

Session 1B

**Emily C. & John E. Hansen Intellectual Property Institute**

**TWENTY-SEVENTH ANNUAL CONFERENCE  
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LAW & POLICY**

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**SESSION 1: PLENARY SESSIONS**

**1B. IP – Past, Present & Future**

***Moderator:***

**Hugh C. Hansen**

*Fordham University School of Law, New York*

***Speakers:***

**Nicholas Banasevic**

*DG Competition, European Commission, Brussels  
The Interaction Between Competition Law and Standardization*

**Donald Dunner**

*Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Washington, D.C.  
Patent Eligibility: Coping with Alice, Mayo, Myriad, Bilski, et al.*

**Ralph Oman**

*The George Washington University Law School, Washington, D.C.  
Copyright: The Reports of Her Death Were Greatly Exaggerated*

**Etienne Sanz de Acedo**

*International Trademark Association (INTA), New York*

***Panelists:***

**Marshall Leaffer**

*Maurer School of Law, University of Indiana, Bloomington*

**Daryl Lim**

*The John Marshall Law School, Chicago*

**James Nurton**

*Lextel Partners; IP Writer/Consultant, London*

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**Brian Pandya**

*U.S. Department of Justice, Washington, D.C.*

**Eleonora Rosati**

*University of Southampton, London*

**Antony Taubman**

*World Trade Organization, Geneva*

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PROF. HANSEN: Welcome to the next panel, “IP — Past, Present, and Future.” Everyone is going to talk a little bit about what was happening in the past, the present, and some prediction of the future with regard to anything they are discussing.

Because we have distinct areas and there is not a lot of overlap, we have a very large panel. I’m going to ask everyone to state their name and affiliation.

MR. OMAN: Ralph Oman with George Washington Law School in Washington, D.C., the author of the *Hymn to Authors and Inventors* that culminated in the celebration of the Bicentennial of Patents and Copyrights in the United States.

PROF. HANSEN: Good, but too long.

MR. SANZ: Etienne Sanz de Acedo, CEO of International Trademark Association (INTA).

MR. DUNNER: Don Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner in Washington, D.C.

MR. BANASEVIC: Nick Banasevic, European Commission, DG Competition.

MR. PANDYA: Brian Pandya, United States Department of Justice in Washington, D.C.

PROF. ROSATI: Eleonora Rosati, University of Southampton, Bird & Bird, and IPKat.

PROF. LEAFFER: Marshall Leaffer, Indiana University Maurer School of Law in Bloomington, Indiana.

PROF. LIM: Daryl Lim, The John Marshall Law School, Chicago, and the Hansen IP Institute, Fordham, New York.

MR. NURTON: James Nurton. I’m a writer and editor mainly working in IP.

MR. TAUBMAN: If you’re wondering whether the multilateral system is being marginalized, I’m Tony Taubman from the World Trade Organization.

PROF. HANSEN: I usually don’t have an introduction, so we’re going to move right to Ralph, who worked on the Hill for Senator Mathias.

MR. OMAN: And Senator Scott, when we passed the Copyright Reform Act of 1976.<sup>1</sup>

PROF. HANSEN: Enough already. But also then Register of Copyrights for how long?

MR. OMAN: Eight and a half years.

PROF. HANSEN: Which did you like better, working on the Hill or being the Register of Copyrights?

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<sup>1</sup> 17 U.S.C. §§ 101-810 (2010).

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MR. OMAN: Certainly working on the Hill. That's where you had real power.  
[Laughter]

PROF. HANSEN: Has the death of copyright been greatly exaggerated? You're going to tell us the answer to that by the end.

MR. OMAN: That's the point, yes.

PROF. HANSEN: Okay, good.

MR. OMAN: In terms of explaining the power issue a minute ago, Mitch Glazier is here and he will explain why the cover of Title 17<sup>2</sup> published by the U.S. government is Duke blue or Northwestern University Law School purple. It was because the Chief Counsel of the House Subcommittee had tremendous influence over what's in it. But that's an obscure bit of trivia.

I will get into my remarks on the death of copyright.

PROF. HANSEN: Ralph, no more trivia, all right? Just go right to the heart of the matter now.

MR. OMAN: I'll head right into it.

We are covering the past, present, and future of copyright in seven minutes — it's like playing *The Minute Waltz* in thirty seconds — but I'll do my best.

The first Copyright Law in the United States — we were the first country actually to include copyright in our Constitution, copyrights and patents. France followed suit shortly thereafter, with The Rights of Man, and included copyright protection under that famous document.

The framers of the U.S. Constitution drafted Article I Section 8 Clause 8,<sup>3</sup> which has been mentioned several times this morning. They were trying to do three things on the copyright front.

First, they wanted to emphasize that the public good was the primary objective of copyright, not the welfare of authors. Even so, James Madison, a gentleman who became president of the United States thereafter, noted in *The Federalist Papers* that the framers did not see the two objectives, the public good and the welfare of authors, as in any way at war with one another. In his words, "The public good fully coincides with the claims of authors,"<sup>4</sup> and we'll see whether that's still true today.

The second purpose of the framers of the Constitution was to establish a national uniform system. Our experience under an earlier form of government, the Articles of the Confederation, turned out to be unworkable, and we needed uniformity across the board.

The third purpose was to create a statutory regime of protection that ignored fancy philosophical arguments about God-given natural rights. The framers weren't French; they were Americans, and they were farmers and merchants and lawyers and very practical and commonsensical people. They were not given to noble concepts like the rights of man. Copyright was an economic bargain, plain and simple: you create it; you share it with the public at large; then we give you a legal right to enforce your rights over a period of time; then the work falls into the public domain, which itself was a positive thing. Congress thought that works going into the public domain was one of the advantages of a limited term, and we stuck by it.

Our first Copyright Law was enacted and signed by President George Washington in 1790. We borrowed it essentially from the British, the Statute of Anne.<sup>5</sup> It protected the

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<sup>2</sup> Copyright Reform Act, 17 U.S.C. §§ 101-810 (1976).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>4</sup> THE FEDERALIST No. 43 (James Madison).

<sup>5</sup> 8 Ann. c. 21. (repealed by Copyright Act, 1842 (5 & 6 Vict. c. 45)).

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works of authorship — books, maps, and charts — for a period of fourteen years, renewable for another fourteen years.

It only protected U.S. authors. Foreign authors were not included. As a result, American publishers and American printers operated a massive piracy operation, much to the displeasure of Charles Dickens, Victor Hugo, Goethe, Gilbert and Sullivan, and other famous British authors.

PROF. HANSEN: Ralph, you only have four minutes left. Let's move to today a little bit.

MR. OMAN: I want to reassure you that the next 200 years go by very quickly. [Laughter] And they will.

The fact that we had differences in philosophical approaches to copyright made a big difference ultimately. Europe moved forward with its own copyright traditions and priorities, and those real differences resulted in policy disagreements that festered until the United States joined the Berne Convention in 1989. The United States did keep moral rights out of its implementing legislation, and the Berne Union accepted us nonetheless.

But that 200-year history of the United States developing its own thing in isolation from the rest of the world, from the European tradition, had its ultimate effects in U.S. law by a system of rigid formalities. David Carson mentioned a few of them a few minutes ago. But we did expand copyright coverage, following the lead of the Europeans, to cover much more than the original books, maps, and charts. It went to music; it extended to choreography, photographs, graphics, motion pictures, characters, sound recordings, computer programs, architectural works.

I thought this basic introduction to copyright for all of our patent colleagues might be useful, but I will now move forward.

PROF. HANSEN: We don't care about patent people, all right? [Laughter]

MR. OMAN: The various trends — the decrease in the formalities, the expansion of coverage, no longer just the right to make a copy but the right of public display, the right of public performance, the right to prepare derivative works — all these things developed over the years.

Term was extended very quickly to the current life of the author plus seventy years.

And we saw, unfortunately, over the last 100 years the growing use of compulsory licenses to solve perceived notions of unequal bargaining power and marketplace failure. The U.S. Congress has a weakness for extending a helping hand to the little guy, the startup companies that face economic titans in the marketplace. Compulsory licenses are a part of that legal thinking, that pattern of legislation.

The U.S. Congress created a compulsory license for record companies early in the 20<sup>th</sup> century; a compulsory license for computer software writers; a compulsory license for cable companies and satellite carriers; and they also created a safe harbor<sup>6</sup> for ISPs that were breaking new ground, trying to turn digital technology into a game-changing innovation that would benefit the public at large. So they were given benefits that would have important implications for all of us today.

As the various industries I mentioned that got compulsory licenses became mature, they worked harder and harder — and it still is hard — to justify the compulsory licenses.

But the fact is that, in the United States at least — I don't want to call it a compulsory license because it's not a compulsory license — the safe-harbor provision has just been dealt a fatal blow in legal concept by the European Union. They moved decisively

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<sup>6</sup> The Digital Millennium Copyright Act, 17 U.S.C. § 512.

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in the direction of adopting Article 17,<sup>7</sup> paving the way, in my view, for a bright future for copyright in the digital age.

PROF. HANSEN: All right, Ralph, you're already about a minute over. So the bottom line is that copyright is not dead?

MR. OMAN: The bottom line is that it is, I think, a very positive step. I think Google is going to respond positively. They have an opportunity to really shape the contours of copyright in the years ahead.

Will they try to be confrontational or hostile to the concept of Article 17, or will they be cooperative and act positively to make sure that there is shared liability on the Web for copyright protection, and will they adopt measures that enable them to help the copyright owners enforce their rights in the digital age on the Internet? I think they will, and I think that's a positive.

They have brilliant lawyers working for them. Bill Patry is here today. It will be Bill Patry and the brilliant lawyers at Google who will in many ways be shaping the future of copyright around the world. They will be working with the various Member State governments of the European Union to draft implementing legislation, and that is going to be the path to the future for copyright.

PROF. HANSEN: Okay. Good. Thanks. Interesting.

I have a little different take on the beginning. I don't think the framers were actually skeptical of copyright at all. The framers only had two substantive civil things that they put in the Constitution: (1) bankruptcy, prohibiting the states from doing it because they wanted to protect property rights; and (2) copyright and patents because of what they viewed as the importance of that.

It says "secure"; it doesn't say "create." They realized they were in existence. They just wanted to be sure and give it more protection. In 1790, when a number of framers were actually not in Congress, it said books, maps, and charts. Well, you don't need copyright to get people to create maps, charts, or books — they were done for years; you had to do them — but they were protecting them because of the very Lockean view that effort creates property, and they protected maps and charts which had been in the public domain before then.

Actually, the first statute contracted the public domain. The public domain was not something that was good; it was something that you had to have after a certain amount of time, but that wasn't something that they thought was a good feature.

And then, you had common-law copyright completely created by judges, which continued to exist even when there was statutory copyright both in the United Kingdom and in the United States, until finally it was said, "Okay, you can only choose one or the other." What is common-law copyright? It is a natural rights view of copyright.

So I think the beginning of this was very much pro copyright and that over time things changed.

One of the things that changed is digital. When we had digital, what happened? All of a sudden, the players were different. Consumers now got something for nothing, so they were on the side of limited copyright. Tech companies, which wanted to sell things, not give consumers something for nothing, were against it.

Then you had academics. When I first started in this field, IP academics were creative wannabes. I wanted to be a novelist. The Copyright Office was full of creative wannabes. Now the people who are teaching copyright are coming from the tech side, and

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<sup>7</sup> Directive on Copyright in the Digital Single Market, art. 17, 2019 O.J. (L 130) 92.

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they actually see copyright as “the ghost in the machine,” something that should be limited. So if you are talking about players, the world has changed considerably.

And then, you have social media, which one side is very good at and the IP side is not very good at. One reason is of course we have IP; we don’t have to explain it.

“Why are you a Catholic? Why are you a Buddhist? Why are you a Muslim?”  
“What do you mean why? I just am.”

“Why is IP protected?” “What do you mean why? Of course it should be. It’s almost a natural right.”

They’re not used to making the policy arguments of why actually IP should be protected. In this world, with social media and everything else, we really need to have two sides to it. It is sort of lopsided right now, and I am actually concerned about the future. I am glad to see that you think it is going to be okay. I guess time will tell.

Now I’ve taken the time of the first two speakers. [Laughter] I’m very sorry.

MR. SANZ: I’m totally fine.

PROF. HANSEN: Thank you, Ralph.

Do we have any comments or thoughts at all?

[No response]

Good. Let’s keep it that way, all right?

Etienne, are you happy to be here?

MR. SANZ: Very.

PROF. HANSEN: What do you think is the best IP conference in the world?

MR. SANZ: Well, I would say Fordham is probably the only conference in the world where you have a bomb threatening you in terms of time.

PROF. HANSEN: Yes, and you’ve turned off the bomb. Would you turn the bomb back on, please, because we’re not messing around with these people here? We mean business.

MR. SANZ: I’m going to talk about the past, present, and future of IP from a trademark (probably more brand) perspective. Frankly, past is past, so we better look at present and future, if you’ll allow me. Let’s concentrate on today and on tomorrow. Let’s see what the trends are.

First of all, IP is in good shape. If you look at the demand for IP, it is rising on a permanent basis. If you look at WIPO statistics, just in 2017 there were 3.1 million patent filings; 1.76 million utility model filings; 12.3 million trademark filings, which is a 26 percent increase versus the prior year; and 1.2 million design filings. This basically means that nowadays we have 43 million trademarks that are active and we have 40 million patents in force. I’m not sure whether that is a good thing, by the way.

If you look at where those filings come from, 65 percent of them come from Asia and 85 percent of them are in the five leading offices (China, United States, Japan, Korea, and the European Patent Office). That is the first trend.

The second trend is intangible assets have gained significance over the years. Eighty-seven percent of the market valuation of Standard & Poor’s 500 companies is based on intangibles versus 13 percent on tangibles.

PROF. HANSEN: Of course, intangibles is IP.

MR. SANZ: It is.

Of course, commerce is changing and trade is changing — B2C (Business to Consumer), B2B (Business to Business), C2C (Consumer to Consumer), perhaps C2B (Consumer to Business), and country to country.

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But what is also changing as a trend is the behavior of employees, and we should not forget that the essential part of any company's IP is stored in the heads of their employees. So employees' knowhow is really what is promoting the company's success. Now, what is also interesting to note is that by 2030, 40 percent of the global workforce will be on temporary or on project contracts, which means that that knowhow will be moving from one company to another. There you have to look at the fact that we are going to have two kinds of companies, we are going to have parent companies and we are going to have fluid companies, and that might have an impact on their IP.

What is also interesting is that consumer behavior is changing. According to the Edelman Trust Barometer for this year, only one in five global citizens feels that the system is currently working for them. And, by the way, here in the United States, 96 percent of Americans are shopping online; 43 percent shop in bed; 20 percent shop in the bathroom; 20 percent shop in their cars — scary; 20 percent shop in the office, so perhaps we need to look at what our employees are doing.

PROF. HANSEN: Twenty percent shop in the bathroom?

MR. SANZ: Shop in the bathroom.

And 10 percent shop under the effects of alcohol or drugs.

PROF. HANSEN: So basically, they could be drunk in the bathroom and having a pretty good time.

MR. SANZ: That could get very expensive.

But what is also interesting is that two out of three customers either buy or boycott products based on the political and social engagement of companies. That's a very relevant trend for companies, and therefore for IP professionals.

And of course, we have technology, we have innovation — we've been talking about AI, blockchain, Internet of Things, big data — but there are also Variable Technologies that have medical impact; we have drones that are being used for rural development; and, according to the World Economic Forum, by 2027 10 percent of the global GDP will be stored in blockchain.

I would like to come back to the fact that we saw that there is a rise in IP rights — but again, is that really a good thing? — and perhaps there are different types of innovation.

One of the trends that we are noticing as well is that there is a lot of business model innovation rather than true innovation. One of the questions we need to ask ourselves is: Do more patents really reflect innovation, and do more patents really aggregate value to our society?

As a final trend, there are new players. There is a trend toward privatization of functions that were traditionally undertaken by the public sector. There is the emergence of new technologies. And, just to name one, there is an increased role of online platforms, from takedown services to potentially registries of IP rights, or from purely marketplaces to legal and IP service providers or facilitators. That is something that might be about to come.

Let's very quickly talk about challenges and opportunities, and here I'm going to really concentrate on brand owners.

The first challenge is harmonization. Filing of rights should be, at least for trademarks, a commodity. The added value is not in filing, the added value is not in prosecution; the added value is in enforcement.

The second major challenge is counterfeiting and piracy. Today we were reading that just on Instagram between 2016 and today there has been a 160 percent increase in counterfeit offerings.

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The Internet is a great opportunity, but it is a great challenge as well. We saw the impact of the EU General Data Protection Regulation (GDPR).<sup>8</sup> We are noticing the impact on the WHOIS mechanism; this is still unresolved and the Internet Corporation for Assigned Names and Numbers (ICANN) continues to discuss that, and the IP constituency is not really being heard any longer.

Last but not least, we have moved from plain packaging to something that is far scarier, brand restrictions. It is the idea that our policymakers, our authorities, are entitled to remove the rights from brand owners.

Just a few examples: We started with tobacco on plain packaging, but now it is moving to sugary drinks, to savory snacks, to infant formula. It started — we know that — in Australia; went to New Zealand; came to Europe; very strong now in Africa, particularly South Africa; extremely strong in Latin America. I'm going to give you just three examples. You cannot use anymore Tony the Tiger on the Kellogg's cereals in Chile. The smile on Pringles chips cannot be used anymore in Chile. And those of you who drink beer will notice that in Hungary if you order Heineken, you will not see the red stars on the bottle because it seems to remind someone of the communist era.

My very final comment, which is perhaps more policy-related: there is from our policymakers — not here in the United States but globally — perhaps a lack of understanding of the relevance of IP. IP today might not be adapted to small and medium-sized enterprises (SMEs) and entrepreneurs. And we might need to rethink accessibility to IP protection and enforcement.

And, last but not least, the IP system perhaps has become too traditional and somehow obsolete. We might need to move toward a new definition of IP, and perhaps we need to think about data as another class of IP assets.

Thank you.

PROF. HANSEN: There are about 17,000 ideas in that talk. Can you give these people a little bit of a break? So, if you were saying what was the most important part of your presentation, what was it — brand restriction?

MR. SANZ: From a brand owner perspective, yes; from a global economic perspective, no. From the global economic perspective, the fact that IP has not adapted to SMEs and entrepreneurs is a huge problem.

PROF. HANSEN: How has it not adapted to them?

MR. SANZ: Well, because the cost of filing is not high — we know that — and we know IP offices are as much as possible reducing that cost. They are extremely proud of getting more filings, but this doesn't really help.

The problem for SMEs is not with filing; it's going to be at prosecution, it's going to be at enforcement. When you talk to SMEs and you tell them filing is going to cost, let's say, \$1000, that's not the issue. The issue is going to be afterwards, when it is going to \$5000, \$10,000, \$20,000. Not only can't they afford it, but their credibility of the IP system is gone. If we don't have that, we have a huge problem because the global economy is mostly based on individuals and SMEs.

PROF. HANSEN: Well, SMEs are being screwed all over the place, right, just being in the marketplace? They're small, and SMEs often don't have a lawyer. One reason is they can't afford it, but another reason is the lawyer says, "You can't do this," and they don't want to hear "You can't do this." So all sorts of problems are there with SMEs.

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<sup>8</sup> General Data Protection Regulation, 2016 J.O. (L119) 1-88 (EU).



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Do you have a group of SMEs saying “down with this” or “down with that,” or are they just going on in their ignorant bliss and having a pretty good life?

MR. SANZ: I think they just have to go on, and that’s part of the issue. And we should not forget one thing: major corporations today started as a single person or an SME, and we need to work more for these people.

This is where as IP professionals we should probably become more business partners, we should probably become more facilitators, and we might need to — at least this is what we are discussing at INTA — trademark professionals, brand professionals might probably be moving into kind of non-business, which is the risk assessment business. This is really answering the demand from industry, whether it’s big or small industry.

PROF. HANSEN: Trademark professionals, wherever you find them in terms of IP, are probably the most set people in their ways. I mean they have been doing this for years, they have a set procedure, they know what to do, and they can do it easily. The European Union comes in with some trademark directive, and they say, “No, no, no, let’s try to stop that.” So globalization in terms of IP is a threat because it’s a threat to their jobs. And the country is supporting it because they make money out of the trademark office.

So the way it is set up now is the group that is probably the least approachable to making change, even though we need it, is probably actually both the countries’ trademark offices and the trademark attorneys. Would you agree or disagree?

MR. SANZ: I would not agree.

PROF. HANSEN: Too bad. Well, that’s good. All right.

We have some trademark people here. Let’s hear what they say.

MR. OMAN: I thought it was very interesting, particularly the numbers that you talked about, Etienne. I think you said there are 12 million trademarks applied globally. I think there were over 3.5 million just in China last year. Do you think this kind of growth is even sustainable looking ahead, and what challenges does it bring?

I think one issue might be that for many businesses, SMEs, trademarks will become less and less relevant to them. Domain names, social media, and hashtags will become more important.

MR. SANZ: I would say that there is a risk. We have already been discussing the concept of the depletion of registries, the fact that there might be too many trademarks within the registries. Yes, that’s a possibility. Somehow, again, IP offices might want to review their strategies and whether they make sense or not.

The other thing we should think about — and I mentioned that very quickly — is the role of marketplaces nowadays, which is basically: you’re an entrepreneur, you’re a single businessman or woman, you’re starting your business. What are you going to do? You are going to go online, and when you go online you are going to go beyond the territorial boundaries. So you’re going to probably think *Do I need to register my rights, or let’s forget about that and let’s see what happens?* Perhaps what is going to happen is that at a certain point they will just register with Alibaba, with Amazon, with Google, with social platforms. Who knows?

PROF. HANSEN: Marshall?

PROF. LEAFFER: I have a follow-up on that. To me, one of the biggest challenges in the world of trademark is trademark depletion, as you mentioned, and also trademark congestion. Clearing trademark rights today can be a very costly matter particularly for SMEs. This problem is this: How can we get rid of the deadwood on trademark registries that are cluttering up the entire system?

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I remember, going back to the 1970s when I was in practice, clearing rights was a very intricate process. But today it is infinitely more difficult and complicated. How are we going to get rid of all those trademark registrations which are of no value to the registrant but which are imposing undue costs to those who wish to legitimately enter markets?

PROF. HANSEN: All I have to do is go online and see if someone has this trademark, and if they do — yes, if you want to have descriptive marks, it's very tough. So you have what? Either you create or it's arbitrary. And then you have the whole world. So it's not like "My God, nobody can do anything." Apple uses APPLE; it never had trouble. The key is to get people away from trademarks that are descriptive or suggestive, move to creating ones out of whole cloth or arbitrary ones. Wouldn't you agree?

PROF. LEAFFER: No, not particularly.

PROF. HANSEN: Nobody's agreeing with me today.

PROF. LEAFFER: Debate is the theme of the Conference, after all.

No, I don't agree with that. I think if you are big company like Apple, clearing trademark rights is not a concern. But an SME is in a different position and it is a very complicated and puzzling and costly process to clear rights; but, if you don't clear rights, you are setting yourself up for lawsuits.

As a matter of fact, it is often not clear who owns what in today's world. You just cannot go online and figure it all out from your bathroom.

PROF. HANSEN: I think I'm going to kill myself after this panel. It's the most depressing thing I've ever heard in my life. But we don't have any more time.

Thank you very much.

MR. DUNNER: Hello.

PROF. HANSEN: Hello. Don Dunner is one of the deans or top people in patent law clearly, and for many years, in terms of not just advising people but actually going out and doing it. I think you've been before the Federal Circuit 750 times or something.

MR. DUNNER: 175.

PROF. HANSEN: Well, I'm going to go with 750. [Laughter]

In terms of your practice, what was the most exciting, best part of your practice over these years?

MR. DUNNER: If I had to pick one point, it would be my first and only argument before the Supreme Court a couple of years ago, where I was asked an interesting question by the Chief Justice that made the "Humor in the Supreme Court" column. The issue involved whether the award of attorney fees was reviewed *de novo* or deferentially. There were two Supreme Court cases that said if the attorney fees are very high it's *de novo*, and that was my position. So I mentioned that I had been involved in two cases where the attorney fees were \$30 million each.

John Roberts looked at me and he said, "That's outrageous. Your fees are too high. You've got to reduce them immediately."

I looked at him and I said without blinking, "Just as yours were a couple of years ago." The record shows "laughter" twice. [Laughter]

And then the comment by him was, "Oh no."

PROF. HANSEN: Did you win that case?

MR. DUNNER: No, I lost that case. [Laughter]

PROF. HANSEN: Maybe there's a lesson there. [Laughter]

The floor is yours.

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MR. DUNNER: I am going to talk about the past, present, and future of a patent issue, the eligibility requirement in Section 101 of the Patent Law.<sup>9</sup>

For years and years the Supreme Court paid no attention to the Federal Circuit; and then, at the turn of the century, about 2001, the Supreme Court started to get really interested in the Federal Circuit; and about nine or ten years later, in 2010, it expanded their interest in Section 101 of Title 35, which basically has been construed as a gatekeeping provision that says patents on processes, compositions of matter, machines, and so on and so forth, will be patent-eligible.

What did the Supreme Court do? It basically imposed a special test on eligibility, and it said if the patent claims involved a law of nature, natural phenomena, or an abstract idea, you had to have a special test distinguishing those inventions from patent-eligible inventions.

It came up with a two-part test. The first part is, was the claim directed to a patent-ineligible concept? The second part is, if it is directed to a patent-ineligible concept, did the claim call for something more than that concept — namely, did it have an inventive concept added on to it?

How did the Federal Circuit deal with that wonderful body of law? Not very well. When it started out, basically if you spoke to Federal Circuit judges, if you read their opinions, they really did not know how to apply that test. What is an abstract idea and when do you have a law of nature involved? Almost every invention in the world involves some kind of law of nature in its application.

The end result was not only did they not understand what was going on, by their own admission, but in several cases, notably two cases involving diagnostic processes in the medical field — *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*<sup>10</sup> and *Athena Diagnostics v. Mayo Collaborative Services*<sup>11</sup> — the court wrote extensive opinions finding that the patents were ineligible and bemoaning the fact that it had to find the patents ineligible because both inventions were in its view close to pioneer inventions.

Where did that leave the Federal Circuit? Well, it did not leave the law in a very good state. But somehow, some way, the Federal Circuit found a way to weave around this Supreme Court jurisprudence.

In one case, *Vanda Pharmaceuticals v. West-Ward Pharmaceuticals International Limited*,<sup>12</sup> the Federal Circuit said: It is not enough in the first step to just find that something is in the patent-ineligible area; you have to find that the claim was directed to a patent-ineligible invention. By way of example, if you had a practical application of what otherwise might be a patent-ineligible invention, that could pass muster and you would not have to go to the second part of the test.

Then, in another case, *Berkheimer v. HP Inc.*<sup>13</sup> — in response to the fact that accused infringers were filing motions to dismiss by the ton in district courts and getting them granted on the ground that the cases involved patent-ineligible inventions — the Federal Circuit basically said that if there is a genuine issue of material fact in the second part of the issue — namely, was the invention well understood, routine, or conventional —

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<sup>9</sup> 35 USC § 101 (2017).

<sup>10</sup> 788 F.3d 1371, 1375-76, *en banc denied*, 809 F.3d 1282 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016).

<sup>11</sup> 915 F.3d 743 (Fed. Cir. 2019).

<sup>12</sup> 887 F.3d 1117 (Fed. Cir. 2018).

<sup>13</sup> 881 F.3d 1360 (Fed. Cir. 2018).

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then you couldn't get a summary disposition of that issue. That resulted in a significant diminution of motions to dismiss in this area.

Unfortunately, cases such as *Vanda* and *Berkheimer* are in the minority in the Federal Circuit, and so we are faced with the proposition that we have an enormous disincentive to patenting in many fields — particularly the medical/diagnostic fields, but not exclusively that, because abstract ideas cover a lot of other things, such as computer-oriented inventions — you have a great disincentive to invent.

So what is everybody else doing in that situation?

The Patent and Trademark Office has gotten involved. The very imaginative Director of the USPTO, Andrei Iancu, who is on the program and is probably in the audience today, has set forth a whole body of guidelines for examiners as to how to apply these rules that are very difficult to apply. There have been revisions and revisions of the revisions that have been published in the *Federal Register*, and that has been extraordinarily helpful in reducing the number of Section 101 rejections by the USPTO.

But that isn't a cure-all, because just recently the Federal Circuit in a case where a USPTO guideline was involved found that the guideline was a misstatement of the law and found the patent ineligible. But nevertheless, that has been a help.

A very significant area of current activity is in Congress. It is very difficult to get changes to the patent laws passed by Congress. However, very recently two senators, Senator Tillis from North Carolina and Senator Coons from Delaware, one a Republican and one a Democrat, are now leading a charge, meeting with leaders in the patent law to come up with a legislative fix to deal with the Section 101 issue.

There have been multiple meetings. They have come up with proposed guidelines that would govern a legislative fix. They are still working on it. There will be exceptions made, but the current thinking is that the Supreme Court's abrogation of Section 101 will basically be overruled; the exceptions in the Supreme Court will be overruled and replaced with other exceptions.

So there is hope. But stay tuned.

PROF. HANSEN: Thank you.

What grade would you give the Supreme Court in patents?

MR. DUNNER: An F. They occasionally do well. Somebody gave an answer — I think it was Ralph — on some cases A, some cases F. Most of the cases I would give them an F, but in a few cases I would give them a good grade.

PROF. HANSEN: What about the Federal Circuit?

MR. DUNNER: Well, I am a lover of the Federal Circuit, so I would give the Federal Circuit a very high grade. Its mandate was to provide predictability and uniformity in the law, and, except for the Supreme Court's intervention, it has largely satisfied that goal. The judges on the Federal Circuit are almost routinely bright, excellent, and well-trained. They are not all patent lawyers, but they are very good.

PROF. HANSEN: Can it be said that the reason the Supreme Court did not touch Federal Circuit rulings was they trusted the Federal Circuit to reach the right result? Then, the Federal Circuit was divided by itself — they'd have an en banc that was 6–5 — and so the view was that “the Federal Circuit itself is divided; maybe we have to step in.” Would you say that's true?

MR. DUNNER: Well, because the Federal Circuit has exclusive jurisdiction over patent cases coming up from the district courts, you do not have the normal door opener to the Supreme Court — namely, a division in circuits. One of the bases for getting Supreme Court review is you have intra-circuit divisions. That is the basis for going up. But I would

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doubt in this area of eligibility that you would have much division in the Federal Circuit on most of the issues. I think most of the judges would like to see a more liberal interpretation of Section 101.

In fact, the Supreme Court, interestingly, has written a whole bunch of decisions, and those decisions are laced with very positive comments inconsistent with the bottom lines of those cases. In one of the cases, *Chakrabarty*,<sup>14</sup> the Supreme Court said that everything is eligible within the knowledge or understanding of men and women. So the Supreme Court has taken a very liberal view in its *dicta* but that is not creditable to do in its decision-making.

PROF. HANSEN: One of the problems with the Supreme Court is they do not have a clue, so they reject a case, and most of the Justices are going to treat it as a vacation and go on and do the other things, and one or two Justices basically are doing the laboring on it and they are given too much discretion.

Breyer's view in his first case was much more restrictive, I think, than a lot. So you see in the opinion "But this isn't overruled, but this isn't overruled, but this isn't overruled." So you have almost this schizophrenic type of opinion sometimes coming out of the Court.

And another problem is that lower courts had more freedom to go one way or the other. I actually think the Supreme Court did not expect the lower courts to go as far as they did in being anti-patents. I don't know. Do you agree?

MR. DUNNER: I think the problem with the Supreme Court versus the Federal Circuit is that the Supreme Court is concerned that the Federal Circuit has come up with a lot of specific rules. The whole purpose of the Federal Circuit's formation was predictability and uniformity. To achieve that goal they have come up with bright-line rules in a whole lot of different areas, including the area of what is obvious and what is not obvious, the *KSR* case.<sup>15</sup> The Supreme Court doesn't like that.

The Supreme Court also would like them to be more generalist in their application of the law rather than be focused so much on patent issues. There are a number of writers and commentators in this field who have focused on those issues. I think that is the reason for the Supreme Court's hostility to a lot of patent cases.

Interestingly enough, the Justice who writes most of the patent opinions is Thomas, who writes pretty good opinions, but unfortunately, they have the wrong result.

PROF. HANSEN: I think Thomas gets them because he is viewed as a pair of safe hands without any particular view one way or the other. That's probably why he gets them. Whereas the Chief Justice is more worried that others are going to go too much one way or the other. I don't know.

Do any of the patent people here have any comments?

MR. PANDYA: I can't comment on some of the specific cases Don mentioned because there are calls for the views of the Solicitor General in two of those cases.

But I will make one observation. I think this is a healthy debate we are having. Don's comments are signs that the patent system is innovating, adjusting to the times, sometimes struggling to get it right, but I think they are trying to get it right.

We heard what Etienne said about the trademark system. I don't want to put words in his mouth, but I think he was a bit gloomy in his outlook about whether the trademark system can adapt to modern technology and modern commerce. Don, I think you were a bit more optimistic in your comments about the patent system. I am also optimistic. These

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<sup>14</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 100 (1980).

<sup>15</sup> *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 (2007).

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are good debates to be had and reflect that as the economy is changing and the world is changing, so are the systems for protecting IP.

PROF. HANSEN: What do you see, having this experience in government? My view, and I think a lot of people's view, of Congress is they do nothing, which is the best thing they do, and then they codify something else, or they codify a solution that industry has come up with. But if you don't have one of those three, most of them just say: "No, we can't really do it. One reason is, even if we pass this law that we like, we can't get it on the floor because of unanimous exception to the normal rules. You can have one or two senators or someone else who do not like it and nothing will come of it."

So it's a very tough system. Our legislative system was meant basically by the framers, I think, not to pass laws, the Jeffersonian view of "to govern least is to govern best."

What do you think?

MR. PANDYA: I think that's a better question for the academics and the private-sector lawyers on panel, particularly the law professor to my left and the elder statesman of the Federal Circuit bar to my right.

PROF. HANSEN: That's right, you can't comment.

PROF. LIM: Just a quick comment on the fate of the USPTO guidelines. I think that is a silver lining to the dark cloud. There was a lot of optimism that the guidelines would, at least in a limited way, correct the self-inflicted injury that the Supreme Court had imposed on the patent system here.

But, I think, given the fact that there is now movement in Congress and the fact that the USPTO can no longer be relied upon to correct the system in the way that was hoped for, there may be additional impetus to actually make this work from a bipartisan point of view and also from a cross-industry point of view.

So I'd say watch this space, and I do so with cautious optimism.

MR. DUNNER: Let me make one comment. The two senators who are assisted by other people in Congress are really going about this, I think, in the right way. They convened roundtables of the leading practitioners in the patent bar, including people on all sides of the issue. They are getting input from everybody. They seem to be not rushing in one direction or another direction. They are doing it deliberately. They are coming up with summaries of the views each time, which are then discussed and which result in input from the various people.

I am optimistic that they are going to come up with something reasonable which will not be totally one-sided. And, moreover, they estimate that something could well happen midyear this year, and they are optimistic that something could happen in Congress.

PROF. HANSEN: That is a very good note to end on. Thank you very much.

Nick is from DG Competition of the European Commission. How are things going at DG Comp?"

MR. BANASEVIC: They're going well, I would say.

PROF. HANSEN: There are Commissioners who are basically political appointees and have a cabinet, and then there is the civil service. I think the Commission's civil service is by far one of the best in the world in terms of their quality and what they can accomplish.

To what extent in the area of competition — or maybe it's difficult to say — do some Commissioners not care and other Commissioners care? Right now do you have a Commissioner who is involved in this or more hands-off?

MR. BANASEVIC: Margrethe Vestager is very committed to her portfolio. She has said that she wants another mandate. I think she has shown through various actions that

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she believes in the principles. Obviously, there are merger cases that have nothing to do with the IP sphere where there have been a lot of political pressures where the principles of just applying the law based on the facts have been pushed through strongly. So I think she is committed and very effective.

PROF. HANSEN: My final preliminary question is: if I have a company and I want to represent them and I want to have DG Comp think about my point of view, what mechanisms are there for me to get my company's or my personal view to the Commission before you take action?

MR. BANASEVIC: Well, come to us early. The door is always open. I think in any walk of life it is better to not wait until the last minute. Engage early and explain. We have an open door and an open mind.

PROF. HANSEN: Okay, great.

MR. BANASEVIC: Thank you very much. It's a pleasure to be here. It is always nice to give a competition presentation to a primarily IP audience.

To start with a general point, sometimes it is said that there is a conflict between IP law and competition law. I don't think that is the case. I think we should always recognize the core point that IP and competition law have the same goals: to promote innovation and new, better products for the benefit of society and consumers. As competition enforcers, we recognize the importance of IP in promoting innovation and incentives to bring such products to the market.

I think it is worth stressing as well that our interventions in the IP sphere are rare. If you look at refusal to license IP, I know that in the United States under *Trinko*<sup>16</sup> that door is essentially closed off, as far as I understand it, even if it was a regulated market.

I think it is not the case, as there is sometimes the perception, that in Europe there is a big contrast. We have had two or three cases in our sixty-plus-year history of sanctioning a refusal to license intellectual property. We have a very high exceptional circumstances legal test. So I think it is worth giving that general context.

The main thing I want to talk about is standard-essential patents and our approach to those. In the past we had maybe different approaches.

PROF. HANSEN: Why don't you explain what standard-essential patents are?

MR. BANASEVIC: Standard-essential patents are when companies come together in a standard-setting body to agree on a technical norm for a standard, which is good because everyone can be compatible, which allows for interoperability and facilitates innovation. They are the patents that are essential technically to practice that standard.

My core point is that actually the standard-essential patent context, the standardization context, has an inherent competition context. Why is that?

That is because standard-setting is, as I said, a technical body where companies come together, often competitors, to agree on a technical norm — which is a good thing because, as I said, it facilitates interoperability and innovation — and they agree to choose one technology as a standard and exclude others. Now, obviously, as a competition authority that is the kind of thing we normally frown on. But, because we recognize the benefits of standardization, it is something that we want to promote and facilitate subject to conditions.

But there is the competition context, because you had alternatives *ex ante*, before the standard was set; and then, once the standard is set, *ex post* there is only one by virtue of that being the nature of the standards process, and there might be patents associated with

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<sup>16</sup> Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 (2004).

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that standard. So you have this competition context. You have the risk of a dominant position by virtue of being in a standard *ex post* which did not exist *ex ante*. That is why in Europe we believe there is this inherent competition context.

We have conditions which allow for and encourage standardization if you have a transparent, open process; and, more particularly, if you give a commitment *ex ante* that if your patent is included in a standard, then as a *quid pro quo* you commit to license it *ex post* on reasonable and nondiscriminatory (RAND) terms. The aim of that is to constrain the *ex post* exercise in terms of being able to extract higher terms, higher royalties, than you otherwise would have been able to absent the standard.

That commitment to license on RAND terms is very central to the competition framework. It does allow for fair remuneration to the IP holder, but at the same time, as I say, it guards against them not being able to extract more than they would have been able to before the standard.

Now, to move to the specific question of injunctions for standard-essential patents, this is where I think the competition context is critical. We in the European Commission have brought cases, and that general approach has been confirmed by the European Court of Justice, our supreme court.

Where an injunction is brought by a standard-essential patent holder that is in a dominant position (and that has to be seen on the facts, of course) that has made a commitment to license on RAND terms — and also there is another side of the coin, the licensee side, where there is a willing licensee — then essentially an injunction based on that standard-essential patent is an abuse of a dominant position because it can lead to exclusion or extraction of terms that you otherwise would not be able to get.

Now, in a sense, that is common sense because it is the corollary of the commitment to license that you have given. By giving this commitment to license on RAND terms, you have chosen *ex ante* to exercise your patent not by using it to exclude, which is normally your right, but by exercising it and by licensing it. For that reason, it needs to be a meaningful commitment and you need to give a license where you have made that commitment as the *quid pro quo* for having the patent included in the standard. But, as I say, on the other side there needs to be a willing licensee. In that sense the rights of the patent holder are protected because if there is an unwilling licensee, then injunctions are still available.

I know that the Department of Justice in this administration has a somewhat different view because I think — and I don't want to put words in your mouth, Brian — it is regarded as more of a contract law issue, if anything. For us it is not just a contract law issue; it is a competition law issue because of the competition context that standardization creates. That has been confirmed by the Court of Justice of the European Union (CJEU).

The *Huawei*<sup>17</sup> judgment of 2015 is now being, I would say, rather effectively applied in national courts around Europe. A lot of litigation occurs in Germany, but also in other Member States, and they are able to apply these principles — the CJEU set out steps that both the licensor and the licensee need to undertake to avoid any issues — and that gives an effective framework for courts to apply.

In conclusion, I would say that we have a balanced approach. The jurisprudence and our policy reflect the inherent competition context in standardization, at the same time as providing fair remuneration for those who contribute IP to standards.

Thank you.

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<sup>17</sup> C-170/13, Huawei Techs. Co. Ltd. v ZTE Corp., 2015 E.C.R. 477.



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PROF. HANSEN: Thank you.

Any comments?

PROF. LIM: A couple or three quick comments on some of the points that were raised.

I think the standard-essential patent debate is joined in a way today that reflects the battle for the heart and soul of what it means to have an IP right. I think in a way that also reflects the current global political climate, that there is a lack of interest in dialogue, so you have two sides that are entrenched in their positions that make petitions and file cases. In a normal situation, you have the highest court in the land deciding the position and the position is settled.

But what happens when you have a global business and a global supply chain and you have one court that decides on a global level what the rate should be or what the rules for injunctions should be? You run into problems of international comity. You run into problems of what it means to have an IP right in the country which you have bargained for, and have those rights affected by a decision elsewhere.

I think these are questions which are global in nature and therefore require global solutions. A place like this, called “the Davos of the IP world,” I think would be a good place to start.

But we really need more notes, more forums, along the lines of what Don was discussing in the context of Section 101, where you have people across industries who are willing to speak to each other in a thoughtful way to find real-world solutions that guide the enactment of legislation.

If anything, there are going to be more players. China is coming up as a force to be reckoned with in the standard-essential patent (SEP) space. Their decisions and reasonings are just as sophisticated as anything that has come out of Europe and the United States. And clearly, China’s market size and heft and political influence would mean that they cannot be easily brushed aside. So China is here to stay, and the other players as well. Therefore, the question is: What do we do about it?

I’ll pause my comments here for now — there are more — but let’s keep the discussion going.

PROF. HANSEN: Brian, do you have something to say?

MR. PANDYA: I do have things to say.

One thing, to add on what Daryl said, is that beyond new countries emerging as players, SEPs are moving beyond the traditional realm of handsets and automobiles. When I was at the Fordham IP Conference five or six years ago, the people who cared about SEPs were primarily in those spaces. Now it is a healthcare issue, it is an energy issue, it is anything connected to the Internet of Things (IoT), and I think that context needs to be considered as we have these debates.

But I agree with Daryl that the types of debates and the thoughtful discussions that are happening in the Section 101 space need to happen in the SEP space. Indeed, SEPs now pose broader issues than before.

PROF. HANSEN: Are SEPs a cancer that is growing or a solution that is growing?

MR. PANDYA: I don’t know if I want to answer that question, at least the way it is posed.

PROF. HANSEN: Well, it is the right question because I asked it.

Generally speaking, are we creating more problems with this or are we maybe trying to solve problems with this?

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MR. PANDYA: Generally speaking, the key point is that SEPs are moving into new areas like healthcare, energy, and IoT, so there are problems and there are solutions.

MR. BANASEVIC: The Internet of Things is bringing new companies into the market that, as Brian said, never had any conception of what this was five years ago. So I think there is a commercial and consumer opportunity when things that we can't imagine or couldn't imagine five years ago — things being connected, like my fridge telling me that I am out of milk because it has communicated with some other device because of standards.

But that also leads to — I don't know if the word is uncertainty — but a need for policy guidance, precisely because we are moving into new product areas where often SMEs, as we were talking about earlier, are entering those kinds of spheres and they do not have experience with this issue. So I think there is a need for some kind of certainty in policy and coordination.

PROF. HANSEN: From a global perspective, is there a divergence in the law that makes it very difficult for somebody to have a global marketplace if SEPs are involved?

MR. BANASEVIC: I think whether you regard it as a competition law issue or a contract law issue, at least at the level of principle, when I go and talk to companies around the world, again it's my view that there is an agreement on the principle that when you have committed to license to a standards body — because you want a license, you want to get money for that — that if there is someone willing to license, then you should license.

But then, as always, the devil is in the details because you have disputes about what it means to be "willing," what level of the chain you need to license, and those are some of the things that the *Huawei* judgment is very helpful on because it gives precise steps for what needs to be done.

PROF. HANSEN? Okay, good. Thanks to this group for their thoughts.

Before we break up and have our prebreak song — I hope you're ready to sing — Eleonora, we're not paying you the big bucks to be silent. In terms of copyright, is the future bright, grim, or whatever?

PROF. ROSATI: It depends, I would say.

I want to go back to what was discussed at the beginning, to what Ralph raised in his talk, and then also Etienne touched upon. It seems to me that Ralph had quite a positive outlook on this Directive, while Etienne in the context of brands and trademarks raised the point that perhaps SMEs and individual entrepreneurs might be those losing out in this future IP landscape.

As far as the Directive is concerned, certainly some of these provisions have been written with some players in mind. It might be the case that smaller players would have to make significant adjustments in order to comply with these rules. I will give a couple of examples.

The first one: In Article 17 there is somewhat of an exemption regime for smaller enterprises, among other things that their service is available in the European Union for fewer than three years, they have a turnover of less than €10 million, and less than 5 million unique visitors per month. If you meet all of those three conditions, then you are somewhat protected from the application of these obligations. However, irrespective of whether you grow or do something to change your business, after three years have passed you might fall into the ordinary regime irrespective of whether anything has happened. So this might be one situation.

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If you take the press publisher's right, also there might be cases in which you will need to get a license, irrespective of whether you are a big multimillion-dollar organization or a news aggregator, and it is unclear whether this right would be waived or not.

Also, there might be on the side of beneficiaries smaller players that might be thinking *Perhaps I need to waive my rights in order to be indexed*. So you are in a somewhat "take it or lose it" situation. Again, both on the side of rightsholders, but also those who will need to comply with these new obligations, smaller players might be those that indeed have to make the bigger adjustments.

PROF. HANSEN: Thank you for that.

Tony is from the World Trade Organization and has usually a multilateral point of view on some things. Do you want to say anything about what is happening today?

MR. TAUBMAN: Yes, please. To use a euphemism, it is a challenging time for the multilateral system.

At the moment we have five parallel disputes concerning the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement,<sup>18</sup> which has never happened before. That is either a very good thing or a very bad thing, but at least it means that the multilateral system is doing something.

It is not proving to be a source of new norms, and we are looking at the dynamism in the regional bilateral context with a note of envy I might say. But what is going on multilaterally is there is a positive momentum now I would say — not at the level of norm setting, but in what I would call the collective management of TRIPs.

That is to say, developing countries, in implementing the TRIPs Agreement, have done extraordinary things over the last twenty-five years. They have basically built the hardware, as it were, established the laws, established the institutions, strengthened them where necessary, and now they are asking for the missing users' manual — you know, "How do we make this thing work?" That is increasingly the dialogue we are having in Geneva, very much beneath the headlines: how do we make this system work for innovation?

By the way, they have geeky people with good technical educations in garages trying to find global markets, too. How does that happen? How do you make the system work from their point of view?

And the public interest? The idea has been that the public interest is just something that developing countries talk about and others don't. That has always been a bit of a diversion.

We are having a much more mature and inclusive discussion about these kinds of issues. Basically, people want to learn from each other. This is what we hear increasingly from developing countries' policymakers. They don't want to hear an exposition on the jurisprudence of Article 30 of TRIPs. They want to hear "what are the innovation policies, what are the e-commerce policies, how do we get our well-educated youth into productive employment" kinds of discussions, rather than the more political matters.

That is what is going on beneath the headlines multilaterally, and I think it is potentially very productive indeed because there is a common willingness to achieve these kinds of objectives.

The same applies to the SEP issue. The role of the courts is becoming much more in focus. Nobody has really looked at Part III of TRIPs, which codifies what the courts do.

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<sup>18</sup> TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

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People want to know what are the thresholds for injunctions; what are the methodologies for determining remedies; how do the courts do their work?

Again, many developing countries have been putting a lot of effort into building their legal systems and, now that the hardware is there, they want to install the software, as it were. That is really where the demand we receive is coming from.

If you are looking to us for the Robin Jacob amendment to TRIPs, it will be a while yet. It won't be in the next twenty-five sessions of this Conference. We do have in the TRIPs amendment, by the way, a kind of a curious variant of what Robin was talking about.

Solutions can be found if there is political will. Certainly, the fact that the law on exhaustion is increasingly judge-made is posing real questions for trade policy generally, and that is something that people want to learn from.

I don't think we will have a negotiated solution, but we will certainly have a much more informed and influential discussion. I think the soft law approach is the future, at least at the multilateral level.

PROF. HANSEN: Thank you.

Thank you, panel.