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### 1B Plenary Session. Key Current IP Issues

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Session 1B

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

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

*Thursday, April 8, 2021 – 10:00 a.m.*

**SESSION 1: Plenary Sessions  
1B. Key Current IP Issues**

***Moderator:***

**Hugh C. Hansen**

*Fordham University School of Law, New York*

***Speakers:***

**Kathleen M. O'Malley**

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

***Will Cross-Border Injunctions and Worldwide Licensing Rates Interfere with  
Efforts to Harmonize the International Patent Landscape?***

**Colin Birss**

*UK Court of Appeal, London*

***The Online Future of Civil Justice***

**Antony Taubman**

*World Trade Organization (WTO), Geneva*

**Michele Woods**

*World Intellectual Property Organization (WIPO), Geneva*

***COVID-19 Disruption in the Creative Industries: Challenges and Opportunities  
Along the Value Chains***

**Allen Dixon**

*Ideas Matter, London*

***Getting the Message Out About the Importance of Intellectual Property***

***Panelists:***

**Jane C. Ginsburg**

*Columbia Law School, New York*

**Annsey Merelle Ward**

*WilmerHale LLP, London*

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HUGH C. HANSEN: Kathleen O'Malley. Kate. You know at the Fordham Conference, everyone's on a first-name basis. People think that's because I'm informal. No, I just forget all the other names, so it's easier for me just to survive by using first names. Of course, Kate, district court judge, Court of Appeal. The Court of Appeals for the Federal Circuit is obviously a major player in IP, and we're delighted to have her with us. So, without further ado, Kate, it's all yours.

KATHLEEN O'MALLEY: Thank you, Hugh. That first session was fabulous, so it's really enjoyable to see everyone again and to hear all these important thoughts. As you know, I am passionate about many purely domestic IP issues, but given the international makeup of this program, and of this particular panel, I've chosen a topic with cross-border implications, and that is SEP<sup>1</sup> litigation.

Now, importantly, I'm not going to step on the FRAND<sup>2</sup> panel that is coming later. It's not my job to talk about, or not my intention to talk about, substantive issues relating to SEP litigation. Instead, I'm going to use this topic as a way to spur discussion on the topic of cross-border harmonization, some of which we talked about in the last program. I think that the cross-border harmonization of IP rights and the dangers of the rise of standard-essential patent litigation for the future of that harmonization are important topics to touch on.

We all know the problem. We have a global economy, and have increasingly global technology, especially as it relates to cell phones and computers. But we have local court systems, and we are jealous guardians of the sovereignty of our courts. The realists among us know that we will never have a full global harmonization of IP law or even of how courts manage IP cases, but the optimists among us hope that by learning from each other's best practices and sharing thoughts with each other, internal changes in our various countries might bring us closer together and provide more uniformity and certainty to the stakeholders.

A few years ago, it looked like progress was really being made. It looked like the Unified Patent Court was on the horizon, with the UK included. The U.S. went to a first to file system<sup>3</sup> in order to try to be more consistent with other systems. WIPO<sup>4</sup> formed a judicial advisory committee and established an annual judges' forum, so judges could interact with each other and understand each other's approaches to IP. Global programs like this one were proliferating, and judges and counsel were increasingly showing up all over the world to interact with each other.

International cooperation agreements and treaties again were proliferating. TRIPS<sup>5</sup> became a reality, and it looked like we were headed in what I consider at

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<sup>1</sup> Standard essential patent.

<sup>2</sup> Fair, reasonable, and non-discriminatory.

<sup>3</sup> A "first to file" system grants a patent to the first party that files a patent for an invention. This is opposed to a "first to invent" system which grants a patent to the first party that invents the invention.

<sup>4</sup> World Intellectual Property Organization.

<sup>5</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights.

least, to be the right direction. Politics, a pandemic, and, in my view, SEP litigation have gotten in the way. Now, others are going to discuss the impact of the pandemic, though I have to say that I never thought I'd see a day when I make comments like, "This isn't my favorite platform," because I've been on too many platforms at this point, and I really miss being with you all in person so that we could interact other than just on the screen.

We all know the political issues. They're obvious. The U.S. pulling out of TRIPS, the UK pulling out of both the EU<sup>6</sup> and the UPC.<sup>7</sup> Trade wars among the countries. They've become very obvious and difficult to deal with. SEP litigation is having an invidious impact as well. I believe worldwide licensing FRAND rates are just a reflection of how businesses negotiate in this age of global technology, and that the move toward more technological standard-setting requires that.

Setting worldwide rates causes an almost visceral reaction in courts in other countries, or at least it has. They will often disagree with the rate established or just blanch at the notion that their own corporate citizens would be bound to a particular rate in order to be able to sell their product in another country. They create races to the courthouses and to countries. The rise of anti-suit, anti-anti-suit, and even anti-anti-anti-suit injunctions is also damaging.<sup>8</sup>

Again, I understand why courts feel that injunctions to prevent duplicative international proceedings helped to protect their own jurisdictions to decide the cases before them, and to do so in the most efficient manner. But the lack of comity they reflect damages cross-border relations, creates uncertainty for patent holders, and alleged infringers alike, and forces courts to react so that they can remain, as I said before, jealous guardians of their own judicial authority.

Now, I could go into the list of all the cases where these anti-suit and anti-anti-suit, and anti-anti-anti-suit injunctions have occurred, but we all know what those are. In the last two years alone, they've been in France, Germany, China, the U.S., and India to name a few.

I want to turn to the panel and I would like Hugh to help me extend these questions which are, whether we are moving farther away from harmonization in recent years because of these things, whether that's a bad thing or a good thing, and whether there's really anything that can be done to stop the trend, especially when the SEP litigation space is involved.

HUGH C. HANSEN: So, the interesting thing is, you raised a very good point, I think. Either across the board, or just in the U.S., it used to be in IP, in copyright for instance, if you had the Second Circuit, and *Nimmer on Copyright*,<sup>9</sup> that was good enough for every circuit in the country. Now there's circuit pride, and everyone wants their own rule, their own this, their own that. In fact, if I'm in the Fourth Circuit, and I can throw some mud on the Second Circuit, that helps my reputation.

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<sup>6</sup> European Union

<sup>7</sup> Unified Patent Court.

<sup>8</sup> An anti-suit injunction is issued by a court, and prevents a party from initiating a proceeding in another jurisdiction.

<sup>9</sup> Melville Nimmer, *Nimmer on Copyright* (1963).

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I think if you take that and put it globally — it used to be what the WIPO said was pretty much what everyone agreed with. There was a small group of people, elites, who basically agreed, and even if you had developing countries, people who went there were part of the elite, and they wanted to be part of the elite. Now, there's no consent. If I'm a developing country, I'm going to try, whether it's TRIPS or something else, I'm a judge there, I'm going to try actually to fight it when this multilateral comes in and sues some of our good guys.

We have a situation I think which is very difficult to say the least, so Kate has said, I think she said specifically, "I don't want to hear what you think, Hugh, I want to hear what the rest of the group thinks," so why don't we go and see. It's a very important issue. What is possible now? All these things we see causing it, are they symptoms of something or of a lack of willingness to harmonize? Anyone want to comment?

ANNSLEY WARD: I can get going, but there's obviously somebody on the panel who might have something more pertinent to say about these issues. I absolutely agree with what Kate has said, that maybe litigation, SEP litigation is increasing almost entrenched positions such that it is impacting the motivation to harmonize cross-border. I think that the SEP litigation space is a result of the fact that at the SDO<sup>10</sup> level, there weren't dispute resolution clauses. If there was a dispute in terms of licensing, it went to the national courts. To be fair to national courts, they were kind of given a little bit a bum deal as to try to resolve these issues in a commercial way, and they stepped into the shoes to make it as commercial as possible, and from the UK context that was, you all enter into global licenses, so we're going to reflect that commercial reality.

The flip side of that is that as soon as you have that from one court, we have been seeing these reactive measures from national courts. I was intrigued by what Renata said on the last panel, which was, there's maybe no role for competition law or a commission, or, she didn't go this far, but legislation to intervene in this, and maybe it's just better for the national courts to duke it out. But when you're dealing with issues of property rights that have national borders, but various courts are extending beyond those national borders or reacting to courts that do that, you're creating a litigation tornado, which just whips people up on both sides to continue using the courts as a means to gain leverage in negotiations, to try to create case law that's more favorable to one side or the other, and then you see other parties then forum shop in response to that in other courts.

As a litigator, it's great. Lots of fun. It's really joyful. There's a lot of interesting issues, but from a practical matter, and from a humanistic perspective, I don't think it's going to be generating a lot of understanding, as it's an adversarial process. No one's coming out of a court decision thinking, "You know what, I lost, but I can see the other side's point of view now. Let's get around a table and have a discussion about it." I am worried that that musical momentum is damaging the ability for people to get around the table and say, "All right guys, what is this all about really?" and try to get the heat out of that. That's my perspective on that.

KATHLEEN O'MALLEY: One important thing, and I know that Colin probably can chime in but, having been a trial court judge, I know that trial court

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<sup>10</sup> Standard development organization

judges aren't thinking about, "I'm making this decision so that I can help my country gain more about litigation." What we're thinking about is, "I have to decide the case before me, it's my obligation, and I have to try to make sure that I keep it under control." I don't think the judges themselves are thinking about the global impact, even if it occurs.

HUGH C. HANSEN: Anyone else?

COLIN BIRSS: Hugh, can I say something briefly? I couldn't disagree with what Kate and Annsley have said. I think what SEP litigation has exposed is something which has always been there but hasn't been as obvious and as high profile as it is now, because actually, international patent litigation has always involved gaming the system. People have always worked out which jurisdictions they want to fight in, and they've fought in different places.

It's just, there's something about the global nature of this technology and the interrelationship with the fact that you take a phone from America to Europe to wherever, makes it even harder, and I don't have an answer for you, but I think the answer will not come from national judges, the answer will come from whether it's WIPO, or WTO,<sup>11</sup> or the UN or TRIPS or something. It has to come from there, I think.

KATHLEEN O'MALLEY: Or the standard-setting organizations themselves.

COLIN BIRSS: Or the SSOs<sup>12</sup> themselves. Absolutely.

HUGH C. HANSEN: I think one of the problems is a much bigger problem than SEPs. It used to be that anywhere you went, and you had a patent case, the judge said, "Why me? Let me try to get rid of this for the least amount of harm to myself or others." Now they get a patent case, and they think, this ruling may be on social media, the whole world is going to hear about me or the world I care about, so the incentive is not to just go along, it's certainly to stand out to some degree. Then if you put small country, big country, net-exporting, net-importing all those things in there, it's actually almost no incentives.

One of the reasons WTO, WIPO recently have been more silent is that nobody wants to use them, and the question is, how do we get people, I think, to want to use these organizations which actually can do this harmonization? There are great people in it. Anyway, I think I'm getting all signals that the time is up, and thanks, Kate, Annsley, Colin. Now, Colin, that's going to be taken out of your time, of course, just keep that in mind.

There's no free lunch here at the Fordham Conference. All right, so Colin. Colin was a wunderkind, a young star blazing a path, whether it was in this little patent county court or this or that. Wherever he was, he was doing things that people took notice. Then, he went to the, what I would call district or a court of first instance. Have you actually stepped foot in a Court of Appeals yet?

COLIN BIRSS: I have.

HUGH C. HANSEN: When?

COLIN BIRSS: Two months ago.

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<sup>11</sup> World Trade Organization.

<sup>12</sup> Standard setting organization.

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HUGH C. HANSEN: A quick question. You were knighted because you were a judge, right?

COLIN BIRSS: Yes, a Federal District Judge. Not federal, obviously, but in the UK system, that level.

HUGH C. HANSEN: Customarily, was it like, everyone was there and it's thrilling and everything else, or is it just that okay, let's move on, and I'll be a judge now? There are not too many knights, right?

COLIN BIRSS: Right. There's a photograph of me kneeling with the Queen with the sword, and it sits on my parents' mantelpiece. For that reason alone, it was worthwhile.

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

COLIN BIRSS: Okay, well thank you very much, Hugh. I'm going to talk about what I call the online future of civil justice. What I'm interested in is that there are conversations happening everywhere, which we're all asking about what the future of our system will be. The first thing I want to say now is, why am I talking about this as an IP conference, because I'm not just talking about IP, I'm talking about civil justice generally.

The reason I think is that as people interested in IP, we can't insulate ourselves from wider changes in civil justice generally. Also, I think the practice of intellectual property law provides us all with some unique perspectives which we can put to good use in this wider conversation. An obvious one is experience with dealing with science and technology. That's a key one, but another one is the fact that intellectual property happens at both ends of the scale. You get multibillion-dollar patent cases between multinationals and you get little £100, dollar or euro photographic copyright cases with one individual photographer, and so IP lawyers have an informed interest in the whole system, and make sure it works for all kinds of cases and everything in between.

We all know before COVID, the courts were moving online. There was a trend towards digitization, but it was pretty slow. Since COVID, at least in England and Wales, the courts with digital files did far better than the ones that had paper files. I think that's probably universal, and now the large majority of the hearings we have are by telephone or remote video, and we use electronic documents. We've all learned how to do it, but what I want to tell you about is where we're going to be in five years' time, and I'm not just talking about me, I'm talking about you.

I will tell you in five years' time, every civil case will be started online. Maybe that's true in your country now. It's not true in every case in the UK. It is true for most IP cases. The people we call the digitally disadvantaged today, they're allowed to file on paper, but in future they won't. They'll have to file online too, and they'll just be helped to do it. Every civil case in future, in five years, will be managed online.

Maybe that's true in your country. Again, it's not true in mine, but in five years, the judges will have access to court files and work on them online. Just to give you an example, we have an online judge's order-making system for some small claims, which is up and running now, and the judge makes the order by clicking on a couple of radio buttons just buttons on the screen. They have the

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ability to add free text if they want but they rarely need to, and that order is available to the parties online instantaneously.

There'll be a funnel. What I mean by that, that's something that my boss the Master of the Rolls talks about, and what he means is that there'll be a single point of entry for people bringing any kind of court action and they will all go to one place on the internet. It'll be all civil, all family, all administrative tribunal cases, and the system will guide the users forward in a funnel so that small money claims go in one place, large patent cases go somewhere else, trademark cases go somewhere else.

We're working on the beginnings of that right now in the UK on something called Case Builder. That's not just about unrepresented parties. This integrated system will allow professionals, law firms, in-house IT systems, to talk directly to the courts like the court's own system. Cases will be defended and issued completely electronically and completely seamlessly. Now, these things, they use things called APIs, Application Program Interfaces, and they already exist. We have them in England and Wales for bulk issuing of debt claims and they're only going to grow.

Just to give you an example, one of the things that we're working on now is to allow an API to make an automatic chronology of a case so that the professionals don't have to type it in themselves. It will pick up the data from their in-house IT system and build a chronology that will be part of the complaint or the particulars of claim, as we call it in the UK, without anyone having to type it.

In this five-year future, all legal documents between professionally represented parties will be served electronically that you won't be able to sign up to the court's IT system, which you will need to do if you're a professional without accepting service that way on behalf of all your clients — we're working on that now as well.

Now, looking a bit more widely, the process of a civil case, like a patent case, is governed by procedural rules. I don't know about your system, but in my system, those rules are routinely not followed. But in the future, that won't be possible. Let me give you an example of something again that we're working on right now.

In our civil justice system, you're required by a rule to provide case management information within 14 days of a case being defended. The parties routinely don't and there's a cottage industry of judges and staff chasing and making orders, entry orders to get them to do it. In our new online small claims system, you can't not do it because the parties are posed the questions by the computer and they can't defend the case without filling in those questions.

Now, they could write "Mickey Mouse" in the text fields, but the basic compliance isn't a problem, it's simply vanished, and the noncompliance problem has vanished altogether. ADR, Alternative Dispute Resolution. At the moment, it happens at a particular point in time, a stage if you like, but what's going to happen in future is that it will be integrated into the court's process that will use machine learning and natural language processing so that the IT system will monitor the file and be able to choose an appropriate moment to make a suggestion to a litigant.

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It might say to a defendant — it might say to the claimant, "Look, the defendant has admitted that they owe you a debt but denied the full amount. Have you considered making an offer that you will settle for a lower sum?" Or maybe to say, "Can I put you both in touch with her with a mediator?" These dialogues will happen at any stage and we're working on that right now.

Another example is pre-action ADR. We've just built an IT system in England and Wales for certain road traffic claims, which is designed to facilitate the settlement of that claim before they get to court, but built into it is the possibility of taking issues to a court on an issue-by-issue basis. You might come out of it and take the liability question to court and then come back into the ADR system. It's not yet fully integrated, but we are going to integrate it. It will happen.

What I'm describing is a system in which every pretrial step will involve an online interaction with the court. I will tell you, in future, they will be remote. There will be rare exceptions that happen in a physical court, but they will be exceptions.

Most of them will take place using video conferencing and with electronic documents. I don't believe this is a denial of justice; we've just learned in the last year that it's not only possible, but it can be far more efficient, not just for the court, but for the parties. What about trials? Now, I'm not talking about jury trials and we don't do civil court jury trials, except for some rare exceptions in my country.

In this future, the trials will, I would suggest, almost all involve at least some video conferencing, if not entirely. The hearings will be paperless, even if the advocates and the judge, so maybe three people, will be in the same room, that's quite possible. Everybody else, all the lawyers, the clients, and the witnesses may very well not be. This ability to access trials remotely has huge benefits for open justice, especially internationally.

We now have routinely in the Patents Court, people from abroad, sitting metaphorically in court, even though they're in California or places like that. That was something that was simply unheard of before. Now, what are the risks in this system? Well, there's one I want to mention. This process is being designed by software engineers. We need to be asking the question, "Who is making these decisions?"

The answer is, at the moment, it's the coders, and we need to engage with this. Otherwise, we risk a dystopian cyberpunk kind of Philip K. Dick future which we don't want. By mentioning that I want to finish with another quote from another Sci-Fi author, William Gibson, that the future is already here. It's just not evenly distributed and not yet, but it will be. Thank you.

HUGH C. HANSEN: Thank you. How depressed am I supposed to be as a result of your talk, Colin?

COLIN BIRSS: Not depressed at all, Hugh. It will be a better future.

HUGH C. HANSEN: The brave new world is going to be a good world?

COLIN BIRSS: Exactly. It will be more IT and that takes — We all had to learn. If you think this last year, how much we've all learned how to do this. I'm not saying a whole of our lives have to be spent in these platforms. I'm sure this isn't Kate's favorite platform, it's probably not mine either, but it's so much more efficient to use this technology appropriately. We need to learn how to do it. That's why I say it's five years from now.

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HUGH C. HANSEN: I think what you actually put your finger on is that the real cause of the pandemic is not a virus, it's these platform owners who realize we're going to say, "Oh my God, look how good this is," and everything else. The fact is that it is, so what's going to happen, the little guy loses in this, is that what you're saying?

COLIN BIRSS: Oh, no, I don't agree with that actually. Quite a lot of the little guys are more tech-savvy than some of the big guys. It's very uneven.

HUGH C. HANSEN: When I was thinking little guy, I was talking about the little guys who are not tech-savvy. There are people, Colin, believe it or not, who are not tech-savvy and I relate to them on a personal basis.

COLIN BIRSS: I know, I agree with you. Of course, there are, but let me give you an example, a personal example. Of course, there are lots of people who are not tech-savvy, I understand that. But I had a really arresting example in about June of last year, where I'd been online, doing online courts for about three months. There was an individual who was exactly the kind of person who is chewed up by the legal system, didn't have lawyers.

She was talking to me about how the hearing was going to take place. I said, I offered to say, "Well, I'll come into court and we can sit in court." She said, "No," she didn't want to do that. Now, she didn't use these words, but it's pretty obvious that the way she explained it to me, and I'm going to be very careful to use the right political expression to describe it, I'd say neurodiversity.

Essentially, that lady was somewhere on, at least in the UK, what we would refer to as a spectrum, the sort of autistic Asperger's spectrum. She was someone who was not comfortable being in the same physical room as other people but was comfortable defending herself online and she was able to do that. It wasn't to do with being tech-savvy, it was to do with the medium in which we interact.

She found this kind of medium actually better for her, much less scary than to actually have to go into a court and sit two feet or not two feet, five feet away from her opponents. That's only an example, I recognize that, but it's a real case.

HUGH C. HANSEN: There is a question for you but we're going to answer that question in the general discussion at the end. Thanks so much, Colin. I've been just getting the message it's time to move on. Tony.

ANTONY TAUBMAN: Good afternoon.

HUGH C. HANSEN: How are you?

ANTONY TAUBMAN: I'm very well.

HUGH C. HANSEN: What did you think of Colin's talk?

ANTONY TAUBMAN: Actually, I can relate to that very much because we've found in multilateral discussions, this platform can be quite leveling. It could have the same actual effect. People seem to be more forthcoming maybe because they're in the sitting rooms in their pajama trousers they might be more comfortable, but it's certainly a more fluid medium than our more formal meetings in Geneva. I can relate to that.

HUGH C. HANSEN: Tony, it's all yours, take it away.

ANTONY TAUBMAN: Let's see if I can buck the trend and put on a few slides. This is my theme. What has TRIPS ever done for me? The point is that TRIPS has been in effect now for over 25 years and we can at least learn the

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practical lessons from what its implementation has meant. It's worth bearing in mind that it was negotiated against serious tension. It's the only WTO Agreement that actually refers to the need to reduce tensions through the development of multilateral procedures on dispute settlement. That's where it comes from, disputation of tensions, and it's worth recalling that.

The negotiators actually took on that challenge not through a zero-sum trade-off as it's often portrayed, but rather by formulating a framework for what amounts to good policy in the IP area. I think the TRIPS Agreement is starting to be understood as an articulation of what amounts to a good policy framework for IP. I'd like to defend that thesis. We have not so much support from our member governments. People have already referred to this already for the TRIPS Agreement as it is. Right now, indeed confronted with the COVID pandemic, quite a large number of our members are saying, "Look, the solution is to suspend key TRIPS Provisions all together, while we ride out the pandemic."

The other major issue is the U.S., EU, and China. Both the U.S. and EU have started disputes against China but for whatever reason have chosen not to proceed with them in our system. Seemingly in those areas of negotiation of norm-setting dispute settlement, it seems less encouraging than you might have thought 25 years ago.

At the same time, we see IP and, this has been touched on already, IP being so much more important in international trade to the extent that IP is traded. This is something that the negotiators did not think about, literally didn't think about. The idea that IP rights, as such, could be tradable goods and we would have these enormous platforms like App Stores as platforms for trading in IP licenses which is in my view what they are. If you look at the 43 pages of click-through licenses, it says somewhere, "By the way, you're not buying anything, you're not trading anything. You're taking out an IP license."

This has transformed the way we should look at TRIPS and the international IP framework. It's just starting to seep into our system now. When we look at the actual experience of dispute settlement, I would argue that it's been much less about enforced compliance and the imposition of top-down rules. It's been more about finding an appropriate balance in our legitimate expectations of each other. About finding that elusive policy balance.

The big disputes have really been about, what exactly is the right way for the IP system to interact with broader public policy questions? That's really what the interesting disputes have been about, not simply "Have you complied or not?" like a parking inspector. It's been much more interesting than that and we have a lot to learn from it. Equally, the expectation that WIPO and WTO would be at odds with each other simply hasn't happened. It's a much more harmonious partnership than was expected 25 years ago. Indeed, in difficult controversial areas like public health, this has expanded into a real partnership also with the World Health Organization.

That's behind the scenes now that we're working very collaboratively in building up capacity to deal with the pandemic at the moment. This is because TRIPS, I think, was misunderstood as being a model law, as just "insert name of country here" and there's your IP legislation. In fact, it's proved to be a platform for

much more interesting regulatory diversity. We have to collect all of the laws and legislative instruments that are used to implement TRIPS. We now have over 5,400 texts in our collection. 140 jurisdictions are covered.

This is, if you're into IP law at least, really interesting stuff because it is not legislating by copy-paste. It is increasingly a measure of regulatory diversity, of people tackling the same problems but in different ways but cleaving to the same broad principles that TRIPS spells out. That's really been our experience and so my real summary here is taken for granted now. This has been an extraordinary transformation of IP laws, especially in developing countries. Many have introduced major chunks of IP legislation for the first time or radically overhauled their IP framework.

It's also led to literally building infrastructure, a major development of IP offices and the administrative infrastructure. Enforcement courts in many developing countries are now developing very interesting jurisprudence. They're really engaging with the issues we've been talking about and grappling with what we've been talking about already. The question of injunctions, the question of remedies, the question of the interplay with antitrust. This is now a very dynamic area in many jurisdictions where this was almost literally unheard of 25 years ago.

The human capital has also remarkably developed in this time in many, many developing countries, not directly because of TRIPS but certainly as part of the same transformation. We take this for granted. We get frustrated because the negotiations are going nowhere, the dispute settlement hasn't delivered the outcomes that some might want. It might be greatly eclipsed by this incredible transformation that has taken place, that is countable, that's manifest that's also evident in the industrial property filing figures. There are the immediate trade frictions and certainly frustrated negotiating ambitions. There's much more in this implementation agenda than in the negotiation or the dispute settlement agenda I would stress.

When the negotiators, 30 odd years ago, framed TRIPS, they said, "Okay let's say for once and for all, what is an IP system for? What's the policy purpose of it?" In my view, TRIPS implementation is a whole lot of jurisdictions trying to answer that question. How to actually deliver on the expected policy benefits of IP.

We need to learn from that. This is, for me, an incredibly powerful base to build on because there's so many interesting and diverse answers as to how to give effect to the "should" of the IP system. The supposed social and economic welfare gains that importantly it delivers on, how do you actually do it in practice? We can learn from this. If we are talking about harmonization and the difficulties of incoherence between systems then, what in my view is needed now is a conversation before we can move towards broader convergence and certainly before harmonization. The difference now, compared to the TRIPS negotiations 30 odd years ago, is that all of those jurisdictions now have skin in the game. They have well-developed IP systems. They have practical experience, they have innovators and creative people benefiting from the system, so they actually have a positive stake in improving and enhancing the system. That wasn't the case in the TRIPS negotiations, but we are there now. So, that's my pitch really, that in spite of all the frustrations of the multinational system and its shortcomings are manifest,

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of course, we actually have in the last 25 years built up an incredible intellectual capital, if you like, that can feed into the outcomes we've been discussing already today. That's my pitch, Hugh.

HUGH C. HANSEN: Okay. Thanks, Tony. Really, TRIPS were started by the U.S., and finally, the EU went along, and it was to get developing countries and other countries to actually protect IP. You're saying now actually the benefit is not just net-exporting against net-importing. You think it's broader now and more people fit into the model of where IP — they can gain from it? It's a win-win?

ANTONY TAUBMAN: In principle and the statistics do bear that increasingly in the flow of royalties. We try and measure those in trade statistics, it's really difficult, but the flow of royalties is evening out, it's becoming much more diverse and interesting. It's not just the big IP behemoths sucking in huge amounts of royalty payments. It's a much more diverse picture and that gives us bringing the step if we can translate that in — if we can use that to inform the politics which is not happening at the moment but the statistics are very encouraging.

HUGH C. HANSEN: Okay, Tony, why don't we call it TRAIP, Trade-Related Aspects of Intellectual Property? What clever person said, that's not good enough, we'll call it TRIPS?

ANTONY TAUBMAN: Yes, it should be TRAIPS, I agree. It actually — nobody knew why on earth you would want to negotiate on IP in a multilateral trade forum. This was back in 1986, so an artificial formula had to be cooked up, and so in the office down the corridor, people were working on TRIMS, Trade-Related Investment Measures, which is actually a sensible acronym, and so TRIPS was just borrowed. So, TRIPS in itself is if you like an act of plagiarism, it's not a very accurate acronym.

HUGH C. HANSEN: Okay. Good. Any questions, comments, thoughts for Tony from anybody? Well, we'll just wait here. So how do you get on with WIPO? Is there any jealousy or this or that or what's going on there?

ANTONY TAUBMAN: Well, both aspects have had a change of senior management. Took us just a month ago, but at the working level, it's great. We actually have really good — very collegial. I mean, early on, there was an assumption, particularly in WIPO that the WTO would be some kind of competitive threat. We have six people working on everything to do with TRIPS and IP. They have, what, 1,300 people? So we're not a competitive threat, and we — no, it's great, we actually work together very well. That's not just secretariat spin. That's the day-to-day stuff.

KATHLEEN O'MALLEY: Hugh, I just want to say one thing. I do think that I really appreciate Antony's comment that it all has to begin with conversation, and I think that was the point that I was saying is that I feel like we're losing that, not just because of the pandemic, but because of some other, you know, court-related jealousies that are occurring. But I think that his structure for how we ultimately get to some harmonization makes complete sense.

HUGH C. HANSEN: Okay, good. Thank you very much. By the way, Annsley, you used the chat, or something like that? You're not authorized to use the chat; you are here to speak publicly and take the consequences. So, you had a question, I think, to Tony, could you ask him?

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ANNSLEY WARD: I'm trying to recall what that question was, Hugh.

HUGH C. HANSEN: Oh, no, no, no. No, actually, how many non-member implemented defendants in—

ANNSLEY WARD: No, no, this was a little side conversation between me and a representative of Interdigital, so it was about the previous topic that Kate was talking about, so—

HUGH C. HANSEN: Annsley, Annsley, side conversations are distracting.

ANNSLEY WARD: This is about conversation here. It's about what Kate was talking about. We need to engage. [crosstalk] Even the people that are opposing us. I'm trying to bring people into the panel.

HUGH C. HANSEN: It's like you pointing to a guy in the audience and having a conversation which no one else is in. Try to think of everybody, all right?

ANNSLEY WARD: [laughs]

ANTONY TAUBMAN: When do we get to have fun? I thought we were here to have fun. Isn't that the—

HUGH C. HANSEN: Oh, come on.

ANNSLEY WARD: No, no.

HUGH C. HANSEN: Yes, the people who are listening to you have the fun. Okay.

KATHLEEN O'MALLEY: You haven't done this enough, Hugh, the side conversations are some of the best parts.

HUGH C. HANSEN: Well, that's good to know. That's good to know, for the future. Okay, so I think I just — Michele. Thank you, Tony, and we're going to discussion at the end where we can revisit this. If there are questions that haven't been answered, I think we can answer them. So, Michele?

MICHELE WOODS: Yes.

HUGH C. HANSEN: How are you?

MICHELE WOODS: I'm fine. I'm still here in Geneva a year later, feeling that the situation is more or less the same, but I'm glad at least you're having the conference, even if it's online.

HUGH C. HANSEN: How often do you speak to Tony?

MICHELE WOODS: Occasionally.

HUGH C. HANSEN: Okay. All right.

MICHELE WOODS: But we are in contact quite often with people on his team or from people in the WTO. For example, when we're doing legislative advice, we've agreed to include TRIPS compliance in our assessment, so there's a lot of back and forth that goes on.

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

MICHELE WOODS: My topic is the impact of the COVID-19 pandemic on the creative industries, but I actually wanted to start with a question that Daren Tang, the WIPO DG,<sup>13</sup> mentioned was not answered earlier and that he thought we might want to answer on this panel. It was a question about what copyright issue

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<sup>13</sup> Director general.

might be the next one that could be addressed in a multilateral treaty through WIPO, following the Marrakesh Treaty<sup>14</sup> and the Beijing Treaty.<sup>15</sup>

That really brings together some of the themes we've been talking about here about the difficulties in the multilateral environment. We don't have one clear answer to this question. We've obviously had the Broadcasting Treaty<sup>16</sup> on the agenda for a long time. There are very strong proponents, but also opponents, of having more treaties on limitations and exceptions. There's also quite a strong demand from some regions for action on a multilateral instrument on the Resale Royalty Rate, but at the moment, multilateral treaties are difficult.

To the extent we are able to achieve the next multilateral copyright agreement, we anticipate it would probably be like Marrakesh or Beijing, narrowly tailored to address a specific problem. The other thing that we would probably need to see is a coalition of parties interested in the issue who've come together, including the active participation of the NGO<sup>17</sup> community as well as the active participation of the member states, saying, "We're now ready to tackle this particular issue. It's come to the point where it's time for a multilateral solution." That's what we'd be looking for.

Of course, all of you are aware that in the pandemic, we've barely been able to meet. We have met virtually, we've continued our meeting schedule, but member states have been somewhat reluctant to engage in substantive discussions and certainly are hesitant to have any negotiations in that context.

At the same time, an interesting side benefit perhaps has been that we've had participation from member states that normally aren't able to obtain financing to come to WIPO to participate in our meetings. We do offer some financing, but it's not at the level where we can finance every member state, and so we have had some new active participation and that's been a very positive development.

With fewer meetings at WIPO, we have been spending more time on some of our other core activities, such as trying to assist and support the creative industries and creators. Today we are looking at this topic on the disruptions the pandemic has caused in the creative industries, and potential lasting changes.

Of course, as everyone is aware, just about every aspect of the creative industries has been affected by the pandemic. We're not out of this yet, but we can start to see how that disruption — and disruption can be positive or negative — how disruptive change will affect the long-term evolution of these industries. We are not looking only at the situation of the major players, but also at the impact on individual creators, authors, and performers, and their ability to make a living in the creative industries. We are also concerned about whether there's a different impact on creators and creative industries in, for example, developed and developing economies.

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<sup>14</sup> Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.

<sup>15</sup> Beijing Treaty on Audiovisual Performances.

<sup>16</sup> Treaty on the Protection of Broadcasting Organizations.

<sup>17</sup> Non-government organization.

We also think about content and user access to content. We heard a lot about that before. There's been an increased demand for many types of existing content, and a heightened role for distributors and streaming platforms.

One of the areas where there's been great impact is education. The World Economic Forum has said that globally 1.2 billion children were out of the classroom during the pandemic. Many still are, and some have been in and out of the classroom during the pandemic. A lot of solutions have evolved to try to address the needs of remote education, both in terms of content and distribution mechanisms, where, once again, platforms have a major role to play. In the entertainment industries, we all have heard about sitting and watching Netflix. Netflix had 10 million new subscribers in the second quarter of 2020. E-commerce, including a significant amount tied to copyright or the creative industries, has also increased rapidly.

As far as the disruption, a key question is, who are the economic winners and losers? In the entertainment context, we've heard about the increase in the use of streaming platforms for all kinds of media, for watching film content, playing video games, getting access to music, all of those services that have seen increased demand. There's been a lot of use of existing content, a lot of demand as people had time during lockdowns, etc. This aspect of the pandemic has created a number of economic winners.

Different parts of the music industry, for example, have been affected very differently. The recorded music sector has had the ability to use these platforms, distribute content, etc., while the live music sector, which normally makes up about half of the revenue stream of the music industry, has been heavily and negatively affected despite trying to pivot to live streaming. We heard a lot about these efforts to adjust at our Global Digital Content Market Conference at the end of last year, and they have only made up for a small part of the loss from cancellation and postponement of live events.

When you think about live events, the impact goes well beyond the events themselves, the performers, the creators, but also affect the venues, the related supply chain, and commerce in the area. The OECD<sup>18</sup> estimates that between 0.8% and 5.5% of national employment in its member countries is affected by the loss of live entertainment of all different types, and most of those employers are small businesses. Some governments have tried to help by giving lifelines, but they have not all been able to do that, and who knows how long that support will continue.

When we think about long-term effects, of course, a lot of the technological innovation — I was thinking when Colin was speaking about that in a different context — a lot of it will stay. A lot of the developments will be retained in terms of educational platforms, in terms of entertainment platforms, the ramped-up pace of innovation and digitization. At the same time, there will be those who will not have access to those developments, to those changes. 40% of the global population is still not online. There are big questions about how to bring everyone into the system to take advantage of the long-term benefits that may result.

Then finally, in terms of the individual creators and artists, will they make it? Will they be able to continue making a living from their art? Will they have

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<sup>18</sup> Organisation for Economic Co-operation and Development.

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already switched to doing something else because they couldn't make it through? There's been some short-term economic support, but governments will have a lot of other priorities as we come out of this pandemic.

So, we're still living in this process now, but we really need to think about how to harness the gains and mitigate the negative effects of the disruption.

HUGH C. HANSEN: Thank you very much. Let me ask you this question. The virus is gone and everything else. To what extent are people going to return? I mean this conference. Everyone says next year it's going to be live. How many companies are going to say, "Okay, spend this amount of money to go to New York" when you can just tell them you want to do it online, and we're going to save a fortune.

Even if people want to do it, what about the financing and entertainment aspect? Are there many obstacles to getting back to normal?

MICHELE WOODS: There certainly are some. What you're saying makes sense. We expect that and we're being encouraged during our budgeting right now to continue to deliver a lot of our programming virtually. At the same time, certainly, in terms of demand for entertainment, there's a huge pent-up demand. You can see every time permission is given for people to somehow participate in a live event, in the cases we hear about, they seem to be very popular, oversubscribed. People want to be together. People want to experience culture together. They want to go to museums; they want to interact with people live.

Certainly, at the same time, those who are weighing the economic costs that are more on the education side or the employment side will make the kinds of judgments you're talking about. Now, I know we've already talked about how we would, of course, be there in New York, because we see the benefits that we get from being in-person, interacting with people around the sidelines of the meetings, things that you really can't replicate, or at least we haven't managed to replicate yet, well, in the online context.

For example, for our meetings, for our negotiations, we think that's essential. We really have found that member states have not been able to replicate a negotiation context in a way that works for them or that they're even willing to participate in. So, we anticipate that for the multilateral, lawmaking negotiation side, we will have to go back to the physical meetings.

There will be some areas where I think it will largely come back, others where it won't, but I think there's a lot of demand to meet. I think many people will want to participate in person even if they are comfortable with technology.

HUGH C. HANSEN: Okay. Good. Thoughts? Comments?

ANNSLEY WARD: I have one here. I was really interested in the discussion as to who's really benefited from the online environment and of course some companies have been and the question is, is that money trickling in to individual creators and artists? My question is, to anyone on the panel, is there a role for IP to intervene to create a fairer incentivization for that kind of boom that has to be filtered in, or is it just a matter of contract law? How are we as IP lawyers tasked?

MICHELE WOODS: It seems to me a lot of this is actually playing out in discussions that are already taking place in terms of looking at the value chains and

online digital content and some of what Marco was talking about in terms of the DSM<sup>19</sup> discussions. Whether or not you think there's a role for IP, there are many who think there is and who will really want to encourage that discussion a lot.

We certainly do hear a lot of concern that at the moment, a lot of the gains aren't getting to performers and creators at the individual level. We also hear pushback saying that the causes of that are not what they think the causes are. That, for example, the record companies aren't doing well either and in fact the performers get more of the gains. There's a lot of discussion around that. I think what's needed is transparency and a lot more clarity about the information as a first step.

ANNSLEY WARD: Just a follow-up question on that, Michele. Transparency is obviously great because then we can see who is getting what money or how the value system and chains are working. How do you get people to give you that data? Is there [unintelligible] Is it a coalition means? How does that happen?

MICHELE WOODS: I think you were asking, and we heard this earlier, how do you get access to the data. That's a very good question. I don't have a comprehensive answer to that. I think that there are different elements of it that can be worked on.

Some of that would be work by standards bodies. If people want to keep data secret, that's one thing, but if data isn't available because it's not in formats that can be shared, if it's not easily retrievable, if it's not consistent, all of those kinds of issues can be worked on and the case can be made that more licensing can be facilitated by having consistent standards and data rules of the game that are understandable and usable by everyone.

At least for me, that's where I would look, because that's an area where you can make progress right now. There are a lot of really interesting projects out there that are looking at those questions.

ANNSLEY WARD: Thank you.

HUGH C. HANSEN: Thank you, Michele. Now I'll move on to Allen.

ALLEN DIXON: Thanks very much. I'm going to talk about a topic that's an important one and one that doesn't get a lot of discussion at the moment, and that is getting the message out about the importance of intellectual property to what I would call normal people.

When you think about and look at intellectual property, again, among normal people, what you often see is the most basic lack of understanding. We get headlines from CNN and other people saying that Pepsi Cola is suing farmers in India for copyright infringement, and General Motors is filing a patent on the Cadillac name.

We also see messages and ideas about intellectual property that are negative, misleading, and often actually false in the press and online, for example, "patents stifle innovation," "patents prevent vaccines," "comedian changes named to Hugo Boss to protest fashion house," "music copyright lawsuits are scaring away new hits."

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<sup>19</sup> DSM is a multinational corporation.

The problem here is that the important reasons to have and use intellectual property and the benefits of the IP system just get lost in people's minds. What a lot of people only hear about intellectual property is that it's a problem. It's difficult, it's unfair, it's counterproductive, it's unnecessary.

This is not just a theoretical issue; it really has negative consequences. For the ordinary consumer, this may mean for example that they believe there's no reason not to use illegal films and music off the internet. Never mind the amazing, creative people involved who have created it. People may also miss the opportunity to protect their own important inventions, not thinking about getting a patent or registering their trademark and then not being able to attract enough investment.

For lawmakers — and we do have some very expert lawmakers that come to this conference — I've talked to a lot of lawmakers over the years who really don't understand how intellectual property works and how it's important as a building block of the economy, and this can increase the risk that they take bad decisions about how IP should be protected or enforced.

Now, when we intellectual property people talk about IP, we're big on our acronyms and other words that normal people don't understand, aren't we? The PTAB,<sup>20</sup> EPC,<sup>21</sup> NPE,<sup>22</sup> SEP, FRAND, FLOSS,<sup>23</sup> FTO.<sup>24</sup> We often talk in these specialized ways that don't get the message out of what it is that's really important here.

To me, there are four messages that are really important for us who are involved in different ways in intellectual property to get out — obviously to governments, but also to big businesses, small businesses, startups, and just the ordinary normal person on the street.

The first is that intellectual property promotes innovation and creation. When you've got the president of China, Xi Jinping, saying that innovation is the number one driver for development and that protecting intellectual property is protecting innovation, this means something. Of course, there have been all kinds of studies done about this, for example, how patents increase the amount of R&D that companies like pharma companies do. Again, it is important to get the message out that IP is a huge incentive and engine for innovation and creativity.

The second is that IP is good for companies, small and large. Again, there have been loads of studies on this — the European Patent Office put one out recently that basically said intellectual property helps small companies even more than large companies. Small companies that use IP generate 68% more revenues per employee than companies that don't use intellectual property. There have been similar studies in the U.S.

Third, intellectual property is good for the economy. Again, there are great studies on this, but they don't get a lot of publicity. In Europe, for example, 45% of all the GDP and 93% of all exports in the EU are generated by intellectual property intensive industries. And this isn't just an industrialized, developed country thing. I

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<sup>20</sup> Patent Trial and Appeal Board.

<sup>21</sup> European Patent Convention.

<sup>22</sup> Non-Practicing Entity.

<sup>23</sup> Free/Libre/Open Source Software.

<sup>24</sup> Freedom to Operate.

put up here our tweet on Malawi that we did not too long ago, that the Malawi government's new IP policy says, "creating a vibrant intellectual property ecosystem will promote and support creativity and innovation, and thereby catalyze industrialization and structural transformation of our economy for national development." IP is good for the economy not only in developed countries but developing countries as well.

The other message that we really need to get out better is that intellectual property is good for consumers and society. Society and consumers benefit from the vast array of technologies, products, services and other things that have been developed on the basis of the incentives and the rewards that the intellectual property system has provided.

Perhaps the best example this year has been the development and delivery of an amazing number of new COVID vaccines to the world in record time, in a year. I was reading this morning that a billion vaccines will have been distributed in a hundred countries by the end of this month. A quote here from Thomas Cueni of the IFPMA,<sup>25</sup> "IP is what brought the solution to the pandemic. Patents and intellectual property remain the lifeline for future pandemic preparedness and allow companies to operate at never-before seen speeds and invest heavily in risky research without guaranteed rewards."

Let me just talk a little bit about how we can get this messaging out better. There's four ways that I'm just going to touch on here, which are things we focus on at the Ideas Matter initiative which I run: Getting out stories of how real people benefit from IP, getting useful data out to people that may not have ever heard any of this stuff, having interesting and convincing commentary, videos and other material that explains IP in practical terms, and doing effective online and social media outreach.

HUGH C. HANSEN: Now, we have some time for discussion of Allen. Anyone want to ask, comment, anything?

ANNSLEY WARD: I'm happy to do so. This issue of getting the message out has been an issue that, and with my IPKat hat on, we've been struggling with for many decades. What we used to do is, we used to arrange teaching sessions with members of the traditional press to explain to them what IP is and how you can't patent a trademark and things like that. It is a little bit of a discussion about it, but it's still hasn't really moved the dial.

My question for Allen is, how would you get the people who should be caring about these things? Because it's important for innovation. It's important for our economy. It's important for job security. It's important for them to understand the issues that hold politicians to account. How do you get them to understand the subject matter enough to report on it in an accurate way? Words really matter for everything, but especially in IP. What do we need to do? What are we as a profession not doing to have this continuing to be a problem?

ALLEN DIXON: Just a couple of thoughts, Annsley. The first is, I don't think we spend enough on public relations agencies, press people, the whole outreach. I figure a TV producer spends a million dollars to produce one television episode, but I would be shocked if there's a tenth of that spent worldwide trying to

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<sup>25</sup> The International Federation of Pharmaceutical Manufacturers & Associations.

get the IP messages out that we need to get out. Ideas Matter worked with a PR company for several years and I thought that was really helpful.

Second, as to the kinds of things we can do, one of the things I really liked was that we did a session a few years back and invited the normal UK press, at least that was around. The question we discussed wasn't an IP specific question. The question was, on World Cancer Day, what was being done to help treat cancer, cure cancer, prevent cancer? We had cancer specialists and drug company people discuss these issues. We talked about issues that were really interesting to the reporters, like personalized cancer care, and we showed specific technology innovations. But everybody participating in the conference just kept saying, "We can't do this unless we can get a patent for this. This is how we get the investment in and do this." Just getting that message out in the course of discussing something that's otherwise really interesting, I think is another good way to do that.

HUGH C. HANSEN: Jane, do you have anything to say about anything?

JANE GINSBURG: It's not really a legal question. It's a question of who controls the narrative. I think until recently, if not still, the IP interests have certainly not controlled the narrative. It's been more the large tech players. Maybe one difference is that the large tech players don't look so angelic of late. Perhaps that shifts the propaganda balance.

HUGH C. HANSEN: Thank you, Jane. Any other thoughts or comments?

MICHELE WOODS: Hugh we have a couple of chat questions about *Google v. Oracle*.<sup>26</sup> I know Jane had mentioned that.

HUGH C. HANSEN: We're not doing *Google v. Oracle*. There's a session at 2:30, which actually has a speaker on that and everything else. Other than the fact is, I think we all agree that if we were in England, Justice Thomas would get knighthood. The rest of the group — I'd love to get the internal workings of how it took them over two years to get five votes in favor of the majority opinion, which was sort of an indication of what was going on there.

KATHLEEN O'MALLEY: Hugh, I want to say one thing. I'm not going to comment on *Google v. Oracle*, but I am going to say that some of what's in that opinion was going to make me comment with respect to Allen's comments, which was that he has to get the message out to the public, but we also have to get the message to the decision makers.

It seems like, at least in our country, the Supreme Court is not cognizant of the importance of IP and in fact, discounts the importance of IP at every opportunity and that's a concern. Not just because of *Google v. Oracle* but there were multiple other decisions in recent years that reflect the same thing.

HUGH C. HANSEN: Let me say this for those who may not know. Kate has this wonderful decision, Court of Appeals in the Federal Circuit, which was absolutely fantastic.

KATHLEEN O'MALLEY: Not just mine, it was a unanimous opinion by a panel.

HUGH C. HANSEN: Don't give me that, all right, Kate? I know it was yours, and everyone realized how good it was. Anyone else?

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<sup>26</sup> *Google LLC v. Oracle America, Inc.*, 141 S.Ct. 1183 (2021).

ANTONY TAUBMAN: Just to pick up on what Allen was saying, mentioning the IP policy of Malawi. As we work in Geneva, there's often a dichotomy between the more politicized approach to IP in the diplomatic circle. Then you go and actually talk to the policymakers back in the capital. Malawi is one example of many, where people are saying, look, the minister is saying, "We've got to get into the knowledge economy. We've got to get into this innovation stuff. What can you do?" Typically, from the TRIPs point of view, we sort of give another lecture about the jurisprudence of Article 30 or whatever. It's changing dramatically to say, "Well, okay, you've got young well-educated innovative people. This is now a way to find your way into global markets." You can produce an app or a downloadable tune almost anywhere on the planet. That experience is really starting to break through. We don't necessarily see it breaking through in Geneva.

HUGH C. HANSEN: Okay, thank you. All right. Now we're going to move to the general questions. If you look at the Q&A on your screen or just go down those, these are from people in the audience. Starts out, Mr. Justice — first of all, you're not called Mr. Justice first anymore.

COLIN BIRSS: Oh, Lord Justice Birss.

HUGH C. HANSEN: Come on, let's get with it. The same way when people don't call me Sir Hugh, I get upset with it. I completely relate to what you're going through.

COLIN BIRSS: It's just such a problem, Hugh. If you want to shake off the shackles of being a Victorian medieval constitution.

HUGH C. HANSEN: All right, so answer the question. Could it be algorithm automated decision-making for small claims that are based on contracts?

COLIN BIRSS: I would say the answer to that question is, "No." I think there is already some use of algorithms to make decisions. If you read the literature, it said that eBay runs a dispute resolution system, which is at least to some extent, algorithmic. I think it's not totally clear how algorithmic it necessarily is, but it certainly is some. I think for courts to do that, I think is a step beyond what's necessary. I don't think there's any need for it is my answer. You can use machine learning to facilitate alternative dispute resolution, but you're still leaving the litigants in the driving seat when you do that. They can suggest solutions, but they still have to agree. You don't need it from the small claims. What you can do is do it more efficiently, which is what we're trying to do. That's my answer.

HUGH C. HANSEN: Go on to the—

JANE GINSBURG: Hugh, can I?

HUGH C. HANSEN: Yes, sure. Absolutely.

JANE GINSBURG: Thank you. The question of algorithmic decision-making also comes in when it comes to posting user-generated or user-posted content on the platforms. Before you ever get to any litigation, systems like Content ID effectively preempt both notice and takedown and potentially any litigation. What goes into the formula that makes a copyright owner decide to authorize or block issue instructions for authorization or blocking is not disclosed.

How an algorithm can assess fair use has been a question that has been lurking at least since the *Lenz* case,<sup>27</sup> if not before that. That's another example of

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<sup>27</sup> *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

algorithmic decision-making. I might venture something a little more radical, which is with an algorithm that allows copyright owners to get paid, not just big copyright owners, ideally all copyright owners. It would no longer be necessary to assess fair use; copyright owners just let it through except in the most egregious cases and then get paid. That's a win-win.

HUGH C. HANSEN: All right. I'm getting these time things here. I would love to hear the rest of Allen's ideas on how to get IP messages out, especially in developing countries, Africa, as we are presented with other limitations, including data access, etc.

ALLEN DIXON: I have spent a fair amount of time in different jobs in different countries, and I would say get the local businesses, creative people and other local people who are trying to be innovative and creative, put them front and center, and say, "Look, these people need protection, if this kind of industry, if this kind of creativity is going to be successful in this country."

I've been in all kinds of countries where the local people involved in music, the local people involved in business or trying to get businesses started that could compete against bigger companies, really care about IP issues. I would say the local people affected, the local businesses, the local creative people are great voices for these kinds of issues.

HUGH C. HANSEN: All right. Thank you. Okay, Tony, here's a question for you. Thanks for the history and perspective in light of the waiver, what have you seen about earnest efforts to reduce tariffs for medicines around the world?

ANTONY TAUBMAN: That's the political, but also desperately urgent right now. What I can say is that the WHO<sup>28</sup> is such, we're working on every factor that is an impediment for getting access to the medicines, in particular, vaccines. One channel of that work is a huge debate about the waiver. Many developing countries, they're saying let's just set TRIPs aside for the time being, but more broadly we're looking at every factor affecting access, and that includes trade facilitation. You're talking about improving cold chain transmission of vaccines. Well, the big debate about export bans at the moment, are they illegal in WTO law or should they be? Indeed, finally, tariffs and non-tariff barriers are not only for the medicines but for the ingredients because one thing we've found out that the production chains, say for these innovative vaccines, are incredibly complex. One manufacturer says there's 290 inputs from 38 different countries.

The value chains are incredibly important, but that's all this hardcore trade policy stuff. There's a related debate about how to swoop up the IP system. Many have said, "Look, just a minute, we've got vaccines coming up in record time, what's the problem?" Others are saying, "No, half the world's population is not getting any access. There is a problem." We're really caught right in the middle of that debate right now.

Our incoming Director General has experience with vaccines for developing countries actually. She's taking a very hands-on approach. All I can say is, "Watch this space over the next month or two."

HUGH C. HANSEN: Okay, thanks. We're getting close to the end. Is an element of the asymmetry that IP and what it protects are discussed separately?

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<sup>28</sup> World Health Organization.

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People like movies but may not connect to that? That the copyright is a unified message for copying. Anyone want to comment on that? We should just make those people not allowed to speak. That's a simple solution. Other than that, is there—

ALLEN DIXON: I just think we haven't gotten the message out. It's interesting, we did a video recently with Stan McCoy, who's the head of the Motion Picture Association in Europe, and had a comedian quoted on there saying things like, "When somebody is thinking about downloading a film or downloading music, or taking something else off the internet, it's likely that nobody's ever said, 'You know what, this is hurting these very people that you like to watch.'"

I just think you're right. I think there's a disconnect between people's thinking about IP and what they're doing.

HUGH C. HANSEN: Good. All right. How can developing countries put more emphasis on IP in their own communities other than by increasing IP rights? This has been discussed to some extent, but does anyone know specifically? All these public announcements, what about just some commercials that are just pro-IP commercials. Would that help at all?

ANNSLEY WARD: I'm not an expert in how IP is used or misused in developing countries, but I think it does have to be culturally and socially sensitive. Because in some countries, the way IP had, I don't know if it necessarily at all today had been used, has not been in a positive aspect. I think you have to be very sensitive to how societies have engaged with IP in various countries before you deliver a message saying, "IP is great. Let's make it stronger," because people may not be willing to meet you there. I think we have to look at the experiences, experiences in different countries.

HUGH C. HANSEN: I agree with you Annsley, but nobody, anyone who — IP is great, let's make it stronger. I don't think it is — They have all these things about how Johnny can do this as a result of this or something. It was all because of IP or this, or factual things, just real-life factual things where IP actually helped people. Unless we don't think there are those. [crosstalk]

ANNSLEY WARD: Sorry.

HUGH C. HANSEN: Go on.

ANNSLEY WARD: But I also think there's a wider issue and something that we were talking about before the panel, which is engaging people in IP, you have to be more inclusive in the stories that you're telling about IP. There's been a lot of reports about how the narrative and those being more to patents are primarily White men. How do we go from a historical narrative where at one point in the U.S.'s history, Black people couldn't own a patent?

To go from that, to saying actually IP and innovation, if you're in that narrative and you can benefit from it, we can have a little bit more of an inclusive discussion so that we're not excluding the majority of the populations across the world from the benefit and wonders of IP. There might be some other people on the panel who want to speak to that. [crosstalk]

HUGH C. HANSEN: You start off by not identifying IP as patents. IP is much broader than patents. Patents is a very small segment of the world. For those who do it, it's great, but the effect of IP, generally speaking, copyrights, trademarks,

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or whatever, is what I was thinking about. There's too much emphasis actually on patents. We're all obsessed with SPCs and everything else.

Anyway, one of the proposals is itself resorting to protection is — I'm not sure what that means. Unless someone wants to respond to that as one of the proposals is itself resorting to protections. I don't know what that means.

KATHLEEN O'MALLEY: Remember that we were once — the United States was once a developing country and that Madison's vision was very much a democratic vision. It's true that they got it wrong because they excluded people who weren't defined as persons under the Constitution, a very horrible chapter in our country. The idea was that the way we could grow our very nascent economy was to encourage people who didn't have the wherewithal to make these products to be creative and to let that be a way to have a career.

Developing countries could take a page from Madison and understand that it's not something — IP isn't reserved for large corporations and shouldn't be. As Annsley said, we have to really work hard, even in the United States now at expanding our pool of entrepreneurs to include everyone as Madison originally intended. But I think developing countries need that message. Maybe that's a message, Allen and Antony, that we can try to spread.

HUGH C. HANSEN: Well, one of the things is the Industrial Revolution and the fact that it is mostly in countries that had IP, whether that was a coincidence or something else. There are various things that could be discussed.

Anyway, thank you all so much. I really enjoyed it.