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1A Plenary Session. Government Leaders' Perspectives on IP

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Emily C. & John E. Hansen Intellectual Property Institute

**TWENTY-EIGHTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

Thursday, April 8, 2021 – 8:15 a.m.

SESSION 1: Plenary Sessions
1A. Government Leaders' Perspectives on IP

Moderator:

Hugh C. Hansen

Fordham University School of Law, New York

Speakers:

Daren Tang

World Intellectual Property Organization (WIPO), Geneva

The Pandemic and Beyond: What Lies Ahead for the Global IP System

António Campinos

European Patent Office (EPO), Munich

The Role of IP Offices in a Sustainable Patent System

Shira Perlmutter

U.S. Copyright Office, Washington, D.C.

Future Directions for U.S. Copyright

Marco Giorello

European Commission, Brussels

The Last 10 Years of Copyright Policy in the EU

Renata Hesse

Sullivan & Cromwell, LLP, Washington, D.C.

SEPs Again: Is the New Madison Approach Old News?

Panelists:

Pauline Newman

U.S. Court of Appeals for the Federal Circuit, Washington, D.C.

Brian H. Pandya

Duane Morris LLP, Washington, D.C.

* * *

HUGH C. HANSEN: Welcome, everybody. This is our 28th Annual Conference. It would have been the 29th, but you all know what's going on.

First, let me just say welcome everybody to the Fordham IP Conference. Every year, we have wonderful people attending. It was averaging 500 people, with fantastic faculty from around the world, and tremendous support from our sponsors. Our sponsors are fantastic; we could not put on a conference without them and we're very, very, very thankful for their support.

This is the Government Leaders' Perspectives on IP. All I'm going to say is who the speaker is and the organization. The information about each speaker is online. Over the years we find that we'd rather use the time to speak. All right. Our first speaker is Daren Tang, and his bio is there. One of the things I noticed he left out of his bio, which upsets me a little bit, is he didn't say that he has been a speaker at the Fordham IP Conference. I will make up for that omission. Daren is the new Director General (DG) of the WIPO.¹ We're really talking about leaders here. Welcome, Daren. I'm going to hand the stage over to you.

DAREN TANG: Good morning, Hugh. It's good to see you again. The last time I was with you was in person in beautiful New York in April. I hope we have that next year. I look forward to that. Also, I want to say hello to António, Shira, Marco, Renata, and of course, to thank Brian and Judge Newman for being our panelists this morning. I know Hugh is the hardest taskmaster in the world. I'm going to go right into my three points, and then I welcome the Q&A and the discussion.

The three points I'm going to make, the first point is that from my point of view as a new DG of WIPO, coming previously from Singapore, from Southeast Asia, from Asia, Asia Pacific region, is that the good news is that innovation is becoming globalized. Northeast Asia is now one of the shapers of the global IP ecosystem, and that's including, joined by other regions of the world, Southeast Asia, South Asia and what I see and what we see is pockets are emerging in Latin America, in Africa, Middle East, Central Asia. This trend you will see in the next 5 to 10 years.

Let me give you some stats to help drive on that point. Last year, Asia really accounts for more than half 53.7% of all PCT² following activity with North-East Asia forming the lead in this area. Globally, Asia has close to 66.8% of all global patent applications worldwide, close up to out of 7 of 10 IP filings for trademarks and industrial designs come from Asia as well. In 2019, China, Japan, Korea, and India were in the top 10 overall for IP filings. 6 out of 10 R&D dollars are being spent in Asia. In the 2020 WIPO Global Innovation Index, some of the leading countries like top of the category where countries like India, Republic of Korea, Malaysia, Singapore, Vietnam, all identified as global innovation leaders, along with Chile, Mexico, Costa Rica, and Latin America and South Africa, Mauritius, Kenya, and Tanzania in Sub-Saharan Africa.

We see the picture all over the world: innovations becoming globalized. It's not just in Europe, in America, but more and more parts of the world. On the creative industry side, Bollywood now produces more films, or the most films in the world. 1,200 for Bollywood, 800 for Hollywood. I think Nollywood

¹ World Intellectual Property Organization.

² Patent Cooperation Treaty, June 9, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 23.

is probably second place, maybe surpassing even Hollywood. What we are beginning to see is that the recognition is coming in, in terms of awards. You have a Korean film winning the Oscar last year. You have African artists winning the Grammys this year. I think this tremendous rise in innovative and creative work around the world, it's leading to something very interesting.

Look at jurisprudence, for example. In China, just in 2019, there were almost half a million IP cases that were concluded. That's a 50% increase from the previous year. IP caseloads are also increasing in Korea and Japan as well. The decisions last year from the Chinese courts were discussed by IP lawyers, IP academics on the AI, and human authorship. This is the *Baidu* case³, as well as the *Shenzhen and Yingxun* case⁴.

Then I think that you've got the famous *Xiaomi v. InterDigital* case, which was a SEP⁵ FRAND⁶ dispute that was litigated in both Wuhan⁷ and Delhi⁸.

In such a warm environment, my exaltation to the Fordham community is to increase your focus even more on other parts of the world, increase your focus, and to study, observe and engage with IP developments all over the world. I know that there's a China segment Hugh that you organized, led by Mark Cohen. We need more Mark Cohens to study more the parts of the world, to lead conversations around IP developments in Southeast Asia and South Asia and Middle East. My dream is for you, Hugh, to have more of these segments that we can have a global survey of IP developments around the world. That's my first point.

My second point: it's moving away from geography to focus on what I see as a hidden tsunami of growth in intangible assets. This is not just IP. It's about data, about know-how in the global economy. If you look at most industrialized economies, a large part of the economy is really in intangible assets. A 2017 WIPO study showed that intangible capital comes with twice the value of manufacturing production as compared to traditional tangible capital.⁹ If we look at S&P 500, we look at what Ocean Tomo's valuation is, close to 90% of the valuation of the S&P 500 is in intangible assets. Global evaluation of intangible assets around the world, some estimates to be around 20 trillion US dollars, which is the size of the US economy. It's a huge growth in intangible assets as innovation and creativity drive asset creation away from traditional

³ Beijing Feilin Law Firm v Baidu Corporation, No 239 [2019] (Civil First Instance, Beijing Internet Ct. April 25, 2019) (China).

⁴ Shenzhen Tencent Computer System Co., Ltd. v. Shanghai Yingxun Technology Co., Ltd., (2019) Yue 0305 Min Chu No. 14010 Civil Judgment (Nanshan District People's Ct., Shenzhen, Guangdong Province, November 24, 2019) (China).

⁵ Standard essential patents.

⁶ Fair, reasonable, and non-discriminatory.

⁷ *Xiaomi Tongxun Jishu Youxian Gongsigongsi Deng Su Jiaohu Shuzi Gongsigongsi Deng Biaozhun Biyao Zhuanli Xuke Feilv Zhengyi Caijue Jiufen An (小米通讯技术有限公司等诉交互数字公司等标准必要专利许可费率争议裁决纠纷案)* [Xiaomi Communication Technology Co., etc. v. InterDigital, Inc., etc., A Dispute over Standard Essential Patents Licensing], Dec. 4, 2020, (2020) E 01 Zhi Min Chu 169 Zhi Er. (Wuhan Intermediate People's Ct. Sept. 23, 2020).

⁸ *Interdigital Technology Corporation & Ors. v. Xiaomi Corporation & Ors.*, (2021) I.A. No. 8772/2020 in CS(COMM) 295/2020 (India).

⁹ World Intellectual Property Organization, *Intangible Capital in Global Value Chains*, 2017, available at <https://www.wipo.int/publications/en/details.jsp?id=4225>.

assets like commodities or resources and other property, into IP, intangible assets, and data.

The challenge we have is that we still lack a common way to value, collateralize, monetize these assets. We lack an understanding of how this asset class is connected to the larger economy, connected to trade, to finance, to the global economy even. I think governments are struggling, and we need to pay attention to this. Academics and researchers and IP officers and IP professionals need to pay attention to this.

I think, again, I want to make an exaltation to the Fordham community. It's not just about law anymore. It's about bringing lawyers and economists and the financiers and all the different stakeholders in the larger, broader innovation ecosystem together so that we can study this area. What WIPO can do is perhaps it can play a role as convener on some of these conversations, but the deep study of these things, it's something that we hope that the community begins to look at.

My third point is: what are WIPO's plans in the next chapter given this spectrum of globalized innovation, which I think will carry on despite challenges to the global community, despite challenges to the multilateral system, and given the rise of intangible assets as economies transformed themselves into an intangible asset-based economy. Well, WIPO will continue doing the things that we do well, traditionally. We'll continue being the best we can in providing services in terms of the international registries that we run. We will try to continue being the best we can in terms of helping to bring countries together to shape international norms, and to provide assistance so IP offices and other stakeholders, in terms of providing products and services that help them to do their job well.

But I think they need to go beyond this. What WIPO wants to do now, what the new team that we have put together wants to do now, is to go beyond that to see how we can broaden the work of WIPO. Beyond looking at just the legal, technical aspects of IP, which is still important but not enough, but to look how we can take IP to the ground. How can we use IP to help SMEs,¹⁰ for example, use IP to translate the ideas, translate their creations into economic growth. Help people look at IP as a tool for jobs, as a tool for attracting investments, as a way of supporting economic growth, as a way of supporting social vibrancy. I think IP officers themselves are looking at how they can transform themselves in this new way. Not just to be IP regulators anymore, but to be IP advocates, IP promoters, to be innovation agencies, participating in the core movements and transformations of their economies.

Then one of the things that I want to challenge all of us is that I sense a growing IP skepticism in the world, and I think this is something which we need to address. How we're going to address this, I think we need to engage better with views. We need to engage better with the men in the street. We need to bring the message of IP to the men and women in the street, to let them know that IP is connected to them. Let them know that IP's part of their lives as well. IP's relevant to them. I think these are the things in which WIPO will be looking into. We look forward to working with many of the partners in this room, IP officers, regulators, the academics, the researchers, and the IP professionals, to really help IP be connected, be relevant and be alive to people in the street.

¹⁰ Small and medium-sized enterprises.

Here with that, I know that my seven minutes is almost up. I will stop here. I look forward to the discussions. I look forward to hearing from my fellow panelists, and of course from hearing from the Fordham community. It's good to be back again.

HUGH C. HANSEN: Well, thank you, Daren. First question is, now that you're the big cheese, is it what you expected it to be before you got there?

DAREN TANG: Well, you know, Hugh, nothing prepares you for a job like that because it's a combination of three things. You've got the technical part; I think that's the part that I'm most prepared for. I came from a national IP office. When I was in the Singapore National IP office, when you're in a national IP office, you have to get your hands dirty. You have to roll up the sleeves and get into the details, get into the weeds, so to say. But I think the unique thing about being in WIPO is that it's not just a technical agency, it's a UN agency at the same time. There's a lot of interaction between the technical aspects and the political aspects of it. And I think one of the things that is very different from running a national IP office is that what we encounter here is we see the geopolitics of the world affecting the way the organization runs and operates, and we have to take that in account.

Let's take, for example, the normative agenda like WIPO. WIPO doesn't set the normative agenda. We facilitate members who set the normative agenda. As you know, many of the items on the normative agenda have been stopped for a long time. From the broadcasting treaty that I know very well, because I used to chair the corporate committee that's been going on for 20 years, to the design law treaty which has been going on for a long time as well.

Of course, the conversations around traditional knowledge; I think here's where the aspirations of the UN system meet the realities of the UN system. I think that's probably something that's, well, it's not affecting just WIPO, but it's affecting all the other UN agencies as well. I think that's the part that has been, not to say different, but that's the part that's a lot more of a feature of the work here in Geneva than it was in the national office.

HUGH C. HANSEN: All right. Daren, how are you going to get the word out? I mean, there's so much going on now in the world. It's almost incredible. Is there room even for the IP message of what IP means, or any of it? Are people up for that, or are they just trying to survive? Also, you have both countries and people within countries that are not firm believers in IP. It's quite a challenge, I would think.

DAREN TANG: Yes. I think, Hugh, it is a challenge, but I think that we have not been very good as an IP community in making IP come alive for people who are not part of the IP pea soup, as I like to call ourselves. We tend to be quite comfortable talking technical and talking about it in a way that fellow technicians or fellow engineers, IP engineers like ourselves, feel comfortable with.

But I do think there's a lot of scope for us to go out there and to tell, very down to earth, and describe in a very down to earth way, how IP has helped the lives of a small struggling community in Cambodia, for example, that we worked with to support their use of the trademark and GI¹¹ system to grow their crops and to get better products for pepper. That's changed their lives. To supporting a startup in Kenya. We told that story in the recent edition of WIPO

¹¹ Geographical Indication.

magazine.¹² Former UN employee, she gave up her job in the UN, went back to Kenya, designed shoes, and she's using both the trademark and the design system to help her earn a living. She's competing with Nike and Adidas in Kenya, creating jobs in Kenya. We need to tell these stories so that people understand IP is not just for big companies and for industrialized countries. IP is to help SMEs and entrepreneurs and startups, female entrepreneurs, to earn a living and to take the ideas to the market. That's why, this year, WIPO's theme is SMEs taking your ideas to the market because we do believe that. I'm coming from Asia. I have seen how IP can transform the lives of the men and women in the street. That's the story in Asia that I've seen for myself growing up.

HUGH C. HANSEN: Ok. Actually, if you see up in the upper right-hand corner, there's a time clock of five minutes, which never was started, but I think we've actually run over or out of time. Thank you so much. Then we're going to have as long discussion- [crosstalk]

DAREN TANG: Thank you, Hugh.

HUGH C. HANSEN: -at the end. We can revisit these things, and they're all very important. Our next speaker is António Campinos, who I met years ago in the EUIPO.¹³ It wasn't called that then. We have a lot of big cheeses here with us today. Now, he's head of the EPO—the European Patent Office. First of all, how long have you been head of the EPO?

ANTÓNIO CAMPINOS: I'm halfway through my mandate, so two and a half years.

HUGH HANSEN: Two and a half years? He was trying to cut off this conversation because he knew it was going to be something he might not want to get involved in, but the trouble with that is I'm running this show. My first question to you is: how do you like it compared to your previous, being head of EUIPO?

ANTÓNIO CAMPINOS: I mean it's difficult not to fall in love with the EPO. It's much bigger than the EUIPO. The EUIPO has close to 1,000 staff in one location. Here, we are close to 7,000 in four locations. The EUIPO is much more legally oriented, so many more lawyers; and at the EPO there are many more engineers and scientists. People who have at least a masters, double masters, but the vast majority have one PhD, two PhDs. We have scientists in all areas of technology, engineers. It's quite an amazing journey. I'm in love. [crosstalk] It doesn't mean that it's easy, but I'm still in love.

HUGH C. HANSEN: All right. It's all yours.

ANTÓNIO CAMPINOS: Okay, so thanks Hugh. Thanks very much for the invitation to speak on this panel. Of course, I'm looking forward, and I know you are as well, to a thought-provoking discussion today. I think this is one of the greatest things about Fordham, is that it forces us always to take a step back and to think about things afresh. Actually, that's what we've been doing a lot at the EPO too recently, and I want to share some of our thinking.

It was the economist, Joseph Schumpeter, an Austrian economist, who developed the idea of a creative destruction and innovation cycle nearly 80 years ago. It might seem strange to talk of an innovation boom when we are in the middle of a pandemic, and a downturn. But actually, that's what some people

¹² Kathryn Carrara, *Enda: Kenya's First Home-Grown Running Shoe*, WIPO Magazine (Sept. 2020), available at https://www.wipo.int/wipo_magazine/en/2020/03/article_0005.html.

¹³ European Union Intellectual Property Office.

are predicting. *The Economist* newspaper, in fact, argued that the 2020s will be a decade of innovation. The BBC has written about countries destined to become innovation superpowers. Of course, the fourth industrial revolution started well before the pandemic, but in a way, it's very possible that the corona crisis is accelerating this process of creative destruction in ways we wouldn't have imagined before last year.

The United Nations Conference on Growth and Development Technology and Innovation Report 2021 shows that the value of fourth industrial revolution technologies in 2018, estimated at \$350 billion (US), is likely to increase tenfold to \$3.2 trillion (US) by 2025 already.¹⁴ What should be our role in all this? Well, I believe that, whatever happens, I do believe that we need to always think about the fundamentals—to respond to changes in technology and business, of course—but also to ensure a strong and sustainable patent system that guarantees predictability and transparency.

At its heart, the patent system is built on two pillars. You know that foundation has served us well since the Paris Convention¹⁵ was signed in 1883—which was one of the earliest multilateral treaties, by the way. One pillar rewards investment in creativity and innovation by granting a temporary monopoly over an invention, to put it simply. The other ensures that the inventions are disclosed to benefit society.

How do we maintain these two pillars as fit for purpose? Above all, I think we must focus on quality. It's true we have always prioritized quality at the EPO, and that is why the EPC, European Patent Convention,¹⁶ foresaw search and examining divisions of at least three people way back in 1973. Quality patents rightly ringfence the invention to those that are novel and possess an inventive step, and don't lead to broad monopolies that would hinder innovation. Instead, they result in robust, enforceable rights, and rights that business can rely on.

The challenge today is greater than ever before. Prior art is growing at an unprecedented pace, and patent applications are becoming more complex as they increasingly cut across different technical fields. That's why we must embrace new tools and technologies.

A fully digitized patent-granting procedure, for example, with paperless workflows, online forums and communication, electronic filing and payments. Above all, better search tools and improved databases to truly master prior art whether we are talking about patent literature, or non-patent literature; and to make this prior art accessible to the division of examiners in an understandable language.

Artificial intelligence is also part of the answer. Not to replace humans, but to improve searching and speed up mundane tasks. To help categorize prior art, for example, and to ensure that each application, patent application, goes to the most appropriate examining team accordingly with the technical fields displayed in the patent application.

Then there are, of course, videoconferences, such as the one we're experiencing today. You know that there has been some resistance to this in

¹⁴ United Nations Conference on Trade and Development, Technology and Innovation Report, 2021, available at https://unctad.org/system/files/official-document/tir2020_en.pdf.

¹⁵ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

¹⁶ Convention on the Grant of European Patents, May 10, 1973, 1065 U.N.T.S. 199.

Europe. But holding oral hearings by video conference is not just about enforcing social distancing or managing the caseload; or even keeping the wheels of justice turning. It also creates greater accountability and transparency and promotes knowledge sharing. Just to give you an example: we broadcasted an enlarged board of appeal hearing online in July last year. More than 1,500 people logged in. What a great learning opportunity. You could never do that before video conferencing. We recently held the first-ever digital European qualifying examination. We conducted an exam for almost 3,800 candidates with 24 hours of papers over five days, and a choice of three languages. We had 80 online invigilators supervising audio and video. A tremendous achievement by everyone involved, for sure.

But it means more than that. It offers access for all aspiring patent attorneys across Europe, wherever they may be. It is a truly level playing field. Soon, we will be launching the European Patent Administration Certificate for formality officers and creating a new generation of paralegals. That will, of course, be digital from day 1. On the 17th of June, we will host the European Inventor Award online for the very first time. Of course, I invite you all here to join us for that important event. All of these initiatives are about maintaining, and even improving, patent quality.

By the way, they also have other benefits. On quality of life, on the environment, on inclusivity, on empowering future generations. We know we must embrace them in a sustainable way, so we will be working with our partners, staff, and stakeholders. We will be rigorous in respecting data protection. In developing, continually reviewing policies in data handling and privacy, especially as we make more and more use of cloud-based services.

We will also reach out to more communities. We will be revamping our 400-strong PATLIB (PATent LIBrary) centers in research centers, universities, business centers, and national patent offices in all of our member states. To help universities turn fundamental research into commercial innovation and support the SMEs, in particular to create and manage their IP portfolio.

You know, we talk a lot about patent information. Our Espacenet database,¹⁷ for instance, contains nearly 130 million documents that can be searched free of charge, and that's fine, but we need to move to an era of patent knowledge. Not only for businesses, or universities, but for the media and, of course, for our policy makers. Another thing we can do is to create a forum for debate. Bring together people with different views and experiences, just like you do here at Fordham. To help with that, we are going to create a patent observatory. It will conduct analysis. It will collect data. It will help identify emerging trends that will support research and effective policy making. We're also reaching out across society. That's another lesson we've learned in the past year.

We have to do better to meet and understand groups that traditionally haven't engaged fully with the patent system. That awareness, that engagement, has to start early, and it has to be pervasive. The European Patent Academy's role is being reinforced to support patent education and awareness. We don't do enough to support teaching on IP in Europe. Over in the US, I think, you're further ahead than we are. IP knowledge is taught in more disciplines. But here in Europe, learning about patents is only the norm for those studying law. We

¹⁷ Available at <https://worldwide.espacenet.com>.

have to break that cycle and start spreading patent knowledge into different disciplines. To engineers, chemists, physicists, computer scientists and so on.

We have to keep reaching beyond Europe, too. Working more closely with our international partners, with our 38 member states. Cooperation is clearly at the heart of our organization, and we take that cooperation beyond Europe by playing an active role in the Trilateral and IP5. We must build on this work with initiatives to develop or complete common IT tools, and also to converge our processes and procedures, where possible, to create benefits for all the different actors that exist in our innovation ecosystem.

To conclude, as this new innovation cycle is in the process of accelerating, we must ensure that the patent system remains fit for purpose. That means building on quality, knowledge and cooperation. Now, this isn't just something we *can* do. It is something we *have* to do; because we have a responsibility to lead the way and show how the patent systems can work for the benefit of everyone. Thank you, Hugh.

HUGH C. HANSEN: Yes, thank you, António. Thank you very much. Now, what about multilateral? Working with the WIPO, working with the U.S., working with other countries outside of the EU, is that part of the plan?

ANTÓNIO CAMPINOS: Of course, it's part of the plan. That's what I was just quoting. There's a formation that was set a few decades ago—called the Trilateral—that brings together Japan, the US and Europe. Every year we have meetings. We have the IP5 adding to these three, South Korea, and China. We are very active in these forums. We are all trying to develop. Actually, we have already developed tools for the benefit of users.

We're looking ahead now and trying to discuss things such as artificial intelligence, which are matters that interest us all, of course. We're even talking about trying to converge processes and procedures—where we can—for the benefit of users. We have bilateral relations with each one of these countries. Cooperation is at the very heart of our office.

Of course, WIPO is our observer in all these formations, and we have a strong memorandum of understanding signed with Daren Tang that oversees common activities and the development of common tools. We're very happy that all of us—via cooperation—are trying to make the life of our users easy.

HUGH C. HANSEN: Okay, thanks.

ANTÓNIO CAMPINOS: I've got a question.

HUGH C. HANSEN: A question is good.

ANTÓNIO CAMPINOS: How are you doing, Hugh?

HUGH C. HANSEN: I've never been busier, it's crazy. I mean, with podcasts and the Conference, but it's fantastic. I think we're all fortunate to be in something that we really love. Even if you're busy, it's good busy, so that's fantastic.

ANTÓNIO CAMPINOS: In March 2020, all the processes and procedures at EPO were based on paper. You had a paper-based patent file that was given to the first examiner. The first examiner did his search, or examination, and gave it to the second examiner. He did his job, and then gave it to the chairman of the division. Then the paper went to the team leader, and maybe to another expert. From one day to another, we had to get rid of the paper file because we all had to move to working from home. In a matter of a few weeks, we just moved from a paper-based process file to a digital one,

something that people here at the EPO would have said was impossible. But suddenly, because of the pandemic, it was made possible. It's unbelievable.

HUGH C. HANSEN: Yes, it's a brave new world, but that brave new world also can rob us of IP, so we have to be careful about it. AI. Are you a big fan of AI?

ANTÓNIO CAMPINOS: Yes. Actually, we've been using AI for quite some time. We're using AI for machine translation. We have an agreement with Google, but now we're developing our own internal algorithms. We have AI on pre-search, which is to say, 30%, 40% of citations of relevant citations are produced by an AI algorithm. We have AI for classification as well. For pre-classification, which means routing the file to the examining division. For pre-search, we already have AI. We, of course, are like the other offices, and Daren knows that very well. We are all working very hard to bring in as much AI as possible to replace mundane tasks, and to increase the number of relevant tasks done by a machine.

Then we have AI as a legal issue. We have cases in the US, and in Europe, on the first invention allegedly invented by AI. The patent application was rejected by the receiving section. I think the name of the applicant was DABUS. I think both in Europe and in the US, we rejected it, and now the case will be discussed by the Board of Appeal, which is entitled to present an application on AI.¹⁸ For us, for now, the inventor needs to be a natural person. But that may evolve over time, of course.

HUGH C. HANSEN: Okay, all right. Well, thank you very much. Now we move on to Shira, who has been a player and leader in almost all of these organizations. Copyright Office, a couple of times, and now she's back as Register. IFPI, international phonogram industry. PTO, WIPO, Oxford research. If there's anyone who can talk to us about the global as well as US aspects of this, it's probably Shira. Shira, the floor is yours.

SHIRA PERLMUTTER: Great. Thanks, Hugh. It is wonderful to be back with all of you at the now venerable Fordham conference, even if it is virtual this year. I have to say I'm really looking forward to next spring in New York. What I'd like to do is to start by identifying what I see as today's overarching challenges for the copyright system globally, and then talk about what we're doing on these fronts in the United States.

I would divide the current challenges into four groupings: data, accessibility, the roles of intermediaries, and the impact of new technologies. First of all, data is absolutely key for copyright in today's world. It's needed to make online markets function smoothly and efficiently, and it's needed to ensure the appropriate treatment of creators. I'm talking about both the accuracy of the data and the availability of the data. We need accurate data with information about works and authors and owners, who owns what, who should get paid, and how can they be contacted. We need the data to be available to would-be users and licensees and to analysts and academics. Among the challenges are the fact that some databases are public, others are proprietary, and there are often divergent formats and standards being used.

Second challenge: accessibility. I'm talking here about the accessibility of copyright services and the copyright system around the world, especially for

¹⁸ Information on the appeal is available at <https://register.epo.org/application?number=EP18275163&lng=en&tab=doclist>.

smaller and less sophisticated stakeholders. This is, of course, the theme of WIPO's World IP Day this year.

We are in a world these days in the copyright space where everyone is now both an author and a user of copyrighted works virtually, just as soon as they start using the internet. We need to make sure that they're aware of what that means and that they have the necessary tools to use or license or enforce their rights. Part of that involves reaching out to underserved communities. Both António and Daren alluded to this. This includes women, it includes minority groups, it includes geographic areas in each country with historically less participation in the copyright system. We are looking to enhance, and when I say we, I mean globally, awareness of copyright and to make copyright understandable and affordable to all of these groups. That will increase the diversity of the content that we all enjoy.

Third, what are the roles and responsibilities of the various players in the distribution and value chain which has become tremendously complex and also international in the digital world? I see two different aspects to this. One is controlling piracy. Who should be doing what, and in what circumstances? That includes the ongoing debates about potential liability and safe harbors, but it's not limited to those discussions.

There's a lot of focus on whether this should be dealt with through legislation or whether voluntary agreements and the adoption of best practices could be an effective solution. There's a related, but somewhat different question that has been raised in some circles and in some countries, and that is, how value is shared. Who is getting what share of the total pie? In what circumstances is payment to creators necessary or appropriate? Of course, different countries have different scopes of exceptions, and that's the subject of ongoing debate, including discussion of the press publishers' right in the EU, which I'm sure we'll hear more about shortly.

The last of these challenges is the impact of new technologies on IP. Of course, this question is constantly being asked and discussed as the technologies of the day keep changing. I'm sure every year there are several panels at Fordham devoted to this. Today's focus, as has already been suggested, is artificial intelligence, and it raises a number of IP policy issues in addition to its use as a tool in IP administration. One question for us is copyrightability: can a computer be an author?

The question that I think is more difficult is the question of the input of material—the infringement question. There are massive amounts of data needed for machine learning. Some of that data will be copyrighted works. When are licenses needed or appropriate? And the related issue is text and data mining. This is an activity that provides very valuable insights and benefits the public in many ways. The question is, to what extent should the copyright owner or owners be able to control the terms of data mining, and for which types of users? In the EU, this has been approached through the Digital Single Market Directive,¹⁹ and in the US primarily through the application of fair use plus licensing.

Let me talk a little bit about the US response to these challenges. I'll focus on the Copyright Office, on our ongoing activities, including the

¹⁹ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

international implications. As to the first two challenges, which are data and accessibility, we are working to modernize and democratize the copyright system. We're doing that in a number of ways.

First of all, modernization of our IT. We are building a state-of-the-art Enterprise Copyright System,²⁰ which will be all digitized, easy to use, with connected and searchable data sets. That will include our services for registration and for recordation, and also access to our historical records. The system has been written in such a way that there's less need for expertise to use it than has been the case in the past, so it'll be easier for the average person without legal advice. It is, I want to make clear, open to international participation and use. We're hoping it can serve as a model to our counterpart offices around the world who are interested in developing similar systems. We're going to be looking for ways to maximize the usefulness of those data sets and the connectivity of those data sets going forward.

The second thing I want to mention is the Music Modernization Act.²¹ This statute set up a new Mechanical Licensing Collective, or MLC, which began operating on January 1st. The law requires a musical works database to address the longtime problem of identifying the right copyright owner to pay. The database will have information about both domestic and foreign musical works, the identity and the location of the copyright owner or owners, and information about the sound recordings in which the musical works are embodied. The musical work information will include the title, the copyright owner, ownership, shares and percentages, contact information, songwriters, administrators, and many internationally used unique identifiers, such as ISWC,²² ISNI,²³ and IPI.²⁴

I won't go into too much detail, but just to say, a musical work copyright owner would include a foreign or domestic collective management organization that has copyright ownership, and it will not include personally identifiable information. Although the legislation doesn't explicitly address the GDPR,²⁵ the Collective has indicated it will follow the GDPR, and is in discussion with European copyright owners.

The data is not owned by the MLC or its vendors, and it's available to the public in a searchable online format free of charge. Anyone can make a bulk download of the database for a fee not to exceed the Collective's marginal cost. That could be particularly useful to international CMOs²⁶ and businesses and other organizations. Although the database is based on US usage, foreign markets can benefit from the improved transparency and access to ownership data.

We're also very excited about the fact that we're now setting up the first small claims court for IP ever in the United States. It's limited to copyright at

²⁰ Further information is available at <https://www.copyright.gov/copyright-modernization/>.

²¹ Music Modernization Act of 2018, Pub. L. No. 115-264. 132 Stat. 3676.

²² International Standard Musical Work Code.

²³ International Standard Name Identifier.

²⁴ Interested Parties Information.

²⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119).

²⁶ Collective Management Organizations.

this point. It will be set up by the end of this year, and it will allow individuals and those with copyright claims or defenses involving small amounts of money to vindicate their positions. This will be a voluntary system because of some constitutional constraints in the United States. We are now consulting with the public and preparing implementing regulations and in the process of hiring the judges. Equally important, we're very involved in doing outreach and education to make sure people are aware of this option. We have a dedicated web page already with Q&A,²⁷ even though the system is not yet operational. I do want to stress that it's open to international participants. They can bring claims in this new forum, but they cannot be sued there unless it is a counterclaim to a claim that they've brought.

HUGH C. HANSEN: Okay, Shira. Now, Shira, 1 to 10, how likely are these things going to happen that you want? 10 meaning yes, they will definitely happen.

SHIRA PERLMUTTER: Let me note that we are very involved in looking at the issue of Section 512 and on legislative discussion of that following our report a year ago.²⁸ We're also quite involved in looking at the AI policy issues, including working closely with both WIPO and the Patent and Trademark Office. Happy to answer any questions about those issues as well. On your 1 to 10 question, which things are you talking about, because the MMA is already in effect and the small claims will be in effect.

HUGH C. HANSEN: I'm trying to get an overall picture. You've been Register for how long now?

SHIRA PERLMUTTER: Five months.

HUGH C. HANSEN: I think there's a problem with the real world not paying attention or even having people trying to stop things. Internally, to Congress, it's this, this, etc. Supreme Court has done some crazy stuff. Just a thing on the future. Is it looking good? Is it okay? Is it not looking good? You can use any word you want. 1 to 10. 10 is it's great, 1 is obviously not. A little bit of a gut feeling about where we are in copyright.

SHIRA PERLMUTTER: It's an exciting time for copyright. I think some of these activities that we're involved in, that WIPO is involved in, that other copyright offices and governments around the world are involved in, are looking very positive. There is an attempt to reach out and to make sure people are aware of all of their rights and responsibilities. There's much more international dialogue and discussion going on than in the past. I think we are at an exciting time and I feel positive. It's hard to answer that question very generally because there's so many different issues to address. If I have to give one overview, I would say optimistic.

HUGH C. HANSEN: Good, good. How about fellow people on the panel? Any comments or thoughts for Shira?

DAREN TANG: Hugh, can I ask a question?

HUGH C. HANSEN: Yes.

DAREN TANG: Shira, one of the things that I've discovered is that policymaking in copyright, or helping people to meet policy in copyright, is really difficult because the data is split across many different actors. Are you facing the same challenges?

²⁷ Further information is available at <https://www.copyright.gov/about/small-claims/faq.html>.

²⁸ 17 U.S. Code § 512.

SHIRA PERLMUTTER: Yes, and that's part of what I was alluding to, about the proprietary databases. I agree that that's a challenge. I think people are understanding that that's a challenge. Part of what's happening with the MLC and the Music Modernization Act in the United States is understanding how important that data is. That is something we need to keep working on. There are ways that data can be made available without compromising proprietary interests, and we need to focus on how best to do that.

HUGH C. HANSEN: We do have a comment from Deborah Newman. It says, "My guess is that this database is going to take years before it's live." I'm not sure which database she's talking about. All right. Anyone? All right. Thank you very much, Shira. We're going to have general discussion at the end of which we can do the bigger picture.

One of the things I want from leaders is where are we going and how hard it is and everything else. Of course, you're going to be enthusiastic and everything else. I'm trying to get a sense of the difficulties, not just the challenges and excitement, but the difficulties. In any case, okay, now we have I think, Marco. How are you by the way?

MARCO GIORELLO: I'm fine, thanks a lot Hugh and hello everybody and thanks for having invited me, again in particular to this panel, of course, which is an honor.

HUGH C. HANSEN: You're with the European Commission, correct?

MARCO GIORELLO: Yes.

HUGH C. HANSEN: How do you like that?

MARCO GIORELLO: I like it a lot. I've been in the Commission for more than 20 years now and copywriter around 10 years, which is actually what I will talk about.

HUGH C. HANSEN: Well, that's an important position you have, and it was responsible for a lot, many years ago, of getting a tremendous amount of stuff through. One of the things early on is that nobody knew copyright, and so in a Commission, Head of Unit of Copyright says it went up, now everyone is out there ready to think about it and everything else, so actually, there's probably less freedom than it was. But 1 to 10, Marco, optimistic about your—You're going to tell us what they are, but I want to know beforehand, what do you think?

MARCO GIORELLO: Optimistic about what? About the future of copyright, about the challenges ahead?

HUGH C. HANSEN: About the future of copyright. I guess I'm the only one thinking about these things. One thing is, what does it look like? Are we going to be able to achieve stuff if there's opposition? I'll wait till the end. Go ahead, forget the question.

MARCO GIORELLO: I will start first by looking back, but hopefully, this will also bring us somehow to the future. Why the last 10 years? Not only because this is pretty much the time that I've been dealing with this fascinating subject, which is copyright in European Union, but also, because this has been a really an extremely intense period for copyright in Europe, to an unprecedented level.

We had seven new legislative instruments over the years, five directives and two regulations: Orphan Works Directive,²⁹ Collective Rights Management,³⁰ implementation of the WIPO Marrakesh Treaty,³¹ Broadcasting, Content Portability,³² and last but not least, the Directive on Copyright in the Digital Single Market,³³ which is the biggest thing that probably everybody is aware of. I counted almost 100 judgments of the European Court of Justice over the last 10 years of dealing with copyright and this has had an impact as well, I will come back to that in a moment. The main driver has been the evolution of the digital economy and the way copyright has been impacted by the internet. I think this is clear for everybody. As I often say, in my experience, regulating copyright in the 21st Century, means in essence, regulating the internet.

This has brought the discussion about copyright clearly to another level over the last years. Internet has triggered a large scale of use of copyright protected content, has multiplied the actors; new actors like platforms have emerged. Ordinary people, as has been said already before, interact with copyright sometimes as authors, sometimes as users. This is really something which has brought copyright everywhere in the internet environment.

Two main trends that I have identified over the last few years. One is that I think I can say that EU legislation has increasingly used copyright as a tool for market regulation. This has been done over the last years, with all the instruments that have been mentioned before, mainly with the goal of addressing the perceived market imbalances between the different actors in the value chain and to protect the weaker contractual party.

Market regulation has translated in a number of targeted interventions, covering the relationship between different actors in the value chain. The relationship between rights holders and online platforms: for example Article 15 and Article 17 of the new copyright directive;³⁴ the relationship between individual creators and their contractual counterparts in the “fair remuneration” chapter of the directive; but also the relationships between users and rights holders which has been dealt with in the broad range of new rules on exceptions that we have introduced over the years.

Second, and this is more a driver coming from the European Court of Justice, the case law has increasingly framed the copyright disputes into a balance between different fundamental rights, as recognized by the European Charter. The right to property, the freedom of expression and the right to

²⁹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works text with EEA relevance, 2012 O.J. (L 299).

³⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market text with EEA relevance, 2014 O.J. (L 84).

³¹ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3 (1994).

³² Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market text with EEA relevance, 2017 O.J. (L 1768).

³³ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

³⁴ *Id.* arts. 15 and 17, 2019 O.J. (L 130).

conduct business. In this context, freedom of expression is increasingly come to the fore in internet copyright cases.

Let's not forget that we don't have a fair use in Europe, but we have a closed list of exceptions. We have had dozens of judgments about exceptions to copyright, where the court has stressed the importance of implementing exception effectively to protect the freedom of expression of the users. Recently, we even had the judgment in the *Pelham* case³⁵ where the Court of Justice seems to have introduced a sort of “rule of reason,” in the interpretation of the scope of copyright in order to take into account the freedom of arts and expression. This was a case about music sampling.

Finally, still in the case law of the Court of Justice, we've had the recent judgments where, in relation to the question whether hyperlinking is a copyright protected act or not, the court has linked freedom of expression with the smooth functioning of the internet and concluded that in some cases—right holders—may need to proactively take action, notably to apply technical protection measures, to protect their content online.

This is an entire ecosystem where, by legislation, and by means of the evolution of the case law, we are increasingly in a context of regulation of relationship between different parties and the need to find the right balance between them. To conclude, where does this leave us? What are the questions that are triggered by these trends that will bring us to the future in European debate about copyright?

The first issue is whether in the future we are going to see more collective management as a tool for rights holders to increase their bargaining power with the larger online platforms. To some extent, I think is interesting to note that some sectors, like press publishers, are increasingly advocating for collective management and possibly even mandatory collective management.

The second question is whether we are still purely in a system of contractual freedom and exclusive right, as we have traditionally understood the copyright framework since the 1996 WIPO Treaties³⁶ and the 2001 copyright directive³⁷ in Europe. Or whether and to what extent the most recent legislation, with all this elements of market regulation, is starting to change the paradigm and to put a limit on contractual freedom in order to regulate the market.

My final point, my final question to the future is, what is going to be the impact of this new regulatory environment on the business models, both from the side of rights holders and the side of users. And I think the bigger question that we have in Europe at the moment is whether we are going to see more consolidation from the rights holders side as a means to increase their bargaining power in regards to big internet players, or whether things are going to work the other way around, with smaller service providers and smaller rights holders.

HUGH C. HANESSEN: Okay. To what extent on a day-to-day basis do you deal with the WIPO? Do you deal with U.S. people about copyright, or is it

³⁵ Case C-476/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2018:1002 (2019).

³⁶ WIPO Performances and Phonograms Treaty, 2186 U.N.T.S. 203 (1996); and WIPO Copyright Treaty, 2186 U.N.T.S. 121 (1996).

³⁷ 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, 2001 O.J. (L 167).

just that you have so much on your hands just doing the EU part, is that enough to keep you very, very busy?

MARCO GIORELLO: We do on a regular basis. Of course, both do with the WIPO and with the US. If I have to say what I think, we have with the US once every couple of months, then it depends, but we have some contacts. And with the WIPO, on a much more regular basis because, of course, we are part of the work on copyright which is ongoing and there are always discussions. I think we should do more, but you're right that the discussions and the European agenda has been, over the last years, always somehow coming a little bit as a first priority. Actually, I would even say, even from the message that I get at the political level, and it has been difficult, but I think we have managed, maybe not perfectly yet, to make space basically for international cooperation and reaching out.

HUGH C. HANSEN: For instance, fair use in the U.S., which we've been having some very interesting stuff going on it. EU hasn't said nothing about fair use, I think, because everyone recognizes it's American and for that reason, we can't really just adopt it. Are you doing fair use stuff without calling it fair use?

MARCO GIORELLO: Well, I think no, but I understand why some commentators may think that this is the case. It is true that we are getting more and more into a delicate exercise of copyright with other fundamental rights, as the current debate around Article 17 of the copyright directive shows.³⁸ This is not fair use, it is still done in the context of a close list of exceptions harmonized at EU level, but the balance often requires a delicate case by case assessment. This brings us back to what I mentioned before on the recent trends of the EU Court of Justice case law.

HUGH C. HANSEN: Marco, there is at least one question. Could you let us know when the guidance on Article 17 of the DSM Directive will be released?

MARCO GIORELLO: Very soon. It seems I cannot escape the question; this is what everybody is asking me these days. Very soon.

HUGH C. HANSEN: Okay.

MARCO GIORELLO: It is the type of question that I get every day of course.

HUGH C. HANSEN: This is another question, and anyone can answer. What are your thoughts about an aggressive public outreach policy, winning the hearts and minds of the public in Europe about copyright?

MARCO GIORELLO: Well, yes, it would be very useful. The question is how to do it. I think that I agree with what Shira said, that we need to reach out more people, but it's difficult. It's difficult because there are, in my experience, a lot of competing interests in this area and it is very difficult for policymakers to come up with a coherent message, simple enough and appealing enough for the public, but the idea is good. It's the practice that is more difficult.

HUGH C. HANSEN: Thank you very much, Marco. We're moving on now. Renata, who was late, not on her own accord, but for technical reasons,

³⁸ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art. 17, 2019 O.J. (L 130).

who has been in government and is now out of government. She's with Sullivan & Cromwell. Renata, It's all yours.

RENATA HESSE: All right. Thank you and thanks to your team for all the technical assistance. It took us several tries, but I'm here. I'm very glad to be here. It's nice to be with everyone, to see some old friends who I haven't seen in a long time, but I, like Shira, am really looking forward to actually seeing everybody in person next spring in New York. Fingers crossed. Just a few comments. I wanted to talk a little bit about what's been going on at the antitrust division from Obama to Trump, and then I might touch a little bit on some predictions for the Biden administration, although I don't have any particular insight [inaudible] exactly what is going to happen in the IP area and then the antitrust area.

I'm an antitrust lawyer, which makes me a strange person at this conference. There is periodically a lot of discussion about the intersection of IP and antitrust. There was a lot of activity during the Obama administration when I was the Acting Head of the Antitrust Division, and then a lot of discussion in the Trump administration around these issues. To me, I think, one of the key things I wanted to start with is, did a lot change?

There was a lot of change in rhetoric, I think. There were a feverish number of statements of interest filed in IP cases, business review letters, all sorts of activities put together under what was called the New Madison approach. But I don't think that the law really changed very much. I think that's because there really wasn't any actual enforcement that took place in this area during the Trump administration, and neither was there during the Obama administration. This was a policy issue that people talked about a lot and thought was very important, but in terms of the issues around standard-essential patents, and injunctions, and patent hold-up, and patent hold-out, we didn't actually see cases brought by the antitrust agencies other than, I'll put to one side for the moment, the *Qualcomm* case³⁹ that the FTC brought around these issues.

I think that it's a very important point in particular, around injunctions and injunctive relief. I think it was two years ago, here, that I was speaking on this panel, and I said something about *eBay*⁴⁰ and there was a patent lawyer on the panel who said, "I disagree with *eBay* and how it thinks about injunctions and patent cases." *eBay* has not changed. *eBay* is still the law of the land. Until it's replaced by the Supreme Court with something else, I think the way the law is structured, in the US at least, is that there is no kind of innate right to an injunction on a patent claim. That doesn't mean that you shouldn't get an injunction, if you can meet the standards set forth in *eBay*, but the right to exclude that's provided by the patent laws is limited in some ways. I think particularly in the area of SEPs,⁴¹ where the debate centered around whether seeking injunctive relief could be an antitrust violation, the existence of *eBay* and the law as articulated in *eBay* around injunctions is an important one.

Europe has taken a different path here. The European Commission, DG Comp,⁴² made a very concrete effort to find a particular case around the standard-essential patents and injunctions, to take that case, to prosecute it, and to take it up to the European Court of Justice. There is now an actual standard

³⁹ Fed. Trade Commn. v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

⁴⁰ eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

⁴¹ Standard-essential patents.

⁴² Directorate General for Competition.

in Europe around standard-essential patents and when seeking an injunction does or does not violate the antitrust laws, and I think that's been positive in terms of bringing some clarity to this area.

A couple of concrete thoughts. It's my very firm view that there is a role for antitrust in connection with standard-essential patents. As I've said a number of times, I think that role can be and probably is quite narrow, but I do believe that IP can be used in ways that harm competition, obviously built beyond the fundamental right to exclude, and that that harm can be actionable under some circumstances, and I think the courts have been consistent on that for a long, long time. There are cases where courts have found that the enforcement of a patent right, or the pursuit of enforcement of a patent right through shared litigation, for example, can violate the antitrust laws.

I do think the narrative that antitrust has no role to play here and that antitrust and IP are somehow in opposition to one another is both incorrect and also actually harmful. I've always viewed the two disciplines to work together towards encouraging innovation and research and development, and I think both play a critical role in driving our innovation economy.

The second thing I wanted to say is there was this way in which hold-out and hold-up were brought into parallel places during the Trump administration in the antitrust sphere, and I actually think that's just fundamentally incorrect. Hold-out is not a creature of antitrust by itself. Now, the antitrust division during the Trump administration was very careful to talk about something called collective hold-out, and collective action can be a violation of the antitrust laws, and collective hold-out as described can be an antitrust violation. But hold-out by an individual firm in a patent license negotiation is really a creature of the patent laws and not a creature of antitrust in my view.

Hold-up is a creature of antitrust. It's a child of the standard-setting process where it's widely understood that the incorporation of a patent in a standard can, but does not always, give rise to market power, and market power is where we get into the antitrust discussion. I think this is a very important point because I really don't think the two theories of harm are equivalent in the antitrust world.

Finally, I know I'm running out of time, but I wanted to make a very quick comment about the IEEE Business Review Letter⁴³ and the Trump administration's letter relating to the 2015 Business Review Letter,⁴⁴ which I signed. The Business Review Letter process is designed to give businesses certainty about how the government, the antitrust authorities, will view prospective conduct.

That certainty is really a key part of the process. While it's theoretically possible for something to come to light that changes the positions taken in a Business Review Letter, they are, by their terms, limited to conduct that is subscribed with precision in the letter. It shouldn't though, in my view, be the

⁴³ Letter from Renata B. Hesse, Acting Assistant Att'y Gen. U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (Feb. 2, 2015), <https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated>.

⁴⁴ Letter from Makan Delrahim, Assistant Att'y Gen. U.S. Dep't of Justice, to Sophia Muirhead, General Counsel and Chief Compliance Officer Institute of Electrical and Electronics Engineers, Inc. (Sept. 10, 2020), <https://www.justice.gov/atr/page/file/1315291/download>.

case that, without a request for a new Business Review Letter or the presentation of new facts that suggest that the conduct described in the Letter is not the same as the conduct in which the Letter recipient has engaged—the views articulated in a properly issued Business Review Letter shouldn't be changed because the letter has been misinterpreted by people in the marketplace.

I think the 2015 letter, by its terms, was not an endorsement of the IEEE policy. The fact that people interpreted it as one is a public relations issue. I was saddened to see the Business Review process used in that way because I think it harms the process itself. I'm now open the questions.

HUGH C. HANSEN: Antitrust has had ups and downs. I actually worked in the antitrust division as a student for a year and a half. It was a great job, all I did was go through all the cases that they've ever had since 1790. I guess, before there wasn't an antitrust division or something. I found the no-no's, I think the 9 no-no's, 10 no-no's, and all this other stuff, were going pretty strong then. Then you have the Chicago School which was really saying that the marketplace should determine most things. Where are we now in this whole spectrum, Renata, in terms of antitrust policy today? Can you describe it or predict how it may be for Biden? Where are we?

RENATA HESSE: *Vis-à-vis* IP specifically, it's a little hard to predict. I do think that the new administration, I'm not sure how different in some ways it's going to be from the Trump administration. I think people expected the Trump administration to be somewhat less active in enforcement, at least in the civil sphere. I think most people think they didn't see that. With respect to IP in particular, I suspect we'll see a shift back a little bit towards the middle in my view, where the interests and views of patent holders are treated similarly to those who license and use patents in their products and services. That's what my expectation is. We'll see a little bit of a drawback in terms of the act of rhetoric, certainly and potentially [inaudible] the policy perspective relating to the use of patents and whether antitrust plays a role in that process.

HUGH C. HANSEN: Hold on. It used to be a question of—is it government action or private action. We went through a period with a tremendous amount of private antitrust suits. These people came over from personal injury or something. And then what about today? I'm out there doing something. Am I more concerned with a company solely, or FTC, or the antitrust division coming after me, or is it difficult to say?

RENATA HESSE: Well, I think in the IP sphere, my hope had always been that either the industry itself would come around to a common view on standard-essential patents and injunction [inaudible] with ETSI⁴⁵ and ITU⁴⁶ and other organizations—both people who represented these patent holders and people who represented implementers trying to come up with a coherent policy position around the enforcement of standard-essential patents and antitrust. That was a very difficult and ultimately unsuccessful process in terms of so-called industry self-regulation.

So I think the courts in private cases have been really taking the laboring over in the US, and we saw this in Europe also, as I mentioned in the *Huawei* case.⁴⁷ The courts have been starting to delineate some of the rules around this

⁴⁵ European Telecommunications Standards Institute.

⁴⁶ International Telecommunication Union.

⁴⁷ *Huawei Techs. Co. v. Verizon Communication, Inc.*, No. 2:20-CV-00030-JRG, 2021 WL 150442 (E.D. Tex. 2021).

and around injunctions and standard-essential patents. For me, I would look more towards private actions and the courts than to the antitrust agencies.

HUGH C. HANSEN: All right.

RENATA HESSE: There's a question about change in antitrust focus of lowest price to consumers for copyright. I'm not sure I get the question, but I'll try to answer it. I think there has been generally a change in focus away from just worrying about the lowest prices to consumers. I think there has been an important recognition that price is not the only thing that matters in the marketplace and making sure the innovation works properly and consumers are getting more and better goods, as opposed to just lower-priced goods, is important. That said, one of the hallmarks of a competitive marketplace is that prices are driven down to as close to marginal cost as the market will allow. Conceptually, it's a little bit difficult to think about that in the copyright context.

HUGH C. HANSEN: All right. From the Copyright Office's perspective, how has the Virtual Card Catalog program have been going? I guess that's for Shira.

SHIRA PERLMUTTER: It's going well. Almost two years ago, we completed the digitization of more than 40 million images from the catalog, which is the entire collection from 1870 through 1977, and it's available to browse now. Now what we're doing is data capture and clean up and enrichment of metadata so that we can have online search capability for the public. It's moving along and it's part of our overall copyright modernization initiative.

HUGH C. HANSEN: All right. Renata, in the academic and advocacy worlds, there's been much talk of bringing back the political dimension of antitrust, rather than just focusing on consumer harm, which you can discuss in a little bit. Any movement towards that in the enforcement world, Renata?

RENATA HESSE: I don't know. There has been [inaudible] that part of the goal behind the Sherman Act,⁴⁸ for example, was to make sure that corporations didn't dominate government such that politics and the political world, and the functioning of the government, wasn't effectively delegated to corporate interests. You can see that in the legislative history of the Sherman Act.

I do think, going on today, there's a very robust political dialogue around concentration and whether or not concentration has, not just harmed consumers and workers, but also political speech. One of the things we're seeing is this actual convergence of, I'll call it the right and the left, around the digital platforms and in particular, whether or not the digital platforms control political speech too much. You've seen the Republicans now interested in Twitter and the so-called dominance of Twitter, and Google, and these other companies because they feel like they are somehow limiting the ability of political speech to get out there. It'll be interesting to see whether that either takes shape in a legislative initiative or in some enforcement dimension. I'm not sure what we're going to see. I know it is a big topic in the legislative sphere.

HUGH C. HANSEN: One follow-up on that. In various stages of this, private commercial transactions and others had to worry about whether, in certain periods, they were going to get an antitrust action, and in other periods didn't have to worry at all. In advising clients, which you do, to what extent actually is the antitrust factor important, less important, more important, as you

⁴⁸ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38.

say in the future to what they can do and actually have better results from what they can do.

RENATA HESSE: There's a lot being asked of antitrust right now, and I think we will see the Biden administration taking that challenge on. Whether or not you agree with the view that lax antitrust enforcement is the cause of many of the ills that we're feeling in the US, there is a real belief that that's the case and there are people coming into the agencies who share that belief. I'm an antitrust lawyer, and so I think what I do is important and matters, but I think companies are going to be concerned about antitrust and enforcement in the antitrust sphere and I think it is going to matter. I think there will be active antitrust enforcement.

HUGH C. HANSEN: Somebody hasn't said anything. Brian?

BRIAN H. PANDYA: Good morning, Hugh. Good to see everyone and thank you for having me on this distinguished panel. I've been shaking my head enough to express my agreement and admiration for what my other panelists had to say. A few points of disagreement as well, but I want to say, speaking now of course as a private citizen as a former Department of Justice official, (and not on behalf of my firm or its clients) I'm heartened by the comments from Daren, António, Shira, Renata, and everyone else that focused on accessibility, on bringing IP rights to underserved communities, and on education. Those are important, we look at ways to facilitate collaboration for licensing, to promote competition. That's what I spent a lot of my last year at the Department of Justice working on to encourage innovation.

I'm also glad to hear there's a focus on emerging technologies like artificial intelligence, both around issues of AI and ML⁴⁹ as inventors. But also, I spent a lot of last year looking at some of the cybersecurity concerns. For example, I think we're not that far away from having a malicious actor, whether it would be a state actor or a private entity that tries to bring a data poisoning attack to some of the AI sets being used to review patents. I think there's a lot of thorny issues that national patent offices need to address related to AI and cybersecurity and they are not getting enough discussion.

One last thing, I actually agreed with a lot of what Renata said. We have some disagreement, or view things from different contexts. But there's one thing I would like to say about the New Madison approach to standard-essential patents that was advocated by the Antitrust Division in the previous administration. Fundamentally, it was really meant to move beyond these zero-sum notions of patent hold-up versus patent hold-out and encourage standard-setting organizations to implement policies that create maximum incentives both for innovators and for licensees to implement new technology.

As we look forward, I think there's a tendency in the FRAND⁵⁰ world and the standard-essential patents world to always look backwards, look over our shoulder at how we handled issues in the past, and I think the 2015 IEEE Business Review letter was very much a product of its time, where we were coming out of a decade of smartphone wars and NPE⁵¹ litigation. I certainly understand and respect Renata's concerns about changing this business review letter. But the fact is, there was concern that it was being misapplied by third parties and people in the Department felt it relied on outdated or controversial

⁴⁹ Artificial Intelligence and Machine Learning.

⁵⁰ Fair, reasonable, and non-discriminatory.

⁵¹ Non-practicing entity.

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caselaw. Instead of looking backwards, I think we need to look forward as to where FRAND issues are going, into issues like automobiles and smart grids, the way we look at how you review essentiality. I think those are different issues in some respects in the handset space.

I think when we come back here next year, I hope we can hear from people like Jay Jurata and Emily Luken who have really tried to address FRAND and SEPs issues in new contexts, I think you'd be doing the government regulators and the academic world a favor by looking at how these issues apply in new technologies. Again, it's an honor to be here and to be with this distinguished panel. Like everyone else, I'm optimistic for the future of IP, for the future of antitrust enforcement that respects competition, collaboration, innovation. I think we are going to have a great year ahead.

HUGH C. HANSEN: Well, thank you very much. I think we had the very top giving us their views, the ones who are going to have the most influence in the future, all right here. Thank you all very much. I thought it was great.

RENATA HESSE: Thank you.

DAREN TANG: Thank you so much Hugh, António. Shira, Renata, Brian, Marco, take care.

RENATA HESSE: Good to see everyone

DAREN TANG: Good to see everyone. Cheers.