you are guided by the cases that come to you. When people come to us and say, "We think you should engage in this space," it really involves looking at the facts, the economics, and the law together to determine whether or not to proceed.

PROF. HANSEN: I know in the past people in industry were saying, "This other party is screwing us up and we want you to look at that." Do you get many of those cases?

MS. MUNCK: That is one way that cases come to us. People ask to come in and talk to us and tell us we should be looking at specific behavior. But the most important thing is that antitrust looks at harm to competition, not harm to competitors. So if someone were to come in and say, "My competitor is harming me in this way," if it's only harm between those two parties, that is most likely not going to be an antitrust case.

PROF. HANSEN: Thank you very much. That was good. Well done.

Carlos, how are you?

MR. ABOIM: Good.

PROF. HANSEN: What do you do for a living?

MR. ABOIM: I'm an attorney at law in Brazil, and I do mostly litigation involving IP.

PROF. HANSEN: How often are you in the United States?

MR. ABOIM: Three or four times a year.

PROF. HANSEN: Why is that?

MR. ABOIM: I hope more for fun, for visiting friends and clients, and for wonderful conferences on IP.

PROF. HANSEN: Do you have any American clients?

MR. ABOIM: We have a good number. We always want to have a greater number, but we have wonderful clients.

PROF. HANSEN: Tell us about the Administrative Council for Economic Defense (CADE).

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[3] Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015).

MR. ABOIM: CADE is the Brazilian antitrust authority, and I think most people already know that CADE is our antitrust watchdog.

PROF. HANSEN: Is that more like our FTC or more like our DOJ Antitrust Division?

MR. ABOIM: It's more like the FTC, acting as an independent agency.

PROF. HANSEN: When you bring a case or defend a case, to what extent are you going to be before CADE or before a court? How does that work?

MR. ABOIM: Usually, the major IP and antitrust matters arise in the context of enforcement, where somebody who is unhappy will go before CADE and file a complaint and CADE will decide. The decision issued by CADE can be challenged before a federal court. However, usually CADE decides if there is an antitrust violation first.

PROF. HANSEN: You mentioned that you think to some extent that the Brazilian authorities or Brazilian courts are relying too much on EU and U.S. precedents. Is that true?

MR. ABOIM: Yes, that's true. We are a civil law country. They can only find antitrust violations based on what is in the statute, so whenever they try to find more colorful antitrust violations, they use U.S. and European precedents to do so.

PROF. HANSEN: Is that a problem or is that good?

MR. ABOIM: It depends on where you stand. I personally see the discussion itself as a good thing. But I have seen examples where this creates some uncertainty in terms of what you can do and what you cannot do, and it ends up with some people advocating less consistency of IP rights.

In a developing country this is a problem because we are constantly trying to create a better environment for innovation and protection of IP rights, and when somebody is unhappy when you enforce the rights and try to use foreign precedents — don't get me wrong; the precedent may be okay, but sometimes the facts of the case get lost in translation, and this creates problems.

PROF. HANSEN: If in fact foreign precedents are used, do you have to be very knowledgeable about EU and U.S. views on competition and practice?

MR. ABOIM: Yes, we need to be knowledgeable. Recently, there was a case filed by the national automobile industry against Volkswagen, Fiat, and Ford in Brazil.[4] We needed to be knowledgeable and submit evidence of people who understood the case.

For instance, there was a 3–4 split decision of a panel of seven commissioners. The commissioner who was the reporting commissioner lost, but he wrote a 130-page opinion based on U.S. and European precedents, saying that in this spare parts case it would be unfair to have the lock-in effect and not allow com-

[4] Associação Nacional dos Fabricantes de Autopeças (ANFAPE) v. Volkswagen do Brasil Indústria de Veículos Ltda., Fiat Automóveis S.A. and Ford Motor Company Brasil Ltda. (ANFAPE), Case No. 08012.002673/2007-51, decided on Feb. 14, 2018. *See generally*, WIPO, CENTRO DE DIREITO INTERNACIONAL, AN OVERVIEW OF CADE'S RECENT JURISPRUDENCE REGARDING INTELLECTUAL PROPERTY (December 2014); WIPO/ACE/13/5 Advisory Committee on Enforcement Thirteenth Session Geneva, September 3 to 5, 2018 The Interface of IP Enforcement and Competition Law (Aug. 21, 2018).

panies to produce spare parts due to design rights. In the decision that prevailed, contrary to the previous recommendation of the CADE Superintendency, counselor Maurício Bandeira Maia voted to close the case, which had been ongoing for eleven years, and was supported by the majority of the Administrative Court of CADE. Mr. Bandeira Maia, the winning vote, mentioned two main documents, the opinion of the Patent Office and the opinion from former FTC Commissioner Joshua Wright.[5] We needed to resort to a U.S. attorney to tell them that according to our statute there is no differentiation between rights in the primary market and in secondary market.

They had to tell CADE that we are a civil law country and that there is no differentiation between IP rights that are conferred by the statute according to these markets and that there is no abuse in the exercise of those rights, and if you want to change the statute, you should change the law.

It's challenging to have to talk about foreign law and domestic law before the agency, because they should know that already. We had to fight the misrepresentation of foreign precedents with a foreign legal opinion. The bottom line is that in that case there was never any actual evidence or any specific facts showing abuse of IP rights.

PROF. HANSEN: Panel? Comments?

MS. WARD: I have one. Why are they relying so much on foreign precedent? Do you think they feel uncomfortable about it, or are they not sure about the IP rights? Why is it?

MR. ABOIM: They wanted to create some language that was not within the statute and said, "Oh, this is unfair, and I have those precedents here that say that enforcing your IP right in the secondary market is illegal, is an abuse," and they have to use this collection of precedents to try to bolster this argument. According to our own statute, there is no provision saying that your right is limited to a certain market.

I think they were trying to overreach a little bit what could be considered an antitrust violation. If you're not happy with the scope of the IP right, I think it's legitimate for you to go before the National Congress and try to change the law, not to try to punish those who have fought to obtain the right and go there after the fact and say, "Oh, this is unfair to these guys."

Professor Josh Wright said in his opinion that the law when it was discussed in the Congress already balanced what is good for innovation and what is good to stop free riders. Therefore, all these considerations were already made when the law was enacted, and an executive agency shouldn't make a political assessment of what is convenient or not because in the end that harms innovation, harms predictability, and harms business. That's my opinion.

PROF. HANSEN: Any questions?

MR. LIANOS: I have a question, if I may. You mentioned that Brazilian competition authorities are relying on European and U.S. precedents. With regard to this particular case, there is actually quite significant European case law in

[5] CADE Investigation of Industry Design Registries Statement of Professor Joshua D. Wright (in English).

Renault/Volvo and in cases dating from the 1980s that in my view take a very different perspective than what Josh Wright is putting forward.

There was a choice that was made by the drafter of that decision to favor, let's say, the U.S. approach – Josh Wright is not entirely the U.S. approach; it is Josh Wright's perspective. What about the European precedents, in this case *Volvo/Renault*? There have been even more recent cases in Europe. Have they been dismissed, or is it something that is an ongoing discussion in Brazil?

MR. ABOIM: I think that they were not specifically accepted or dismissed. There was an opinion that had a lot of grounds to find for an antitrust violation. This reasoning was completely dismissed when the prevailing vote was for not finding a violation. So there was no specific acceptance of each argument. There was a reasoning.

I agree that the European precedents were in line with a finding for an antitrust violation, but I think that the facts and the law in Europe are different than the facts and the law in Brazil, so I think they should not automatically apply. They could be used as a persuasive argument, but they got it right with the facts and the law before them.

PROF. HANSEN: Thank you, Carlos.

Ioannis, you are in London?

MR. LIANOS: That's correct. Right now I'm here, but yes, I live in London.

PROF. HANSEN: You're with University College London. How is that gig? Do you like it?

MR. LIANOS: Oh, yes, very much. I've been there for thirteen years, so I like it very much.

PROF. HANSEN: Where were you before that?

MR. LIANOS: I was based in France. Also I studied in the United States at New York University and I was at Berkeley for some time.

PROF. HANSEN: How did you end up picking London out of all the places you've been?

MR. LIANOS: Well, it's pretty nice, isn't it? Good theater. Food is improving. [Laughter]

PROF. HANSEN: Brexit — will you remain or break up?

MR. LIANOS: We'll see how the negotiations go. We don't know yet.

MS. WARD: Are you a remainer or Brexiteer?

MR. LIANOS: Oh, I'm a remainer, obviously. But even if there is Brexit, I might still stay, depending on the conditions of the agreement between the European Union and the United Kingdom.

PROF. HANSEN: You indicated beforehand that you wanted to talk about sham litigation, so why don't you tell us about that?

MR. LIANOS: I want to discuss an area of interaction between IP and competition which I found quite intriguing and quite interesting, which is the fact that competition law and antitrust in the United States are intervening in order to limit the abuse of IP and the regulatory system. You have a number of these cases coming in. For instance, they involve collusive behavior, settlement agreements, reverse payment settlements, or pay-for-delay, which have been obviously the

focus of attention both here in the United States, with the *Actavis* case in the Supreme Court,[6] as well as in the European Union, with the *Lundbeck* case more recently.[7]

We have a number of unilateral practices that might also be important here, in particular, fraudulent use of the patent system, misrepresentation to the Patent Office, and there is case law in the United States, but very old case law, I think from the 1960s.

In Europe you have the *AstraZeneca* case,[8] a recent case of the Court of Justice, but also more recently in some litigations basically the use of the IP litigation process in order to impose costs on your competitors.

PROF. HANSEN: You're talking about sham litigation now, right?

MR. LIANOS: Yes. The idea is that you're not necessarily aiming to claim your rights; your main objective is basically to harass your rivals and increase their costs. In this area, in the United States you have the Supreme Court precedent in the *Columbia* case,[9] but more recently in FTC v. *AbbVie*[10] $448 million of damages was awarded for the abuse of the litigation system in this context.

In Europe we also have a number of cases in this area, starting with *ITT Promedia*,[11] more recently *Protégé International*,[12] where the Court of Justice basically held that if you are bringing a baseless claim or you are maintaining a baseless claim and at the same time that is part of a strategy that there is intention to harm a competitor, and the main reason that you bring the case is to harm the competitor, that could be considered as a violation of competition law. I think there is a quite interesting discussion about you can identify these two very broad criteria, how you can actually build this up.

One of the things that I found quite interesting in the *FTC v. AbbVie* case was the importance of the patent attorneys in this context. The district court specifically mentioned that the patent attorneys knew that the case they were bringing was baseless — there was no competition and no equivalence between the different products, the technologies that were the subject of the litigation, but the main reason they were bringing this was basically to harass their rivals — and the court assumed from the fact that these were patent attorneys, these were professionals who knew what they were doing, that the intention of the firm was to harass its rival rather than bring a valid claim.

PROF. HANSEN: How often do you think this type of litigation is being litigated?

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[6] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[7] Case T-472-13, H. Lundbeck A/S and Lundbeck Ltd v. European Comm'n, Judgment of the General Court (Ninth Chamber) of 8 September 2016.

[8] Case C-457-10 P, AstraZeneca AB and AstraZeneca plc v. European Comm'n, Judgment of the Court (First Chamber), 6 December 2012.

[9] Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 113 S.Ct. 1920 (1993).

[10] FTC v. AbbVie, 107 F.Supp.3d 428 (E.D. Pa. 2015).

[11] Case T-111-96, ITT Promedia v. European Comm'n, Judgment of the Court (Fourth Chamber, extended composition) of 17 July 1998.

[12] Case T-119-09, Protégé Int'l Ltd v. European Comm'n, Judgment of the General Court (Seventh Chamber) of 13 September 2012.

MR. LIANOS: Not very often, but I think there will probably be more in the future. Of course, all of the cases, both at the EU level and in the United States, are focusing on the fact that this type of litigation is exceptional.

But, at the same time, I think in Europe we now have difficulties, for instance, in bringing excessive-pricing litigation. Particularly, if you look at the *Flynn* case,[13] a recent case of the UK Competition Appeal Tribunal, that could have also been brought as an abuse-of-process case. That might lead some litigants to try the sham litigation or abusive litigation strategy rather than to bring directly an excessive-pricing claim in case the Competition Appeal Tribunal, the UK precedent, takes hold all over Europe. It is not clear yet what the Court of Justice will do.

PROF. HANSEN: So under your definition actually the lawyers are unethical and they could be accused of unethical practice. Is that true?

MR. LIANOS: There are possibilities to bring a case against the attorneys themselves according to the standards.

PROF. HANSEN: Has anyone ever thought of doing that?

MR. LIANOS: I don't know. The civil procedure rules in various jurisdictions may offer that possibility. But what I'm talking about is a competition case, so it's basically a case brought against a specific firm for having abused in a certain way.

PROF. HANSEN: I got what you have, but there are still lawyers involved who did the abuse.

MR. LIANOS: Yes, there is a possibility of bringing a case against them in addition, depending on the rules of professional ethics.

PROF. HANSEN: Is there a danger in excessive pricing that there will be abuse of those defenses basically to try to intimidate the plaintiffs, just throw it in there, and they have to worry about being called this or this or this? Is that a possibility?

MR. LIANOS: You are in a free economy, and obviously setting the price is a very important element of competition. There is a risk in an excessive-pricing case. Considering that the price might be excessive and an antitrust case could be brought, which in Europe might lead to important fines going up to 10 percent of the global turnover of the company, that might be somehow creating some business incentives, let's say, for firms.

At the same time, I think the effort that has been made by the European courts, and particularly the Competition Appeal Tribunal case in the *Flynn* case, is to limit and narrow the doctrine of excessive pricing. You know, what is "excessive?" Basically, there are two parts of the test: there is the excessiveness limb and the unfairness limb. So there has to be, first, the fact that there is an excessive price, a price that is beyond the reasonable economic value of the product; and, second, that this difference is unfair.

There actually there have been efforts by the Competition Appeal Tribunal to narrow that and to protect the rights of the companies and the presumption of

[13] Pfizer and Flynn Pharma v. CMA, Judgment of the UK Competition Appeal Tribunal (7 June 2018).

innocence in this context by saying that you have to rely on various theories and various methods and approaches in order to determine if the price is excessive, and only if all of them are moving to the same direction could that be considered a valid excessive-pricing case.

There I will say there is some difference with the case law of the European Court of Justice, which in the *United Brands* case[14] and more recently the Latvian copyright case[15] wasn't as strict as the Competition Appeal Tribunal in the United Kingdom. But this is, again, an ongoing conversation.

The Commission has recently opened a formal investigation into concerns that Aspen Pharma has engaged in excessive pricing concerning cancer medicines.[16] There are a number of investigations in a number of European countries on this issue.

There is an ongoing process of designing better rules for practice.

PROF. HANSEN: Do you find in continental Europe or other places that the public or the authorities are more suspicious, just generally speaking, of corporations than, for instance, in the United States or in the United Kingdom?

For instance, prior to a 2006 Directive,[17] comparative advertising was almost impossible in Europe because of the view that they would just be lying about the other party. I don't know how much that is being followed by the Commission. That view would be considered crazy in the United States, which thinks comparative advertising is exactly what you should have.

MR. LIANOS: I cannot comment on that because I don't have any surveys about the position of the European public on that. But I can say that from the U.S. antitrust perspective — I use the expression by Judge Posner in a recent conference in Chicago — "antitrust is dead."[18] In a way, if you compare the activity of the U.S. antitrust agencies with that of the European agencies, there is definitely a difference there.

Now, if that is due to the fact that in Europe we are more suspicious, so populist arguments might be more influential, that's not something I can say for sure is the cause of that. But it is clear that there is a difference in the intensity of the antitrust activity in Europe and in the United States right now in the design of the various standards. For instance, an excessive-pricing case could not be brought in the United States, an exploitative type of abuse, unless you use Section 5 of the FTC Act in a certain way.

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[14] Case 27/76, United Brands Co. and United Brands Continentaal BV v. European Comm'n (*Chiquita Bananas*), Judgment of the Court of 14 February 1978, ECLI:EU:C:1978:22.

[15] Case C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Konkurences padome, Judgment of the Court (Second Chamber) of 14 September 2017, ECLI:EU:C:2017:689.

[16] European Commission, Press Release, Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines (15 May 2017).

[17] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (Text with EEA relevance), O.J. (L) 376/21 (27 Dec. 2006).

[18] Richard Posner: The Real Corruption Is the Ownership of Congress by the Rich, Keynote Address at Stigler Center, Chicago, promarket.org, Posted on Mar. 28, 2017.

MS. MUNCK: Just quickly to jump in, I don't think it would be fair to say, for example, that the FTC has stopped engaging in pay-for-delay cases. Those continue to be a high priority for us, as Chairman Joseph Simons said in a recent Georgetown speech.[19] So I wouldn't want to send a signal that we are walking away from that in any situation.

Also, in the *AbbVie* case, to your question, you have to look at the facts. They were claiming a penetration enhancer for a certain topical drug, and they disclaimed certain enhancers during prosecution and then later claimed doctrine of equivalents infringement of those enhancers. So you have to look at the facts as well.

MR. LIANOS: Sure. Concerning the first point, my points were about unilateral practices. There is much more convergence with regard to collusive practices in this context, but in actual practice there is a very important difference between the European Union and the United States with regard to excessive pricing, for instance.

PROF. HANSEN: Any comments?

MR. HAHN: Tobias Hahn from HOYNG ROKH MONEGIER. I'm a patent litigator.

I see the issue of sham litigation, particularly in relation to costs of the litigation, but since it's an issue really of the costs of litigation, I would strongly advocate to not deal with these cases under competition law. It's something the respective national laws need to sort out on the cost side.

I would strongly advise against competition law getting involved there because it must be the clear exception that going to a court and enforcing a right, no matter how ridiculous your position may be on the enforcement of rights, must be ensured. If you file an apparently unsubstantiated claim, then you will lose the litigation. That's the natural consequence, and I think that should remain the natural consequence, and sort out the rest on the costs.

PROF. HANSEN: Any questions from the audience?

AUDIENCE [Prof. Tom Cotter, University of Minnesota Law School]: This goes to what both Tobias and Ioannis were talking about. In the United States, under the *Columbia Pictures* case that Ioannis cited, for an antitrust plaintiff to proceed with a sham litigation claim under Section 2, the antitrust plaintiff has to demonstrate that the assertion of IP rights was both objectively and subjectively baseless to strip the antitrust defendant of *Noerr-Pennington* immunity.[20]

Is there a comparable safeguard under EU law that would alleviate the problem that Tobias flagged?

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[19] Prepared Remarks of Chairman Joseph Simons, Georgetown Law Global Antitrust Enforcement Symposium, Washington, D.C. (Sept. 25, 2018).

[20] Under the *Noerr–Pennington* doctrine, private entities are immune from liability under the antitrust laws for attempts to influence the passage or enforcement of laws, even if the laws they advocate for would have anticompetitive effects. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965).

MR. LIANOS: Yes, exactly. The same conditions actually apply, so you have objectively baseless type of litigation and then the fact that it's part of a strategy to harass a competitor, which is the intention element.

The question is what type of evidence you need for building a case. For example, for the first aspect of objectively baseless, even a cost-benefit analysis might work. If you bring a case that has a huge amount of cost for basically a very small benefit, unless there is conclusive evidence, that might be an indication of an objectively baseless type of litigation, if you knew that there was clearly not necessarily an IP violation there.

The second element, the intentional element, is a little trickier. You have to rely on evidence about other types of practices that form part of a pattern of exclusionary conduct in this case. So it depends again on the facts of each case.

Again, it might sound quite broad, but actually the courts are very careful to indicate that these are exceptional cases, and I think they will not necessarily be very open to broadening the standard in the future.

PROF. HANSEN: Thank you very much.

MR. HAHN: Just one additional comment since Tom addressed me as well. In German litigation that is usually not an issue because we have cost reimbursement, the loser pays, so in the end you'll get at least most of the money you spent on litigation back. I think that is the sort of solution you should be looking for.

PROF. HANSEN: Okay.

MR. ABOIM: Using sham litigation is an example of what I was talking about before. There is no sham litigation in the antitrust law in Brazil, but they investigated *Lundbeck* for enforcing data packaging for many years, and last October they issued a decision finding there was no sham litigation because there was a favorable judicial decision, and I wondered if there wasn't.

We file many leading cases seeking to enforce IP rights when nobody has done it before. So, if it depends on a favorable decision to not have a final sham litigation, that certainly has a chilling effect on access to courts.

PROF. HANSEN: Thank you.

PROF. COHEN: Mark Cohen from UC Berkeley.

It seems to me that there are three approaches to sham litigation or abusive litigation: one is antitrust; one is general civil law principles; and the third one is within the IP law, whether *Walker Process*[21] or IP misuse.

I think the Chinese experience, to the extent it's relevant to this, is that abusive assertion of IP is generally handled as a civil law matter, under the civil law rather than under the IP law or antitrust law, where it would actually have a lot of benefit in dealing with low-quality or no-quality patents that are frequently prosecuted and litigated.

The result has also been that those kinds of cases typically go through the civil courts rather than the IP courts, which have a very limited understanding of both antitrust and of IP. So there is basically no real deterrence, notwithstanding that there sometimes is cost recovery for attorney's fees; but at least that is nomi-

[21] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 86 S. Ct. 347 (1965).

nal. The remedy, I think, depends in part upon the kinds of courts that hear the cases.

PROF. HANSEN: Okay, thank you.

Annsley, you're world famous for being IPKAT, and you're called AmeriKat.

MS. WARD: Yes.

PROF. HANSEN: Do you have a British accent?

MS. WARD: No, I don't. I am wholly American, 100 percent American-made.

PROF. HANSEN: How different, by the way, are the people in London from the people — if there are any differences — in the United States?

MS. WARD: The English are renowned for not being very direct. They are very polite. They talk around issues without necessarily always getting to the point, so you may leave a conversation and not be quite sure what happened or what was decided, but you would have had a lovely time doing it and had numerous cups of tea. [Laughter]

PROF. HANSEN: What you want to talk about.

MS. WARD: I want to talk about the *Unwired Planet* decision.[22] This was a decision from our Court of Appeal that was handed down at the end of October 2017.

The main issue I want to talk about is the question of jurisdiction expansionism and this global fair, reasonable and nondiscriminatory (FRAND) "arms race" between courts across the world. We are talking about telecoms, we are talking about standard-essential patent (SEP) litigation, and which court is the right court to determine FRAND licenses and issues of competition, namely dominant and abusive litigation.

At the end of October 2017, the U.K. Court of Appeal handed down their decision in the *Unwired Planet v. Huawei*. It was no surprise to me what happened. The Court of Appeal decision was written by Lord Kitchin, as he now is (he has just been elevated to the Supreme Court, so we have an IP patent specialist judge now sitting on our Supreme Court for the first time ever). He upheld Mr. Justice Colin Birss's decision at first instance,[23] which set a global FRAND rate for a portfolio of patents.

Huawei had taken issue with this because, their argument goes, why should an English court set a global FRAND rate for a portfolio of patents that includes patents that are not UK-designated, foreign patents? Was the United Kingdom overreaching?

The Court of Appeal said: "No, it wasn't. It's perfectly within our remit to set global FRAND license terms. We are not infringing or usurping the foreign courts, which would still have jurisdiction to determine validity and infringement issues and, importantly, remedies."

This decision has been a very welcome movement for SEP owners. Some commentators are saying, "Well, this is just showing that the English court is try-

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[22] Unwired Planet Int'l v. Huawei Techs., [2018] EWCA Civ 2344 (23 Oct. 2018).

[23] Unwired Planet Int'l v. Huawei, Techs., [2017] EWHC 711 (Pat) (5 Apr. 2017) (Birss, J).

ing to make itself seem very attractive to litigants, especially SEP litigants, in advance of the upcoming Brexit deadline in March." That may be reading too much into the decision.

The question that I have is different. We are starting to see other courts and bodies be more visible and proactive about their role. We are seeing guidance being issued: for example, the Japanese Patent Office's Guide to SEP negotiations and licensing;[24] Guangdong Guidelines,[25] which say that the Guangdong courts are able to set a global FRAND rate; and the European Commission Communication.[26]

We are starting to see more activism of other courts saying, "Well, we can set a global FRAND license."

"Oh, no, but we can as well."

"We can as well."

So there are issues of who gets to set it and, especially when we have competition issues, which are at least nationally and sometimes regionally specific, how are the courts balancing that? I don't have a specific answer to it because we are still developing with this, but that is something that we are seeing more and more.

In particular, if I may — though you're in charge, Hugh — I will turn to Tobias, because one of the arguments that came from Huawei on the appellate side was: "Well, you know, you may say you're not usurping foreign courts' rights, but actually you are indirectly meddling in their affairs, because if you set a global FRAND rate in English court, what about our litigation in Germany? What's the point of that?" I think, Tobias, you may have an answer to that.

PROF. HANSEN: Before that, let me ask a question. Now I'm in Germany. Can the Court of Appeals for England say under German law, "We don't care what they're doing; this is a bad SEP," or to some extent are they bound by some sort of estoppel because "These people have litigated this someplace in the world"? What happens?

MS. WARD: This fundamentally comes down to the nature of the claim. This was a patent infringement claim based on territorially limited rights. It involved the UK designations of these patent rights, so the English court can only decide, "Yes, these are infringed, and because these are infringed we are going to go ahead and set a FRAND rate and the FRAND terms of the license."

Within that license — and this did not get a lot of airtime because this wasn't under appeal by Huawei — there was a mechanism whereby if one of the patents in the portfolio was challenged in another court — e.g., a German designation of a patent was challenged and held to be invalid — then there would be a

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[24] Japan Patent Office, "Guide to Licensing Negotiations Involving Standard Essential Patents" (5 June 2018).

[25] Guangdong High People's Court, "Working Guideline of Guangdong High People's Court on the Trial of Standard Essential Patent Dispute Cases (for trial implementation)" (26 Apr. 2018).

[26] European Commission, Communication from the Commission to the Institutions on Setting out the EU approach to Standard Essential Patents (29 Nov. 2017).

mechanism to turn down the royalty. That is the way that the English court dealt with it.

It didn't get a lot of airtime. It's something that's probably going to come back again as to whether that's the right mechanism, but Huawei is completely free to go to the German courts and try to knock out these patents. Then the knock-on effect would reduce this royalty.

PROF. HANSEN: We were talking before about specialized courts, and of course England to an extent has that at first instance and a patent-savvy Court of Appeal. Usually, the patent people on the Court of Appeal take the opinion.

MS. WARD: You have to keep in mind that these specialist judges were all at the bar together, and the IP bar, especially the patent bar in London, is a very, very closed circle. The top patent silks would just fill this table here. So they know each other. They've been up against each other. Some may be good friends. Some may think about cases the same way, given their litigation history and experience. Others may come at a case completely differently which may shade how they look at cases on appeal. They are all individuals at the end of the day.

But, generally, where they are united is that our judges are pretty commercially savvy, and I believe they are becoming increasingly commercially savvy, which, in turn, makes our courts attractive. Courts have to be competitive, flexible, and commercial.

As a practitioner, I welcome a competitive and commercial system. I am conscious of Brexit approaching and what that may or may not mean in terms of any alleged chilling in our jurisdiction.

PROF. HANSEN: Thank you.

MR. HAHN: I think what's important to keep in mind for the question of jurisdiction is that the specific question that was before the UK court was the request for an injunction based on the UK patent. The way Colin Birss handled it was he said, "I will issue an injunction unless you as a defendant accept what I have determined as the FRAND rate." Bearing that in mind, I don't think there is a true jurisdictional issue because the UK judges have decided on a truly UK-based motion based on UK patents.

I think what's also important to keep in mind in that specific case is that Huawei, if I understand correctly, was not on appeal actually challenging the determination of the FRAND conditions by Mr. Justice Birss, so they seemed to have accepted it. At least, that was not part of the motion in the appeal.

MS. WARD: There were three grounds of appeal.

The first appeal was that he should not have set a global rate; it should have been a national rate. Because Mr. Justice Birss is very good at being very commercial about something and looking at both sides and hitting a middle point, he said there's one FRAND rate. Huawei said, "No way could there only ever be one FRAND rate in any set of circumstances." He was overturned on that point, and that point was, "Yes, you can actually have a range." It wasn't that the court couldn't set some licensing terms; it was that it ended up being a global rate, which was under appeal.

MR. HAHN: As I said, I don't think it's a purely or truly jurisdictional issue, but, as you said, there are implications. The consequence will, of course, be

that you will have to accept the global FRAND rate set by the UK courts in order to avoid the restricted-to-the-United Kingdom injunction.

I think there is wording in the appeal decision that the only consequence you have to face as a defendant is the UK injunction, and you may well decide not to accept the FRAND offer and then take the UK injunction and you will only be injuncted for the United Kingdom. Whether that's a very realistic scenario I don't know. What reasonable company would accept that as an alternative? I think that's a difficult thought.

The other point is — and you've pointed it out as well — so okay, the UK court may set a global rate. But in fact it didn't set a global rate. The rate was differentiating between different regions. That's one thing.

The other thing is, of course, if you take into account the other defenses that Huawei brought forward in that case — e.g., "We filed invalidity actions in Germany; these patents will be invalidated" — the specific FRAND terms he set provided for adjustment clauses in case patents fail in other jurisdictions. I think that will cover some of the arguments that Huawei had brought against the jurisdiction.

PROF. HANSEN: Okay, thank you.

MR. DJAVAHERIAN: I think we need to look at this issue through a bit of a different lens, and that is the lens of traditional patent law. There is a bit of burden shifting going on. Yes, the court said, "Well, if you don't take this, I'm only going to limit my injunction to the United Kingdom," so it's not global in that sense. But negotiating with a gun to your head is not negotiating. Many companies cannot operate if they would be excluded from a certain territory.

The United States has had FRAND rate-setting cases also, but we've done it based on consent. In *In re Innovatio* here in Chicago,[27] the parties agreed to that process. In *TCL*, where I'm from in Orange County, the parties agreed to that process.[28]

Here there wasn't an agreement to a global rate setting, and the court effectively determined infringement and validity for U.S. patents and Chinese patents and other countries' patents and said: "I'm determining the rate here. Assuming that they are valid, I'm going to flip the burden of proof and put it on you as the licensee to go to these countries, spend a bunch of money, and try to invalidate these patents to knock down the rate to what the FRAND rate should be."

That, I think, is a significant change in how we have always done patent litigation, where the plaintiff's burden is to establish under the rules of the relevant jurisdiction that there is actual use and infringement. I view that as a bit of a concerning development, particularly if this becomes the beginning of, as you put it, an "arms race" where different jurisdictions are vying to set a FRAND rate that is favorable for their industries, their companies, what have you.

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[27] *In re* Innovatio IP Ventures, Inc., No. 1:2011cv09308, Document 565 (N.D. Ill. 2013).

[28] TCL v. Ericsson, Case 8:14-cv-00341-JVS-DFM, Document 1802 (C.D. Cal. Dec. 21, 2017).

PROF. HANSEN: After Brexit, some worry that no one's going to come and bring lawsuits in the courts of England and Wales, but actually this could be an incentive to bring cases there.

MR. DJAVAHERIAN: I don't think it's because of Brexit. I don't know whether that that came into the court's analysis. I do think it's something that has been put forward by a certain interest group, namely companies that focus on patent licensing of SEPs, as a solution to their concern, which is, "I don't want to have to chase people all around to these different jurisdictions and sue them, and that's the only way I can get them to take a license."

I know we've heard interest from the Chinese for doing this. In the United States it remains a consensual process. But the Europeans seem to be convinced that there is the problem of "We've got to figure out a way to get these SEP holders paid," and doing it on a global basis rather than a national basis seems to be directionally where at least a number of thinkers are going. I think that's the wrong direction, but I think that's what the momentum is currently.

PROF. HANSEN: Okay. Thank you.

MS. WARD: I just want to correct one thing. Paragraph 80 of the Court of Appeal *Unwired Planet* judgment contradicts your point.[29]

AUDIENCE: [Prof. Tom Cotter, University of Minnesota]: Following up on the last three comments, on the one hand, the English court, I think rightly, points out that there are tremendous efficiencies from setting a global rate and that a global rate is what would normally be voluntarily negotiated if there hadn't been litigation.[30] On the other hand, there are risks of forum shopping or abuses, comity problems, and we see some of those problems even in the United States, where courts on a couple of occasions, in *Microsoft v. Motorola*[31] and *Huawei v.*

[29] [2018] EWCA Civ 2344 (23 Oct. 2018), ¶ 80:

> The next matter is the meaning and effect of the undertaking that UP has given to ETSI in relation to the SEPs in its patent portfolio, wherever those rights may be situated. This is a single undertaking, the construction, validity and enforcement of which are governed by French law. As we have explained, the judge decided, as he was entitled to decide, that this undertaking is enforceable by third party implementers and it requires a SEP owner to grant a licence to any such implementer under its SEPs on FRAND terms. One of the critical questions for the judge in this trial was what those FRAND terms were for a licence by UP to Huawei and, in particular, whether UP was required by its undertaking to grant to Huawei a licence under its SEPs territory by territory or whether it could meet its obligations to ETSI by offering to Huawei a worldwide licence. The judge decided this issue in favour of UP. In doing so he was not adjudicating on issues of infringement or validity concerning any foreign SEPs. Nor was he deciding what the appropriate relief for infringement of any foreign SEPs might be. He was simply determining the terms of the licence that UP was required to offer to Huawei pursuant to its undertaking to ETSI. It was then a matter for Huawei whether it was prepared to take that licence, and to do so in its full scope. It could not be compelled to do so, and if it chose not to, the only relief to which UP would be entitled would be relief for infringement of the two UK SEPs the judge had found to be valid and essential.

[30] *See id.*, ¶¶ 38–39, 60–61, 96, 110, 115.

[31] Microsoft Corp. v. Motorola Inc., 696 F.3d 872 (9th Cir. 2012).

Samsung,[32] have enjoined litigants from pursuing claims or enforcing claims in foreign countries in FRAND-related cases.

I'm wondering what any of the panelists would think about a proposal recently floated by Professor Jorge Contreras for the establishment of a non-governmental global institute that parties could use, perhaps standard-setting organizations (SSOs) could compel them to use, to determine FRAND licensing issues, sort of a mandatory alternative dispute resolution (ADR) system globally.[33]

MR. HAHN: I think mandatory ADR is very difficult. I don't think you can make it mandatory from an EU perspective. Perhaps that would be on everyone's wish list in position one, but I don't think you can do that.

AUDIENCE [Prof. Cotter]: But the SSOs could require it.

MR. HAHN: Yes, but the SSOs will never agree on anything due to the diversity of their members. I think we all agree that that would be the ideal solution, but I don't think that will happen.

PROF. HANSEN: We're going to have to move on because we have two more panelists.

Mark Cohen is a man for all seasons. He has done a million things, both foreign and in the United States. He taught at Fordham. He's now at Berkeley.

You've done a lot of things: a big muck-a-muck in the USPTO, worked very closely with Dave Kappos and previous directors; you were an attaché for IP in our embassy in China. Of all the different things you've done what is the thing that you enjoy the most?

PROF. COHEN: I enjoy teaching the most. But the other thing that I've enjoyed over the years is setting up in the government new structures for engaging on IP. So we set up the attaché program; we did road shows; I established a working group between the United States and China on intellectual property; I made the phone call to invite China to the IP5 (Five IP Offices) and later the TM5 (Five Trademark Offices), working with Jon Dudas at the time to set up a different way of handling patent prosecution. If I look back on my personal accomplishments, those new structures, which continue for the most part to exist, are probably the things I'm proudest of.

PROF. HANSEN: China?

PROF. COHEN: Big country.

PROF. HANSEN: Big country, complex. For a while everyone viewed China as a problem, and then it looked like they were moving to an IP regime that was more like the rest of the world. Where are we with China now?

PROF. COHEN: At least in antitrust and patents we are in a rapidly evolving landscape, some of it coming from statutory and structural changes and some of it coming from economic pressure.

As for the statutory and structural changes, an announcement on October 26, 2018 from the National People's Congress (NPC) on the establishment of a

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[32] Hawaii Techs. Co., Ltd. v. Samsung Elecs. Co., Inc., Case No. 3:16-cv-02787-WHO, WL 1784065 (N.D. Cal., Apr. 13, 2018).

[33] Jorge L. Contreras, *Global Rate-Setting: A Solution for Standards-Essential Patents?*, WASH. L. REV. (forthcoming 2019).

national appellate IP court for technology-related IP matters and antitrust was confirmed. This is a quasi-Federal Circuit court that would have national jurisdiction.

PROF. HANSEN: Is that an intermediate court?

PROF. COHEN: No. There are four instances in China. We already have what are called — this is getting really complicated — "3 + 15" specialized IP courts (and I'm using these words very narrowly, so be careful) plus we have the IP tribunals. Those are at an intermediate level. Then you have the high courts at the provinces and you have the Supreme People's Court.

Beginning January 1, 2019, there will be a tribunal within the Supreme People's Court that will hear appeals of technology-related IP cases and antitrust cases. It is an attempt to basically harmonize — it's almost verbiage right out of the creation of the Federal Circuit — different approaches to patent and technology-related IP disputes. They have to deal with this, they have to unify the situation in China, so there's now going to be a three-year trial of a national appellate IP court.

Appeals from the Beijing IP court, if it's technology-related IP, or Shanghai or Guangzhou or these other fifteen IP courts and other tribunals that have patent jurisdiction will now go to this tribunal.

PROF. HANSEN: What was the motivation for this?

PROF. COHEN: Unification. I think also to promote the innovation agenda. Many of us who had worked on this for decades, including former Chief Judge Rader, myself, and others, had hoped originally when the IP court experiment was launched about four years ago that instead of having an intermediate court it would be at the national appellate level, the idea being to mitigate local economic influence on court decisions and also to have some unity in approach.

Actually, I think the unity and approach issue is a little bit overstated. I think what we're really talking about is concerns about local protectionism, home-courting cases.

PROF. HANSEN: That could come from the judge; that could come from the military; that could come from the Party out there in the hinterlands.

PROF. COHEN: The Party's role is pervasive. I think mostly we're looking at courts that want to promote local economic interests.

But that's only one of the structural changes. I want to mention two others.

The second one is the creation of the State Administration for Market Regulation (SAMR), which combined the three antitrust agencies — the National Development and Reform Commission, the Ministry of Commerce, and the State Administration for Industry and Commerce — into one, and it stripped the Chinese Patent Office (SIPO) of its antitrust jurisdiction. It was trying to get involved in standards and patent issues. It also incorporates the Standardization Administration of China and the Patent Office into one humongous agency. But the antitrust agencies are all combined.

How they are going to work together will be of great interest. I would like to be a fly on the wall when you have an examiner looking at whether or not to grant a SEP application, you have the Standardization Administration thinking about how to promote Chinese standards nationally, and you have the three anti-

trust agencies sitting around a lunch table. You can see that there's a real potential for mischief to promote Chinese interests that could affect either the decision to grant the patent, the decision to promote a standard, or the decision to consider an antitrust case.

The third thing, though, is the economically driven changes in China. The Patent Law has not been changed since 2008. The Anti-Monopoly Law also dates from 2007. Yet, in the past ten to twelve years there has been a rapid evolution of thinking, particularly around standard-essential patents.

Back around 2008, the Supreme People's Court of China basically said if you have a patent incorporated into a standard, you're going to have a royalty-free or compulsory license that you'll be stuck with and that was the benefit of being incorporated into the standard.

But that has evolved very quickly. We had the *InterDigital* case, which looked extensively at pricing in determining whether there was an abuse of dominance by the FRAND holder InterDigital, and actually made — in this discussion about comity — a determination that essentially filing a Section 337 case in the United States constituted an antitrust action in China without waiting for that decision to emerge from the International Trade Commission.

More recently three things have occurred. One is the Beijing High People's Court issued Guidelines for Patent Infringement Litigation.[34] Before that, in March 2016, the Supreme People's Court issued Judicial Interpretation II on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases. The third is the Guangdong Guidance. Those have looked at good faith in entering into negotiations, determining whether an injunction should issue. I think the Guangdong court's elaboration is probably the most specific in terms of looking at individual factors.

But this is rather remarkable because the law has *not* changed. The behavior has, and China's emergence as a standard setter and not just a standards taker is probably affecting how the courts undertake these matters. This is all judicially determined, which is also unique for a country like China, which not only adheres to some civil law doctrine that it should all be statutory but really tries to keep judges in line in following the law to the extent possible.

To me this is largely an economically driven situation, but one could also say it's due to the courts getting more experience in handling SEP matters as well.

PROF. HANSEN: In terms of suing in China, it used to be thought that a foreign plaintiff would have little success, certainly against third parties, although it may have some success against a licensee. Do you see that situation?

PROF. COHEN: As I said, this is a big issue. Let me just say that there are a lot of articles out there about high win rates for foreigners in patent litigation. In my view, the kind of research that needs to be done to justify that assumption has not been done.

I will point to a couple of deficiencies in a lot of these analyses. Number one is none of them take into account the grant rate from the Patent Office, the

[34] Beijing High People's Court, Revised Guidelines for Patent Infringement Determination (20 Apr. 2017).

Patent Reexamination Board, or the Beijing IP court. To really understand whether a given patent is likely to result in an infringement determination, an injunction, and perhaps damages, you have to look at how the court system is handling the grant of the patent.

What we've seen in certain areas, like in the pharma sector in particular, is that some of those patents are not being granted in a very robust manner. An economist in Switzerland has done a study in terms of looking at targeted Chinese industries, and he found that there was a significant likelihood that a foreigner would not be granted a patent after adjusting for quality, the examiner, and the lawyer representing them, if it was at a targeted industry.[35] I think we can assume that all SEP cases in high tech, and particularly in cellphone technology, are targeted industries. So the first thing is the validity.

The second thing is the selection bias of the databases. The Chinese court database — this has improved tremendously, so I don't want to sound too negative — but still 30–50 percent of the Supreme Court database, out of 30 million cases overall for all of China, are missing. In China, inevitably it's what's missing that's most important, not what is there. Think of Kremlin photographs from twenty years ago: Who's missing in the photograph?

That's the place we're at now. The *Schneider* case, the largest patent judgment in Chinese history, is not in the judicial database, so it is not going to appear in the win/loss rates and damages rates. *Huawei v. InterDigital* is not going to appear there either. Two preliminary injunction cases, the *Veeco* case and the *Micron* case in Fujian, which shut down two U.S. companies, are not in the judicial database because preliminary injunctions are not in the judicial database.

So we really have to be very careful. Transparency has improved dramatically, and you should consult those databases when you are looking at where to litigate, likelihood of success, etc. This is great information. On the other hand, to say it's complete information would be misleading, and you have to judge it in the context of other factors.

PROF. HANSEN: Okay. That's great.

We have seven on this panel, which is unusual, so we're going to have to move on, even though I think people would love to discuss this more.

What would you like to discuss?

MR. DJAVAHERIAN: I just have two things to say, and I think that they are significant given that this is an IP and competition panel.

We talked a little bit about SEPs. That's what I do these days. I'm a litigation attorney by training.

PROF. HANSEN: Give us your background. Where are you employed?

MR. DJAVAHERIAN: I've had an interesting career arc. I was a litigator at a law firm for a long time. I was inhouse eight years, both on the licensor side and then on the licensee side, most recently at Broadcom. In 2014 I started a small firm called PacTech Law, and I practice in the area of standards, IP, licensing, and litigation.

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[35] Gaétan de Rassenfosse & Emilio Raiteri, *Technology Protectionism and the Patent System: Strategic Technologies in China* (2016).

PROF. HANSEN: It's a two-person firm?

MR. DJAVAHERIAN: Two-person firm, yes.

PROF. HANSEN: One is in Orange County, and that's you?

MR. DJAVAHERIAN: One is in Orange County. One is in the Bay Area. She is the former head of litigation at Cisco.

PROF. HANSEN: Why should someone come to you? What service are you providing?

MR. DJAVAHERIAN: We do a couple of things. I think we are really unique in what we do.

One is we have been doing SEP licensing for at least the last ten years, and understanding all of this case law, understanding the evolution of it, understanding how to conduct the negotiations in a way that gets you a fair result, that's what we do.

The other aspect of the work that I do is policy. I go to the European Telecommunications Standards Institute (ETSI), which is the telecommunications standardization body; I go to the Institute of Electrical and Electronic Engineers (IEEE); I go to the International Telecommunications Union (ITU). I go to the places where these standards are being made and work on the policies, which means I interface on a daily basis with all of the other people at all of these companies, the forty, fifty, or hundred companies that participate in these organizations and make these policies, and ultimately negotiate licensing them, litigate about them, etc. So we get that holistic view of what is really going on out there.

PROF. HANSEN: Are you an add-on to everyone's normal lawyers for this specialty, or all they need is you?

MR. DJAVAHERIAN: Depends on what stage you're at. If you want to do policy, all you need is us. If you want to do licensing, for the most part all you need is us. I have a patent team that I work with on a contract basis that I use to do patent analysis, but we can handle the licensing negotiations large and small.

When you get toward litigation, that's when we partner with other traditional big firms. I've had clients that have progressed to licensing negotiations and ended up at a standstill where no progress was going to be made, new litigation was coming, and at that point we bring in the larger firms and work with them.

PROF. HANSEN: Do you find that your clients are from one side or the other?

MR. DJAVAHERIAN: In this world it's hard to play both sides of the fence. I am firmly rooted in the defense bar at this point.

PROF. HANSEN: When standardization in IP started, ETSI, a standard organization in Europe, actually said there shouldn't be any protection for IP. I imagine they've moved way beyond that by now.

MR. DJAVAHERIAN: There was a big fight in the early 1990s, actually going back to when ETSI was founded in the late 1980s, about how they were going to handle IP. Remember, this was a world where you had the Bell Operating Companies, you had landline networks that were regional. Some of the folks wanted to have everything be free. Some of the folks wanted to have different rules depending on geographic region, etc.

The companies that were most forceful in advocating for IP rights in the development of what we now call FRAND "ecosystem" were companies like Motorola, which had IP, was IP-savvy, understood the system. The Europeans at that time weren't very IP-savvy, weren't very patent-savvy. It's an incredibly interesting read to go back and look at what people were saying at the time. There is a book by Rudi Bekkers that documents the history and development of the early days at ETSI and the IPR policy.

PROF. LIM: I will exercise the organizer's prerogative and end this panel so you've got time for a break and come back for the copyright session after that. I think it has been a fascinating discussion, and I encourage you to continue it.

Please join me in thanking the panel.