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1B Plenary Session. Key Current IP Issues: Reflections & Analysis

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SESSION 1: Plenary Sessions
1B. Key Current IP Issues: Reflections & Analysis

Moderator:
Hugh C. Hansen
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***Speakers*:**

Paul R. Michel
U.S. Court of Appeals for the Federal Circuit, Washington, D.C. (retired)
Injunctions as the Driver of Licensing and Technology Sharing and Essential to Vindicating the Patentee's Right to Exclude

Denny Chin
U.S. Court of Appeals for the Second Circuit, New York
As Time Goes By: Judging Through the Years

He Jing
Gen Law Firm, Beijing
What is "Big Protection of IP" in China?

Richard D. Arnold
UK Court of Appeal, London
Legally Enforceable Global Arbitration of SEP/FRAND Disputes

***Panelists*:**

Renata B. Hesse
Sullivan & Cromwell LLP, Washington, D.C.
* * *

HUGH C. HANSEN: Okay. Hello everyone, we're starting now apparently. IB, key current IP issues, reflections, and analysis. We have an incredible panel here, looking forward to hear them all and all of the discussion. We're going to start out with Paul. As you know, as I discussed, we don't give backgrounds to anybody and speakers. You can get their resumes and all the other things on the website, this gives us more time to just go straight into the discussion. Paul, formerly, Court of Appeals for the federal circuit, big muckamuck now out in the real world. First question, Paul, what are you doing actually, day-to-day?

PAUL R. MICHEL: Mediations, arbitrations, mock trials, many moot courts, strategy advice, testifying in front of Congress, and writing articles for the general media to try to educate people about IP systems, particularly the patent system.

HUGH C. HANSEN: Wow. Very impressive. Compare this to your life, I guess, of leisure as a chief judge of the court, which do you prefer? If you had to do only that for your whole life?

PAUL R. MICHEL: I like the change. It's been an exciting 11 years. The variety is great. I've been able to learn much from investors and inventors, and scientists, and economists, and all sorts of people that I had very little contact with when I was on the court. There you're mostly conferring with litigators and reading and listening to what litigators present. It's been very educational, kind of inspiring, and it's given me a much broader perspective, so I'd hate to have to choose. It was good doing the one for 22 years and now the other for 11 years.

HUGH C. HANSEN: Okay, great answer. Okay. Why don't you start Paul?

PAUL R. MICHEL: All right. I want to talk about injunctions and their availability, really unavailability. It applies to all types of IP, but I'm going to concentrate on patents, as an example. My thesis is that in the United States, as virtually everywhere else, the patent system operates primarily, as a licensing system, not by litigation. But it’s licensing that's encouraged by the possibility of litigation and the possibility of injunctions. It's a two-way incentive system. It's meant to encourage inventors and investors to innovate, but it's also meant to encourage users of another's patented technology to license.

This is the way it has to be because courts can't possibly do all the work themselves. For example, in the United States every year, about 5,000 infringement complaints are filed, but only a 100 or 200 can actually be tried to conclusion in the courts, and maybe another 100 or 200 are resolved by summary judgment. Obviously, the vast majority of cases must settle and must end in licensing or surrender by the patent owner. So, the courts just cannot try thousands of cases per year. Therefore, the availability of injunctions in those cases that are litigated becomes critically important, because it drives the

licensing decisions of all the people not yet in litigation, or newly in litigation, who are looking for a way out.

Now by contrast to the US, where injunctions used to be routine but now are very rare, in Europe, in the UK, in China and elsewhere injunctions are routine. In the US, out of several hundred valid verdicts a year, there are only a couple dozen permanent injunctions issued post-trial. You can see how much of an outlier we are. It obviously ultimately traces back to the page and a half concurrence by Justice Kennedy in the infamous eBay case. There he speculated, and made statements that were unexplained and undocumented, three in particular.

He said, injunctions, "Can be employed as a bargaining tool to charge exorbitant fees." Secondly, "When the threat of an injunction is employed simply for undue leverage, legal damages may well be sufficient." What about due leverage? Third, he said, "And an injunction may not serve the public interest." Well, it may not, but I would suggest in many situations it may. What happened was lower courts, trial courts gradually read Kennedy's use of the word "may" as: " usually, routinely, almost always."

The result was that, even after judgments of infringement, injunctions are very rarely issued. So, courts on their own authority from Congress, in my opinion, have converted the right to exclude, the IP right to exclude, patents, copyrights, and the rest, into a kind of compulsory licensing regime and critically one run, not by business leaders, but by judges and that's a whole problem in and of itself. Consider that patents particularly are explicitly called, a part of intellectual property and indeed in the statute, the Patent Act, are expressly termed property. §261 says, patents shall have "The attributes of personal property". That was the mandate by Congress. But the Supreme Court has converted the patent right into a little more than a ticket to sue. Meaning the patent owner can spend many years and many millions of dollars and litigate simultaneously in the Patent Trial and Appeal board in an IPR in order to try to enforce the patents. Often the damages, even for post-verdict infringement are the same as, or little more, than the licensing fee that a licensor would have taken, back at the start. The technology user is getting, a real bargain in this situation.

Consider the contrast over time. In the 1990s, IBM licensed tens of thousands of its patents to willing licensees and the license fees totaled billions of dollars per year, and in a couple of years, it was the primary source of profit for IBM in that era. They never had to file a single lawsuit because there was an honor system then where users of technology willingly took licenses. That has totally changed.

Consider another example, I was involved along with many others, in an attempt to create a stock market for licensing patent rights. It was called IP

Exchange International. It was going to be computerized, totally transparent, entirely market-driven, and provide low fees for use on a per-use basis. They had six key portfolios, and they were being widely used by numerous implementers. All the implementers' officials admitted internally that the patents looked valid and that they were using the technology and therefore were infringing.

They suggested because the licenses were so cheap and you could sell back what you didn't use because it was on a pro use basis, that the companies involved should take a license, and even the CEOs in most cases agreed. Then what happened? They talked to their outside litigation counsel and the litigation counsel told them, "Do not take a license. You don't need to take a license. Many owners cannot afford to enforce the patents against you. Even those who can, you can have a very good chance of getting an IPR instituted and a very high level of invalidation occurs there. You may prevail at trial. At worst you'll pay a normal licensing fee many years later."

Of course IPXI, the stock market that would've been a great innovation in the patent licensing world, completely collapsed. What's happened downstream in terms of effects? Consider venture capital investment in serious technologies, real technologies. These levels tend to reflect the strength of patents as measured by the size and timing of awards of damages, and particularly by the availability of injunctions. When injunctions were routine, venture capital money flowed into technology like crazy. Now, much of it is being diverted into entertainment and hospitality, and other non-technology uses.

Because injunctions are still routine in China and Europe, U.S. VC money is now flowing overseas in a way it never did before. Previously regarding U.S. VC money, 85% or more was spent in the U.S. Now that level is down to 50% and there's much documentation of this in reports by the U.S. Inventors for Jobs, in a recent book by a patent academic/economist, Jonathan Barnett at the University of Southern California, and many other reports. The particular brunt, the impact here has been very harsh on smaller players; startups, universities, hospitals, research institutes, small and emerging companies.

Yet these are vital players, not the only important players, but vital players in the innovation ecosystem and historically most breakthrough innovations were done by these smaller, newer, nimbler entities.

HUGH C. HANSEN: Okay, Paul. Time is up and we're very strict on that. Thank you. Panel discussion questions for Paul. Give him your discussion period so he can finish.

RICHARD D. ARNOLD: Okay, so I've got a question for Paul. What's the answer?

PAUL R. MICHEL: Well, the answer is the U.S. judges should imitate trial judges in England and the other jurisdictions I mentioned, and injunctions in

appropriate cases, which would be the norm, should issue. That will incentivize licensing not only by the party before the court at the moment, but by many other parties who are aware of the proceeding. We should return to what we used to do. The UK should continue to do what it continues to do. I'm very envious, particularly of Germany and China that seem to do everything very well.

HUGH C. HANSEN: What is interesting to me is not in the original opinion, not in your discussion now, not in concurring a decision, or opinions. No one mentioned that the constitution says exclusive right, Article 1, Section 8, clause 8, an exclusive right is not what is going on now. Why hasn't anyone said, the constitution says this and the author of the opinion you're talking about of which Kennedy was concurring is "an originalist." He did not mention what the constitution said when that's almost part of his life, is we got to go back there. Why is that not anyone bringing that into the discussion, do you think?

PAUL R. MICHEL: Well Hugh, I've brought it up in 35 articles that I've written in the last two or three years. I bring it up every time, it's an exclusive right, it's a negative right. It's the opposite of the old British system, which was the king granted a company the sole right to manufacture a given product. They had to a manufacturer under the so-called “working requirement”, or their patents were void.

HUGH C. HANSEN: But you didn't bring up the constitution in your discussion now, and no one brings it up. I mean, you may have done it in your articles, but if you look at any cases on this, no one is bringing up that constitution actually says it and therefore Congress can't, even if it's a good idea, supposedly not give an exclusive right. Anyway, I-

PAUL R. MICHEL: The problem with that is that not every case should yield an injunction. I think it should be the norm as it was here and remains elsewhere, but there are exceptions because it's a exercise of equitable discretion by judges, which is appropriate. If there are strong, strong equities against issuing an injunction, or at least delaying or narrowing its impact, that's perfectly appropriate. That doesn't mean you've totally trashed the exclusive right system; it just means exceptions in extreme circumstances-

HUGH C. HANSEN: But at least you mention, okay, we're making an exception from the constitutional command, because of these good reasons. Right now no one is doing that. It's almost like it could be a common law case and everyone is just saying what should be done and everything else. I guess what the bottom line is, and as a legal realist I know this, don't think the constitution is going to have a lot to do with anything today, but I'm surprised that more people on the patent side don't actually raise that. That's a very good point, Paul.

Any other thoughts, we're going to have a discussion at the end, so we can come back to this, but with timing, this stage and Paul's time is up, both the

discussion. Paul, if you could bring a lawsuit, would you sue for lack of time? Appropriate time for your talk?

PAUL R. MICHEL: [Chuckles] No, I very much like compressing talks into five or six or seven minutes. I think it's a great idea. It makes people think harder, compress more. All lawyers should learn to present much more concisely than they do if they're left to their own devices. I entirely applaud your strict management and judges should do the same more often than they do in my opinion.

HUGH C. HANSEN: Okay. Our next speaker is as you can see on the screen, the Honorable Denny Chin, who is currently a judge. How do you like being a judge Denny, basically just between you and me?

DENNY CHIN: Well, if you ask me to talk about 27 years of judging and what's changed, but I'm still enjoying it very much. I will try to compress my remarks into six minutes. I thought I had seven, but I'll make do with six.

HUGH C. HANSEN: No, it was seven, but then we switched to six. Hold on, hold on, hold on. Learn, debate, have fun, and adapt. We have now added adapt to what this conference is giving to everybody. Okay. All right. Go on.

DENNY CHIN: I will adapt.

HUGH C. HANSEN: All right. All yours. Now start it.

DENNY CHIN: What's changed in 27 years of judging, from my perspective? The biggest change for me personally, is to shift from trial court to the appellate court. I was a trial judge for almost 16 years, I've now been an appellate judge for more than 11 years. I miss the action of the trial court. As the great Judge Weinfeld put it, I miss rubbing elbows with the people. I heard another judge describe difference between the trial court and the appellate court, as the difference between searching for truth and searching for error. It's a lot more fun searching for the truth.

I've tried to hold on to some aspects of being a trial judge. I've actually tried 10 cases as a circuit judge sitting by designation in the Southern District of New York. Another big change personally is that I took senior status last June, and I'm no longer presiding. I'm no longer writing summary orders. I have a little more time and I'm trying to spend more of it now here at Fordham. There have certainly been changes in the docket and the case law load over the course of my time in the trial court and also on the appellate court.

In the early years in the trial court, I was trying 20 to 25 cases a year. I tried my first case two weeks after I was confirmed as a district judge, and over time, the number of trials dropped significantly. My last couple of years as a trial judge, I was trying perhaps five, or six trials a year, and it wasn't just me, it was other colleagues in the Southern District and, nationally, it was true as well. In the

circuit court when I started in 2010, active judges on the court were being given 44 days of sittings, and on each day we'd hear four or five, six cases.

I understood that some years earlier, the judges had 55 days of sittings. Well, the number has dropped steadily over the course of my time on the circuit. This year an active judge took 33 days only. I took an 80% caseload as a senior, so I sat 28 days. Then next year, the number's going to go down to 30 days and I've actually asked for a full load to go up to 30 because I've got to keep my law clerks busy.

In terms of IP cases, a recent report of the administrative office says that the overall number of IP cases has increased dramatically over the 20 years or so before the report, at least for patent and copyright. The lines are not steady, there were fluctuations along the way, apparently affected by legislation or case law, but overall, copyright and patent cases are way up from where they were 20 to 25 years ago. Trademark cases, however, have remained relatively consistent, so while filings are down in the circuit courts in general, they are up in the federal circuit.

Another area where there has been tremendous change is technology. When I started in 1994, I barely had a mobile phone. It was a personal one. It took some years for the court even to give me a court device and it was a Blackberry. Lawyers were still running around trying to serve hard copies of papers and then they had to hustle to get to the courthouse before the doors closed at five o'clock. The presentation of evidence at trial consisted of the large black binders filled with exhibits. Sometimes lawyers used an Elmo, that was an overhead projector for those of you who are younger. The government might use a Velcro pad and stick up mug shots of the different members of the conspiracy.

Electronic filing was introduced in the 1990s and made life easier for lawyers, but also greater access for the public. Now, of course, we have computer monitors, in the jury box and things are done very differently. Technology continued to evolve and thankfully during the pandemic, we had Zoom, we were hearing arguments by Zoom, we were live streaming our arguments. I'm pleased to say that the pandemic has killed the fax machine in the second circuit. We were still using the fax machine until the pandemic hit. I remember going in after a period of time and my machine was out of paper. There were sheets of paper flying all over.

It's not just how we do things. The technology has impacted our decision-making substantively. We've had to apply decades-old statutes to the evolving and new technologies. I remember early on having a peer-to-peer music downloading case, and then over the years I had Cable Vision, Google books, and Aereo cases that keep evolving and raising these issues. Another area is the demographics. When I was appointed in 1994, I became only the fourth or fifth

Asian American Article III judge in the whole country. When I was appointed to the circuit in 2010, I became the only active Asian American circuit judge in the country.

I'm pleased to say there's been a lot of progress. Today there are 12 active Asian American judges in the circuit courts. There are now 33 active district judges of Asian American descent, so there's been a lot of progress, but the bench is still overwhelmingly white, 71%, and male, 64%, so there is still room for improvement. I'll stop there Hugh.

HUGH C. HANSEN: Okay. How long have you been Asian American?

DENNY CHIN: Well, not my entire life because I was born in Hong Kong and came to this country as a child.

HUGH C. HANSEN: Yes, but when you were first coming around and I first knew you, those labels, no one would have said, "Oh, Denny's Asian American," or anything. At some point, and you seem to think it's a good idea, we're saying more and more that this person is an Asian American and this or this. The reason for that is if you don't do that, some people are not going to be treated properly or what? What's the reason for that?

DENNY CHIN: Well, it's a complicated question that will take more than five minutes, but I think diversity in the profession is incredibly important. I think diversity on the bench is incredibly important. I think the quality of justice is better if the bench is more reflective of society. I certainly do not believe in quotas and hard numbers or anything like that, but I think when judges have a better understanding of life, their decisions will be truer. I think if you show some empathy, appreciate where people have come from, I think you'll listen better, you'll pay more attention, and I think, in the end, justice will be better.

HUGH C. HANSEN: Okay. By the way, Denny is staying at Fordham in his honorable position, I think, we just created of in residence at Fordham and we're very, very happy. He's always in residence because he's been teaching as an adjunct.

DENNY CHIN: I've been given a title now, Distinguished Jurist in Residence, but more important than a title is an office, I finally have an office, so I'm in my office here at Fordham.

HUGH C. HANSEN: How long are you going to be this distinguished judge? The rest of your life?

DENNY CHIN: I don't know. We'll see. I'm enjoying it so far, a lot.

HUGH C. HANSEN: Do they pay you anything for that?

DENNY CHIN: Yes, they do.

HUGH C. HANSEN: Is that proper?

DENNY CHIN: One of the benefits of taking senior status, by the way, is as an active judge, there's a limit on how much you can earn teaching, for

example. When you become a senior judge, you're in essence retired, your salary becomes pension, but the cap is gone, so you can be paid more money.

HUGH C. HANSEN: Okay. By the way, you probably have more money than you know what to do. If that's the case, just think of the IP Institute every once in a while as a possible source of sharing. Great. Panel, any thoughts on what Denny has said, or done?

RICHARD ARNOLD: I would like to know the answer to the mystery that Denny posed to us, which is case numbers are way up, but sitting days are way down. How does that compute?

DENNY CHIN: Well, I don't know. I mean, I think the numbers in the court of appeals are down, but the numbers in the trial court are up. I looked at the statistics yesterday, the filings in the trial courts, I think, were up 32%, and yet we have fewer appeals. I'm not sure what accounts for that. Some of it is the way--

RICHARD ARNOLD: But you also said trials?

DENNY CHIN: Well, the trials are definitely down, even though the filings are up. Part of it, I think, is-- there are different explanations. I think the number of trials went down after 9/11. I think law enforcement was directing their attentions elsewhere. We've had changes in sentencing law. There's a lot more discretion in sentencing now that the guidelines are no longer mandatory. I think you'd see more litigation over sentencing issues, but more people are pleading guilty and not going to trial.

I think there have been improvements in management techniques, and judges are better at settling cases and getting cases resolved before trial. It also could be Iqbal v. Twombly, it's a little bit easier now to grant a 12(b)(6) motion because there's a plausibility requirement. So when you look at all these things, they probably all contribute to the reduction in the number of trials. Litigation has become so expensive that if you take a case all the way, it's so expensive, you're better off resolving it.

HUGH C. HANSEN: It sounds pretty horrible, actually, Denny. Is this like, "Oh, my God," or it's okay because ultimately people are getting the right decisions or what?

DENNY CHIN: Well, you know I always thought it was better if parties resolve the cases between themselves.

HUGH C. HANSEN: In fact, you're actually someone-- I think you used to say, "The world would be better if you settled every case."

DENNY CHIN: I don't know that I said that because I enjoyed the trials. Sometimes, you don't want to see parties compromise too much, simply because the other side is wearing them down and making it too expensive. I think, for the most part, if the parties can agree on a resolution, that's better off than going all

the way and spending all that money, and having a jury make that hard decision which is probably not really going to make anyone happy.

HUGH C. HANSEN: Okay. Thank you very much. Well, He Jing?

HE JING: Hey, Hugh.

HUGH C. HANSEN: How are you?

HE JING: All right.

HUGH C. HANSEN: Where are you physically right now? Denny, by the way, what floor are you on?

DENNY CHIN: I'm on the seventh floor.

HUGH C. HANSEN: Oh, that's my floor. If I ever went to school anymore, we can actually--

DENNY CHIN: Come to school and see me.

HUGH C. HANSEN: Yes, exactly. He Jing, where are you if I may ask?

HE JING: I'm in Beijing in my office.

HUGH C. HANSEN: Okay and how are things going there for you right now?

HE JING: Well, work side is good. I'm just a little bit disappointed, actually quite disappointed for canceling my trip to the US. I was thinking about coming out at the end of April, but there are way too much uncertainty how I'm ever going to be able to come back.

HUGH C. HANSEN: Let me say this, don't go back.

HE JING: I guess I wasn't going to say it, so I'll end up being a U.S. judge, right?

HUGH C. HANSEN: Yes. I know you were thinking of opening a law firm in the United States. This is a perfect time.

HE JING: Hey, if I never [crosstalk]

HUGH C. HANSEN: The demand for you right now is always going to be high, but since everyone is locked in there, can't move everything. You're going to be there in hopefully New York, but maybe Washington, or West Coast, God forbid. You're going to just wipe. It's going to be incredible.

HE JING: Hugh, you're very nice and kind.

HUGH C. HANSEN: In any case, we can discuss that later and I'm giving you advice for a reason, because I think when you start making the big bucks, you might remember, who gave you the advice early on in this situation. All right. Okay, so it's all yours.

HE JING: Thank you, so great to be here, be back at Fordham. Very happy to be one of the Chinese friends of the Institute and also Hugh. Today I'm going to be talking about what's going on in China. It's really my personal view being someone doing all this work for over 20 years. Right now we are in a very special time. One of the big term that I'm even learning myself, I spend quite a bit of time

grappling with what is big IP protection, which is really touted as the key the government theme this days in China, the big IP protection. I think I discovered something, that's why I come here to share with our friends here.

I think fundamentally the first thing is coming from the current view of IP in China. When I was starting learning Chinese IP back in 1994, for the most part in the last nearly 30 years, here in China, we think IP is really about private rights. It's really about because of trade. China protect the IP in order to attract foreign investments. We want to be getting market access in U.S. in Europe. We want to make it in order to protect IP, we want to get more money, we want to make it. That's why it's really to follow the US, China negotiate, or the trade negotiation, look at the new rules, all the things, improving.

Now in the last two or three years, especially since the Trump administration, I think the view about IP is starting to shift. It's no longer about making it, it's more about winning it. We need a competition game that we think that Trump or now a Biden impose on us. This is really geopolitical side. In China, we now sayin IP actually equal-- IP equals innovation, but probably don't be too excited about it. When we linked IP to innovation, we really see our government sees IP as a "strategic resource for international competition."

It sounds very fancy, but what it really says, my personal view, is that how the government, how China can use IP to win against the U.S. Why? Because the underlying concern is that or even a consensus, we have a consensus here in China. We have a consensus that U.S. politicians have a consensus that U.S. is determined to decouple with China, at least on the technology side, on technology innovation. Probably U.S. has not a major consensus about the trade, decoupling China from the trade, but there's a consensus in China that Americans have a consensus that they are decoupling China on the innovation side. That create a huge amount of concerns.

One thing is that China decided, well if we are decoupled, we got to rely on ourselves, we got to do whatever we can. We got to make our IP system better, and stronger to stimulate innovation. That's probably part of the things that, Judge Michel was talking about, "We got to do whatever we can." On the other side, we know the game, we know the competition is very significant. I think that deep inside I'm guessing none of us believe IP protection is enough for innovation. IP never equals innovation, right? It's one of the really important conditions. It's really not probably one of the only things.

I think actually there's already-- I'm betting on there's probably some conversations coming up soon in China. That well, if the IP is not sufficient, what else? If the IP is not sufficient, why do we need to spend so many resources on IP protection, but right now we still believe the IP is very critical. That's why China throws out this policy about the big IP protection. We have the whole process

protection for IP, so spend a lot of effort on the IP protection. In a way it's a pretty golden time in China being an IP lawyer. Hugh, that's why I'm not in a hurry to open up offices in the US. China really now has infrastructure. I'm arguing, okay? I'm arguing China has the infrastructure ready for realizing IP values.

Looking at our courts, we have many more international IP courts now. We're thinking about upgrading our CFC type of courts. We're sending a lot of trained patent examiners to the court to be the technical investigators. Our judges have no technical issues they cannot understand because they have very capable technical investigators as those in Japan. Of course, there are some arguments why that's a problem.

Then there are lots of new things. One small example I can give to you, China, actually are looking at TPP viewers. Now we call CPTPP because Americans back out of it. One of the things about it, a well-known trademark. Now in China, some local government, even before China joins it, actually adopt CPTPP rules and well known trademark. Unregistered well known trademark can be protected across the class. Patent linkage, we have a patent office working around the clock on the patent linkage cases, but somehow the Chinese court beat them first. The first patent linkage case just came out with the decision against innovators, against originators.

Now researchers in the state owned institutes have much bigger freedom now to monetize their patents. They can sell their patents, like draw the cash, like ATM. In the state owned institutes, this is a government policy to stimulate innovation. Our own companies, now we talk about anti-suit injunctions. I think Judge Arnold is going to talk about China. Now, our own company ZTE is suing our own Chinese company Tinno for the global FRAND rate setting, so our courts is working on that. Huawei is really openly talking about a licensing program. They only making like 1.3 billion as revenues.

There's lot of things that are going on, but the problem is, as I said, it's probably not enough. It's never enough. No matter how much IP protection you have, the innovation may not be really there. I think right now as an IP lawyer, I'm actually a little bit curious about what the IP is, and whose IP it is. I'm concerned if that innovation we want is not coming, are we still relevant? That's the world we are dealing with. I'm researching on the COVID the vaccine patent waiver policy. This is just a very interesting example about when public health policy comes in where the IP is. I'll just pause here, I think my time is up. Hugh, you're mute.

HUGH C. HANSEN: Unmuted. There are so many things going on in China. You're Chinese. How long have you been Chinese? Quite a while. To what--

HE JING: Except for five years in the US, I'm still Chinese, not even Chinese Americans.

HUGH C. HANSEN: No, hold it. To what extent that you get involved in IP, which drags you out to international stuff and other things away? Think about especially the US, because the US, frankly is god, in terms of IP. We all have to recognize that, but we'll discuss that with Richard. Does that make you change at all, that you're more international? You're more this, less maybe Chinese? I think, to some degree, in the U.S. if you're dealing with Europe a lot and everything else, your views become less, I don't know, solid in one area. Is that true for you in China?

HE JING: I'm guessing you're, I don't know, maybe you're probably maybe pointing to something about us in terms of identity, whether Chinese, American, International.

HUGH C. HANSEN: No, no.

HE JING: Yesterday I actually run a very interesting webinar on globalization, when looking at whether Ukrainian war is ending the globalization as we know of. This is something that we are deeply realizing it is a part of the context, we talk about almost anything, that economic globalization is probably ending. Now, when were looking at what is really coming, we're looking at all the securities, the security, the trust, you're talking about FRAND. I was reading the speech of Yellen at the Atlantic Council. We're seeing that wow, this is a policy speech talking about America will never allow anyone to take advantage of raw materials supply chain to weaken America's ability for unwanted geopolitical advantage. I think IP is already part of it. In China, we are now linking IP to national security. Whether I'm a Chinese or not, it forces me to look at something maybe at the bigger picture.

HUGH C. HANSEN: All right. Any comments or thoughts? Renata, you can jump in on any of this stuff. I told Renata at first, "Don't say anything," but I'm retracting that now. Please feel free to say anything you want.

RENATA B. HESSE: Thank you. Thank you, Hugh. I'm the lowly antitrust lawyer in all this. I'm waiting for my moment to debate Paul on injunctions and eBay.

HUGH C. HANSEN: Okay. Is your life better, the same, or worse in the last year or two than it had been previous to that?

HE JING: It's probably more--

HUGH C. HANSEN: Just between us. Just between us. You don't have to-

HE JING: [laughs] The mixed answer would be worst in a way, good in a way, better in a way. Better in a way I'm growing a new law firm. It's very exciting. We've got a new law firm with 100 people. Worse in a way that I'm definitely spending much less time with my family. It's a cause I'm realizing. The

good thing is I'm a keep communicating love to my family, so they know even though they don't spend enough time. they know that the love is there.

HUGH C. HANSEN: Now, are you still thinking of a U.S. law firm, and moving, at least have an office in the U.S.?

HE JING: The funny thing, I'm very pragmatic actually. Like you say, you're realistic. I think it's probably better these days for Chinese law firms to set up office maybe in Brussels and Europe. I think Chinese companies are moving to Europe, they think that the U.S. is decoupling them anyway. Our companies are pulling away from the stock market from New York. We are in a very strange time actually, very strange time.

HUGH C. HANSEN: Et tu.

HE JING: We thought Americans also want to win the Europeans over as well.

HUGH C. HANSEN: Et tu, He Jing, this is really kind of sad. Brussels and all, you were going to be in a hardcore U.S. country. I love Brussels actually. I actually love Europe and London.

HE JING: If we can't go to Europe, maybe Africa is another country we're going to look into, keep in mind Belt and Road.

HUGH C. HANSEN: All right. Thank you very much. Now we're going to move on to Richard. How are you doing Richard?

RICHARD D. ARNOLD: Fine, thank you.

HUGH C. HANSEN: Okay.

RICHARD D. ARNOLD: Enjoying being at Fordham as always, of course.

HUGH C. HANSEN: Now, everyone, did you see what Richard said? Learn from that in the future. Okay? All of you. All right. Good. Thank you, Richard. It's all yours.

RICHARD D. ARNOLD: In that case, I'm going to share my screen if everybody doesn't mind. Sorry, I just need to get the right screen. I check that I've got the right screen. Hopefully you've got my presentation. Is that correct?

HUGH C. HANSEN: Don't ask me.

RENATA B. HESSE: We had the slides, but now we have your menu.

RICHARD D. ARNOLD: Sorry.

RENATA B. HESSE: We're not seeing the slides anymore. We were a moment ago, but now it looks like they minimized on your screen.

RICHARD D. ARNOLD: Excuse me for that. Apologies. Let me try again. Do you have the slides now?

RENATA B. HESSE: No.

RICHARD D. ARNOLD: No. Apologies for the technical incompetence, but there is a reason for doing this.

COURTNEY SOLIDAY: Richard, it's Courtney. Justice Arnold, excuse me. I'll let you try again and then if not, I can pull them up.

RICHARD D. ARNOLD: Are we there yet?

HUGH C. HANSEN: No, not yet. All right.

RENATA B. HESSE: There we are.

RICHARD D. ARNOLD: Are you there?

HUGH C. HANSEN: Yes.

RENATA B. HESSE: Yes, we go them.

RICHARD D. ARNOLD: Wonderful. I apologize it's taken me so long. I'm talking about Legally Enforceable Global Arbitration of SEP/FRAND Disputes. I think everybody knows the problem that we have in this area by now, which is that patents are territorial, whereas standards and FRAND are global. We have jurisdictional disputes. We have anti-suit injunctions, anti anti-suit injunctions, you name it.

Recently, of course, we've had the EU's WTO complaint against China about anti-suit injunctions granted by the Chinese courts. It seems to me the essential question that that complaint raises is who should decide the terms of FRAND licenses of SEPs on a global basis. As everybody knows, Western SEP holders typically want Western courts to decide, or Chinese implementers typically want Chinese courts to decide, but it's not just about Western versus Chinese, there are concerns elsewhere in the world, and this problem is the same whatever the nationality of the parties.

What we need is a supranational procedure for resolving these disputes, which is acceptable to everybody. No national courts can do that. The obvious answer is arbitration on a global basis. This has many advantages, which I'm listing on the screen here. You can get to the core issue of the terms of a FRAND license directly. You don't need to have all this complex and expensive preliminary litigation over patent infringement and validity. You can avoid the need for litigation in many territories, you don't need to rush to court, you don't need to have anti-suit injunctions.

FRAND terms for the whole world can be determined by one tribunal, no risk of inconsistent decisions. You can have a multinational tribunal, and you can force the awards under the New York convention. What's not to like? Why doesn't everybody do it? The answer is because it's not a legally enforceable requirement. Therefore, when you have a dispute, one party or the other thinks it may be able to do better by litigating. Therefore, to make a solution to these problems, what you need is to make it a legally enforceable obligation.

Now, there is precedent for arbitration clauses in some SDO IPR policies, but you need to make them legally binding on both members and non-members of the organizations and on both patentees and implementers. Can we do that? I've

put forward a proposal, which I don't pretend is without flaws, but it is at any rate a proposal as to how to achieve this. Step one, we include an arbitration clause in the contract formed between the patentee and the SDO under the IPR policy. Requiring a patentee who has made a declaration of essentiality, and who has a dispute with an implementer as the terms of a license for SEP to enter into arbitration. That has all the details you need about the arbitral rules and so on. The effect of that, if courts enforce it, is that the implementer can enforce the arbitration clause against the patentee to obtain a stay if the patentee brings infringement proceedings.

Then step two, the IPR policy should provide that a second contract is formed when an implementer makes a statement of compliance with the standard under which the implementer undertakes to the SDO to take a license of any SEPs on FRAND terms, and in return, receives the benefit of such a license. This contract should then contain a mirror image arbitration clause to the arbitration clause in the first contract.

Effect of that, again, assuming courts are willing to enforce, is that this time, if the implementer brings proceedings, then they can likewise be a stay obtained. This way, either party can obtain a stay of court proceedings brought by the other party falling within the scope of the arbitration clause. That being the proposal, what are the objections to it? So far, I've counted six main objections.

Objection number one is you can't oust the right of a party to have access to the court because this is a constitutional or a human right. My answer to that objection is well, this is what arbitration clauses do all the time in other contexts, such as commodities contracts, but of course, that doesn't mean say you can't have at least limited review by courts of arbitral awards, e.g. for manifest error of law. It doesn't mean that there's a complete absence of court supervision. What it means is that your primary tribunal is the arbitral tribunal.

Objection number two is a variant of objection number one, which is, I've heard it say that you can't do this under EU law, but I don't think that's right. This is commercial arbitration, and therefore, it shouldn't be contrary to EU law. Objection number three is that an arbitral panel would have no jurisdiction to determine the validity of SEPs to which the answer is absolutely right, but it doesn't matter because you wouldn't need to do that. What the arbitral panel would need to do is take a view on the strength of the patentee's portfolio, but that's all they need to do and the arbitration clause wouldn't stop implementers from commencing revocation proceedings, but they're very unlikely to do that worldwide.

Objection number four, is that arbitration is undesirable because it lacks positive externalities, use the economist jargon because it doesn't provide transparency and precedents. My answer to that is, well, arbitration doesn't have

to be completely secret. There are plenty of contexts in which arbitral awards are published, and we should make this one of them. Objection number five, is that arbitration is undesirable because arbitral tribunals lack the power to obtain disclosure of prior license agreements entered into by the parties. My answer to that is that's incorrect. It can be done provided you've got appropriate procedural rules, and in fact, it has been done in a small number of arbitrations.

The last one that I've come across is that it can't be done because it requires everybody in an SDO, all the members to consent. That's true, at least with some of the SDOs like ETSI, but the answer to that is, that's a political question, why shouldn't you ask people if they will consent, and maybe the antitrust authorities can persuade people, it's in their own best interests. That is a quick counter through my proposal. I'm not saying I've got the answer to everything, but my challenge is, if anybody else has got a better answer, put it forward.

HUGH C. HANSEN: Which means actually, Richard, you are saying you have the best answer, but you're trying to say it in a polite way. Okay. Excellent. Renata, Paul, Denny, or Jing, any comments or thoughts for Richard before we move on to the general discussion?

PAUL R. MICHEL: I think there is a great role for arbitration where the parties consent. The problem with the proposal, which I think has a wonderful goal, is that it requires the SDOs to be willing to do this and so far, they've shown inclination to be completely unwilling to make such requirements so that's a problem.

RICHARD D. ARNOLD: If I could just come back on that. I acknowledge the fact that so far, the SDOs have been a little reluctant, but then think about how they adopted IPR policies in the first place. They were reluctant to do that, and they were persuaded by the antitrust authorities that it was in their own best interests, and they did so. Maybe history could repeat itself.

RENATA B. HESSE: When I was at DOJ, I spent a fair amount of time speaking with people at SDOs, about the FRAND issue and how to figure out a better way to navigate these licensing disputes, which seem to be intractable and we're spending a lot of resources both at the SEPs and SDOs and amongst the participants. To Judge Michel's point, there was relatively little appetite, I guess, for two things.

One is for the SDO to take on the burden of mandating a resolution and the other is, I think one of your objections that you laid out was that there really was no consensus amongst the two sides of the debate about whether arbitration was good and in some cases, both sides of the debate agree that they didn't like arbitration. I don't know that I have a better solution. I've often thought that it would be when the antitrust authorities urged the SDOs, and the participants in

the SDOs to develop policies that provided greater clarity about what FRAND meant.

There was tremendous resistance to compromising and reaching a policy that bridged the gaps between the implementer and the patent holder's side. I'm not confident that you're going to be able to get the SDOs to do this or to get the members of the SDOs to really push for it.

RICHARD D. ARNOLD: I understand that, and of course, there are other things that need attention. I'm not saying that this is the only issue in the FRAND space that needs attention. There's other things that need attention, of course, but the thing is, how do we deal with this fundamental jurisdictional issue? Because that's what the WTO complaint is all about. It's all about the EU saying, "Oh, my God, the Chinese courts have started doing what we used to do and granting anti-suit injunctions and, "Oh my God, it's terrible."

Why was it not a problem when we did it? I'm not quite sure what the answer to that is. Apparently, if Chinese courts do it, it's all wrong and it's breach of TRIPS, but if European courts and U.S. courts do it, it's fine. The only answer to that is to have a supernational body and what supernational body do we have? Answer, arbitrable tribunals. I can't see any other one.

[crosstalk]

RENATA B. HESSE: This is just a dumb antitrust lawyer's question. I couldn't really understand how the court in the UK and Unwired Planet believed it could impose worldwide rates for patents that were not UK patents. How does it do that? What jurisdiction does it have to do that?

RICHARD D. ARNOLD: The answer is straightforward. The only jurisdiction he has is in respect to the UK patent. We grant an injunction in respect to the UK patent unless a FRAND license is taken. If the terms of the FRAND license are global, then that's the option that the implementer has, they either take the FRAND license on global terms, or alternatively, if they don't want to do that, then they've got to comply with the injunction and that may mean staying out of the UK.

RENATA B. HESSE: But only the UK?

RICHARD D. ARNOLD: Only the UK.

HE JING: Just so you know that China is now working on its own intellectual property arbitration center. It's a new creature so this actually goes back to what Hugh asked me earlier, this is really against the Chinese arbitration place, or international, or global. China probably could have pulled some of the international judges or former judges over to be the arbitrators, and offer that, or maybe even linked to someone in Japan, or make it international. I think everybody agree, arbitration is the one, it is a solution. The key thing is create something that's acceptable for companies around the world. Otherwise, there'll

be another round of a fight. If you're looking at WTO as a better system is collapsing already.

RENATA B. HESSE: Would it be another possible path to have these SDOs do something about determining actual validity and essentiality?

RICHARD D. ARNOLD: It's very difficult though. Because the problem is when you've got a large portfolio, of course, if it's small, it's less of an issue, but this issue becomes particularly prominent with the larger portfolios. It's an awful lot of work to assess validity and to assess essentiality particularly if you're going to do both of those exercises and not just one of them. The question is who does it and who pays?

RENATA B. HESSE: Doesn't that same issue come up in the arbitration or shouldn't it? Let me put it differently.

RICHARD D. ARNOLD: Well, in the arbitration context, it's easier to handle because you can do it for example, through sampling mechanisms, which is typically what's been done in the arbitrations that have been held in this space. I'm not suggesting that these problems suddenly disappear, but they get much more manageable. Because you only have to do it once for the whole world and you can do it on a sampling basis. You can make it manageable. There have been successful arbitrations for FRAND disputes of set portfolios, just a relatively limited number of them.

HUGH C. HANSEN: Okay. All right, Denny, did you have something to say it looked like you were? No? Okay. He Jing, let me ask you a question, you said, you gung-ho on getting in the United States, as part of your office. Now you're thinking Brussels, is that because our supreme court has screwed up patent law so much that nobody stays in U.S. anymore to discuss patents, they're all overseas, and that you would end up with no clients, is that what's going on here?

HE JING: Probably not your supreme court, probably your BIS, the department of commerce all the export control, the entity lists, all the sanctions, and all the SEC and all this Foreign Companies Accountability Act. It's a general suit. I think, like I said, there is a general consensus here, Americans has a consensus. It's got to be decoupling on technology side.

HUGH C. HANSEN: Okay. I've already asked Paul, he was a judge and now he's been freed almost. He broke free and now he can live again. It sounded great, so Denny and Richard, Denny, you've both been court of first instance or appellate court. If you would have to do the rest from beginning of your life, court of first instance or appellate court, which would you choose? Start with Denny.

DENNY CHIN: I enjoyed the trial court more, and I think, among other things, you can do your own thing. You can write your own opinion. You don't have to compromise, you don't have to hondle with colleagues. You don't need a second vote, and I think there's just a greater variety in what you do.

HUGH C. HANSEN: Okay. Richard?

RICHARD D. ARNOLD: I enjoyed both. I had a great time as a trial court judge. I'm having a great time now. Of course, under our system, I can't do what I do now without having been a trial court judge first. I've never had the possibility of only choosing one. If you see what I mean. If I have been forced to choose one, I really don't know what I would choose because as I say, I'm really enjoying myself now, even though I had a great time at first instance.

HUGH C. HANSEN: Okay. Weaselly, but still, all right. Now in our free and open, I'll hold it. Are there questions? Let me look for you guys in the chat.

RENATA B. HESSE: There are a lot of them in the Q & A, Hugh.

HUGH C. HANSEN: All right. Well, why don't we just start going down? Paul, would the award of attorney's fees help?

PAUL R. MICHEL: Sure, but it's hard to do because patent cases are so complicated, and you have so many different issues. There's so many times where the litigation as positioned is not frivolous. It's not implausible, it's not unreasonable, but it may in the end be unsuccessful. Where it can be done, it should be done. I think judges are a little more reluctant than they should be to shift costs. As a general proposition, I don't think in the U.S. we're ever going to get to a major cost-shifting regime, like “loser pays.”.

HUGH C. HANSEN: All right. Paul, there's a question from Josh Landau, can you read that in the chat, question and answer? It's at the Q & A at the bottom and just click on it.

PAUL R. MICHEL: Well, I don't think that his question goes to whether injunctions are appropriate or not. It seems to me he's referring to whether damages, if that was the final determination, would cover things well beyond what was patented. Obviously, they shouldn't, but that's a defect in damages law. I think the damages law, for decades, has been underdeveloped and unclear in the U.S. and the Federal Circuit has not done a good job in my opinion of making it more predictable, more consistent, more rational, more economically sound, and that should be done. I hope it will be done, but that's really a damages issue, not an injunction issue in my view.

RICHARD D. ARNOLD: Maybe I could chip in because I don't think the audience can see the question. The question that's asked is this, "Where is the equity in giving injunctions, which permit the extraction of value outside of the patented technology to those whose only interest in litigation is monetary?" Now that's a very loaded question if I may say so. In the first place, what patentee brings litigation, except for monetary reasons? I'm sorry, you don't have moral rights in patents. In copyright, you've got moral rights for sure, but people only litigate patents for monetary reasons.

That seems quite a strange way of putting it, but also Josh refers to injunctions, which permit the extraction of value outside of the patented technology. Well, that shouldn't happen. A well-crafted injunction should only prevent the use of the patented technology. If it is actually being used for other purposes, then something is wrong with the injunction. The answer to that is not to stop granting injunctions, it's to be careful about the tailoring of injunctions.

HUGH C. HANSEN: Okay. That sounds good. All right.

RENATA B. HESSE: Just one quick thing. I think in fairness to Josh, I think what he is talking about, but I don't know in terms of the monetization point, and I do think this is an issue that contributes to the reluctance in some cases to give injunctions. Is that in the US, at least there's been a huge focus on monetizing patent portfolios, which has very little to do with actually putting the patents into our product and then getting a royalty for the practicing of the patent by an implementer, and has more to do with aggregating patents and monetizing them in ways that, I think some people view to be anticompetitive, which is different than just obviously getting a royalty.

I think what he's talking about is extracting a rents that are beyond the value of the actual patented technology by using litigation tools and patent aggregation-

HUGH C. HANSEN: [crosstalk] 25 minutes?

RENATA B. HESSE: -lack of transparency, I think but Josh could jump in for itself in the chat.

HUGH C. HANSEN: [crosstalk] 20 on that.

PAUL R. MICHEL: Well, he's assuming the result, he's assuming that there's this kind of extraction when I don't see any evidence of it. Of course, it's possible, and it may happen in some cases, but he's assuming that happens all the time. I don't see any basis for that assumption.

HUGH C. HANSEN: Okay. All righty, let's move on then. We got other questions. Jenny Pariser, by the way, I think everybody can see the questions, in the Q & A that are out in the audience or not. If I'm mistaken, someone should tell me that. Denny, are you looking at that? There's a question to you.

DENNY CHIN: Yes, I see it. Let me clarify, when I refer to sitting days, I'm referring to appeals, in the circuit, we have sitting days. There have been fewer sitting days because there are fewer appeals. Ironically, in the trial court, the filings are up. It's inconsistent that the filings are up in the trial court, but the appeals are down. It just means, there are fewer people who are losing, who are appealing. I believe that both jury and bench trials are down. I talked a little bit before about some of the reasons why it's across the board, both civil and criminal. The changes in sentencing law, for example, change in priorities, but I do think a big part of the story is that litigation is too expensive.

To take a case through motion practice, through discovery, through additional motion practice, then into the trial, and then to have the expense of appeals after that, it is such a great expense that many people are electing to, resolve the matters rather than to go full steam ahead.

HUGH C. HANSEN: Denny, let me ask you a question, when you're a district court judge and you are writing an opinion, to what extent are you thinking, "I want to write an opinion that won't be appealed or appealed, I'm okay," that has some effect of what you were put in, as opposed to just on the merits before you?

DENNY CHIN: No, it's a factor. I think part of it is what is the status? If I'm denying a motion for summary judgment, for example, I can keep it very short and simple. Here are the issues of fact, motion denied. I'm writing that opinion just for the parties. If something is likely to be appealed, if I'm going to grant summary judgment, I want to try to make it, less likely to be reversed. I'll write a somewhat different opinion. On occasion, there'll be something that's really important, really high profile, really significant there. You're writing, not just for the parties, not just for the court of appeals, but also for the public. Depending on what's going to happen, what you think might happen, you would take on the writing differently.

HUGH C. HANSEN: It's interesting, you're talking about summary judgment, which I think is the friend of the district court judge if I had to guess. Second circuit and in like a 1940 opinion said, "You can't have summary judgment because of the seventh amendment, right to a jury trial," and you're taking that away. Obviously, this is the whole swings the other way, and maybe litigants like it, maybe the judges like it, the court of appeals likes it because yes or no, you can get rid of this thing. You don't have to do too much on it. The role of summary judgment seems to me has dramatically increased, and that has some effect on what people do, right? Or am I wrong?

DENNY CHIN: No, I think that's true. There was a professor who wrote a law review article a few years back saying that summary judgment is unconstitutional precisely for the reason that you said. There definitely is a role for summary judgment. If there are no genuine issues of fact, there's no point in having a trial, but I think as I was saying earlier too, there are probably more 12(b)(6) motions being granted, and with more summary judgment motions being granted, I think that's probably true, and therefore fewer trials.

HUGH C. HANSEN: Okay, thanks. Bartow, are you there?

DENNY CHIN: She doesn't have a question. She's just saying hooray for practice.

HUGH C. HANSEN: Yes. I want to know exactly what her hooray is because I don't think I authorized that. What is that for?

RENATA B. HESSE: I think it was for Judge Chin's note that the bench had diversified considerably.

HUGH C. HANSEN: Okay. Now, all right.

DENNY CHIN: I joined in that hooray then.

HUGH C. HANSEN: Now, hold on. Let me ask a question. 10,15 years ago, 20 years, Denny, would you want to be known as Denny Chin, which you were, just Denny Chin, or Denny Chin, a Chinese American judge, which would you prefer people to think of it?

DENNY CHIN: I would prefer to be known as Denny Chin, a very good judge, period. The fact of the matter is many people probably looked at me and said, he's one of four or five Asian American judges in the whole country. It's like Jeremy Lin, it's not just Jeremy Lin, it's the Asian American basketball player, and so part of the concern is if Jeremy Lin messes up, it's not just Jeremy Lin messing up. It's the Asian American basketball player messing up. That is part of the issue here.

HUGH C. HANSEN: Okay. Ansley. All right. I think this is for Richard. You want to look at that?

RICHARD D. ARNOLD: Yes. I think I've answered both of Ansley's questions already. The first is about--

HUGH C. HANSEN: No, then that's okay. Then if you've answered it, then we don't have to do it. All right. Ansley is now asking another question and that's, by the way--

RICHARD D. ARNOLD: Again, that's the transparency issue, which again, I've answered, which is to say, you don't have to do it all behind closed doors. The more interesting question, which I haven't already touched on is Carlo Lavizzari's question about, whether this applies downstream. Of course, this is still a hot topic in FRAND disputes is where the appropriate licensing level is. I don't want to make any pronouncements about what legally is the correct answer, because that's something I might have to adjudicate upon. As a match for practicality, it seems to me that there is a lot to be said for licensing at the level of the consumer artifacts.

We're familiar with this in the case of mobile phones, you license the mobile phone and therefore the license extends to all of the components of that mobile phone, Although that's been resisted in the case of automobiles, it seems to me that as a matter of practicality, it makes a lot of sense there too. You license the automobile and that includes all the components within it. The point as to why that's a practical solution is that in those circumstances, the royalty burden doesn't make anybody bankrupt down the chain. That seems to me to be a quite important consideration, but as I say, that's not a legal analysis, that's a practical analysis.

HUGH C. HANSEN: Okay. All right. I want everyone to look at Gordon Humphreys. I'm not sure who's direct-- Oh, maybe Richard again, and answer his questions. The last question in the Q & A.

RICHARD D. ARNOLD: Yes, Gordon's asking about whether there's a role for the WIPO IP arbitration and media center. Yes. Potentially that they could provide a suitable arbitral tribunal. I certainly wouldn't rule that out and on the contrary, I would encourage them to try and step up and solve this problem.

HUGH C. HANSEN: Okay.

HE JING: They actually have an office in Shanghai, the arbitration center actually wrote the paper to them, have someone talk to them, but they're very silent. WIPO looks like, for some reason, they're quiet about this.

HUGH C. HANSEN: Let me ask you this, all of you. Is being in the law better than it used to be the same or worse?

PAUL R. MICHEL: It's better for the judges because there's more challenge. It's worse for a lot of the clients because judges are over-extended into areas where their grasp of details and nuances is I think very limited, particularly in the economic and business realm.

HUGH C. HANSEN: It's better or worse for the judges?

PAUL R. MICHEL: It's more fun for the judges because they have a greater variety of very challenging, interesting issues, but it's worse for the clients because they're getting subpar results from people who are beyond their level of comfort and competence.

HUGH C. HANSEN: Now, hold on, hold on. If you want to read back my question, I wasn't asking about clients and everything else, I was asking about you as individuals, don't try to avoid this deep theory, factual questions, Paul. For you, right this now, is being in the law, which you are incredibly, admirably in it better, the same or worse than let's say 5, 10 years ago or pick any period?

PAUL R. MICHEL: I think for results, it's worse because I can't seem to get the Congress or the patent office or the FDA or the district courts or the federal circuit to do what I think they need to do. It's more frustrating, but it also has more promise. How to net that out is a little bit unclear, but I'm a volunteer like a marine. I'm doing what I want to do, what I like to do and I'm not complaining about it, but it's really hard to deal with people outside legal expertise and patents, antitrust, and other tightly related areas because they just don't understand anything and it's very difficult to educate and convince them and understandably so but it creates a big problem.

HUGH C. HANSEN: I can absolutely see that and I agree with you on that from my perspective.

DENNY CHIN: I think things are worse than they were some years ago and I think it's in part because of where we are, the country is so politicized, the

country is so divided, we're also into our second year of a pandemic. I think the polarization of the country has carried over somewhat into the judicial system. The picking of judges has become incredibly partisan. The decision-makers used to want to pick moderate judges who were concerned about doing the right thing and weren't agenda-driven. Unfortunately, I think things have changed.

HUGH C. HANSEN: I agree with you on that too. That leaves three people who have to answer this question, or they won't be allowed to leave.

RENATA B. HESSE: I'll round out the U.S. before you go to China and the UK. I think it's less pleasant for some of the reasons that Judge Chin just mentioned. I think there's a lot less interest in having real intellectual discussions about what the law says or should say, and a lot more name-calling and personalization. I think that that just makes the practice less enjoyable.

HE JING: I think in China, being the laws, I think still getting better. As I said, China build a better and better infrastructure so it's more people, more competent, and learning to take advantage. In that sense, it is but in a way that we know the problem is getting bigger and bigger and it takes a lot more to make a real difference.

HUGH C. HANSEN: Is it easier to be Chinese now than it was? Easier or harder to be Chinese now, He Jing, than it was let's say about 5, 10 years ago?

HE JING: It's easier, but also accountability is, it's also bigger. I think it's really time for Chinese to step up.

HUGH C. HANSEN: To what extent, I'm recording this for the Chinese government, you may not realize this, but to what extent, do you now have to worry about things like that where maybe before you could just be He Jing?

HE JING: Oh, I definitely watch myself a lot more when the IP is linked to national security. That's our policy's theme actually here, even though I don't quite know what it really means.

HUGH C. HANSEN: Richard, you've already answered a question along these lines, but not the actual question which is, well, you know what it is. What's your answer?

RICHARD D. ARNOLD: I'm going to try and answer the question you asked, rather than looking at it more widely. For me personally, I would say it's better, in part that's just for obvious reasons, going up the system and all of that, but also, the great thing about what we do is we learn every day and so I know more than I did before and there's still more to learn, which is great.

HUGH C. HANSEN: Now, how many years did you spend in PR because it's worked wonders for you. Okay, all right. We still have as I see it in my calculation, I think we have about five minutes left for this discussion. Is there anything anyone wants to add or discuss or think about?

HE JING: I want to advertise for our China law session at sunrise tomorrow, especially for those colleagues in European timezone. We have a great panel, Michael Dean, talking about multinational perspectives, we have a China global company talk about their view. The theme is about what's going to be possible, what will look like in five years in China IP. For the friends, the colleagues, who are curious about what's going on, you're more than welcome to join, 6:30.

HUGH C. HANSEN: You're talking about the first session tomorrow?

HE JING: Yes, sunrise.

HUGH C. HANSEN: I don't know why you did it, but you scheduled it at some ungodly hour in the morning.

HE JING: That's the only available time slot, that's really for our European friends.

HUGH C. HANSEN: Everyone, we're recording this so two days from now, you can listen to this or listen to that or listen to whatever. It's $5 every time you do it, but what's $5 nowadays, that's pretty easy going there. There's a reception, lady and gentleman, after the last session, which is three and I just want to remind you that. You probably think I'm wonderfully, technically advanced but the fact of the matter is, I'm not. I can even do this reception where the tables and you can move around and everything else, which is incredible.

I actually think it's interesting this Remo reception might even be better than the live reception because the live reception, you go to a table people you know, you're not actually going to say, "See you later,' or this or this or this. You actually that's good but you could have had lunch with them or something else. Actually, meeting people and talking to people you don't know, is something that can happen with this more easily. In any case, I advise you all to think about it and I hope you'll be able to. It's three o'clock Eastern, that's United States.

Now, one of the things you probably have to think is there's a good reason why the two of you are not in the United States, one is in the UK and the other is in China. Really come on, think of all the [crosstalk]

RICHARD D. ARNOLD: It's because you're not doing it in person, Hugh, if you were doing in person, I would be there.

HE JING: Are we going to have that next year?

HUGH C. HANSEN: I'm not talking that, I'm talking about your life. You've decided to stay in the UK, you've decided to stay in China. You could be here for heaven's sakes. All right. It's your decision, I guess I can't affect that, that much.

HE JING: You're very infectious, I will rethink.

HUGH C. HANSEN: No. All right. Well, thank you, everybody. This has been great. I've really enjoyed it. Stay safe, everybody, and I hope to see some of you at three o'clock.