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### 1C Plenary Session. Views from the Judiciary

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Richard Arnold

Annabelle Bennett

Colin Birss

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

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

*Friday, April 9, 2021 – 1:30 p.m.*

**SESSION 1: Plenary Sessions  
1C. *Views from the Judiciary***

***Moderator:***

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***Panelists:***

**Richard Arnold**

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**Annabelle Bennett**

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Robina, Queensland*

**Colin Birss**

*U.K. Court of Appeal, London*

**Stephen Burley**

*Federal Court of Australia, Sydney*

**Paolo Catalozzi**

*Supreme Court of Italy, Rome*

**Jennifer Choe-Groves**

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HUGH C. HANSEN: Alright. Well, hello everybody. So I've been told that we're starting with Rian today because she has to leave early. Rian, you went to LSE for a while. Why did you do that?

RIAN KALDEN: I was offered a scholarship to go to London and I had Professor Cornish, who taught Intellectual Property. That's how I ended up there.

HUGH C. HANSEN: Annabelle, we're going to discuss this sooner. Professor Cornish, everyone thinks he's English. He acts English. He thought he was English. He's actually Australian.

ANNABELLE BENNETT: He is. He's an Aussie.

RIAN KALDEN: Oh, really?

HUGH C. HANSEN: We'll do that later. First of all, how was Stibbe? You were there for a while, 11 years. How was that—practicing?

RIAN KALDEN: Oh, that was great fun. I started off with intellectual property, but I also did a lot of things like company law, arbitration, and that sort of thing. I think it's very important for a judge to be in private practice first. That experience is really important before you go to the other side of the desk, so to say.

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HUGH C. HANSEN: You have been in the judge's career in what, maybe four different spots, or three different spots, or what?

RIAN KALDEN: I started off in The Hague at the District Court. Then, I shortly was in Haarlem, which is a place next to Amsterdam. I did try a bit-- I did criminal law.

HUGH C. HANSEN: For a very short time.

RIAN KALDEN: Very short time, because it was not really my piece of cake, I must admit, and so I left the Hague and that's where I still went.

HUGH C. HANSEN: You're also an arbitrator. An active arbitrator as a judge, is that usual?

RIAN KALDEN: At the moment, I don't really do it because it's too busy with the court job at the moment. I did that mostly when I was a criminal judge because I had time to do that next to working as a judge. It is allowed. If you are not a full-time judge, you can be a part-time judge in the Netherlands. I was a part-time judge at the time, so I did have time to do some arbitration next. It's allowed.

HUGH C. HANSEN: Going back over your career, is there anything you would do differently now, looking back, with all the knowledge and maturity you have now?

RIAN KALDEN: No, I don't think so. Even though I didn't quite like the criminal law department, I think it's very good for a judge to do that for a time, because it's an aspect of being a judge. You get to see a completely different part of society than what you're used to being in. I think it's very valuable, so no I don't think I have any regrets.

HUGH C. HANSEN: How much are you affected by law decisions or whatever in other countries, like the U.S. or wherever, in terms of your thinking about issues? Does that actually play a part at all?

RIAN KALDEN: I think they do because, even though we're of course not bound, it's always good to see how your colleagues approach similar questions. It makes you think. We're all working towards harmonization as much as we can. You cannot do that unless you are aware of the decisions in other parts of the world.

HUGH C. HANSEN: How much has Brexit stopped views of harmonization? You're still going to be looking to the UK in the same way, even though it's not official, or does that actually have some actual effect on decisions you'll be making?

RIAN KALDEN: So far, there's not much different. At the moment Brexit was effect until that time, legislation, especially European Directives and everything, are still the same and implemented in the UK. How much we are deviating from this point, we'll just have to find out. At the moment, I don't think there's much difference that we experience, at least not for my part.

HUGH C. HANSEN: This may be a difficult question but— the Court of Justice, U.S. people have viewed it as the supreme court. Sometimes it's not very favorable at all, and actually, most people, most judges don't care about it because the chance of a case being reversed is something else— This is my legal realist coming out, but I don't know. To what extent do you think about— What if one of the parties refers it for a decision, does that change actually anything you do in the case, or you just wait for it and then see what happens, or what?

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RIAN KALDEN: If a case gets referred, then, of course, you have to wait for the answer. Once they've made a decision, we're bound by it. There's no way we cannot follow whatever they already decided.

HUGH C. HANSEN: Oh yes there is, Rian. Theoretically, they don't apply it to the facts. There is some leeway there, of how you would apply whatever rule they make to the facts. No?

RIAN KALDEN: If the facts allow a different route, of course, that will be possible, but you have to follow the rules, the general, the legal guidelines that they give. The interpretation of provisions of the guidelines, we have to follow that. There's no way around it. In that sense, yes, we just have to look and see and wait for it.

HUGH C. HANSEN: I see from the clock that our time is up. Thank you very much for your participation and over the years. It's been great.

RIAN KALDEN: Thank you. It has been very nice, very pleasant. It was not the real thing, but we've got a feeling anyway.

HUGH C. HANSEN: One of the things we all have to think about is, there are benefits to remote that you don't have at live, and obviously, the benefit from lives that you don't have.

Also, we're going to have to face a situation of, who's going to pay for it if you could just go to a conference that is remote. Because they haven't put it in their budget for two years, there's going to be problems we're going to face. Even if everyone wants to do it, will they actually have people who will pay for them to come? The international people who travel is a big part of what we do. We do pay for the judges, but practitioners and everything else have to pay their own way. Anyway, it's going to be an interesting situation.

RIAN KALDEN: I still hope that we actually get to see each other because being in person is so much better, not just for the fun. It's much more fun, of course, but also the value of these conferences is getting to know your colleagues, discussing in between the panels, meeting each other informally. That, so much, contributes to mutual understanding, and ultimately, to harmonization, so I think it's very valuable for us, these conferences. Therefore, I would strongly hope there's still opportunity to meet up again in person next year.

HUGH C. HANSEN: So do I. Thank you.

RIAN KALDEN: Thank you.

HUGH C. HANSEN: Now I see next up is Richard. Is that correct?

RICHARD ARNOLD: I'm him.

HUGH C. HANSEN: Where did you grow up?

RICHARD ARNOLD: From the age of two, in North London, where I am now. I'm living now, and have done for any years, just a small number of miles from where I grew up. My life within a very narrow world, I'm afraid.

HUGH C. HANSEN: I love this expression "called to the bar." When I'm called to the bar, I get drunk. You, called to the bar, it's pretty— What does that mean, actually, called to the bar?

RICHARD ARNOLD: It means becoming a barrister. It's a ceremony. These days, of course, they do it online. Before COVID, we had ceremonies in person. You would go through a little ceremony where you will be called by your Inn of Court. That formalized your becoming a barrister.

HUGH C. HANSEN: Is there any chance that you won't get it, become a barrister? Is it more of a formality to be called to the bar?

RICHARD ARNOLD: Oh, absolutely. These days, the examination requirements are quite stringent. There's quite a high failure rate, which has been one of the big complaints in recent years, particularly because it's a very costly system. It's quite a complicated story. The Inns of Court, a couple of years ago, took action and started providing courses themselves, which has had the desired effect of reducing the cost of this. It's still a very competitive system, it's still quite costly, and there is still a substantial failure rate.

HUGH C. HANSEN: Ok. Brexit, if there's any judge that's going to be— They're going to miss you because of Brexit, because you have the record of the most referrals.

RICHARD ARNOLD: They might be grateful to have fewer references from me—reducing their caseload.

HUGH C. HANSEN: That may be the case, but then that's too bad because it's their loss. Are you going to feel, "Gee whiz, I wish—" Is there any loss to you of Brexit at all, or is it just carry on pretty much the same?

RICHARD ARNOLD: As with all of these things, there's downsides and there's upsides. I was a believer in the system of references to the Court of Justice. That's one of the reasons—there are many other reasons—why I ended up making 14 references. Of course, the Court of Justice is not perfect, but then most supreme courts around the globe are not perfect either. As a system, it worked quite well, I found, particularly once you learned how to operate it. There is a big burden on the national courts, as well as on the Court of Justice to make the system operate properly. From that point of view, it's sad no longer to be part of the system.

On the upside, one has the chance now to be free of the constraints of the Court of Justice. If the right case presents itself, where there's a bad precedent from the Court of Justice that one wants to be free of, then we will have that opportunity. Although I have to tell you that, in the first case that I've done where that opportunity has arisen, we've decided not to do it. This is a case just decided recently in the Court of Appeal called *Warner UK Ltd v TuneIn Inc.*<sup>1</sup> One of the parties asked us in terms to depart from the Court of Justice's case law, and we decided we weren't going to do it.

HUGH C. HANSEN: I clerked for two judges, Southern District, Second Circuit, and both of them said they preferred— Well, the guy in the district court said that he wouldn't take a position in the Second Circuit, which may or may not be true. The one in the Second Circuit said he had much more enjoyed being a district court judge than a Second Circuit judge. What about you? You've been first instance; you've been in a Court of Appeal.

RICHARD ARNOLD: I have enjoyed both. I had a great time as a first instance judge for 11 years. Under our system, you have the advantage that you're sitting on your own. You're in complete control of the courtroom. You have the privilege of hearing the expert witnesses, in particular in patent actions, which I really loved. It was always great to hear from the expert witnesses. Now, of course, I'm sitting in a court of three and it's purely an appellate court, so no witnesses at all. On the upside, I have the great advantage of having colleagues to discuss the case with for the first time. I'm really enjoying that. Some of the most interesting cases I've had since being in the Court of Appeal have been where the court is split.

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<sup>1</sup> *TuneIn Inc. v. Warner Music UK Ltd.* [2021] EWCA Civ 441 (Eng.).

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HUGH C. HANSEN: That's interesting. Going around the halls, I forget— Are you called Lord Justice of Appeal or something? What is your title?

RICHARD ARNOLD: We always get into a complicated story with our titles. Yes, I'm Lord Justice Arnold. My position is Lord Justice of Appeal.

HUGH C. HANSEN: When you're walking around the courthouse, do people who aren't judges— what do they call you? Lord Justice? Lord Justice Arnold? What do they call you?

RICHARD ARNOLD: What? You mean staff? They just say sir. It's much simpler.

HUGH C. HANSEN: Yes, I guess that would be much simpler. I'm getting these indications that actually the time is up. Normally, we have six, seven, eight judges. We have 18 this time. I think the past ones were so incredibly successful that people are just banging on the door to do this, but unfortunately, we have less time to talk about it. Are there any final thoughts you want to say about your career for the record?

RICHARD ARNOLD: No. I will use the time to echo what Rian said, which is that I've really enjoyed being at Fordham virtually this year. It's been an awful lot better than not having it. But like Rian, I'm looking forward to doing it in person again next year.

HUGH C. HANSEN: Fingers crossed. Fingers crossed. Thank you very much.

RICHARD ARNOLD: You're welcome.

HUGH C. HANSEN: Annabelle, why did you stop being a judge? Was it mandatory?

ANNABELLE BENNETT: No, no, no, no. I want you to know that I left well before the mandatory retirement age, just to make that absolutely clear. I wasn't that old. I'm getting there.

Why did I stop? I'd always thought that I would go before I had to. I stayed on for 13 years. I thought that if I was going to have another career after being a judge, then that was the time to do it. When I was still "young enough" to be able to start off something else and to do it before I was forced to resign when everyone would know how old I was. I'd already had two careers, so I decided that it was maybe time for one more.

HUGH C. HANSEN: What is the one more?

ANNABELLE BENNETT: It's a grab bag, actually. It's a mix. I chair a number of boards. I'm chancellor of the university. I sit on other boards. I do arbitrations. I do some strategic advice work in cases, mainly IP cases for people preparing for court. I chair the advisory group of judges for WIPO.<sup>2</sup> That's broadly it. Now I chair boards covering a range of subject matter, such as infrastructure. I'm president of the New South Wales anti-discrimination board. I sat on a Royal Commission concerning national natural disasters. What else do I chair? Oh, Australia's Nuclear Science and Technology Organization, which runs Australia's only nuclear reactor. It's a mix. It's fabulous. It's a fascinating thing. I check every day what I'm about to do, and then I have to read madly to get on top of what I have to know for that day. That part is like being a judge.

HUGH C. HANSEN: Is it possible that you're doing all those things because you don't really like any of them?

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<sup>2</sup> World Intellectual Property Organization.

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ANNABELLE BENNETT: No. I like all of them. I do have an inability to say a dreaded word with two letters, starting with the letter N.

HUGH C. HANSEN: I was just sort of joking with that. Consultant barrister, this means somebody has hired you. Is that what that means?

ANNABELLE BENNETT: It means that I'm a barrister. Officially, I'm back at the bar and I'm a member of chambers, but I won't go to court. I don't believe that as an ex-judge it's right. Some do. I don't. I won't appear in court, but I will consult with people on cases if they want me to.

I've sat on a mock trial, a mock case. I think that they occur more in the U.S. than otherwise, but it's very expensive for the parties to do that. I've sat on one of those. Otherwise, I'll just advise on arguments and things like that.

HUGH C. HANSEN: In school, you were a science person, right?

ANNABELLE BENNETT: In school, you mean like in high school? I started –

HUGH C. HANSEN: No, no, no. You have a PhD in biochemistry, I thought?

ANNABELLE BENNETT: Yes, I do. It would now be called cell biology. Yes, I did a PhD in science and a year of post-doc before I started studying law.

HUGH C. HANSEN: How did that lead to your life as a lawyer? Were you always going to just focus on that, or IP, or patents, or what?

ANNABELLE BENNETT: No. When I came to the bar, we weren't allowed to advertise, so nobody knew I had this PhD. I was doing everything, lots of commercial work, equity, all sorts of general stuff. One day, there was an article about a very new breed then of women barristers because there weren't many of us, and it mentioned I had a PhD. Somebody saw that. A patent attorney saw that and briefed me in my first patent case. The rest, as they say, is history. I ended up then specializing in IP. I was, in fact, the only technically qualified IP judge in Australia—then.

HUGH C. HANSEN: That's good. I'm looking at this, I think we're out of time. Thank you so much. Thank you for all your support over the years.

ANNABELLE BENNETT: Echoing everybody else, believe me, I would not have done this 2:30 AM timing for my panel, and now this at this time, for many people, but for you and Fordham, it's actually a pleasure. It's so much fun to see all the wonderful people I've met at Fordham, at least on screen. Thank you for continuing to do this.

HUGH C. HANSEN: Well, thank you. With regard to everybody, I'm looking forward to when we actually can meet and I can travel. Thank you very much, Annabelle. I'm looking at the list. I think it's Colin.

COLIN BIRSS: Hi.

HUGH C. HANSEN: Where are you? Yes. We discussed a number of times that I don't want to repeat my questions, but I haven't done it actually in a forum like this. How did you decide to become a lawyer?

COLIN BIRSS: Me? I didn't like programming computers. I thought there wasn't any future in that. Shows you what a good judge I am. I didn't enjoy it anyway and I wanted a profession. I worked out that being an accountant was boring. Being a doctor was too complicated. Being a barrister was the shortest route to getting a professional qualification. I started looking at that, it looked interesting, and I did it. That was it. True story.

HUGH C. HANSEN: How does it come about that you became a judge? Did they come and get you? Did you apply? How does that work?

COLIN BIRSS: No, you apply. The system we used to have of a tap on the shoulder, that was abolished a long time ago, which is a good thing, so, yes, you apply. A post came up for this Patents County Court thing that I did, and I thought it looks interesting. I was a bit tired of working too hard as a lawyer, so I thought, "Why not become a judge?" and then discovered judges work too hard too.

HUGH C. HANSEN: You became a judge in a way that you transformed almost, that small, I forget the name, County Court or whatever it is. I knew the person that was in it before you, and it wasn't doing that well. You really turned it around and made it work. What about the Court of First Instance?

COLIN BIRSS: The High Court? Yes. The County Court was a Court of First Instance too, but it was for smaller cases—

HUGH C. HANSEN: Yes, I know. Hold it. On that thing, we have this Case Act<sup>3</sup> and other stuff we're trying to have courts for small things. You made it work, but we're having trouble making it work because you can opt out, and the question is, what defendant won't opt out under those circumstances. Do you have any advice to us over here how we can try to make this thing work?

COLIN BIRSS: Finally. I must say, having the ability to opt out, I think is a problem actually. You need a system. The rules on how you get in and out of those sorts of courts I think are very, very important. It wasn't just me that made it work, by the way. The way it was set up was extremely effective, and one of the things was that. Support from the senior judiciary was pretty important, support from the appeal courts, that's an important factor as well. The parties have to believe that the decisions that are made in a more streamlined way will be supported on appeal. That was a problem that we had in our system in the '90s, when it was first tried because it was felt that, rightly or wrongly, it was felt that the judge was always being overturned on appeal, which is no good to anyone. That's pretty important.

HUGH C. HANSEN: How many times have you been stung by bees?

COLIN BIRSS: [laughs] Regularly [laughs]. Since I keep bees, you can't keep bees without being stung.

HUGH C. HANSEN: Didn't somebody tell you maybe don't keep bees?

COLIN BIRSS: Actually, the reason I keep bees is I got drunk at a party and I was talking to one of my friends. He told me the best thing I should do is keep bees. I woke up with a hangover the next day and that was the one thing I remembered from the party, and sure enough, I did it.

HUGH C. HANSEN: How many bees do you have?

COLIN BIRSS: Individuals, all named, 10,000. Bees, you have a hive. I have one hive. It's just coming out of the winter now, so it's still a bit weak, but it should be all right.

HUGH C. HANSEN: You have three children. How many children do you have?

COLIN BIRSS: Three. Three children.

HUGH C. HANSEN: What if they get stung by these bees, what are you going to say to them? "Chin up," or, "Maybe I shouldn't have done this?" What's going on there?

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<sup>3</sup> Copyright Alternative in Small-Claims Enforcement Act. *See* 17 U.S.C. § 1502.

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COLIN BIRSS: I try and make sure they don't. I don't think my children have ever been stung by the bees, but that's because they haven't been interested enough to help their dear father with his mad obsession. Maybe it's a problem.

HUGH C. HANSEN: How much time do you spend on it, actually?

COLIN BIRSS: Oh, not that long. Not that long. In this time of the year, it's about an afternoon, a weekend, something like that, a bit less.

HUGH C. HANSEN: Of all the judging, you've just gone to the Court of Appeal, right?

COLIN BIRSS: Yes.

HUGH C. HANSEN: I'm going to ask the same question because it interests me. Which do you think you'll actually enjoy? There's value to all of them, but personal enjoyment. You had the small court, you had first instance, and now you have the Court of Appeal.

COLIN BIRSS: That's really tough. It's so new. The Court of Appeal for me is so new. I don't know. I hope I enjoy it. I'm sure I won't dislike it at all, but I did love my first judging job, doing those small cases. When you're doing—in a small specialist court, you can do more, I used to call it, "justice per hour." You can do more cases and more things in a day than you can as you move up into the High Court it's slower, and then in the Court of Appeal, it's even slower.

Of course, higher up the system you're making bigger decisions. That's the point. That's the way the system works. There are harder, tougher calls. They have more impact overall. In terms of the day-to-day, that was great. I'm not sure I'll ever find anything better than that.

HUGH C. HANSEN: Best of luck in it. Time is up, so I have to move on. Thank you very much for your support over the years—

COLIN BIRSS: Thanks to you. Thanks. The forum was brilliant as ever, even if it's virtual.

HUGH C. HANSEN: Let's hope we can make it even better next year, maybe even live. Stephen, are you here?

STEPHEN BURLEY: I am. Hello.

HUGH C. HANSEN: Hello. I'm trying to find you on the screen. Oh, there you are. This is your first time at Fordham, right?

STEPHEN BURLEY: Well, no. Actually, I crept in 2019, so I gave it a little scoping review.

HUGH C. HANSEN: Oh, okay. Have you enjoyed it this year?

STEPHEN BURLEY: I have. It's surprised me how much I enjoyed it, even at midnight, I don't remember the midnight sessions last time I was there. Absolutely fabulous. All the presentations that I've seen have been just wonderful.

HUGH C. HANSEN: What is your main area of law? Is it IP? Is it patents? Is it other things? What is it?

STEPHEN BURLEY: It's mainly IP with a strong bent towards patents which reflects the way that I conducted my career as a barrister also.

HUGH C. HANSEN: Yes, but you don't have a science background, but that hasn't hindered you?

STEPHEN BURLEY: No, I think it rather clears the mind, not having too much information in it.

HUGH C. HANSEN: That's good. I like that. For some reason, have you been doing something with regard to new rules on injunctions or damages or anything like that?

STEPHEN BURLEY: I've been talking about that a little bit. I'm quite fascinated with the process that's emerging about proportionality for injunctions, whether or not the way your country has gone with *eBay*<sup>4</sup> and depriving people of opportunities for injunctions in patent cases. I think it's a legitimate discussion to have. I'm quite interested in that.

HUGH C. HANSEN: *eBay* is, I think, another example of why our Supreme Court can screw up in a number of ways. We have a Constitution that says Congress has the power to grant exclusive rights. I would think, if you can't get an injunction, you don't have exclusive rights, but the court did not even mention that. Thomas, who's an originalist, as with Scalia, neither of one mentioned the Constitution, which shows there are other reasons going on here rather than they just thought equity was cool.

I think a couple of things were going on. There are a lot of bad patents. I think at the back of their mind was, okay, they won't grant injunctions for the bad— It was a view right around this time, and I had it too. Non-patent people didn't know better, but they just allowed— Part of it is no prior art and software and biotech and all these other things, so a lot of stuff was going through. I think this was their solution to make sure only good patents are going to be treated.

It doesn't make any sense, all those years of, if you have a good case, you should get an injunction. What is it over there in Australia?

STEPHEN BURLEY: The default position is you get your injunction if you have a valid claim that's infringed. Really it looks like the interesting area for us is, I can't see us going extreme the way Supreme Court did in *eBay*, but where you've got a very small patent component in a complex product, for instance, like a smartphone, whether or not the remedy is adjusted to grant no, or an injunction for a limited use of the product, we haven't explored the depths of that yet.

It's one of the reasons why coming to Fordham's a good idea. The ideas of proportionality and so forth that are being explored in Europe seem to be pretty interesting in that regard.

HUGH C. HANSEN: Great. Thank you very much for coming. Oh, to what extent do you care what the rest of the world is doing, in Australia? Is it pretty much whatever works there and you don't even look outside? What do you think?

STEPHEN BURLEY: No, we like to delude ourselves that we're part of the greater world, and that intellectual property is part of a stream that flows to Australia and from it. We're pretty much fascinated by that.

HUGH C. HANSEN: Final question. Just between you and me, what do you think of Annabelle?

STEPHEN BURLEY: It's a bit of a love fest for Annabelle as far as I can tell, and that I share in it. Thank you for asking and thank you for having me here. I really enjoyed it too.

HUGH C. HANSEN: Our pleasure. Moving on. I'm usually late in everything I do, but they're going to close down this place at a certain time. I'm not sure why. We really have to try to stick to the timetable.

Paolo, if I can call you that, you are actually in the Supreme Court of Italy, the very high court up there? Where are you?

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<sup>4</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

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PAOLO CATALLOZZI: Yes. First of all, thank you for the invitation. It's my first time. It's really an honor for me to be with you today. Yes, I'm in the Supreme Court of Italy now.

HUGH C. HANSEN: How do you like that? How long have you been on the Supreme Court?

PAOLO CATALLOZZI: Since 2017, so it's four years now. Three years and a half, actually.

HUGH C. HANSEN: You were also at the First Instance and in a Court of Appeals for a while, right?

PAOLO CATALLOZZI: No, I have been only at Court of First Instance of Rome.

HUGH C. HANSEN: Oh, no, you weren't. No, no, no, no, no. You weren't, actually. I made a mistake there.

PAOLO CATALLOZZI: No problem.

HUGH C. HANSEN: Enterprise Court of First Instance in Rome?

PAOLO CATALLOZZI: Yes. For seven, eight years, yes.

HUGH C. HANSEN: How did you come to get on the Supreme Court? How does that work?

PAOLO CATALLOZZI: Actually, you have to be in the judiciary, and then you are selected. Every year there are a few magistrate judges that are selected to go to the Supreme Court, and so they chose me.

HUGH C. HANSEN: How many judges are there?

PAOLO CATALLOZZI: Now in Supreme Court, how many judges are we?

HUGH C. HANSEN: Yes.

PAOLO CATALLOZZI: Quite a lot, in comparison with other jurisdictions. We are more or less 300. We have many cases, because in Italy, we have a provision in our constitutional chart that you can go to the Supreme Court against every judgment, even for criminal conviction cases. You can file a claim to the Supreme Court. We have many criminal cases in Supreme Court, and also many civil cases. Not many IP, unfortunately.

HUGH C. HANSEN: Have you heard of the Napoleonic code?

PAOLO CATALLOZZI: Not really.

HUGH C. HANSEN: No? Bonaparte had this Napoleonic code which basically—

PAOLO CATALLOZZI: Oh, yes, I did not hear well what you said.

HUGH C. HANSEN: I thought it was the basis of the civil system or something.

PAOLO CATALLOZZI: Yes. I could not listen to you. Yes.

HUGH C. HANSEN: My question was to what extent does it have any effect? The civil law system must have grown and it's just a civil law system, but you're not still looking back, or are you still looking back at that code at all?

PAOLO CATALLOZZI: As Italian judges, we come from a civil law culture. We have a really tight relationship with our past. Unless you deal with specific subjects, like, for example, tax law, IP law or international contracts, usually, we don't have a very open culture towards other countries' jurisdictions and legislations.

HUGH C. HANSEN: Are there previous cases' precedents that you have to follow?

PAOLO CATALLOZZI: Previous cases?

HUGH C. HANSEN: Previous cases, yes. I thought that actually, originally anyway, there aren't any precedents. You just decide that case and move on.

PAOLO CATALLOZZI: Yes. We have many cases. Actually, I have a very good memory of my experience in Court of First Instance because we had many, many cases in IP in Rome. We have, especially, many copyright cases. We have also trademark cases, patent cases. I had an Apple case, for example, in which a patent owner claimed against Apple for infringement of his patent. Many, many cases and many injunctions on copyright. In the last years, we had many cases concerning ISP liability, internet service provider liability. This topic is very actual in Italy, and I think in Europe as well, and also in United States.

HUGH C. HANSEN: I asked this before. Do you look outside of Italy for any ideas on any of these issues?

PAOLO CATALLOZZI: Personally, I look at a lot at others, especially other European countries. IP is harmonized legislation in Europe and so we have frequent contacts, also directly with my European colleagues. I see Richard Arnold I met personally, and also other English judges, and Klaus Grabinski. I'm in touch with some of them. In any case, sometimes we have parallel judgments, especially on patents because we don't have unitary patents in Europe. Sometimes you have issues about validity of the same patent that are brought in from different jurisdictions. I read judgments from England, from Germany, from Netherlands. It's a way to know how the judges deal with the same cases.

HUGH C. HANSEN: Thank you very much. Thank you for coming.

PAOLO CATALLOZZI: Thank you again. Thank you again. It was a pleasure.

HUGH C. HANSEN: Klaus?

KLAUS GRABINSKI: My cue.

HUGH C. HANSEN: How are you?

KLAUS GRABINSKI: I'm fine, thanks.

HUGH C. HANSEN: What is this expert panel on the preparatory committee for the future of the Unified Patent Court? Is that still going to happen? Do you know?

KLAUS GRABINSKI: The UPC, you mean?

HUGH C. HANSEN: Yes.

KLAUS GRABINSKI: It is still pending before the Constitutional Court again. Germany passed legislation for application of the UPC agreement. It has been challenged by two constitutional complaints. German Constitutional Court asked the German President to wait with his signature under the bill until they decided on a preliminary request. This decision on the preliminary request is expected to be decided soon. It's going to be a green or red light.<sup>5</sup> We will see.

HUGH C. HANSEN: There seems to be tremendous feedback on this. You know what? I'll come back to you. All right?

KLAUS GRABINSKI: Yes, okay. I'm changing something else.

HUGH C. HANSEN: Is Lennie here? Lennie? I think the answer to that is yes.

LENNIE HOFFMAN: Right now, you have me on sound.

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<sup>5</sup> See BVerfG, 2 BvR 2216/20 -, Rn. 1-81, June 23, 2021, [http://www.bverfg.de/e/rs20210623\\_2bvr221620.html](http://www.bverfg.de/e/rs20210623_2bvr221620.html).

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HUGH C. HANSEN: How are you?

LENNIE HOFFMAN: I'm very well, thank you. I'm very pleased to be here. The people who organized this ought to be congratulated because it's turned out far better than I thought it might. Although, of course, we'd much rather be there, I think it's been a great success.

HUGH C. HANSEN: Yuan Yuan, Rilana and Soban, our team, have done a fantastic job—all the mechanics and everything else. What are you doing day to day these days?

LENNIE HOFFMAN: What am I doing, did you say?

HUGH C. HANSEN: Yes.

LENNIE HOFFMAN: Unlike Annabelle, I'm retired because I'm very old. The result of that is that I do a fair amount of reading. I'm speaking to you from our cottage out in the country, where I've been for the last year. I do, from time to time, arbitrations on Zoom. What else do I do? I listen to concerts from the Wigmore Hall on Zoom. I went to Hong Kong for three weeks just before Christmas to sit in court there. That was in person, so to speak, but it worked.

HUGH C. HANSEN: Oh, that's interesting. That's still going on, then?

LENNIE HOFFMAN: Yes, it goes on.

HUGH C. HANSEN: The whole thing about Hong Kong, do you see it as oh my God, this is horrible, or is it actually a move in the right direction because you can do things without worrying about demonstrations?

I just spoke to someone who works there, and I thought he would be horrified. He's actually thankful for some of the crackdown. He's American, which really surprised me. What do you think?

LENNIE HOFFMAN: It is the case that the demonstrations were horrible. They were very difficult for people who are living in Hong Kong in 2019. On the other hand, one is a bit apprehensive about the way things are going at the moment. As a judge there, my view is that when asked to support one's colleagues, they're doing their best to uphold the rule of law. I don't think one should just flounce out as a political gesture. We're not in the business of politics. Until such time as the legal system has become intolerable, we ought to stick it out.

HUGH C. HANSEN: How many cases did you hear in Hong Kong?

LENNIE HOFFMAN: Three, when I was there.

HUGH C. HANSEN: How many judges are on that panel?

LENNIE HOFFMAN: We were five on each.

HUGH C. HANSEN: How many are British or foreign as opposed to—

LENNIE HOFFMAN: Four of them are always local people. It's only the fifth judge who is either British or Australian or New Zealand, or at the moment, Canadian as well. We have Beverley McLachlin as a member of the court, former Chief Justice of Canada. The foreign judge, so to speak, always occupies the fifth position on the court.

HUGH C. HANSEN: Do you feel that they're doing it because they have to, or you are having an effect on the decisions?

LENNIE HOFFMAN: Do I feel that who's doing what because they have to?

HUGH C. HANSEN: Pardon me?

LENNIE HOFFMAN: Do I feel that who is doing something because they [crosstalk]?

HUGH C. HANSEN: The other four judges?

LENNIE HOFFMAN: Oh, no, no. The other four judges are, as far as I'm concerned, no different in their independence, and indeed in their competence from judges whom I've sat with in England.

HUGH C. HANSEN: It started out obviously, Great Britain, and English law and fundamental and the privy council will be providing for a while, the law there. To what extent is that influence is still there, or basically Hong Kong is moving on to its own way with less influence?

LENNIE HOFFMAN: As far as the judiciary is concerned, it is a common law country. It has a judiciary which is trained in the English notions of the rule of law and the independence of the judiciary. I've never, in 21 years now that I've been sitting on that court come across any instance in which the judges have acted other than independently.

HUGH C. HANSEN: That's very interesting. Very interesting indeed. I've just gotten the notice that we have to continue, but Lennie, it's great seeing you again.

LENNIE HOFFMAN: It's good to see you all. I hope I can see you all in person next year.

HUGH C. HANSEN: Yes, absolutely. Take care. Is Simon the next person? Am I right on that? Is he here?

KLAUS GRABINSKI: We have another try. Is it working better?

HUGH C. HANSEN: Oh, yes.

KLAUS GRABINSKI: I have a new microphone, you see. [chuckles]

HUGH C. HANSEN: Oh, this is fantastic. You obviously saw this little thing I put in there that was trying to— It's great. Where were we?

KLAUS GRABINSKI: I think we were where I'm living. I was telling you that it isn't Rome, but it is a place where the Romans have been 2,000 years ago. We also have some kind of history, at least older than New York.

HUGH C. HANSEN: How have you been?

KLAUS GRABINSKI: I'm fine, thanks.

HUGH C. HANSEN: How long have you been a judge?

KLAUS GRABINSKI: Oh, it goes back to 1992.

HUGH C. HANSEN: Oh, wow. You've been in various levels, correct?

KLAUS GRABINSKI: Right.

HUGH C. HANSEN: Any preferences, or just enjoyment?

KLAUS GRABINSKI: There's a time for everything. There's a time for being a Judge First Instance, so you get all the new cases, or you get to know about all the new developments. Now, it's very interesting, in particular, to be a First Instance judge with regard to SEP<sup>6</sup> cases. Of course, there's also time and it's nice when you are at the end of the chain and have the final say and have a little more time for the cases but being also quite influential, yes.

HUGH C. HANSEN: Hold on. Actually, this is good. Pardon me. There are some questions in the Q&A. I don't think anything applies here. What is there legally, either in Germany or the EU, or anything else that you think can be improved, if anything?

KLAUS GRABINSKI: That's a tough one. Probably at the moment, the only thing of the pandemic situation, that decision-making should be a bit more focused than it is currently in the EU. That will be probably a good thing. I heard that in the U.S., you have a four-star general who makes all the decisions with

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<sup>6</sup> Standard Essential Patent.

regard to the pandemic situation. There are moments when I would prefer also to have a four-star general in Europe who makes decisions and in a more effective way with regard to the pandemic than it's done right now.

HUGH C. HANSEN: I wouldn't say we have a situation where anybody's making anything that everyone's listening to, because some are just ignoring. Mayors are doing things that they want. Different countries have different views. Actually, we could use a real four-star general, maybe, just saying, "Okay, we're going to do this." In terms of going, do you ever have an inclination to go to the Court of Justice on a case and say, "I want to know what they think?"

KLAUS GRABINSKI: You mean to the CJEU?<sup>7</sup>

HUGH C. HANSEN: Yes.

KLAUS GRABINSKI: Well, because we're also Court of Justice.

HUGH C. HANSEN: Yes, of course, I mean the CJEU.

KLAUS GRABINSKI: We are obliged to, because when you are a Supreme Court, and there is a decision, there's a question of interpretation of Union law that has to be answered in order to be able to decide the case. As the Supreme Court, you have to make a referral to the CJEU but only if this question is an open question, has not already been clearly decided. Or it is clear by itself, so no interpretation is really needed.

HUGH C. HANSEN: How often have you referred anything to the CJEU?

KLAUS GRABINSKI: At the Supreme Court level, we did a couple of times. Once it was important, the question was with regard to the Biotech Directive,<sup>8</sup> what's the understanding of an embryo because this is not eligible, patentable matter. We got a clear answer in this case. It was highly controversial also on the political level. We don't do it very often because, luckily or unluckily, I leave this to you to decide, most parts of patent law are not Union law, they are ECJ– Sorry, European Patent Convention law and this is not European Union law. These are not questions that should be referred to the CJEU.

HUGH C. HANSEN: Okay, Klaus, my final question. What do you think of the Germany Constitutional Court?

KLAUS GRABINSKI: Well, it's important to have a court to decide on constitutional issues. There's one big advantage when I compare it to the Supreme Court in the U.S. The Supreme Court in the U.S. decides on all kinds of subject matters, and also on patent law, for example, while the German Constitutional Court only decides on constitutional issues, which means that in patent law, the Federal Court of Justice, the court to which I adhere has the final say. It's only when constitutional issues are involved that it becomes also a matter of the Federal Constitutional Court.

HUGH C. HANSEN: Now, isn't it true that they say they're the supreme law, but the EU treaty say actually, they're not the supreme law? They should be referring to the–

KLAUS GRABINSKI: Yes, there are different ways of interpreting who has the final say. The European Court of Justice says, "Well, they have the final say, because they have the final say in the area of Union law." The German

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<sup>7</sup> Court of Justice of the European Union.

<sup>8</sup> Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998, on the legal protection of biotechnological inventions, 1998 O.J. (L 213) 13, 21.

Constitutional Court says they have the final say, because they have the final say with regard to the German constitution, which is called the basic law, and they are currently trying to find out who has really the final say.

HUGH C. HANSEN: Well, thank you. I just got a notice to say that we now have only three minutes, and it's basically thanks to you screwing up mechanically, Klaus.

KLAUS GRABINSKI: Thanks a lot for your patience.

HUGH C. HANSEN: We only have three minutes per person now, under the new thing. Well, thank you very much Klaus, good seeing you again. Simon.

ANNABELLE BENNETT: What about Christopher?

HUGH C. HANSEN: Hold it. Christopher, we haven't done Christopher. What do you want to talk about, Christopher?

CHRISTOPHER FLOYD: I'll tell you one thing I could talk about, which is, you quite often raise the question of people's titles. You raised it with, I think, Colin about whether he was Lord Justice. You've often said that you'd very much like to be Sir Hugh yourself. Well, the grass is always greener on the other side of the fence. Now, that I'm retired, I've lost my title. I'm still Sir Christopher, but I'm no longer Lord Justice, but I've become an honorary professor. That's the most exciting thing for me, so far as my future is concerned.

HUGH C. HANSEN: How did you get that? Did you have to pay for that, or how do you get one of those?

CHRISTOPHER FLOYD: Well, I was approached by a well-known professor of a university, and I agreed to become an honorary professor. So far, it's not involved any onerous duties, but I've got the title and that's what really counts. Maybe, on that footing, we could arrange a knighthood for you?

HUGH C. HANSEN: If I'm not wrong, you can also occasionally hear cases on the court, right? You're not completely gone from that, are you?

CHRISTOPHER FLOYD: That's right, until I'm 75 years old, I can sit as a so-called retired member of the Court of Appeal, which are sometimes unkindly are called "retreads."

HUGH C. HANSEN: You decided to do this on your own, there was no compulsion. You just wanted to move on or whatever, correct?

CHRISTOPHER FLOYD: Well, like Annabelle, I wanted to go before I was pushed. The judges and the IP system in the UK are now very well stocked with judges at each level. There are two very fine Lords Justices of Appeal who are also on the screen at the moment. There's a judge in the Supreme Court with specialist IP expertise, and there are two fantastic new judges at First Instance. With all that new blood and all those bases filled, to use a baseball term, I thought it was time for me to move on and look in different fields.

HUGH C. HANSEN: What fields?

CHRISTOPHER FLOYD: Well, I'm doing a certain amount of teaching through the EPO, teaching judges patent law. I've rejoined my great old chambers at 11 South Square. I have done some mock trials, it's early days yet. I've done two mock trials. I've done some advice, and I'm giving some evidence in some foreign proceedings about English law. We'll see how it goes. What I don't want to do, is to be as busy as I was as a judge.

HUGH C. HANSEN: Okay. Are you still a bencher of your Inn?

CHRISTOPHER FLOYD: I am, yes.

HUGH C. HANSEN: Now, what does that mean? How much power do wield with that?

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CHRISTOPHER FLOYD: It depends how much you want to get involved with the Inn. Being a bencher itself doesn't really give you any power at all, apart from some dining rights. If you want to get involved in the administration of the Inn, then, there are plenty of opportunities: teaching, advocacy, mentoring, running the affairs of the Inn, all sorts of things.

HUGH C. HANSEN: Okay, good. All right. Well, great talking to you again. We are going to no longer see you.

CHRISTOPHER FLOYD: Well, I'd love to still be invited. I'm still trying to be active in IP. I've greatly enjoyed all the Fordham conferences that I've attended. Please don't get the idea that virtual conferences are the same, because I don't think they are, even though this has been a wonderful conference.

HUGH C. HANSEN: Christopher, it's great talking to you again. Is Judge Newman here?

PAULINE NEWMAN: Yes, I'm here. I'm here on the phone.

HUGH C. HANSEN: That's great. I'm very glad to see that. Okay, going on. Next on my list is Gordon. Where is Gordon?

GORDON HUMPHREYS: I'm here.

HUGH C. HANSEN: Hi, Gordon. I'm not going to be able to do that question you have, because you can see in the time constraints that we have. Where were you born?

GORDON HUMPHREYS: London.

HUGH C. HANSEN: Why did you abandon your home country?

GORDON HUMPHREYS: I always was drawn to more international things. I can't really explain why, but I always had an attraction for anything foreign, basically.

HUGH C. HANSEN: You've been on the Boards of Appeals. Now, I got the impression at one point that your Boards of Appeal, because so many people came from different countries— Actually, one thing that I've learned about people is that where they grew up with trademarks, maybe as opposed to others, is more ingrained in them. That's the way it should be done, maybe because— I don't know. Do you run into situations where this Board of Appeal is doing this, and you're doing this, or is everything pretty much harmonized?

GORDON HUMPHREYS: Well, on the procedural side, we're getting more harmonized. We're not there yet, but we're getting more harmonized. On substance, of course, as you say, people have their own interpretations of substance. That's more difficult. The way we've tried to tackle it is through the Grand Board. What we're trying to do is make greater use of the Grand Board, but there you've got nine people taking decisions together by a majority. That's not always a simple process, but that's the route by which we're trying to tackle that problem. That's how we're trying to do it.

HUGH C. HANSEN: Now, I see that you're also an accredited mediator.

GORDON HUMPHREYS: Yes.

HUGH C. HANSEN: Why is that? You're not busy enough or what? What's going on?

GORDON HUMPHREYS: No, the Boards of Appeal about 10 years ago, decided that we should offer alternative dispute resolution to parties before us, because up until 2019, we've had a four-tier appeal system or a four-tier

decision taking system in the EU, with first instance of EUIPO,<sup>9</sup> then the Boards of Appeal, then the General Court and then to the CJEU.

Sometimes, it can take 14 or even longer. This year we decided the *BABY-DRY* case.<sup>10</sup> We finally disposed of that. Well, since 1996, that case has been ongoing. It makes sense to offer other ways of doing things.

HUGH C. HANSEN: Over here, a number of people are thinking arbitration is a much better way to go, but we'll see. I see— Good seeing you again.

GORDON HUMPHREYS: Likewise, Hugh. Thank you for the invitation, and a great job. I hope that next year, like everybody said that we can be in person.

HUGH C. HANSEN: Well, I'm hoping that-- I just had the second shot and actually it expires today, the waiting period. I can be more free. I hope that I can travel, and I'll see a lot of you people. Well, not Australia because I'm not crazy, but other places, perhaps. Anyway, good seeing you again. [crosstalk]

GORDON HUMPHREYS: Okay.

HUGH C. HANSEN: Robin, is he here?

ROBIN JACOB: Yes.

HUGH C. HANSEN: How are you?

ROBIN JACOB: I'm on very good form, Hugh. I'm very glad to see you appear to be so as well.

HUGH C. HANSEN: What are you doing day-to-day now?

ROBIN JACOB: Well, a bit like Chris, I'm doing a bit of arbitration, a bit of expert witness stuff. I signed off on an affidavit in some Indian proceedings on Tuesday. I'm doing a slightly interesting review at the moment on behalf of the patent office of its tribunal system.

HUGH C. HANSEN: Wow, that's pretty cool.

ROBIN JACOB: I think it's one of the best patent offices in the world, its tribunal system is pretty bloody good, which I can think of a few touches to improve it.

HUGH C. HANSEN: Now, you're the Hugh Laddie Chair, of course. We all remember Hugh very fondly. Are you really doing anything at that university or was that just, you had to—

ROBIN JACOB: That's my offices. When I went to the office, that's where I go. What do you go there for?

HUGH C. HANSEN: I know that's where you are. It's like real estate. Are you actually doing anything in that university?

ROBIN JACOB: Of course, I am. I've been to most of the classes given by other people, of course, but I come along and tell jokes or war stories and ask difficult questions at most of the classes these days, most of the lectures. I train our IP Moot Team, our Oxford IP Moot Team. I get involved in the faculty in all sorts of ways.

HUGH C. HANSEN: You can actually, I think, still sit in a Court of Appeal for—

ROBIN JACOB: No.

HUGH C. HANSEN: No, it's gone?

ROBIN JACOB: Time expired five years ago.

HUGH C. HANSEN: Now, do you miss it, or are you glad?

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<sup>9</sup> European Union Intellectual Property Office.

<sup>10</sup> See Case C-383/99 P, *Procter & Gamble Co. v. OHIM*, 2001 E.C.R. I-06251.

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ROBIN JACOB: I miss every job I've ever had.

HUGH C. HANSEN: Well, hold on, then you need therapy—  
[laughter] because you must be a pretty miserable person if you are missing all these jobs. Come to me, Uncle Hugh. We can talk through these things. Justice in Kazakhstan, however you say that— You're hearing cases?

ROBIN JACOB: Yes, I made a few orders in cases remotely. The Kazakh court is going to work. Now, many, many big companies have signed up pretty well. All the oil companies have all signed up to the jurisdiction of the court. It's difficult to believe. A country like that, said, "People don't trust Kazakh justice. In fact, they don't even know what Kazakh law is." If we're going to have international investment, they're not going to trust that.

Either they're going to do it by arbitration in London, or we set our own court. If we set up our own court, it's going to be one that everybody knows and understands.

HUGH C. HANSEN: Sounds good.

ROBIN JACOB: They've got a bunch of us mainly from the UK. I think all from UK. Well, in fact, all from England and Wales. Mainly retired from the Court of Appeal, but the first Chief Justice was Lord Woolf, who'd been in our Supreme Court and our Chief Justice. Now, we've got another ex-member of Supreme Court as the Chief Justice of Kazakhstan. I get time expired on my birthday, which is coming up fairly shortly as World Intellectual Property Day and my birthday on the 26th of April.

HUGH C. HANSEN: Really? Oh, that's cool. Are you too busy?

ROBIN JACOB: No, I'm just about right. Occasionally, it gets a bit hairy, the odd mock trial comes in or whatever, but basically, it's all working out fine.

HUGH C. HANSEN: I'm getting the sense that you have enough money, right? Because I'm looking for donors.

ROBIN JACOB: I once saw a chap in a case about the level of royalty for records—I was the Chairman of the tribunal—Sydney Kentridge was cross-examining. The witness had run a very successful business in the record business in the late '80s. Kylie Minogue was one of his successes, but he had plenty of others, and his company was called "The Hit Factory." His name was Peter Waterman.

He was out by the side that wanted the rate of royalty raised. Cross-examining Sydney got the witness to say: "When people say, "Haven't you have enough dosh?" I say, "Does anybody ever enough dosh?" It wasn't a very strong argument for raising the royalty. I don't have enough money because I've got all these expensive grandchildren of mine.

HUGH C. HANSEN: Oh, that's a wonderful way to think of them.  
[laughter] All right, Robin, great seeing you again.

ROBIN JACOB: [chuckles] Thank you. Thank you very much indeed.  
All right.

HUGH C. HANSEN: Carl, is he here?

CARL JOSEFSSON: Yes. Thank you. I'm here.

HUGH C. HANSEN: All right. You're in the European Patent Office, correct?

CARL JOSEFSSON: Yes. At the Boards of Appeal.

HUGH C. HANSEN: You are former Swedish Judge, Court of Appeal in Stockholm. Why did you leave that? This is a better gig?

CARL JOSEFSSON: Well, in many ways, yes. To be honest, I think so. I enjoyed it very much as a Court of Appeal Judge in Sweden. I had also a background in working in the ministries with the UPC, in particular, for many years, so yes.

HUGH C. HANSEN: You're in a Boards of Appeals of the EPO, that's pretty heady stuff, right? You're a big shot, the cheese. Not only that, you're the president of an Enlarged Board of Appeal. What exactly does that mean?

CARL JOSEFSSON: I'm the chairman of the Enlarged Board. Formerly, that's, actually if you really go into the nitty-gritty and the regulation, it's the basic function I have being chairman of the Enlarged Board. Then, according to the implementing regulations of the EPC,<sup>11</sup> the chairman of the Enlarged Board shall also be president of the Boards of Appeal.

The Enlarged Board is the body then deciding, determining, well, eventually the points of law under the EPC. We are seven, sitting together when we do it, and we also have judges from the contracting states participating in these cases.

HUGH C. HANSEN: Are you going to hear more cases because of Brexit, because no one's going to the CJEU anymore, or it has no effect?

CARL JOSEFSSON: I would not say that that has any effect. I would welcome to see more cases, but that really depends on the boards within the Boards of Appeal referring questions, as well as the president of the office referring questions to us. I cannot refer a question myself.

HUGH C. HANSEN: Where do you live?

CARL JOSEFSSON: I live in Munich now. Since I was appointed here, I live with my family in Munich.

HUGH C. HANSEN: Is that where the European Patent Office is?

CARL JOSEFSSON: Yes. Well, parts of it, but the Boards of Appeal, we are located in Munich, yes.

HUGH C. HANSEN: All right. That's great. Well, good to see you. Welcome to Fordham.

CARL JOSEFSSON: Thank you very much. Great pleasure to be here and to see you all. Thank you.

HUGH C. HANSEN: Great. All right. Kate, are you here? Yes, I can see you over there in the corner.

KATHLEEN M. O'MALLEY: Can you hear me?

HUGH C. HANSEN: Yes, I can hear you now. Both Kate and I have gone through a difficult period in the last couple of days, because the Supreme Court, I don't know, our Supreme Court, I mean, really, they— Almost don't know what to say about them anymore. Anyway, they had a decision. Kate had a decision. It was fantastic. The government came in on that side, everything outside— People thought maybe they'd futz around with a little bit of fair use, but they would clearly say that this is copyrightable and everything else, and they didn't do that.

What they did is pathetic. The dissent, if you want to see what the law should be, look at the dissent that Justice Thomas wrote with Alito concurring in it. Now, Breyer, he's done this a number of times. He screwed up patent law and said, "No, it's not precedent. Don't worry, we're not overruling this." Now, he said, "No, it's not precedent at all." We'll see.

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<sup>11</sup> European Patent Convention.

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It looks like what happened is, they couldn't make a decision. It took them forever to get the votes for this decision. It's not a good day, I think, for our Supreme Court. I'm sorry, Kate. I didn't mean to get carried away on this.

KATHLEEN M. O'MALLEY: When I was on the district court, we always had a great line that said, "I'd rather be right than affirmed."

HUGH C. HANSEN: There you go. Exactly right.

KATHLEEN M. O'MALLEY: It wasn't just my decision. It was a decision of a unanimous three-member panel. They were as equally in agreement with me. It was all three of us.

HUGH C. HANSEN: Good. Okay, so I have a bunch of questions, but I'm afraid I'm not going to be able to. Next time I see you, I can ask you the question.

KATHLEEN M. O'MALLEY: [chuckles] Just give me a call anytime.

HUGH C. HANSEN: If they weren't going to actually kick us out of the room, which apparently, they are. Keep up the good work. All right. Simon, I had you here for a while. Are you here?

SIMON HOLZER: I'm here. Yes. Hi, Hugh.

HUGH C. HANSEN: All right. Now, just between you and me, Simon, have you thought what on earth is going on in this session? Why am I in this session? It's—

SIMON HOLZER: It's actually true. From my work, probably, my work as a judge is probably less than 10% and that's why I asked myself if— [crosstalk]

HUGH C. HANSEN: No, that's not what I'm talking about. I'm saying, "This guy is crazy. This whole thing is crazy. How did I get involved in this, and how do I get out of it?" Fortunately, we're short of time, so you won't have to suffer much.

SIMON HOLZER: I just realized that I forgot to grab a glass of red wine before the session, and that's probably a big mistake.

HUGH C. HANSEN: I think actually that would have been a good idea for both of us, I think. What is this Swiss Federal Patent Court all about?

SIMON HOLZER: It's a court established in 2012 with jurisdiction on all patent infringement matters and patent nullity matters in Switzerland. I think the specialty is that you have two full time judges and roughly 30 part time judges appointed on a case-by-case basis, and I am one of them.

HUGH C. HANSEN: Are you a part time judge?

SIMON HOLZER: I am a part time judge, yes.

HUGH C. HANSEN: If you're a part time judge, can you ever sit on a case because you're also an advocate on other cases? How does that work?

SIMON HOLZER: Yes, but this can be a problem. You have to have the same people sitting as a judge on the bench and litigating cases in the same court. Switzerland is a small country, and if you want to have a specialized court, we thought that's a good solution for us, and it seems to work, but from time to time, we have cases, motions for recusal of judges. That's true, yes.

HUGH C. HANSEN: Why would I want to sue in Switzerland rather than some other place? Is there something about— Let's say, there's infringement going on all over the place. Is there a good reason? You probably hear the cases quickly. You're very good. You're all very smart, and frankly, you all think you're smarter than everyone else. Am I right on that? Yes. Okay. Is that a reason to sue in Switzerland?

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SIMON HOLZER: Yes, that's probably one of the reasons. No, actually what's the reason for coming to Switzerland? I think that the specialized judges, that's certainly one of the reasons. You have a panel of three to five judges, and at least one of them has a technical education. Most of the time, two or three of them have a technical background or scientific background. That certainly helps in patent cases that you have judges with a legal background and with a technical background.

HUGH C. HANSEN: Okay, Simon. Well, thank you very much for coming. I hope to see you again. I go to Switzerland every once in a while. Genève is in Switzerland, right?

SIMON HOLZER: Genève is in Switzerland. Yes.

HUGH C. HANSEN: Which is really lovely. Lake Geneva, my heavens, I could spend the rest of my life on that.

SIMON HOLZER: Yes, we have a branch of our law firm there, and so we have meetings there from time to time. I like it very much.

HUGH C. HANSEN: All right. Well, maybe I'll see you over there sometime. Anyway, thank you for coming.

SIMON HOLZER: You should let me know. Thank you for having me and for organizing this. Thank you.

HUGH C. HANSEN: Okay, I got a note that Judge Newman is with us. Polly, are you here?

PAULINE NEWMAN: Yes, I'm here.

HUGH C. HANSEN: What is going on that makes you happy these days?

PAULINE NEWMAN: Well, I can't say that "happy" is quite the word. As I was listening to all of you, it occurred to me, and especially for those of you who might be doing other things and have decided to even join or stay in this business, that this is really looking back over the decades of very interesting time in intellectual property law, patent and copyright. In trying to understand why that should be, it seems pretty clear to me, it's because the technology is so different. Therefore, the business interests are different. The vested interests are different. The law needs to adjust in the interest of progress, in the interest of the sort of things that are allowing us to have this conference today, remotely.

HUGH C. HANSEN: Okay.

PAULINE NEWMAN: The other thing is, what's interesting, just having to start the thinking process all over again for each new issue that I once thought we solved 30 years ago.

HUGH C. HANSEN: Okay. Sorry to say this, Polly, I just got a message saying we have to go. The next two people only get two minutes. Great to hear from you. I'm sorry that it's so little. Paul?

PAUL R. MICHEL: Yes.

HUGH C. HANSEN: How are you?

PAUL R. MICHEL: Very good and very busy, even though I'm supposedly retired.

HUGH C. HANSEN: Well, you were an assistant Watergate special prosecutor. I want to know: what did you know, and when did you know it?

PAUL R. MICHEL: [laughs] Well, yes, my experience was that when there's an emergency, you can pull together a small team of very capable people, give them a very short timeline and they can produce great results, and that's what the Watergate special prosecutor's office did.

HUGH C. HANSEN: Well, that's one version of it. People don't realize that Nixon leaving the White House was really a result of my actions. I was sending him letters, handwritten and typed, to get out of there. Then, I saw this thing, it's cheaper than a regular mailgram. They'll mail it on Tuesday and they get it on Thursday, and this and that.

On Tuesday, I sent him a mailgram. Thursday, he resigned from the presidency. I demanded that he resigned, by the way. I think it's pretty clear really what was going on there. Did you get caught up in that at all?

PAUL R. MICHEL: Yes, of course. I was investigating a slush fund of money given to the President's confidant, his secretary Rose Mary Woods and his banker friend, Charles Rebozo by various multimillionaires, quite a handful of them, all of whom provided \$100,000 in cash in a briefcase, separately, of course. There was much more about to come out beyond what the public knew, but it was clear from the tapes we prosecutors got by subpoena and from witness statements. Besides, the senators were telling President Nixon he would be convicted in the Senate, so he better resign, so he did. I was up to my eyeballs and part of the pressure that led to his resignation.

HUGH C. HANSEN: You should write that up. That's interesting. Now, you were a Chief Judge for six years, 23 years I think on the court. Why did you leave the court?

PAUL R. MICHEL: I loved the work. I loved the colleagues, the lawyers, the cases, I enjoyed every day. I thought I would never leave until I had to be carried out in a pine box, but I left because the patent law and IP law, in general, was under such assault by strong commercial forces, and the Supreme Court was making a hash out of it, so I've spent the last decade trying to help revive patents, copyrights, trademarks, and other IP rights. Only today, I was on the phone with some key senatorial staffers along with David Kappos, trying to straighten out the mess of eligibility law. This is my new vocation, and it's a long battle, but I think it's worth it. It's necessary. There's no alternative because the Supreme Court refuses to fix the mess they inadvertently created.

HUGH C. HANSEN: Okay. All right. Well, I'm glad you're there. You're a good man. I look forward to the next time we can get together. Thank you. All right. Jennifer, are you here?

JENNIFER CHOE-GROVES: I'm here. Hi there.

HUGH C. HANSEN: You were this wonderful concert pianist as a teenager, right?

JENNIFER CHOE-GROVES: Yes, I studied a lot of piano my whole life and I went to Juilliard.

HUGH C. HANSEN: Juilliard, which is right there. That's fantastic.

JENNIFER CHOE-GROVES: Yes, right across the street from Fordham Law School.

HUGH C. HANSEN: Then you abandoned that and went into the law, why?

JENNIFER CHOE-GROVES: It's complicated. Essentially, I wanted a profession. Classical piano is a really tough business. The best way I can describe it is, I was winning lots of competitions in the New York area, but I wasn't winning the Van Cliburn Competition, I wasn't at that international level. Some of my friends and classmates were. You have a real look at reality when you're young and you realize, "Where am I going to go in this field?" I decided to do something different. That's how I got into intellectual property, because I

was always very interested in music, in copyrights, and just all of IP, so that's how I started.

HUGH C. HANSEN: What do you think of the Court of International Trade?

JENNIFER CHOE-GROVES: It's been fantastic, it's been great. We're really, really busy right now. I'm sitting on a three-judge panel right now, it's the biggest case our court has ever had. It's about 3,600 complaints stemming from USTR,<sup>12</sup> who had a Section 301<sup>13</sup> investigation of IP and technology transfer in China, and then almost 4,000 companies have sued the U.S. Government and USTR, and U.S. Customs and Border Patrol. I am on this panel right now, and we're winding our way through this case.

HUGH C. HANSEN: Sounds great. I tell my students that most of the counterfeiters and pirates are sending stuff from overseas. "Grey goods" are coming from overseas. Your court is the one that can block it more easily than I think if they sued in a district court or something else, so it would seem to me. Are you overworked, underworked, or what are you over there?

JENNIFER CHOE-GROVES: We're very, very busy. Then, even in the 337<sup>14</sup> context, I've had multiple cases involving 337 exclusion orders at the borders. I've also had grey market goods cases. We're just very, very busy right now.

HUGH C. HANSEN: Okay. All right, thanks Jennifer. The next person and the last person is somebody who used to be on your court. Do you know Scott at all?

JENNIFER CHOE-GROVES: No. Hi, Scott. [chuckles]

HUGH C. HANSEN: All right, thank you. Now, Scott we have 70 seconds. How are you doing?

F. SCOTT KIEFF: Great to see you, Hugh. How are you?

HUGH C. HANSEN: I'm doing well, thanks. Man, it sounds— I saw a part of what you were talking about, you're doing all sorts of interesting stuff. How are you earning a living?

F. SCOTT KIEFF: You're very kind. I'm enjoying teaching my students and doing my writing, as well as doing my consulting. It's a combination of things.

HUGH C. HANSEN: What would you say— Is there anything in your life— You've done a lot of different things. You're basically a patent person, right, if I had to guess?

F. SCOTT KIEFF: Yes, I grew up a patent lawyer.

HUGH C. HANSEN: You were able to overcome that?

F. SCOTT KIEFF: I managed to learn to wear dark socks with dark shoes, and light socks with sneakers, and put away the pocket protector.

HUGH C. HANSEN: Where do you want to be five years, 10 years from now, doing what?

F. SCOTT KIEFF: [laughs] Trying to play a little more tennis and otherwise doing the same things. I really enjoy writing, and I really enjoy problem solving.

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<sup>12</sup> United States Trade Representative.

<sup>13</sup> Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978-2 (1975).

<sup>14</sup> 19 U.S.C. § 1337 (2012).

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HUGH C. HANSEN: Well, you're doing a great job, everybody here. This is like excess of wonderful people and great people. It's fantastic from my perspective. Stay safe, and we'll hopefully see you next time.