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6C Copyright Law, Competition & Trademark Law Session. FRAND

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Session 6C

Emily C. & John E. Hansen Intellectual Property Institute

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

Friday, April 9, 2021 – 10:30 a.m.

**SESSION 6: COPYRIGHT LAW, COMPETITION &
TRADEMARK
LAW
6C. FRAND**

Moderator:

Cordula Schumacher

Arnold Ruess, Düsseldorf

Panelists:

David Por

Allen & Overy, Paris

Steven Geiszler

Huawei Technologies, USA, Inc., Plano

Anne-Charlotte Le Bihan

Bird & Bird, Paris

Milan Kristof

Court of Justice for the European Union, Luxembourg

Rian Kalden

Court of Appeal of the The Hague, The Hague

Tobias Hahn

Hoyng Rokh Monegier, Düsseldorf

Steve Akerley

InterDigital, Inc., Wilmington

* * *

CORDULA SCHUMACHER: Welcome everybody to the FRAND¹ session. Personally, I love the FRAND topic. I think it involves so many aspects, patent law, competition law, economics, licensing practices. It's really, truly international or global. Increasingly, we see a lot of jurisdictional and procedural aspects, so there's a lot of things to discuss. Also, we have some key developments. Last year we had some national decisions on the CJEU decision *Huawei-ZTE*,² from Germany, from the UK, and others. We had the ongoing ASI³ and AASI⁴ battles, and we had a new referral from the Düsseldorf Court to the CJEU in the “connected cars” dispute.⁵

I think there are a lot of topics to discuss and to address, and we have an extraordinary panel here for our discussion. We do not have specific presentations but we will just address the various topics and have an open discussion. I'll invite everybody from the audience to put forward their questions and join us in the discussion. For our panel, I would ask each of my panelists to briefly do their own introduction because I tend to speak too much anyway, reducing my speaking time. Maybe, Anne-Charlotte, over to you.

ANNE-CHARLOTTE LE BIHAN: Thank you, Cordula. The first thing you need to know about me is that it's my very first Fordham attendance so please apologies for not knowing exactly how this all works out. There's one thing that I got over the past two days, one of the many but I understood that we're meant to call each other by our first names. My first name is Anne-Charlotte. Hopefully, after one or two Fordham's attendances, you will end up calling me AC, which does sound like air conditioning but it's much shorter than Anne-Charlotte.

Apart from this, I'm a patent litigator. I've had the joy to practice patent litigation for about 20 years, even though after attending the copyright session, it also sounded fun [chuckles] and sometimes much more fun than patent litigation. I'm a partner at Bird & Bird. I am based in the Paris office, and I very much look forward to our exchange today. It's a great honor to be a part of that panel.

CORDULA SCHUMACHER: Perfect. David.

DAVID POR: My name is David Por. Paris-based partner at Allen & Overy doing patent litigation.

CORDULA SCHUMACHER: Perfect.

DAVID POR: Nice to be here.

CORDULA SCHUMACHER: Milan?

MILAN KRISTOF: Hi, so I'm happy to be here at Fordham, even though I'm not physically there, unfortunately this time, but anyway, happy that we can try to have some normality and have this great conference. I have worked at the European Court of Justice since 2006. Before that, I worked in the European Commission in DG Comp and in Willkie Farr LLP. Looking forward to this.

CORDULA SCHUMACHER: Rian, over to you.

¹ Fair, reasonable, and non-discriminatory.

² Case C-170/13, *Huawei Tech. Co. v. ZTE Corp.*, 2015 EUR-Lex CELEX LEXIS 62013CJ0170 (July 16, 2015).

³ Anti-suit injunction.

⁴ Anti-anti suit injunction.

⁵ See LG Düsseldorf, Nov. 26, 2020, 4c O 17/19, *openjur* (Ger.) <https://openjur.de/u/2308405.html>.

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RIAN KALDEN: Thank you so much here, Cordula. My name is Rian Kalden and I am a judge at the Court of Appeal in the Hague. I deal with patent cases and other IP cases mainly. I have been involved in, well, one of, or maybe the only FRAND case that actually got to a decision on the FRAND issue, last year. I'm happy to be on this panel. Thank you.

CORDULA SCHUMACHER: Steven?

STEVE AKERLEY: Thanks, Cordula. I'm Steve Akerley. I'm with InterDigital but have only been with InterDigital for about nine months now. I come from 28 years in private practice at a variety of firms where I handled patent cases, almost exclusively litigating and trying those cases in district courts in the ITC. Last year I decided to give up chasing clients to take a job where I can be at the cutting edge of some of these issues that we're going to be talking about today. Judging by the number of references to cases that we have going on in earlier panels, I think I succeeded in that goal. Great to be here. Anne-Charlotte, it is my first Fordham conference as well so you're not alone.

CORDULA SCHUMACHER: Perfect. Steven? I will have to make sure I pronounce that correctly. Steve and Steven.

STEVEN GEISZLER: My name is Steven Geiszler. I work for Huawei. I live in Dallas, Texas so a lot of my work is in the Eastern District of Texas and also nowadays in the Western District of Texas, both of which are quite popular. Similar to Steve, I also practiced for many years in law firms as a patent litigator. I practiced for 15 years in firms. Also dreaded client developments so I certainly understand Steve's point. Even as a client, I'm not a big fan of client development but anyway, joking aside. I've been with Huawei for about four and a half years here in Dallas. Technically in Plano, but that's just a suburb of Dallas, Texas. Happy to be here.

CORDULA SCHUMACHER: Thank you, Steven. Tobias from across the street here.

TOBIAS HAHN: I'll keep it short. I'm a patent litigator and partner at Hoyng Rokh Monegier and have been involved in FRAND disputes for the last 15 years since they've really shot up in Germany. I feel honored to be on this really distinguished panel. I'm looking forward to our discussion bearing in mind the three discussions we've already had in preparation of this session.

CORDULA SCHUMACHER: Great. I just want to mention Kamil Kiljanski from the European Commission, unfortunately, can't make it. He has an urgent last-minute matter to get vaccinations up to speed here in Europe. Because he promised to get us all vaccinated very quickly, I think he has a good excuse. We will try to make up for that. Let's get started. I would like to start with the jurisdictional topics. I think that has two angles.

Maybe the first question is, the place of jurisdiction for a FRAND case. Assessing FRAND and assessing infringement, and things like that. Let's say the substantial FRAND matters and the anti-suit injunction that we're seeing now. You maneuver to avoid unfavorable forums, maybe also a consequence of the discussion we're having about the right forum on the material FRAND question. I would like to start with a question to you, Rian. What is your view on this current race to the best forum and the fight about the best jurisdiction? What do you think about the current state of play here?

RIAN KALDEN: I think Kate yesterday had some very sensible and correct observations on this. That is, that it's a very unfortunate and damaging situation at the same time both for parties involved and maybe even on a political level. I think we're now at the stage where nobody really wants to be. The only reason why this is all getting out of hand is there is a lack of international forum to deal with these cases, and then, of course, the national courts have to deal with it because somebody has to do it. Very often, it's said that the UK with the *Unwired Planet v. Huawei* decision⁶ caused this whole situation with the anti-suit injunctions.

I don't think that's entirely correct at all. It may have caused it, but it's not guilty so to say, of this decision because a lot of these cases start off with a patent infringement dispute, and then of course, the competent national court has to deal with that. That court also is entitled, and often has to, deal with the defense to such a claim. I think they were justified in doing that, and I think also the court, especially the first instance court, made it quite clear that that decision only had effect in the UK. Of course, as a practical consequence, if the condition is you have to enter into this global agreement, the ultimate effect might be that it has a global effect but that cannot alter the situation, that the court has to deal with the defense as such.

The problem is that the claim is nationally based, and the basis of the defense has an international basis because with the business practice of these licenses being on a global or regional level. Also, if you look at the decision by the UK, they'd actually foreseen the consequences they said that the result, could be risk of forum-shopping, conflicting judgments and anti-suit injunctions, but also pointed to the fact that the standard-setting organizations have failed to actually have an international forum in dealing with these cases. You can't really blame the Brits I think.

Now, the level of the race to the court, I think, has also been fed by a lot of distrust among both courts and parties alike, towards the courts at the other side of the globe. The U.S. doesn't trust the Europeans, the Europeans don't trust the Chinese, the Chinese do not trust anything from the West, so there you go. You actually have a lot of protectionism and politics and that's the situation where we are. I think the only possible solution as has been mentioned before, is that there will be one forum to deal with it, either an international court or arbitration. Each has a lot of problems, but there should be a one-stop-shop.

Because there's also been a suggestion earlier today that a court should only determine licenses on a national level, but I don't think that's a practical solution because, of course, that would require the patentee to have that litigation in each and every country, which is time consuming, and very costly, and also not business practice. The Court of Justice referred to business practice as being the guideline for this so that's not a feasible solution, I think. Those will be my first views.

CORDULA SCHUMACHER: Yes, good suggestion with the standard-setting organizations, but as long as we don't have that, I guess we have to continue with country-by-country litigation. David, what are your views on that? Do you think one can prohibit the patentee from going country by country? Should there be

⁶ *Unwired Planet Int'l v. Huawei Tech. Co.* [2017] EWHC 711 (Pat) (Eng.).

one forum from a FRAND perspective, or isn't the starting point the infringement, so in the end, we have to stay with the national courts there?

DAVID POR: It's a really interesting question. I think probably where we currently are is the result of everybody rightly saying that it's impractical and time-consuming, and terribly expensive and only good for the lawyers if you force people to litigate the same issue in X number of jurisdictions and fair enough. Given that, and I would add one thing to what Rian said about there not being a single international forum, which is that I'm not sure there is a single internationally accepted substantive law on FRAND either. Actually, if you consider FRAND to be a competition law issue, rather than a contractual issue, there won't be any single internationally accepted standard, because there's no reason why there should be.

You end up with different jurisdictions, arguably different substantive laws. Of course, parties are going to do what parties do. They're going to forum shop. That's a perfectly understandable, legitimate and inevitable consequence of a situation where you can expect to get different results, be it in terms of actual outcome in terms of speed, in terms of willingness of courts to engage with certain aspects of the issue. Of course, both the patentee and the implementer are going to try to play out the system as best as they can, because that's the rational thing to do for them.

CORDULA SCHUMACHER: Is arbitration a solution for that? Can we force the parties into arbitration? I would be interested to hear the thoughts of our in-house people, of Steven and Steve, on that. What they think of the various forums and whether it would make your life easier if there were an obligation for arbitration to settle on one neutral forum.

STEVE AKERLEY: Yes, the simple answer, from my perspective is yes to that last point, which is, it certainly would make our lives easier and it's something that InterDigital embraces, quite publicly in fact, a willingness to engage in independent arbitration. When I think about the idea of having some formal tribunals set up, if you could even do that, and already Rian and David had hinted at some of the real difficulties in doing that, but if it is truly an independent panel that is balanced, it starts to sound to me, a lot like private arbitration. I would wonder, ultimately, if an idea like that went forward, what the implementer community's position would be on that. Because there certainly is a hesitation that we see toward willingly moving toward private arbitration.

STEVEN GEISZLER: My position is a little bit different, and maybe a lot of that's driven by my client being both a large patent holder and a large implementer so sitting on or straddling the fence, being on both sides of it. Arbitration can be a mixed bag. I'm not saying that federal court litigation in any country is perfect, but there's good and bad with both court litigation and arbitration. I think many companies have concerns. Again, I think most people would agree that the devil's in the details. How do you compose it? What kind of substantive law is going to govern?

I had pointed out, for those of you who joined this room a little bit earlier and the copyright presentation was going on, one of the presenters was talking about the compulsory licensing right in Canada for music, being just set to a rate that is one-tenth the rate set in the United States. You're talking about two countries

that are very similar, no matter what people may or may not think, just across the border from each other, very similar values, and yet setting a rate for copyright one-tenth that set by the United States. So much of this is just driven by the valuations and the economics and legal history of one nation versus another. That's why ultimately what we're talking about — it's not just a global race to the courthouse, what we're now seeing is a winner-take-all global race to the courthouse.

If you win by getting the jurisdiction that you want, that's aligned with your economics and your view of patents, then you've got it made not only for that jurisdiction, not only for that country or that region but for the whole global rate. While arbitration might be some improvement on that, again, we need to see the details, we need to see whether this is going to address the very different treatment that different nations or regions have for patents and reflect that type of reality, rather than just running up the rates or vice versa, dropping down the rates artificially too much, and that's the concern.

CORDULA SCHUMACHER: Isn't this forum-shopping and you win in one country or in one key country and the winner-takes-it-all and you have a settlement on that basis, isn't that also something that happens in normal patent litigation? If you have the global disputes, not related to standard-essential patents, nobody would litigate in every country, but you take key jurisdictions and eventually they have a settlement that settles the matter globally, also in countries where there hadn't been litigation. It doesn't seem to me that that's so far away.

STEVEN GEISZLER: I think that's fair. I know a lot of people say, "Well, Steven, what you're advocating is 100 patent lawsuits in 100 different nations between two countries." I don't think that's fair. If you're talking about TVs, or cell phones or automobiles, once you start addressing what a proper rate is in the United States and Germany and/or the UK, if that ends up being separate determination in China, we can throw in Brazil, within four or five cases you're really going to know what the various rates are that apply. As you said, once you start having a winner or loser in just the first or second cases, that may snowball and just drive to an ultimate determination. Ultimately, the point is, shouldn't German courts be setting German rates on German patents and likewise, American courts be determining what a proper rate is on an American patent?

Again, I don't think it requires 100 lawsuits in 100 nations. I think it's a handful and I think you've seen that many, many times. To address your point, I've also seen where you have had multi-jurisdiction cases. The first case, when it went through trial, there was a determination, and it did not end the dispute because that first case was in either a jurisdiction or the wealth in issue in terms of the number of patents, the number of sales was not large enough. It was not such a large representation of the overall pie to be dispositive or even truly indicative of what the overall global rate and amount should be.

CORDULA SCHUMACHER: For standard-essential patents, it is forcing someone to give a license. Can I force a patentee to give a license for one country if the licensee is not prepared to pay for infringement in another country? Tobias, I think you wanted to comment on the global portfolio license.

TOBIAS HAHN: Yes, I wanted to pick up the earlier question of you whether you force the parties to arbitration or some sort of other third-party

FRAND determination. I think we can combine the two. With all the different interests involved, what I hope we can all agree on is that a global license in the field of technology we're talking about seems to be standard industry practice. The question is, of course, who determines that and who determines what's FRAND or what's not FRAND? I think what you first of all need to differentiate is what proceedings do you have in front of you? One is where you, let's say, merely raise a FRAND defense by saying whatever the other party has offered is not FRAND.

There, you just determine what is not FRAND and differentiate that over proceedings where you actually determine what is FRAND. We are more or less talking about the second issue. Someone has to do it, as Rian has said. I'm aware of all the practical problems involved in trying to combine this into one forum, whatever that may be, be it arbitration, et cetera. David asked whether both laws were actually applicable. I think it's a really important question. I'd like to leave aside the practical issues for a moment and come back to can you force both parties to arbitration? Obviously, parties need to agree to it, so forcing is probably the wrong word.

I think Colin Birss in his *Unwired Planet* decision phrased it to say that a willing licensee, and I think that equally applies to the patentee, must be one willing to take or grant a FRAND license on whatever terms are in fact FRAND. Picking that up, I think you could at least argue to say a party refusing FRAND determination, by whatever forum, let's say arbitration is not acting FRAND and that applies to either the patentee or the defendant. At least the argument arbitration is voluntary, I think, falls short of the issue we're discussing.

CORDULA SCHUMACHER: Anybody wants to comment on that?

STEVE AKERLEY: Cordula, I just wanted to step back a second to *Unwired Planet* and how that arose. I think everybody here, probably at the conference knows this. The setting of the FRAND terms by Justice Birss occurred as a result of a FRAND defense being raised, I believe, by Huawei. Otherwise, there was an injunction that was going to issue post-trial. In countries where injunctions are still available, and I have to say I was fascinated with the discussion earlier today in patent in the other room, by Judge Michel and David Kappos of the U.S. In jurisdictions where an injunction is available, that's a perfectly fine remedy in my view. I'm not aware of any other jurisdiction that has taken up other than the UK, the idea of setting FRAND terms as a result of someone raising a FRAND defense to avoid an injunction.

The context here is very, very important because we're going to get to — in later questions, I'm sure — that what's happening now in other courts in terms of declaratory judgment cases and the idea of setting worldwide FRAND rates. The context to me is very, very important.

CORDULA SCHUMACHER: Maybe moving on to the topic of anti-suit injunctions, which are at the moment the key instrument, it seems, to get ahead of the other party, and to determine the right forum. Question to you, Steven, where do you think this all came from? Is it the fight for the right jurisdiction? Is *Unwired Planet* to blame here?

STEVEN GEISZLER: I want to be careful about blaming anyone or any court. Usually not a good career move. I will say, certainly over the past few years

with the rulings, and Steve made a good point. If you look at *Unwired Planet* and how it evolved there is a procedural background that many people rightfully point out, that's a fair point. At a higher level of generality, when we are combining global rate setting with injunctions or potential injunctions, that is a very powerful combination. Again, that is where we're now seeing this, what I call the winner-take-all global race to the courthouse.

That is the driver, because a plaintiff wants to be in a court that will set a higher rate for patents, hopefully globally, and have the stick of a potential injunction to really add the leverage to that. Certainly, a defendant, particularly an implementer with a smaller patent portfolio, is going to want a different jurisdiction. As I mentioned, I live in Dallas. I do a lot of work in ED Texas, Eastern District of Texas, as well as Western District of Texas. Those are preferred venues, but the point is, those venues versus another court in the United States, really typically are only going to affect U.S. outcomes. They don't affect global outcomes. That's my concern.

The anti-suit injunctions, I'm not going to say that any particular one was necessarily wrong, that a party was wrong for asking for it, or a court was wrong for granting it. I think most of us would agree, that just the sheer volume of them is a sign that there's something very wrong with our global system on FRAND licensing and litigation. There just should not be this many. Frankly, I think some of the rhetoric that we're seeing in either the orders or perhaps submissions like declarations that are being submitted to courts when deciding the ASIs, that is also not helpful for just the international comity, because we're seeing more and more of declarations or briefs saying, "This first country is confident, has a good economic and legal system, and the second nation doesn't." I don't think that's a good place for us to be in international litigation and licensing.

CORDULA SCHUMACHER: I fully agree with that. Just by the tone, it's escalating. Rian, I think you wanted to comment on that.

RIAN KALDEN: The whole discussion about whether you should get a license just for the country where your infringement suit is pending. I think we should go back to the basis of this. The basis is ETSI.⁷ ETSI is an obligation to offer a license agreement, which is compliant, it's reasonable and everything but most of all, is in accordance with business practice. Business practice is usually either a region or globally. Now, going back to asserting licenses only for a particular country and then forcing the patentee to start infringement proceedings in at least six countries or so, in order to have global coverage, I think that's not intended by ETSI. I don't think it's a fair proposition for the patentee to force him to do that. That certainly was not, I think, what was anticipated by the standard-setting companies.

Also, with respect to there not being any global substantive law – I agree that may well be, but that does not prevent the parties so far. There are quite a lot of willing implementers and patentees as well that do enter into agreements. They are able to work it out on a [inaudible] I don't think we should see too many bears on the road in order to get to a proper solution for this.

⁷ European Telecommunications Standards Institute.

CORDULA SCHUMACHER: Certainly, ETSI is at the basis of it, but if you look from one angle, isn't it that on the other hand, it's the competition law and the basic question is, is it an abuse of the dominant position if I enforce my patent rights? A patentee has patent rights and these patent rights are being infringed and can I enforce these patent rights? From the guidelines, we see from *Huawei v. ZTE* it says, "Yes, you can enforce your patent rights provided the infringer had the possibility of an exit by taking a FRAND license."

If there's the option of a FRAND license, yes, you can enforce your patent rights and make sure that they are being respected.

RIAN KALDEN: Yes, I agree, but also, the Court of Justice, who made this decision, referred to business practice. Again, I don't think anybody had in mind that these licenses should be entered into on a national basis because of these problems. We're going back to the same thing. The problem is that standard-setting organizations have failed to set up one single institute, either arbitration or anything else to deal with this. What we're seeing now with the anti-suit injunctions, is just a consequence of that failure and it's not going to lead anywhere. It's going to lead to a deadlock situation and in the end, something has to happen.

CORDULA SCHUMACHER: I have to say, on the anti-suit injunctions, when I first heard about that I have to admit, I was pretty shocked because if you come from the civil law background, it's a fundamental right that everybody can go to court. Then that court has to decide whether your claims are founded or unfounded, or whether the court has jurisdiction or not. I understand that in the common law countries, it's a different approach. From what I understand anti-suit injunctions in the past have been used for very specific cases, for a later-filed case that had the risk of endangering the first five cases and in this limited scope, it might make sense.

Isn't the anti-suit injunction that the instrument is being taken far beyond what it was? Is it not the responsibility of the courts to take it back to the original sense of where it does make sense because if I'm looking at the recent decision that it has gone to prohibiting the use of patents against anybody anywhere in the world. A very broad scope. I don't know, Anne-Charlotte, you also have had some anti-suit injunctions in France, I don't know whether you have the same understanding coming from a civil law background.

ANNE-CHARLOTTE LE BIHAN: Exactly, that's what I was going to say. I'm coming from a civil law background, so the anti-suit concept is obviously very odd to me. The decisions that were rendered in the *Lenovo vs. ICom*⁸ case, perfectly reflect what you just said. The anti-constitutional, anti-EU Conventional and this is exactly what the presiding judge of the Paris Court said, and the Court of Appeal confirmed. Obviously, it ends up nowhere when you have to implement this ASI in France. I understand, in Germany, where you recently had an AAASI.⁹

At the end of the day, I'm not sure how efficient those ASI, AASI, and AAASI come because the patents are not even enforceable. Obviously, this doesn't need to certainly work. There's one point that I wanted to comment earlier about ETSI and I fully echo what was said earlier by Rian is it all comes from ETSI and

⁸ Cour d'appel [CA] [regional court of appeal] Paris, Mar. 3, 2020, RG 19/21426.

⁹ Anti-anti-anti suit injunction.

its IPR¹⁰ policy. The undertaking that the patent holder has is, believe it or not, but it's contractual. There's this stipulation pour autrui.¹¹

This stipulation pour autrui has been qualified by UK judges, US judges, and has been confirmed by a French Court recently.¹² If we come back to the contractual obligation and the fact that FRAND rights has to do something with patent holders obligation, then I don't see why this would not be centralized before a court that would give itself a forum, whether court A, X, Y, or Z should have better jurisdiction than another one is the question, but at the end of the day, the basis of ETSI was definitely, I don't believe it was to split those litigation between 25 countries in the world.

If we go back to that road, of course, there's the competition issue, but before that, there is still this contractual issue, and this was the first question that was asked both before the UK Court and the U.S. Court. This could be a way to centralize all this and whether we should go to arbitration and if ETSI had an IPR policy with an arbitration clause, perhaps we'd not be facing all these issues today, but that's another question of whether ETSI would like to take that route.

CORDULA SCHUMACHER: Maybe wrapping up a bit on the jurisdictional point and moving over to the FRAND and willingness, I wonder whether the approach taken recently by the Munich Court is the solution to the ASI battles, where the Munich Court said that, "Someone applying for an ASI or threatening to apply for an ASI by which the patent holder is being stopped from using his patent rights is, per se, an unwilling behavior and therefore such an implementer loses his rights to a FRAND defense."¹³ Steve, what do you think of this approach?

STEVE AKERLEY: Well, I need to be a little careful, but the decision is public and obviously we agree with it—we asked for it. This is what I'll say. I think that that part of the Munich decision¹⁴ is really an extension of the observations made by the court in *Sisvel v. Haier*,¹⁵ which is to just peep behind the curtain a little bit and see what a licensee that claims to be a willing licensee is actually doing. Whether that's taking months to respond, not responding, asking for hundreds of claim charts, the things that were noted in the *Sisvel* case, or filling for an ASI, to me, that's just another extension.

Obviously, the court concluded as it did that it was an indication of unwillingness, but to me, I see that as merely an extension. What I would say about the solution to this problem is found in every AASI. I'm not sure that people steeped in this understand this, but in every instance, where an ASI has been sought or

¹⁰ Intellectual Property Rights.

¹¹ "For other persons... A contractual provision that benefits a third party and gives the third party a cause of action against the promisor for specific performance." *Stipulation pour autrui*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹² See Tribunal Judiciaire de Paris [TJ] [judicial court of Paris] Paris, Feb. 6, 2020, RG 19/02085.

¹³ LG München I, Feb. 25, 2021, 7 O 14276/20, bayern.recht (Ger.) <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2021-N-3995?hl=true>.

¹⁴ *Id.*

¹⁵ BGH, Nov. 24, 2020, KZR 35/17, juris (Ger.) <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=4&nr=115021&pos=121&anz=580>.

issued, an AASI has been granted against that ASI. There's a reason for that. It goes back to the history of ASIs that you were talking about, Cordula, which is that there's just no — it's not a proper application in FRAND patent context of ASIs.

The reliance that companies seeking ASIs, at least in the U.S., companies rely on the *Motorola v. Microsoft*¹⁶ and *Samsung v. Huawei*¹⁷ cases. None of those were actually anti-suit injunctions. They were anti-injunction injunctions. Until the Wuhan court issued the first anti-suit injunction¹⁸ in our case and then followed it with the Samsung case,¹⁹ there was no precedent for an ASI that had the scope of telling a patent owner that it could not assert its patent rights in other foreign jurisdictions, on foreign national rights. It just didn't exist.

We'll see what the Federal Circuit does. The *Samsung-Ericsson* AASI from Judge Gilstrap²⁰ is up on appeal now, and we'll see what happens there. I think the answer is what you've seen from the French court, from the UK court, in both *IPCom* cases that I was indirectly involved in. Whether it's the Indian court in my case, whether it's a German court in my case, the courts around the world have unanimously issued AASIs in response to this.

CORDULA SCHUMACHER: Anyone who disagrees? Tobias.

TOBIAS HAHN: I partly disagree. First of all, let's focus on what I agree with, first.

CORDULA SCHUMACHER: No, let's focus on the disagreements.

TOBIAS HAHN: I'll get to that in a minute. I think, first of all, I think we all agree on two things. First of all, ASI, ASSI, AASIs, if that's a valid legal remedy in the respective jurisdiction, I can get access to that in that respective jurisdiction. Secondly, this ping pong game, of course, doesn't lead anywhere. It's a ping pong game, and we can continue it forever and ever. It's no solution. I think the ASI, AASIs, to solve a conflict, they're completely useless. They do exactly the contrary. It's certainly not a way to deal with these disputes.

Thirdly, however and, Steve, I leave aside the specific facts of the case that the Munich court had to decide upon, I modify the facts slightly. The mere fact that I go through some venue around the globe, and ask that venue, that court, to determine what, let's say, a global FRAND rate is, and trying to protect that by trying to avoid that — for example, an injunction in Germany comes first and, *de facto*, forces one of the parties into a contract prior to a decision of what a FRAND rate actually is, to qualify the seeking of a FRAND determination as unwillingness, I have a problem with that. I just think it's wrong.

¹⁶ *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012).

¹⁷ *Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd.*, 340 F. Supp. 3d 934 (N.D. Cal. 2018).

¹⁸ *Huatai P&C Co Ltd Shenzhen Branch v. Clipper Chartering SA* (Maritime Ct. of Wuhan City, 2017).

¹⁹ *Samsung Electronics Co., Ltd. v. Telefonaktiebolaget LM Ericsson* (Wuhan Intermediate People's Ct. Dec. 25, 2020), translation available at <https://www.ratnerprestia.com/wp-content/uploads/2021/01/English-translation-of-Wuhan-Order.pdf>.

²⁰ *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:20-CV-00380-JRG, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021).

I know the facts in the case that InterDigital was involved in were different. There are other aspects to that. I think there are other aspects in the decision and the case. You are much more aware of the facts of the case than what I can take from public sources. There may be other reasons why that specific party was unwilling, but I don't think you can argue that seeking an anti-suit injunction to protect a FRAND determination litigation somewhere per se makes you unwilling — I just don't think you can do that.

CORDULA SCHUMACHER: Would that not run against what Steven said beforehand, that eventually, we have various court decisions in various countries, and they all come to slightly different outcomes regarding FRAND? Then, the parties eventually get tired of litigation and settle, and it's one against three, or two against two. You weigh up the decisions, but if one goes to the court and has the possibility to stop all other litigation, it is really the race to the first court.

Then it is really winner-take-all because, one, whoever is the first one runs to a court and avoids any conflicting decisions and is the one who decides the forum and the one who decides, then, the outcome.

TOBIAS HAHN: Yes. Cordula, I agree with all of what you've said. I think that's an outcome we all don't want, but I think it cuts both ways. Again, I want to move away from the specific facts of the *InterDigital* case,²¹ but let's assume you have what I would call a willing licensee who really wants a license. He applies to FRAND determination, let's say, in the US.

CORDULA SCHUMACHER: Yes. Go ahead.

TOBIAS HAHN: To put it more extreme — the other party goes for a PI²² in Germany.

CORDULA SCHUMACHER: Good luck.

TOBIAS HAHN: Let's further construe the facts in that I have a patentee who is the unwilling party that wants to extract the most money possible out of it. The point I want to make is that the mere fact that you're trying to protect a proceeding that you filed and filed with good intent [chuckles] without delaying, without all of that implementers sometimes do, trying to protect that against a patentee shortcutting this, I think you can simply not argue that that makes you unwilling.

CORDULA SCHUMACHER: Let's enter the unwillingness discussion and leaving a bit of the specifics of jurisdictional question and ASIs aside. We lately have seen in the decisions that are more focused on the process, especially in the *Sisvel v. Haier* decision here in Germany. Not so much looking at what is actually FRAND, but the approach rather being we're looking at the behavior of the parties, because if both parties are engaging, chances are that eventually, there will be an agreement. It could of course be either one, but if one party is not engaging, they have no way that, ever, a FRAND agreement will be the result. Because only when both parties are entering into discussion, into positive discussions, you cannot narrow it down what could be FRAND in those circumstances.

FRAND as a process or, alternatively, is it to be seen much strictly like ping pong? You tick the box, you notify, and then you make a FRAND offer. Unless you

²¹ See *supra* note 13.

²² Preliminary injunction.

haven't done that, the implementer doesn't have to do anything. Rian, the view of the German court, is that also in line with the Dutch courts?

RIAN KALDEN: It depends on which German court you refer to.

CORDULA SCHUMACHER: Well then, first to the Court of Justice, to the highest court, I would say. First refer to it.

RIAN KALDEN: Yes, indeed. The *Sisvel* decision, by the Bundesgerichtshof is very much in line with the decision that we rendered, in the FRAND cases that we delivered, or the other way around, but we are in conformity with each other on how to view the *Huawei-ZTE* decision. Basically, that decision provides for a set of, well, steps that are meant to be guidelines, I think, and so does the Bundesgerichtshof.

Those are steps that will provide a safe harbor. As long as you stick to that, you'll be fine, but it's not as strict as sometimes interpreted. Having said that, I think the willingness is a very important aspect of that whole scheme, because going back to the basics again. The basis is the agreement with ETSI. In that agreement, that was just referred to by AC from SA, it's a third-party beneficiary. The potential licensee has to go forward, and say to the patentee, "I'd like to have a license." He has to show his willingness to actually obtain a license.

Also, the European Commission, they ruled in one of the very first decisions on this that it's not forbidden, it's not prohibited, to actually enforce your standard-essential patent. It's only prohibited, it's only abusive, if you do so against a willing licensee. The willingness of a licensee is of paramount importance. It also, I think, balances the interests of the parties because the patentee is in a situation where his patent is out in the open, and may be used even prior to negotiations having started. It is quite right to then also ask of the implementer to actually show and be really willing to enter into negotiations. That's how we viewed it.

CORDULA SCHUMACHER: Okay.

RIAN KALDEN: I think this is how we viewed it, so did the Bundesgerichtshof and so did the UK decision I reckon.

CORDULA SCHUMACHER: Yes. Milan, it's time to get you on board. Maybe we can take you as the expert on how to interpret *Huawei vs. ZTE*, being at the source of it. So question to you. Is the interpretation of the German, Dutch and UK courts and I assume most of the French courts, is that in line with how you would understand *Huawei-ZTE* and the requirement of willingness and the FRAND process?

MILAN KRISTOF: I think a smart answer would be that we have to wait for the *Nokia v Daimler*²³ judgment of the CJEU.

CORDULA SCHUMACHER: But that would be the *Huawei* answer.

MILAN KRISTOF: I think this is something that we will still be talking about in a few conferences. There's no silver bullet and my impression is that what the Court of Justice did in *Huawei* is that it at least tried to come up with some workable solution. This was, as I like to call it, "the FRAND dance." It just provides the framework, and it seems generally to work in practice. I would agree with what Rian said. I would say they are more or less in line with that CJEU judgment. I

²³ Case C-182/21, *Nokia Tech. Oy v. Daimler AG*, 2021 EUR-Lex CELEX LEXIS 3A62021CN0182 (Mar. 23, 2021).

think everybody will be watching now what the Court of Justice will say in the *Nokia* reference, because part of it is exactly to clarify and further develop the *Huawei* precedent.

I have to be careful obviously with what I say about it, because it's a pending case and I work at the Court of Justice and could end up dealing with the case...

CORDULA SCHUMACHER: Just tell us your personal opinion.

MILAN KRISTOF: Yes, it's only my personal opinion. I think that's the case you want to watch, and maybe next year we will be able to already discuss some development. Maybe at least the opinion of the advocate general. But also, on the previous issue on the jurisdiction, again, I'm not sure we can find a perfect solution. I know that there have been voices saying that arbitration could be a solution. I admit it may be strange for someone working in a court to argue in favor of arbitration. But I think the standard setting organizations could tell the parties to enter into arbitration. That could at least be one of the solutions. I'm happy to discuss this issue further.

CORDULA SCHUMACHER: I think the *Sisvel v. Haier* decision that has been very clearly developed. At least my understanding that I can see it also in other national decisions is that, in fact, when we're talking about hold out by the implementer and hold up by the patentee, that the risk for hold out is seen much larger than the actual risk of a hold-up by a patentee. The German Court of Justice argues that in a standard essential patent case, the implementer already has full access to the technology, especially because it is a standard. It's an open standard. Everybody can use it, everybody has access, meaning that the implementer per se has no interest in entering into a license agreement, because his situation is only going to get worse because he has to pay for something he has been using for free beforehand.

While the patentee has to give the license anyway and his only interest is to eventually get a license and obviously get a fair license. But in order to get such license fee, he first has to go to Court at considerable costs obviously, and therefore because it might be in the interest of the implementer to drag on, and to delay, and file ASIs, it's the hold out that is the much more critical problem, and therefore the key focus on winning this. Someone has to prove that one is not holding out, but actually is willing. I don't know whether you would, Milan, address whether you would agree with — it's a bit of a competition law analysis of the situation.

MILAN KRISTOF: Yes, our view in Europe or in the view of the Court of Justice and the European Commission, there is clearly a competition law aspect to this. I know that is different to the UK in *Unwired Planet*, which says that under English law it's more of a contract issue. In Europe, your patent is essential, so you have essentially a monopoly (dominant position), and so then you have responsibility not to abuse that position. That's why there is a competition law aspect in Europe, and that's why there is this framework, like in *Huawei-ZTE*. It's that you have to then make sure that you are not abusing your dominant position.

Also, in *Unwired Planet* there is a part in the judgment where the UK court says that it's a global rate, but if then some patents in the portfolio, because they talk about the portfolio, if some patents turn out not to be valid, then obviously the

court acknowledges that you have a right then to go and litigate that even though you have entered into a standard essential patent.

CORDULA SCHUMACHER: Yes.

MILAN KRISTOF: Furthermore, from the EU side there's clearly a competition law angle, but I know that in the U.S., for example, that at least until recently, that was not really the line. I saw lately, from the FTC, there were also voices saying that the stakeholders shouldn't be abusing market power, so maybe now they will be more in line, the U.S. and European approaches.

CORDULA SCHUMACHER: Tobias, Rian also mentioned when she was asking which German Courts you're referring to? That we have, let's say, deviating approaches. It seems that the Düsseldorf court's unwillingness is basically a question on whether the German Court of Justice got it right. What do you make of this competition between the courts with Germany to be settled by the CJEU?

TOBIAS HAHN: I think there's — When you look at the referral questions, I personally don't think there is such an apparent conflict of the codes. I mean, when you look at the referral questions, they're basically two topics, let's say. One is the licensed to all issue, whether—

CORDULA SCHUMACHER: We'll get to that.

TOBIAS HAHN: Leave that aside. That's a specific fact pattern, but also the Court had referred several questions relating to the dance, as Milan has phrased it, and the way to interpret it is, is it strictly consecutive, is it more flexible, et cetera? I think these questions do need an answer. These questions have not been answered by the Federal Court of Justice either. I think these questions still need to be answered, and not to my understanding, not in direct conflict with the decision of the Federal Court of Justice.

The other topic you had mentioned is the hold up versus the hold out and the focus on the hold out of the Federal Court of Justice by pointing to the fact that different to the usual essential facilities cases in SEP²⁴ cases, the implementer has already started using and can simply pick up use of the patents. That is, of course, correct and I think that is different to the classic essential facilities cases. Nevertheless, I think to me it was a rather blunt statement from the Court of Justice because it leaves out two things. First of all, the use of the patents is what is intended by standardization. Of course, not without the license. You need a license eventually, but the mere fact that you can pick up implementation, that's the essence of standardization.

The second point there is, of course, while you have the possibility to pick up use immediately without actually obtaining the license, that is true. At least aside the risk that with an injunction coming into place at least in jurisdictions where there is an adjunction available, this right to use will, or this possibility to use I should say, because obviously, you wouldn't have a right at this stage, it will immediately cease. You will have all the sunk costs that you have put into a starting venue.

To me, the focus — what Rian has said is true. We need to talk about willingness and willingness cannot just be, I raise my hand and say, "I want a FRAND license." That cannot be it, but I do think that there are at least these two

²⁴ Standard-Essential Patent.

considerations that the Court of Justice may, I don't know, but from the judgment may not have fully reflected upon. I see that Rian strongly disagrees.

CORDULA SCHUMACHER: Well, just one point on, of course, the risk of eventually facing an injunction. That risk is, of course, not really threatening because you just accept the FRAND offer. There's never going to be an — eventually, the only risk that you — once there is an injunction and enforceable injunction that you just accept the FRAND offer. The risk of the implementer being unwilling until the very last moment seems limited if we agree.

TOBIAS HAHN: If people actually know what a FRAND rate is but—

CORDULA SCHUMACHER: Well, you won't get an injunction unless it is a FRAND offer, or you were explicitly unwilling.

TOBIAS HAHN: That depends on the process, how the injunction litigation is handled.

RIAN KALDEN: Well, I may have misread the federal *Sisvel* decision or maybe translation issues, but as far as I see, the questions referred by their district court were dealt with in that decision to a very large extent. Well, but that's an internal issue. I won't get into that. One of the major questions is, can an implementer make up for unwilling behavior prior to legal proceedings once legal proceedings have already started?

Now I know there are some German Courts that actually think that that's possible, but then my query is, how would you then view the balance between a penalty and an implementer? Because the implementer can just in the negotiation phase land back. Be unwilling as he can be and just wait for the rate to come in, and then all of a sudden become willing. In the meantime, valuable time has passed because the patent may lapse for instance in six months or so. How do you view the balance of interests if that will be possible?

CORDULA SCHUMACHER: I guess the time aspect is a crucial one that we always have to keep in mind. We are negotiating, we are discussing negotiations in a framework where the rights of the patent are expiring. Someone who's actually willing to put things on a legal basis, I would think has to act accordingly quickly. I personally would say that you can make up for it if you actually really make up for it and take a big leap eventually.

Maybe turning to the French sides, Anne-Charlotte and David, how would you think the French courts are approaching FRAND of the process and a focus on willingness? Go ahead, Anne-Charlotte, or AC, or David, whoever.

DAVID POR: Anne-Charlotte left me that one because I'm afraid we don't have much to say on it. The French court said, "Yes, we're happy to do it and we're going to do it and we have jurisdiction to do it." Then this unfortunate thing happened which is called a settlement, and we were left with that as a decision. I think the response is I don't know. Anne-Charlotte, please feel free to disagree.

ANNE-CHARLOTTE LE BIHAN: I don't know either.

CORDULA SCHUMACHER: Thank you. I'm seeing a question from Frank-Erich Hufnagel my former boss, and hopefully, he's not mad at me for changing to the dark side. Do you want to come onto the panel and ask your questions yourself directly? There he is.

FRANK-ERICH HUFNAGEL: I'm really a bit sorry that you've moved to the dark side, but well, there you are. That's fine, that's crossroads anyway. I've just actually two questions that are linked together. One is a bit prompted by your remark a minute ago. The question of what does willingness to take a license actually mean? Is that a one-way concept, and does it mean that the implementer has to swallow the royalty rates that the SEP owner demands whatever they are without asking, without questioning them, without even starting to negotiate them?

Secondly, what happens if both parties cannot agree on the rates? Is it not abusive by the patent owner in such circumstances to refuse to subject to a regular court determination, binding determination of the royalty rate if the implementer offers such a binding determination? That's the old Orange Book concept of the Federal Supreme Court in Germany. Thank you.

CORDULA SCHUMACHER: Thank you, Frank-Erich. I guess number two, it's the question of timing but Rian, I see you are happy to reply.

RIAN KALDEN: Oh, yes. First of all, willingness, of course, is just following the rate that's proposed. I think what is required is a position in which you will enter into good faith negotiations. Everybody has a grasp of what that means, and it doesn't mean that you can just remain silent for six months after you've been notified. That's not a willingness in my view anyway.

Also, dragging on negotiations, requesting information all the time, avoiding any commercial discussions— all of that will be taken into account when viewing if the implementer is actually a willing party. It's not swallowing whatever is proposed, but notably the willingness comes prior to the offer according to *Huawei v. ZTE*. Also, in that sense that's not what it means.

On the second note I wouldn't — I don't quite understand the question because an implementer I think can always go to a competent court and ask the court to set the rate. There's not much the SEP holder can do about it. As long as it is a willing implementer, he cannot obtain an injunction either on the *Huawei v. ZTE* decision. A more interesting question would be if the implementer or the other way around the SEP owner would propose to the other side to enter into arbitration, to get it settled, whether that's—

CORDULA SCHUMACHER: I guess it's where we kind of started, willingness to arbitrate, or you can of course choose arbitration, or say let's choose an appropriate court to set the rate. Here again, I suppose it's a question of the circumstances, when does that come? Does it come at the very last moment when the injunction is threatening and I wanted to prove that I'm willing just before I'm losing my sales, or do I do it in the beginning of the process, when not much time has passed and actually it's something that still advances the matter, or is it something that would stop the matter, stop all injunctions, stop all litigation and initiate new proceedings again, and direct things on?

I guess as always, questionable circumstances. I don't know. Does anybody else have comments on that point? Milan.

MILAN KRISTOF: Yes, if I'm not mistaken, Justice Birss says in his judgment in *Unwired Planet* that basically both parties are willing if they are ready to accept the global rate. This may be an interesting angle. I wanted to refer you to

the European Commission *Motorola* decision²⁵ from 2014, which was before the *Huawei-ZTE* judgment. It's interesting because in the *Motorola* Commission decision from 2014, they said that there was a willing licensee, and this was because Apple agreed to have the royalty rate set by the German court. And the Commission also says then an implementer is not unwilling if it wishes to challenge the validity, infringement or essentiality of patents.

STEVE AKERLEY: I think there's also a practical reality here and this relates to what makes it a willing licensee. Do they have to just accept the rates that are given to them? I think the obvious answer is, "No." I also think that in the real world, it's hard to imagine a licensor of a significant SEP portfolio not engaging in some back and forth. I don't think it's a realistic proposition to suggest that anybody is going and saying, "Here's my rate. We're not even going to talk about it and we're going to file a lawsuit," because that doesn't make any business sense at all.

There are clearly circumstances where negotiations can take time, in complicated cases that's true too. The important aspect of what the German courts have done specifically. And Cordula, you asked about non-U.S. jurisdictions. I don't think there is a hard — in the US, no court that I'm aware of has applied a staged requirement, like was described in some of the German decisions. The reality is that viewing the ETSI requirement as a bilateral agreement that requires a willingness on both sides is the important part of these decisions.

CORDULA SCHUMACHER: Steven, as you noted you're licensing in and licensing out so to say on both sides. When you are licensing out, what qualifies a willing licensee from your perspective?

STEVEN GEISZLER: It's funny. I agree, probably 50% with Steve. I think that in most cases you do have professionals on both sides. If you're talking about the larger companies, the larger portfolio holders, you do try to have some back and forth, meaningful substantive response from the licensee. There are cases, there's no question. There are cases where you have just a blatant holdout, a licensee who just is not going to give a substantive response. Maybe they'll be on the phone with you, but they're not going to respond.

I don't think they necessarily have to have a counteroffer rate immediately, but particularly if it's a sophisticated company there is some expectation that they're going to engage in a meaningful discussion about numbers and work if there are concerns. Milan was talking about the *Motorola* case from years back. If there are concerns about the quality of the patents and validity. Those types of meaningful discussions, because again, we're talking about patent portfolios, we're talking about patents, not just contracts. I don't think we should ever completely lose track or lose sight of the underlying patents. That's a legitimate pushback by a licensee.

As I can see and have certainly seen – and this is more wearing the licensor hat – I've seen instances where licensees just don't want to talk at all, not in a meaningful way. The problem though, and more specifically addressing your question, Cordula is the *Huawei-ZTE* dance, so many people call it, even though it doesn't control in the United States, it is well respected. As Rian was talking about, the reality is, most conversations are global in nature. The effect of *Huawei-ZTE* is that it has just globally affected the interactions of people or parties.

²⁵ Commission Decision of 29.04.2014, Case AT.39985 (C(2014) 2892 final).

My concern is, over time, as more cases are decided and we start accumulating more and more, and we start fleshing it out more and more, I'm hoping that the dance does not become too rigid. Because in reality, there are all sorts of unforeseen circumstances that a very rigid, very narrow choreograph may not allow for, but still are legitimate circumstances.

The other concern I have, because we keep on talking about the willing licensees, and I understand there's some academic literature out there saying that hold up is not nearly as prevalent a threat as hold out. I understand that. We shouldn't say that there's never a hold up. If nothing else, I've met some patent plaintiffs who are very adamant about their position and very slow, if ever willing to budge.

The point is, the moment that we say that, "Hey, we don't need to worry about hold up," that would be akin to— This is not a great analogy, but let's just say that a court stated as a matter of policy that "Steven Geiszler is always an honest person; Steven Geiszler would never steal." Well, if I had a court rule that, then tomorrow I may quit my job and become a bank robber because I know the court has said that I will never be found to be a thief. We do need to make sure that we're looking at the behavior of both parties.

To Americanize it, we are seeing more and more the jury verdict form because now for the *Ericsson v. TCL* case,²⁶ the Federal Circuit has talked about FRAND determinations being made by the jury, not the judge. You do see in verdict forms the questions asked to the American juries, "Did you find that this party acted in good faith in negotiation?" You ask the same question about the other side. The juries are asked to look at the overall conduct of both sides. I think that's important.

I just don't want to focus only on licensees, but again like I said, in fairness to Steve, yes, there are many instances where you will find licensees who just will not promptly give any kind of substantive response. It just forces the hand of the licensor.

CORDULA SCHUMACHER: It takes two to tango.

STEVEN GEISZLER: Yes.

STEVE AKERLEY: Cordula, I'm very happy to say that I agree with more than 50% of what Steven just said.

CORDULA SCHUMACHER: That's lovely. Although we want to have a discussion, we all don't want agreement here. We have six minutes remaining. I do want to get to the second part of the CJEU referral, i.e. the licensing level. Of course, everybody's very interested to hear Milan's position and opinion, and thoughts on that as far as you can give them. You're on mute.

MILAN KRISTOF: I'm having some technical issues, so if you could repeat the question.

CORULA SCHUMACHER: I'm referring to the first part of the CJEU referral by the Düsseldorf court where it is about the licensing level. In the specific situation, Nokia suing Daimler and Daimler just assuming for a moment, doesn't want to take its own license. The facts are slightly different, but one thing that Nokia

²⁶ *Ericsson Inc. v. TCL Commc'n Tech. Holdings Ltd.*, 955 F.3d 1317 (Fed. Cir. 2020), *cert. denied sub nom. Ericsson Inc. v. TCL Commc'n*, No. 20-1130, 2021 WL 1951814 (U.S. May 17, 2021).

licenses the suppliers and not the tier-one suppliers because they got an offer, but the tier two suppliers. That's, of course, an interesting question. I don't know whether you already have any views on that. I might let everybody know that we know the docket number already for that case. It's CJEU case number C-182/21. We will see when we hear on that.

MILAN KRISTOF: In my personal view, the issue is that whether there is a duty to license at any level or at all levels, where we have somebody that is asking to license. This is interesting because the German court is also saying that the fact that there are certain practices in this business – we are talking about the automotive industry – carmakers are arguing that they do not want to be held liable for lawsuits by patent holders. Then Nokia should license with respect to the automotive modules for communication directly from the suppliers rather than the carmaker. They say, "No, this has been the standard practice in this business."

Daimler says that they would like to buy components for their cars from parties which ensure that all IPR is indemnified. Daimler doesn't want to have liability for infringement. This is so important because it's not only about cars, it's about the Internet of Things.²⁷ With 5G arriving this is going to be very important when you talk about smart phones and — I'm getting a bit hungry here — e.g. smart fridges.

What is interesting is that Daimler has already lost some injunctions in Germany. I don't know how the CJEU will decide. I think that we will all have to wait and see. I don't want to talk about it too much because I may end up being involved directly in the case. The issue will be whether asset holders like Qualcomm or Nokia, whether they can license their patents only at the end-product level, like the car manufacturer, or whether they can do it directly at the supplier level.

CORDULA SCHUMACHER: Whether the access given through exhaustion and have made rights access sufficient or do you need a license agreement. They're academically extremely interesting questions, but isn't it all just about the price? In the end, it's all about the money, isn't it? One side wanting the license rates to be determined on the basis of the end product, on the benefits of communication realized at the end product level, and the other side wants to base the license rate on the hardware price of a component.

Obviously, in a way that the results are different, but the license rate is higher on the one side, and the license rate is lower at the other side. It seems that this all is, the legal discussion is a pretext on the price.

MILAN KRISTOF: Is that a question for me still or—

CORDULA SCHUMACHER: To anybody else. I don't know whether anybody else wants to reply.

STEVE AKERLEY: I think that's a fair observation, but I think it's the present European equivalent of the smallest saleable patent unit. That was

²⁷ "The [Internet of Things] is a giant network of connected things and people – all of which collect and share data about the way they are used and about the environment around them." Jen Clark, *What is the Internet of Things (IoT)?*, IBM (Nov. 17, 2016), <https://www.ibm.com/blogs/internet-of-things/what-is-the-iot/>.

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developed in the U.S. To me, it's a question of value of the invention as opposed to the cost of a component or something further up the chain.

STEVEN GEISZLER: Cordula, if I could -

CORDULA SCHUMACHER: Six seconds left. Go ahead, Steven.

STEVEN GEISZLER: Not only is it a play on the pricing, it's also a play on the leveraging because if I can enjoin you in Germany on the sale of a car, I have much more leverage at the negotiating table than if I simply can enjoin you from the sale of a chip— the manufacture and sale of a chip. Even where the rate is capped, which is many times the counterargument because they're often capped rates— it doesn't always scale as a percentage of the price of the car; you still have to leverage because of injunction rate risk.

CORDULA SCHUMACHER: The question is, is that a good or is that a bad thing if you have a patent right and you have the leverage?

STEVEN GEISZLER: That's right. It's a matter of perspective.

CORDULA SCHUMACHER: That may be a good closing remark. We would be bang on time and as we were running overtime in the previous sessions anyway, unless anybody has an important final remark to make... I'm looking at everybody. I thank you all for the great discussion and all the inputs. It has been a great pleasure. I hope that the audience enjoyed it.