

Session 1C

Emily C. & John E. Hansen Intellectual Property Institute

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SESSION 1: PLENARY SESSIONS

1C. Government Leaders' Perspectives on IP

Moderator:

Hugh C. Hansen

Fordham University School of Law, New York

Speakers:

Andrew C. Finch

*Antitrust Division, U.S. Department of Justice, Washington, D.C.
Why Patent Law's Right to Exclude Is Procompetitive*

Marco Giorello

*DG CONNECT, European Commission, Brussels
Europe's Copyright Reform. The Final Outcome*

Andrei Iancu

*U.S. Patent and Trademark Office, Alexandria
USPTO Updates: New Section 101 Guidance & Other Hot Topics*

Paul Michel

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

Maria Martin-Prat

*DG Trade, European Commission, Brussels
The Current State of IP International Norm Setting*

Karyn A. Temple

*U.S. Copyright Office, Washington, D.C.
New Era in Copyright Legislation?*

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PROF. HANSEN: This is our final session of the morning, “Government Leaders’ Perspectives on IP.” We have a fantastic group. We are very fortunate to have them here. I appreciate their taking time out from their busy lives and important jobs to be here.

Our first speaker is Andrei Iancu, who is head of the Patent and Trademark Office and Under Secretary of Commerce for Intellectual Property.

Obviously, the patent system was in need of some help, and a lot of people think that Andrei has come to the rescue, or at least is starting the rescue operation. We’ll see what his perspective is on it.

MR. IANCU: Thank you. It’s good to see everybody. It’s also good to see that we are still part of the morning session.

Lots and lots of things are going on in the patent world and at the USPTO. However, given the circumstances, I’m going to speak only about one issue. It seems to be everybody’s favorite issue anyway. It happens to be that I think this is *the* most important issue of substantive patent law currently, and that is Section 101¹ patentable subject matter.

To me, this issue must be fixed, must be addressed now, in the United States. The *status quo ante*, prior to our guidance in January of this year simply was unworkable for many reasons, and we must address it.

I think there is broad-based consensus that the state of the law is unworkable. You don’t have to just take my word for it coming from the USPTO, but industry in general across the board has a similar view. Obviously, nobody agrees 100 percent on all the problems or how to solve them and so on, but there is broad-based consensus that something needs to be done.

So what has happened? The fact of the matter is that the statute itself basically has not changed since 1793 when Jefferson and Madison wrote it. It worked pretty well for 200-some years until five, six, ten years ago. Obviously, the statute hasn’t changed — something else has changed in the past five to ten years — and it’s not a big mystery: recent case law has created significant confusion in this regard.

But it doesn’t have to be this way. It wasn’t for 200-some years. We can fix it.

What are some of the key principles?

First and foremost, we need to remember that the 1952 Patent Act² separated the categories of eligibility, which is Section 101 of the current Patent Code, from the conditions for patentability, which are Sections 102,³ 103,⁴ and 112⁵ of the Patent Code. We must not mix them up again.

Section 101 patentable subject matter is about what is per se, by itself, not patentable, not part of the useful arts, not part of a useful process, machine, manufacture, or composition of matter — by itself, per se, what is not meant to be in the patent system.

If we look at all the cases really from the beginning of time of our patent system, they basically are math, pure unapplied mathematics; compositions of matter or natural principles, scientific principles and the like; human interactions, like economic principles; and mental processes. These are the broad-based categories. Every single Supreme Court

¹ 35 U.S.C. §101.

² 35 U.S.C. §§1-293.

³ 35 U.S.C. §102.

⁴ 35 U.S.C. §103.

⁵ 35 U.S.C. §112.

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case dealt with facts that included these four basic categories, and most Federal Circuit cases as well.

But we have deviated in recent years in the way we think about it and in the way we apply it, and certain mistakes have been made. What are some of those mistakes in the application of these basic principles?

One is the application of these exclusions to all types of matters, to all types of technology, even if it is not per se problematic. I think this is contrary to what the Supreme Court has said to date. Applying exclusions to Section 101 patentable subject matter in the United States to matter that is by itself not per se problematic, to matter that is technological, to matter that is not one of those four categories that I mentioned, goes beyond what the Supreme Court has said, and certainly is nowhere to be found in the statute itself. That is one place where the analysis has deviated.

A second place is by considering that claims in patents that are perhaps vague or indefinite or functionally oriented create a Section 101 problem. They do not. That conflates the statutes that the 1952 Patent Code separated. Those are Section 112 problems.

Another problem is considering claims under Section 101 for inventiveness, considering whether claims have an inventive concept in them, questions of newness so to speak in Section 101; taking things that were done manually before and, for example, putting them on a computer — you see analyses that say “doing it on a computer” is ineligible, without regard to what the “it” might be — so combinations of regular activities, technological activities, automated on a computer, those combinations effectively of prior art, have been found to be problematic under Section 101, and that actually should be done under Section 103. We know the standards. We know how to combine prior art.

There are other issues as well, but I will leave them to the side for now.

The USPTO has looked at all these cases, and in January we provided guidance to our examiners that tries to synthesize the case law and make these basic points.

First and foremost — and this is the most critical aspect of our guidance and I think the way the analysis should be done — you must look and see whether the claims contain something that is per se by itself problematic. If they do not, you are basically done with the Section 101 exclusion analysis. If they do, then you can consider whether you have a practical application or not, which is entirely consistent with court decisions.

What will happen now that we have the guidelines?

First of all, the USPTO examination results so far have been fantastic. Our examiners really appreciate the new approach. It has created more consistency. It has created more time for them to deal with prior art searching and § 102, § 103, and § 112 analyses. It should increase the quality overall of the examination.

What will the courts do? We don't know. We have an independent judiciary. They are not bound by our guidelines, obviously. They have not yet addressed them per se.

However, having said that, the decisions that keep issuing from the Federal Circuit seem to be entirely consistent with what they have been doing for the past few years. I have not yet seen in any significant way a change in the way they approach the analysis itself.

This leaves Congress. As we heard earlier, there are efforts in Congress, and we will see where that leads.

I will stop there. I am quite optimistic. I think we have provided a framework that works, and I think that, whether through courts or Congress, if folks follow the framework as a general matter, the matter is resolved.

Generally speaking, foreign jurisdictions have addressed this issue, and we must do the same here in the United States.

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PROF. HANSEN: Thank you.

Let me ask this. You have two groups that you have to worry about within your guidelines. One is your own examiners, and you have 2.5 million — how many examiners do you have?

MR. IANCU: About 8500 examiners.

PROF. HANSEN: And they spread all over.

MR. IANCU: Yes.

PROF. HANSEN: Do you have some supervisory device, because they have been following the Supreme Court, for checking to see whether the examiners are going to change the way they do examination, or do you just rely on them to do it without much supervision?

MR. IANCU: First, we have had training; virtually all 8500 of them have been trained. The applicants themselves need to push the examiners to follow the guidelines. Now I think they will follow the guidelines. If they do not, applicants can appeal to the Patent Trial and Appeal Board (PTAB) in ex parte appeals, and hopefully the issue will be addressed there as well. The guidelines do apply to the PTAB as well.

PROF. HANSEN: To what extent does the PTAB have a mind of their own, or are they under control?

MR. IANCU: The PTAB judges and the examiners have minds of their own. Having said that, the guidelines bind the examination process for all personnel at the USPTO. They do not change the law; they just synthesize the law. It's an approach, it's a framework of analysis, the steps you do in the analysis. As far as we can tell, the PTAB so far — it has been three months — has been applying the guidelines.

PROF. HANSEN: Finally, are you saying that the Federal Circuit is already onboard because they have pretty much followed the Supreme Court and now you are concerned about them continuing to follow the Supreme Court?

MR. IANCU: If you look at the Supreme Court cases, by themselves those cases are not necessarily the ones that have caused the current predicament. In the way those cases have been interpreted afterwards by whoever, whether it's the lower courts or actually at the USPTO itself, over the past number of years we have deviated from the core message of the Supreme Court to some extent.

Now, the Supreme Court may disagree if they take up another case, but the fact of the matter is that to date the Federal Circuit has only addressed Section 101 exclusions vis-à-vis categories of matter that are per se ineligible. So you have, for example, in *Benson*,⁶ *Flook*,⁷ and *Diamond v. Diehr*,⁸ all math-based questions; *Diamond v. Chakrabarty*,⁹ a natural phenomenon case; *Alice*¹⁰ and *Bilski*¹¹ both fundamentally economic principle cases — matter that by itself would never be considered so far by the courts as part of the useful arts.

The problem has come in later, after we have somewhat gone beyond those issues, and now we are treating technological patents or technological matter as coming somehow within the scope of these exclusions. By focusing the analysis, by organizing the analysis

⁶ *Gottschalk v. Benson*, 409 U.S. 63 (1972).

⁷ *Parker v. Flook*, 437 U.S. 584 (1978).

⁸ 450 U.S. 175 (1981).

⁹ 447 U.S. 303 (1980).

¹⁰ *Alice Corp. Pty. Ltd. v. CLS Bank Intern*, 573 U.S. 208 (2014).

¹¹ *Bilski v. Kappos*, 561 U.S. 593 (2010).

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so that we can first identify whether we have per se problematic subject matter, I think we will have less of an opportunity to make a mistake. Let me put it that way.

PROF. HANSEN: Okay. Thank you.

Any questions or comments from the panelists or the audience?

QUESTION [Donald Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Washington, D.C.]: Are you saying that the Federal Circuit can fix the problem right now without further Supreme Court intervention, without congressional intervention, and, in particular, given the strong dissent by Judge Lourie and Judge Moore in the *Ariosa*¹² case that lamented the fact that this great invention could not be patented, that they could actually change their view on that, as Judge Newman did? Judge Newman is already there and now thinks that you can have a diagnostic method such as was involved in that case and still pass muster.

MR. IANCU: I don't know if completely, but if the Federal Circuit wanted to do it — and that's important — I think they can to a large extent fix the problem.

I have suggested, as I said at the American Bar Association Section of Antitrust Law Spring Meeting two or three weeks ago, that the Federal Circuit could take a few cases en banc, get *amicus* input, hear from the government, and have a one-day broad-based discussion on some specific cases to try to address the matter.

But yes, to a large extent I do think if they wish, they could fix it, certainly on the abstract idea front and on the diagnostic front. Take the *Athena*¹³ case for example. Judge Newman saw a distinction and she wrote a vigorous dissent in the *Athena* case. She did not think that in that case those claims had to be invalid in light of Supreme Court guidance.

So there is a path, but I have not yet seen any broad-based consensus at the Federal Circuit to want to move in that direction. If that's true, then we are left with legislation as a necessity.

PROF. HANSEN: Okay. Thank you.

Judge Newman, by the way, was going to be here, but she wasn't able to make the Conference. I am not a patent person, but when I read the decisions, I always think Judge Newman is exceptionally good.

Thank you very much.

Paul Michel, former Chief Judge of the Federal Circuit, what do you think? How long have you not been on the Federal Circuit?

JUDGE MICHEL: Nine years.

PROF. HANSEN: What grade would you give the Federal Circuit since you've left?

JUDGE MICHEL: C overall — As and Fs, as stated before, yielding an average of C. But in the Section 101 area pretty bad.

PROF. HANSEN: All right.

JUDGE MICHEL: You know, they are trapped. The Supreme Court has trapped itself by ancient dicta going back to the 1800s. It has treated patent law not as commercial law but as if it were constitutional law where everything has to ultimately be decided by judges and not by private parties or government agencies, and it has adopted terminology that is just intellectually bankrupt. It is incoherent to talk about “directed to,” “significantly more,” “inventive concept,” “markedly different,” “basic building blocks of science,”

¹² *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 809 F.3d 1282, 1284 (Fed. Cir. 2015) (Lourie, J., concurring).

¹³ *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC*, 915 F.3d 743 (Fed. Cir. 2019).

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“laws of nature,” “natural phenomena.” These are terms not known in science, with no prior clear meaning. They were not defined by the Supreme Court when they used, and repeatedly used, these terms. I think that they are really undefinable.

It seems to me we are in a very big trap, and that is equally so in the electronic area as in the human health area, and the results are counterproductive for the advance of technology and for economic growth and job growth because investment is deterred by uncertainty, and massive uncertainty is the main result of the Supreme Court’s quartet of cases.

And it is not even just because you get inconsistent, unexplainable results and irreconcilable precedents in the Federal Circuit itself, not to mention among 1000 trial judges scattered across the country. I think the Federal Circuit, if it would go en banc along the line of what the Director has suggested, could solve about a quarter to a third of the total scope of the problem. But the rest will require legislation.

I can tell you as the former Chief Judge that getting the court to go en banc was never easy. It takes seven votes out of the twelve active judges. Some judges almost never want to go en banc, and others don’t want to go en banc because they like a decision they wrote as a panel member which they don’t want to be in jeopardy of being modified or overruled by the full court. That problem has gotten worse in the nearly a decade since I was there, so I’m not too optimistic that they will do what Andrei usefully suggests. They might. If they do, they could help, but they really can’t solve the problem.

The Supreme Court has the whole country completely trapped. The whole point here really is not to encourage inventors as much as it is to encourage investors, because most invention takes money, often a lot of money, from R&D right down through product production and everything in between. Serial investments have to be made. Money managers have fiduciary and other obligations, and so they are interested in return on investment — how big is the risk; how long will it be until there is any return; will the return be adequate; can I predict any of the above factors?

Under the Section 101 case law, the answer is, “Well, no you really can’t.” So, when in doubt, the people who manage money, whether venture capitalists or pension fund directors or private equity people, don’t do it. So what are they doing? They are investing more and more in entertainment instead of real technology and the investments, particularly at the VC (Venture Capitalist) level, in real technology have plummeted. If you look at the percentage of total VC money invested in semiconductors now compared to ten years ago, it’s less than 1 percent of what it used to be as a proportion of the total. That is just an indicator. I don’t want to make too much of that.

We are in a very negative downward spiral. And, because so much is global — science is global, commerce is global, money is global and mobile — what is happening? In addition to the shift from hard technology to entertainment on the part of investment decisions, there is a shift overseas. Now more and more U.S. VC money that used to be invested here is being invested elsewhere — Europe, Asia, China — and quite properly, because the return on investment is better there because eligibility is wider, certainty is higher, and the risks are lower. That will keep happening unless and until the public authorities here who control broad policy have an epiphany and do something about this tremendous problem.

I want to compliment our friends — many, many visitors from Europe, Asia, and elsewhere — because all of you in my view have done a much better job providing much more clarity, predictability, certainty, reliability, and other things that intellectual property rights desperately need if they are going to function for their purpose. So good for you, bad

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for us, and sorry that when you come here you have all the risks and unpredictability that we have when we are operating domestically.

I think legislation really is the only solution. I would have had the view that the Supreme Court, having spoken schizophrenically in *Mayo*,¹⁴ *Alice*, and some of the other cases, would have intervened. But *Bilski* was nine years ago, *Mayo* seven years ago, *Alice* five years ago, and in between they have turned down every petition for certiorari that would have allowed them to straighten out the mess.

So I conclude — maybe I’m too impatient — that the Supreme Court has no intention of straightening out the mess. The Federal Circuit — we’ve already covered that. Obviously, the district judges cannot do anything. So I am hoping for efforts in Congress to be focused and balanced and give us a solution here.

PROF. HANSEN: Wow!

I don’t think the Supreme Court actually knew what they were getting into. Part of it is Justice Breyer had this big dissent and moaned about them not taking cases; and then, all of a sudden, they took a case basically for Breyer and they gave it to Breyer; and then they said, “Oh my God, look what has happened!” Now they’re trying to temper back, and that doesn’t seem to be working.

I think you are right that the Supreme Court doesn’t want to go near this anymore. I don’t know — maybe that’s good, maybe that’s not good — but I don’t think that is probably going to happen. Do you disagree with that?

MR. IANCU: I agree with some of what you just said. I agree that it is not highly likely that the Supreme Court is going to look at the issue again. If they do, who knows if they are going to make it better? It could actually go the other way.

I will say that we have seen an increased number of requests from the Supreme Court this past year for the government’s views on Section 101 cases. For example, both the *Vanda*¹⁵ and the *Berkheimer*¹⁶ cases that were discussed in the prior panel are now at the Supreme Court and they are seeking the government’s views. I’m not saying that those are the right cases, but in any event, they are looking at the issue.

I don’t disagree with the concept that from a practical point of view legislation may be the only path here.

My point is that the legislation has not changed since 1793. This predicament that we are in now was not caused by a shift in legislation. This predicament was caused by a new interpretation by the judiciary of the legislation.

Obviously, the judiciary, should it want to, can fix it. Again, I don’t yet see broad-based evidence that they want to; and, even if they do want to address it with a unified voice, I don’t yet see the evidence that it would be in a direction that solves it. So we’ll see what happens.

But, look, the fact is legislation is unpredictable too, and any new words that the Congress will put in there will have to be interpreted again by the courts by definition. So I think to suggest that with a stroke of a pen Congress can wipe this away and we are going to wake up one morning and everything is going to be hunky-dory — if the courts are not in it, I think (a) we are far away from that, and (b) to some extent it is unlikely because, no matter what, the courts have to be in it, obviously.

¹⁴ *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012).

¹⁵ *Vanda Pharm. Inc. v. W.-Ward Pharm. Int’l Ltd.*, 887 F.3d 1117 (Fed. Cir. 2018), *cert. denied*, 140 S. Ct. 911 (2020).

¹⁶ *Berkheimer v. HP Inc.*, 881 F.3d 1360, 1362 (Fed. Cir. 2018), *cert. denied*, 140 S. Ct. 911 (2020).

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PROF. HANSEN: Is one of the problems that to some degree the courts have lost faith in IP protection, they are not as sure that strong protection, especially in patents, is right, and there are some who definitely think it is wrong; whereas before it was, I would think, more generally agreed that IP protection is good? Is that part of the problem? And, as you say, even if Congress does something, those people will still be around who can nitpick or do something else.

JUDGE MICHEL: Well, as you know, in *Bilski* former Justice Kennedy wrote that the so-called “implied exceptions” — that’s the label for their interventions — had become settled as a matter of what he called “statutory *stare decisis*.”¹⁷ I’m not sure what that means. That doesn’t make a lot of sense to me. But I translate it this way into everyday language: “Congress has never told us to stop doing this, so we are going to keep doing it.”

In my view, Congress should explicitly overrule at least the four recent cases — maybe also *Flook* and *Benson*, but certainly the four most recent cases — and then I think the Supreme Court would get the message.

Consider this: the Supreme Court quartet of cases was unnecessary because Sections 102, 103, and 112 solve 99.9 percent of the problems without needing Section 101. But Breyer came along in *Mayo* and said, “No, no, the implied exceptions are better established than Section 103.” That just makes no sense to me.

I think that is unnecessary, unwise, unadministrable fairly, unscientific, but also undemocratic, because we have nine appointed Justices making broad national innovation policy in the United States instead of 535 democratically elected representatives of the people in a patent system that is entirely statutory.

This isn’t like First Amendment law. This is commercial law based on a detailed statute, and the Supreme Court doesn’t even pretend to be interpreting any word in Section 101; they just make stuff up. To me it’s an illicit encroachment on the prerogatives and duties of the Congress and Congress ought to reclaim its rightful role.

PROF. HANSEN: We don’t have time for further discussion — this has been great! — but I want to give you both a chance. Would you bet all the money you and all your relatives have that Congress will produce a good solution or Congress will not produce, and if you guess wrong, you’re bankrupt? I could have said everyone in your family is murdered, but I thought that was too extreme, so we’ll just go with bankrupt.

JUDGE MICHEL: I predict it is more likely than not that over the course of the next two to four years there will be a statute. It won’t be perfect, but it will be a huge improvement over the *status quo*, and I am happy to settle for that. The basis of my confidence is that the outflow of investment money and the relocation of labs and the flight of talent that is likely to continue and accelerate will finally become so clear that Congress will realize that *This is a job killer; this is a killer of technological leadership; this might even have national security impacts that are negative for the United States*. As those things become clearer and clearer, the motivation and the resolve to act will go up very, very rapidly. So I am predicting by 2021 that we will have a statute that is much better than what we have now.

PROF. HANSEN: Are you going to personally go to the Hill and talk to people?

JUDGE MICHEL: I’ve been doing that constantly.

PROF. HANSEN: Good.

MR. IANCU: I generally agree with Judge Michel. The *status quo* is simply unworkable. It is harming American innovation. It is harming American investment. Most

¹⁷ 561 U.S. 593 (2010).

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importantly, it is becoming a national security issue because if we are on the cusp of the Fourth Industrial Revolution (4IR) here, we cannot and should not relinquish our leading technological edge. If our laws are unclear and unpredictable, then we stand to risk all of that.

And I think Congress sees that. Unless courts fix the path they have put us on — and, as I said, I don't currently see any evidence that is about to happen — then I think legislators will step in.

They are stepping in. The folks who are speaking up are indicating that they are planning to introduce a bill by this summer, and then we will see where it goes from there. But I am encouraged that the efforts are both bipartisan and bicameral and they are moving in parallel.

JUDGE MICHEL: Hugh, there's another angle here. I spent nine years as a Senate staffer in a prior life. It is true that legislation is a slow, tortuous process, and you can never quite guarantee the final outcome until the bill is signed by a president.

On the other hand, I have seen innumerable examples of where the courts were going in a crazy direction and then a legislative solution was crafted by leaders such as we have now — as the Director has alluded to, bipartisan and bicameral — and when there are hearings, then there is a markup, and then a bill goes to the floor, at least in one body, the whole calculus changes. The media starts echoing that there's a big problem here, and not only is it likely that will help get legislation passed, but, even short of enactment, the courts will start backtracking. They are very political at the Supreme Court level. They are paying intense attention to every headline, every televised hearing, every bill that is moving forward in the process.

We don't have to choose between do we want legislation or do we want a court fix. We should bet on both horses and they will work in tandem.

PROF. HANSEN: Good.

By the way, we were going to have two Federal Circuit judges here, Judge O'Malley and Polly Newman, which would have been great for this panel, but both unfortunately were unable to make it. I'm sorry about that.

Thank you very much.

Now we have the new Register of Copyrights. Congratulations on that appointment.

MS. TEMPLE: Thank you.

PROF. HANSEN: It's very good to have Karyn with us. She is going to be talking about a new era in copyright legislation.

MS. TEMPLE: Great. Thank you, Hugh. It's a pleasure to be here.

Call me an optimist, but I sense a change in the air in terms of the ability of the United States to actually enact copyright legislation.

Updating the copyright law has often been an arduous and, dare I say, painful process. It took more than twenty years for us to update the 1976 Act,¹⁸ and that process actually began in the 1950s.

Fast-forward to the United States' updates to address the digital age and term, which occurred more than twenty years ago with the Digital Millennium Copyright Act¹⁹ and the copyright term extension in 1998.

Since then, there have been only minor and kind of technical corrections to the copyright law — until now.

¹⁸ Copyright Act of 1967, Pub. L. No. 94-553, 90 Stat. 2541.

¹⁹ Pub. L. No. 105-304, 112 Stat. 2860 (1998).

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A critical issue that has affected the atmosphere for copyright legislation occurred in 2011–2012, when we were considering legislative efforts to address online piracy. SOPA²⁰/PIPA²¹ will probably long live in infamy in terms of a cautionary tale of how not to get copyright legislation passed. I think it is still spoken of in whispers in some quarters, so I am taking a daring step to even mention it here.

PROF. HANSEN: Why don't you tell the audience a little bit about what happened?

MS. TEMPLE: Yes. In my speech I actually have some of that background.

It's the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA). There was an issue that I think most people could agree on, that online piracy was rampant and that current efforts were not really having the impact that was needed to comprehensively address the issue.

But critics, I think, will say that the content side went a little bit too far and overestimated its influence and the emerging might of the Internet, as well as the need to have consensus in the Internet age on broad legislation, and that is consensus of all key players — content, tech, and the public.

So provisions that already existed or processes that already existed elsewhere — we heard about the United Kingdom having some website-blocking legislation or a blocking mechanism since 2011 — came to an inglorious end in the United States.

Initially, SOPA had thirty-two sponsors and PIPA had forty-two sponsors, many of whom defected before it was over.

Slogans such as “Don't Break the Internet,” “Stop Internet Censorship,” “PIPA and SOPA! How About NOPA?” and my personal favorite “SOPA means LOSER in Swedish,” became common parlance, and most of the public was actually convinced that the legislation would literally break the Internet.

PROF. HANSEN: Of course it wasn't the public. It was some people working out of their bathrooms on the Internet. [Laughter]

MS. TEMPLE: Right, which aren't the public — but yes.

And, in a bit of irony I would say, the Internet was actually broken for a day intentionally by some tech companies themselves that had thought of an Internet Blackout Day,²² where Wikipedia, Reddit, and others went down for the day to demonstrate what they contended would be the result if those pieces of legislation had passed.

Since that kind of happy confluence of copyright controversy occurred, legislation on IP has often been blackballed simply by branding it with the “Scarlet Letter A” of being “the next great SOPA and PIPA.”

The CLASSICS Act,²³ which would have addressed pre-1972 sound recordings, was actually called “the next SOPA/PIPA”; The Register of Copyrights Selection and Accountability Act was called “the next SOPA/PIPA,” although it had nothing to do with IP enforcement; and there were a number of areas, even internationally, where the term “SOPA and PIPA” was applied to all sorts of different provisions.

²⁰ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

²¹ Protect IP Act, S. 968, 112th Cong. (2011).

²² On January 18, 2012, in protest of SOPA and PIPA, several websites coordinated a shutdown. See David A. Fahrenthold, SOPA Protests Shut Down Web Sites, WASH. POST, (Jan. 18, 2012), https://www.washingtonpost.com/politics/2012/01/17/gIQA4WY16P_story.html?utm_term=.37515a5b4226.

²³ Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act, H.R. 3301, 115th Cong. (2017).

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Congress didn't even want to consider enforcement of any kind. And at the time that the then Register of Copyright Maria Pallante called for The Next Great Copyright Act in 2015, many were very, very skeptical that there could be any legislation passed in Congress on copyright.

I think certain things have changed since that initial call for The Next Great Copyright Act. Content and tech did begin partnering on numerous issues rather than opposing each other. The Rap Genius website agreed to license with the Music Publishers of America (MPA) in May 2014. The Motion Picture Association of America (MPAA) and Donuts established a voluntary partnership to reduce online piracy in February 2016. YouTube signed a new music licensing deal with Sony and Universal Music Group in December 2017. Facebook signed music licensing deals with all three major labels in March 2018. Netflix joined the MPAA in January of this year.

And I think tech has also received its own amount of criticism, which some have called the "techlash," which has partially changed the political context in which these policy conversations are now taking place. And, of course, other countries have continued to legislate in these areas.

So I think both sides, so to speak, had something to gain by actually working together when it came to copyright legislation.

The Music Modernization Act²⁴ (MMA) was able to cross that finish line in relatively quick fashion. The Copyright Office wrote its *Music Licensing Report*²⁵ in 2015. The first recent music bill, including components of what became the MMA, was introduced in the House at the end of March 2017, there was a hearing on the MMA in May 2018, and the law was actually passed and signed by October 2018. That is actually a relatively quick, and I would say painless — maybe some lobbyists wouldn't agree, but I would say painless — process in terms of getting what will now probably be considered one of the most significant pieces of legislation passed.

Other recent examples outside the copyright space demonstrate the changing dynamics.

In 2018 legislation was introduced to amend Section 230 of the Communications Decency Act,²⁶ which excluded sex trafficking: the Stop Enabling Sex Traffickers Act (SESTA)²⁷ and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA).²⁸ The Electronic Frontier Foundation (EFF), which was a key player in the SOPA/PIPA debate, called it "a dangerous bill that would lead to censorship." Others, like Fight for the Future, directly accused it of being "the next SOPA/PIPA" and said that it would literally break the Internet. But that bill passed with the support of the Internet Association.

So what's on the horizon that might benefit from this copyright team spirit that I'm hoping exists?

- Small Claims. This is something that we have pushed in the Copyright Office for some time. There was a hearing last December, so we're hopeful that small claims will finally be able to get across the finish line.

- Enforcement. No, not SOPA/PIPA Part 2, but an actual real dialogue based on concrete facts on enforcement issues.

²⁴ Pub. L. No. 115-264 (2018).

²⁵ U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE (2015).

²⁶ 47 U.S.C §230.

²⁷ S. 516, 115th Cong. (2017).

²⁸ Pub. L. No. 115-164 (2018).

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- Other reforms to the music system that were not addressed in the MMA but that will continue to help the music system become updated.

So it is a new day, hopefully, for copyright legislation. We are ready in the Copyright Office to get to work on it and are very, very hopeful that, given the dynamics and copyright team spirit that is among content, tech, and the public, that we will be able to actually be very active and get small claims, enforcement issues like felony streaming, and orphan works finally across the finish line.

Thank you.

PROF. HANSEN: I feel 100 percent better now. Excellent.

Panel, anyone? Audience, anyone?

[No response]

MS. TEMPLE: We all agree. Thank you very much.

PROF. HANSEN: A tremendous presentation. I'm going to be able to sleep tonight now after that presentation. This morning I was almost suicidal listening to some of the panels, but this has been great.

Our next speaker is Maria Martin-Prat, who has been here for many years as part of DG-III and DG Growth, and now DG Trade. Just *entre nous*, did you like better working in DG Growth or DG Trade?

MS. MARTIN-PRAT: I never worked in DG Growth.

PROF. HANSEN: DG III was DG Growth, wasn't it?

MS. MARTIN-PRAT: I used to work in the Internal Market Directorate General of the Commission and now I am in DG Trade. I enjoyed both.

PROF. HANSEN: All right. Let's proceed.

MS. MARTIN-PRAT: I am going to try to cover the current state of IP international norm setting, and I am going to look at two issues very quickly. The first one is the question, which I think is increasingly important, of whether we are going towards further convergence, increasing divergence, or managed diversity in terms of IP rules worldwide. The second relates to the fact that there are ongoing discussions on issues such as forced technology transfer or digital trade that I believe are going to play an increasingly important role in terms of IP protection.

As to the first question — at least I think; some in the room may disagree — it has become clear that we might have left behind the time where we could agree on big multilateral IP treaties. It is true that there has been IP norm setting at the international level in the last two decades, but it has often been on very specific issues, often as well related to improving or completing existing treaties or agreements.

Now, an absence of international norm setting does not necessarily mean divergence of national rules. First of all, some areas are already highly integrated in the sense that there is a good common set of rules at the international level. We also often already have seen parallel legislative developments in different jurisdictions, particularly when technology evolves. Also, we do continue to have bilateral and plurilateral trade agreements that normally include IP chapters and also help in setting international standards.

However, if you look today at both national law and trade agreements, my impression is that we may be going towards more of a divergence than convergence, and this is likely to continue. It is a trend that should worry us in view of the fact that we are increasingly in front of global markets and cross-border services.

If you look at national laws, I think we will all agree there are going to be marked differences, at least for a while, for instance, between the U.S. legislation and the EU

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legislation in terms of how we address issues such as publishers' rights, or certainly the rules for ISPs.

We have had also other developments in Europe recently, for example, with regard to Supplementary Protection Certificates for patents that also seem to be moving towards divergence.

This is not the first time that we might have divergent views between, for instance, the European Union and the United States, and I think geographical indications is the seminal example. Nevertheless, I think it is undeniable that differences when they emerge affect stakeholders across many jurisdictions.

The same happens when you look at trade agreements these days. Now that we have more of them that are being concluded, so the network of trade agreements is thickening, it is quite interesting to engage in a comparison of their IP chapters.

If you take, for instance, the IP chapter in the U.S.–Mexico–Canada agreement and the IP chapter in the free trade agreement that is now almost concluded between the European Union and Mexico and compare those with the Trans-Pacific Partnership IP chapter, you will see a degree of diversity in their norms. It will be interesting to see how this managed diversity is going to be applied when you will have players present in all those countries. And you could do the same exercise with other networks of agreements that include the European Union, Japan, Singapore, etc. In a way, what we are seeing is increasing accommodation of divergence. A further sign of divergence can be found in the provisions of the IP chapter in the Trans-Pacific Partnership that were suspended after the United States decided not to go ahead with its conclusion.

So that's what we see in terms of norm setting.

There is another aspect that I think is quite interesting when you look at what is happening more generally in trade and investment discussions.

The most important discussion on IP today is likely to be related to forced technology transfer. I'm sure all of you follow these discussions. They are very present in this country, in particular, after the United States imposed tariffs of \$250 billion on Chinese goods following the findings in the Section 301 Report²⁹ of large-scale intellectual property theft in China.

The European Commission disagrees with a number of the methods used by the United States but does agree with the identification of the underlying problem. We do agree that one of the greatest challenges we have today in terms of IP protection is forced technology transfer, which is an issue mostly related to trade and investment law but also, obviously, related to weak IP rules or enforcement systems, notably in the areas of patents and trade secrets, and also to the lack of a clear recognition of market principles and freedom of contract for IP transactions.

Forced technology transfer is an important point in the agenda of a number of players, like the United States, Japan, and the European Union; talks as to a possible plurilateral discussion of those matters in the World Trade Organization (WTO); and also negotiations about to start now in the WTO on digital trade or electronic commerce, which are likely as well to have a radical impact on IP protection, in particular if some issues such as ISP liability are included.

In conclusion, in my view we will be going now towards a time where bilateral and plurilateral negotiations will be the main vehicle for further IP norm setting at the

²⁹ OFF. OF THE U.S. TRADE REPRESENTATIVE, SECTION 301 REPORT INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY AND INNOVATION (2018).

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international level. And we will be in a phase of managed diversity, which is nevertheless sustained by a solid basis of common rules established in existing international conventions and the TRIPs Agreement. In parallel, I think we will see negotiations on trade and investment that are also likely to play an increasingly important role in the shaping and the effective exercise of IP rules.

PROF. HANSEN: Thank you very much.

Any comments or thoughts from anywhere?

QUESTION [Angus Lang, Tenth Floor Selborne/Wentworth Chambers, Sydney]: You mentioned that we are in a phase of managed divergence. I wonder about two possible mechanisms for managing it, or perhaps that might be alternative mechanisms for norm convergence.

One, in a world where more and more aspects of life are governed by data flows, in particular cross-border data flows, themselves areas of technology that may or not become more standardized, but the standard-setting bodies for all of those aspects of life might become *de facto* norm or rule makers rather than the more conventional mechanisms that are used, so the influence of supranational standard-setting bodies in various fields.

Second, the possible role of international investment courts under the auspices of investment traders in the divergence between norms.

MS. MARTIN-PRAT: I think that is more a comment than a question. I do agree that in the absence of sufficient agreement to set rules at the multilateral level, which from my point of view is the ideal objective, you do face instances in which the standards are set by the bigger players. We are all rushing in terms of seeing who is first to set certain standards, and there are new important players there, China being one of them.

I was not referring to traditional investment treaties when talking about agreements that may shape IP, but rather more generally to trade and investment agreements or trade in general, for the specific issue of forced technology transfer.

PROF. HANSEN: How difficult is it to do convergence, for instance? Convergence with whom? Is it the Member States? Also you have the courts and foreign trade involving 18,000 different jurisdictions. In terms of actually producing a situation where there is some convergence, would you say it is very difficult; no, it is okay because people want it; or what? What do you think?

MS. MARTIN-PRAT: Convergence is very difficult; it is increasingly difficult. Anyone who has been following international negotiations for the last thirty years realizes that and anyone who sees what is happening in WIPO and WTO realizes that.

I am leaving aside convergence with EU Member States. That is our daily work. That is part of how we function.

In terms of the convergence of rules with other big players, it is complex. I think it is easier to try to focus on very specific issues. But some of the issues we would like to address will require the engagement of certain players as well that may not be willing to engage, or not willing to engage on the terms that we want them to engage. That is a challenge that is faced by the European Union, by the United States, by Japan, by many other jurisdictions, in particular when wanting to bring onboard other emerging, very important players. China is clearly one of those.

PROF. HANSEN: A question over there?

QUESTION [George York, Recording Industry Association of America]: Maria, you mentioned a point on which I think there is a fair amount of consensus, that the arc of history, the arc of trade negotiations, is moving from multilateral to both bilateral and plurilateral.

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I wonder, though, how sustainable is that new paradigm of bilateral and plurilateral? The Council just recently adopted a very narrow set of terms to engage on in negotiations with the United States, for example, limited to a few key areas but not a comprehensive negotiation.

To what extent are there other alternatives to pursuing the promotion of IP norm setting that are maybe not at the trade agreement level but still could be bilateral and plurilateral — for example, through working groups, through trade preference programs incentivizing implementing IP norms and other mechanisms?

MS. MARTIN-PRAT: I thought George was going to ask about geographical indications. Good you left that behind.

On the issue of whether it is sustainable to continue with a network that is thickening, as I was saying, of bilateral or plurilateral agreements, that is a good question. I don't know whether we are going to be able to have an alternative, but I don't think it is ideal. Again, if you look at specific issues of IP protection, whether it is the length of a term of protection or the type of coverage of enforcement provisions, they are different. When Mexico discusses with the European Union or when Mexico discusses with the rest of the countries of the Trans-Pacific Partnership or when Mexico discusses with the United States, it is bound to at some point create some problems.

Are there alternatives to that in terms of rule-making? One path that is increasingly being considered now in the context of WTO is plurilaterals, plurilaterals that may not be at the moment specific on IP, but, as I was saying, may include forced technology transfer related provisions, and clearly, we are starting to discuss digital trade.

Besides norm setting, I think efforts have to continue in the area of enforcement of the existing rules. There is already a big base of common rules on which we can work. So yes, there is a lot of work that can be done.

But that does not take away the fact that at some point, for some issues, ideally we will want to have new common rules agreed, at least at the plurilateral if not the multilateral level.

PROF. HANSEN: Thank you very much.

Andrew Finch, what's going on in the Antitrust Division these days?

MR. FINCH: To return the conversation a little bit to something that Nick spoke about on the last panel, we are very focused on where the antitrust laws can apply to standard-development organizations (SDOs) and standard-setting organizations (SSOs).

PROF. HANSEN: One of the remarkable things about this Administration is the USPTO has produced wonderful guidelines and the Antitrust Division is taking a position with regard to IP that is heretical compared to the traditional "Nine No-No's" and everything else, which is quite remarkable, and from my point of view obviously very welcome.

Why don't you proceed?

MR. FINCH: Sure. Thank you for the invitation to be here. It is really nice to be an antitrust lawyer in front of a group of IP lawyers because I speak a lot to antitrust groups and it's refreshing to see so many unfamiliar faces out there.

As Hugh mentioned, we are going through a bit of a "rebalancing," we've called it, although I don't think it's an adjustment that is off to one end of the swing of the pendulum; it's actually bringing it back towards the middle.

I attribute part of that to the fact that the Head of the Antitrust Division, Makan Delrahim, started off practicing law as a patent lawyer, and he is the first Head of the

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Antitrust Division who was previously a practicing patent lawyer. That informs a lot of his views on the intersection of antitrust and intellectual property law.

He gave a speech not long after he was confirmed as Assistant Attorney General in which he talked about what he called the “New Madison” approach to intellectual property rights and antitrust.³⁰ He said that we have to acknowledge that the patent right is embodied in the Constitution. As Hugh mentioned earlier, the only place in the original Constitution the word “right” appears is in Article I, Section 8, Clause 8; and not only is it the word “right,” it’s the words “exclusive right.” That’s important because the founding document of our government recognizes the importance in patent law of the right to exclude.

That informs our interpretation and application of antitrust law. The Sherman Act³¹ is old — it was passed in 1890 — but it’s not that old; it’s not as old as the Constitution. The fact that the exclusive right is in the Constitution is something that is very important to us and has played an important role in helping us articulate our current position on standard-setting organizations.

How does antitrust fit into this? This morning I was reminded of that famous Ronald Reagan quote, which I will adapt here, which would say there are probably no more frightening words to a bunch of IP lawyers than “I’m from the Antitrust Division and I’m here to help.” [Laughter]

But what we see is a lack of balance over the last decade or so in antitrust law, particularly in the way the enforcement agencies have been applying antitrust law to the conduct of standard-essential patent holders in particular.

What I mean by that is there was a view that was publicized and adopted by a number of enforcement agencies around the world that the breach of a fair, reasonable, and nondiscriminatory (FRAND) commitment in and of itself could give rise to an antitrust claim. That is a concern for us because it is inconsistent with the right to exclude — and I’ll come back to that. But it is also concerning because it suggests that there is somehow a treble-damages claim that should flow from an allegation that a patent holder who made a FRAND commitment simply failed to abide by that FRAND commitment.

A lot has been written about FRAND commitments, but they are in some sense incomplete contract terms. When an SSO requires a FRAND commitment, and a patent holder contributes his IP and says, “I’ll negotiate on a FRAND basis,” that is a placeholder for something to be determined through future negotiation.

When those negotiations break down, for whatever reason, that may give rise to a contract claim for breach of a FRAND commitment and courts could sort out what the value of the rights are. The courts do that all the time. The contract claim, however, doesn’t convert automatically into an antitrust claim just because that FRAND commitment was made in the context of a standard-setting organization.

We have taken that position and we are very committed to it. We believe that the threat of treble damages undermines the incentive to innovate and the incentive to invest that Judge Michel was talking about. The virtuous cycle — which begins with investment, then innovation, implementation — and then the cycle of dynamic competition is slowed if the incentive to innovate is not well protected.

³⁰ Makan Delrahim, Assistant Attorney Gen., U.S Dep’t of Justice, Remarks at University of Pennsylvania. Law School: The “New Madison” Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018).

³¹ 15 U.S.C §§ 1-38.

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We are concerned that the inaccurate application of the antitrust law in this context threatens to do exactly that and undermines the incentive to innovate.

That doesn't mean antitrust law has no role with regard to standard-setting organizations. We've been very clear that we do believe, as Nick referred to, a standard-setting organization is a group of competitors coming together to exclude. The rules that we are focused on are the rules of the Supreme Court, which has taken a bit of a beating today, articulated in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*³² and *American Society of Mechanical Engineers v. Hydrolevel Corp.*³³ about standard-setting organizations: they are rife with opportunities for anticompetitive activity; they need to be safeguarded to make sure that the decision-making is balanced and that the right technology for the beneficial purpose of the organization is adopted.

So we are more focused now in terms of antitrust enforcement on how standard-setting organizations operate. How do they select a particular technology? How do they adopt patent policies that guide the operation of the SDO? Is the representation fair and balanced? Are there groups of members within an SDO that are trying to exclude competing technology? Are there groups of implementers that are trying to suppress the rates paid to certain technology holders? Those are things that are concerning us.

We have written some letters to the American National Standards Institute and we have done some other competition advocacy along those lines. We're interested in those issues.

The second part of our agenda is focusing on the joint conduct of members of standard-setting organizations, to try to preserve the promise of standard-setting organizations to choose the best innovations and create the best standards, and to preserve the cycle of innovation.

Thank you.

PROF. HANSEN: Right on time. Well done.

Any questions?

QUESTION [Thomas Cotter, University of Minnesota Law School, Minneapolis]: If an SDO, let's say, were to adopt a policy requiring disputes over FRAND terms to be submitted to some duly established new tribunal, would that be a problem from the perspective of the Antitrust Division?

Relatedly, some SDOs have subgroups, special-interest groups — they may go by different names — whereby certain groups of members may work on certain policies, may be trying to address certain specific problems. Do firms now run the risk of antitrust liability if they participate in such subgroups?

MR. FINCH: Two questions. The first one is an interesting idea; that is, should FRAND disputes automatically be subject to some sort of arbitration.

One thing that we've been very clear about is that we encourage standard-setting organizations in thinking about their IP policies to be flexible, to innovate in that regard, and to in some sense compete with each other. So it could be possible that your idea might work. It might be interesting. It could be something worth trying.

I'm not in the business of giving business review letters when I'm sitting on panels, but that's something that might be worthy of consideration. It could help resolve the issue, depending of course on how it's implemented and who wants to implement it and what the actual mechanisms are.

³² 486 U.S. 492 (1988).

³³ 456 U.S. 556 (1982).

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On your second question about special-interest groups, again it depends on the facts. There are issues around special-interest groups that could actually raise concerns. Who are the members? Is it known that the special-interest group exists? How much power or how many votes does the special-interest group have compared to the members of the actual organization itself? There are all kinds of questions swirling around there.

Sometimes it's possible to run the risk of antitrust liability, yes. There is antitrust risk everywhere in this endeavor, but can you minimize it by thinking about how to operate a special-interest group in a way that maximizes transparency and avoids dominance and things like that?

Again, it depends on the facts. There is risk, but there is also, I think, a way to manage it.

QUESTION [Claudia Tapia, Ericsson]: One question because we were talking before about the principles of open, transparent, consensus based — all these principles that help to have certain safeguards — do you see them in order to avoid antitrust concerns to be those principles only applied to the standardization process or also to the development and approval of IPR policies?

MR. FINCH: Certainly, at the level of the approval of IPR policies. Of course, our first focus was the process of selecting a technology to embody in the standard, but you can also achieve an anticompetitive result if you manage to change the IPR policy through a skewed process. There's sometimes an idea that somehow the next level up, which is the process for adopting the policy or the management of the SDO itself, is somehow immune from antitrust concern. That is not something that we would agree with. That's an area where there should be focus and attention to the antitrust risks.

QUESTION [David Sutcliffe, Sports Technology]: A follow-up question, Andrew. On the cover of today's *New York Times*³⁴ an article about a proposed \$5 billion fine — it might be less — for Facebook mentioned that a \$5 billion fine to a company that's got \$56 billion in annual revenue is essentially a slap on the wrist.

Jerry Nadler told a group of us about ten days ago here at Fordham that he in particular was going to look into the monopoly situation of companies like Amazon, Google, and Facebook.

Isn't it time — obviously, Elizabeth Warren thinks it's past time — that the government and your Department look into breaking up these companies, which are monopoly companies dominating the world with their platforms? I wonder what your thoughts are.

MR. FINCH: I only have seven seconds left. [Laughter]

I really can't comment on the FTC's investigation of Facebook. I would refer you to some speeches I've given previously on the issue of monopolization. There is a Capitol Forum speech in December that you could look at.

PROF. HANSEN: Okay. Thank you very much.

Marco, you're a pretty big cheese in the European Commission. How does it feel to be running this? You had a lot to do with the copyright reforms that just came out, didn't you?

MR. GIORELLO: Yes. I feel relief and very happy.

PROF. HANSEN: A lot of people thought it couldn't happen, so congratulations on just getting it done.

³⁴ Mike Isaac & Cecilia Kang, *Facebook Expected to be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues*, N.Y. TIMES, (Apr. 25, 2019), <https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html>.

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MR. GIORELLO: Thank you.

PROF. HANSEN: DGs change. There used to be DG I, DG II, DG III; then they sort of morphed to DG Internal Market; now there's Growth, there's CONNECT. What are we supposed to figure out from DG CONNECT, other than it normally was considered pro-tech? Is it still?

MR. GIORELLO: I think it was intentional to move copyright to DG CONNECT five years ago to deliver the copyright reform. This is a little bit our internal dynamics, but for many years there were different views within the Commission on how to approach the subject. Then, at some point, the political willingness to deliver copyright reform came to the fore, and I think it was a wise decision actually to merge the two departments dealing with copyright. After that, I think it worked much better. I think the result is we've achieved copyright reform partly because of this.

PROF. HANSEN: Please proceed.

MR. GIORELLO: Thanks a lot for the invitation. In my few minutes I will try to start drawing some first lessons learned from this big story actually, which was the negotiation of the copyright reform. Formally the Directive³⁵ was adopted only ten days ago. It is a long story, but the final signature was only ten days ago.

As many of you know, this was a very long and controversial political process. It was highly political. There was a constant need to find the majorities among the Member States and within the European Parliament. There was a lot of public debate. This makes the story interesting because it allows us now to draw some conclusions about the state of copyright in the digital economy and about the policymakers' thinking about copyright nowadays. Of course, this is a discussion which will probably last for many years to come.

As you know, the original Commission proposal, which was pretty much endorsed in the end in the final Copyright Directive, covered a broad range of provisions, many players affected, many different aspects. This again, I think, is what makes it very interesting to see what happened because you can see how the different players have been considered in the end in the final Directive. I will focus on just a few examples.

The first category of interesting conclusions is what the Directive, as finally adopted, tells us in terms of the role of rightsholders, of copyright industries, in the copyright framework in Europe. The message here is that in the end the challenges that the rightsholders are facing in the digital economy in their relationship with the platforms have been recognized. One can definitely see that in the end the policymakers sided with the copyright industries on that. But to some extent this also comes with a price in terms of checks and balances for rightsholders. Let me just give you two examples.

As you know, the new Directive introduces a new copyright for press publishers, a neighboring right, which is something that did not exist before in European law. While previous neighboring rights, like for film producers, had been drafted in one paragraph in previous legislation, now the new publishers' right is an article with ten paragraphs. This tells us how complex lawmaking in this area has become.

Second example: the liability of the platforms has been recognized in Article 17,³⁶ but it comes with checks and balances in terms of mitigation of liability and new provisions to protect the users uploading the content in certain situations.

³⁵ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

³⁶ *Id.* at 119-21.

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If one looks at the final Directive from the perspective of the users, there are a number of provisions on exceptions aiming at stimulating public policy objectives in the areas of education, research, text and data mining.

I think it is also interesting to see that while there are new exceptions, they often come with novelties in terms of mechanisms which to some extent are there to leave a space, in some cases giving priority to licenses even in cases where exceptions apply. Three examples.

- The new teaching exception gives Member States the possibility to give priority to licenses when implementing the exception in national law.
- The new general text and data mining exception comes with the right for rightsholders to opt-out from it if they want to license their content in certain situations.
- The new mechanism for simplified licenses to facilitate the digitization of cultural heritage is complemented by a so called “fallback exception” which applies to allow digitation and online display of out-of-commerce works if licensing solutions are not available.

These are all interesting novelties which talk about an attempt to find a balance and to find a middle way between exclusive rights, public policy objectives, and exceptions in a number of areas.

Some people may think that this is too complex, that this is not good. I actually have a different opinion. I think that this level of complexity was necessary. Rather than complexity, I would say it is pragmatism; it is the attempt to find good solutions, to find the balance in the copyright system.

To conclude, what does this story tell us about copyright more generally? As we know, this was a negotiation that in the end was depicted very much as a battle between the Internet platforms and the content industries. To some extent it was. It was very political. We also had our days of Wikipedia closing down, people demonstrating in the streets, and all those things. But in the end, the fact that we managed to deliver this reform shows that we can still deliver complex reforms in the Internet. In the end, copyright still matters in the digital economy and its role has been recognized by the European policymakers.

Thank you.

PROF. HANSEN: Thank you very much for that excellent presentation.