

Emily C. & John E. Hansen Intellectual Property Institute

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

*Fordham University School of Law
Skadden Conference Center, Costantino A/B
150 West 62nd Street
New York, New York
Friday, April 26, 2019 – 2:45 p.m.*

**SESSION 8: COMPETITION AND PATENT LAW
8A. Competition**

Moderator:

Daryl Lim

UIC John Marshall Law School, Chicago

Panelists:

Thomas F. Cotter

*University of Minnesota Law School, Minneapolis;
2018-19 Innovators Network Foundation Intellectual Property Fellow*

Eleanor M. Fox

New York University School of Law, New York

Milan Kristof

Court of Justice of the European Union, Luxembourg

Suzanne Munck

Federal Trade Commission, Washington, D.C.

Maureen K. Ohlhausen

Baker Botts LLP, Washington, D.C.

Thomas D. Pease

Quinn Emanuel Urquhart & Sullivan, LLP, New York

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PROF. LIM: Welcome to the Competition session. If this is not your right session, you have two alternatives, one to your left and one downstairs.

PROF. COTTER: That's competition in action.

PROF. LIM: There you go.

My name is Daryl Lim. I'm very pleased to moderate this session.

We have a distinguished panel. Since we have a couple of minutes before people get seated, please say your name, your affiliation, and something about yourself you want the audience to know about.

PROF. COTTER: I'm Tom Cotter. I'm the Briggs and Morgan Professor of Law at the University of Minnesota Law School, and I'm always happy to be back in Manhattan, where I had my first job after law school.

PROF. LIM: Thank you, Tom.

PROF. FOX: I'm Eleanor Fox. I'm on the faculty of New York University School of Law. My main field is antitrust, but I do a lot of work at the interface with intellectual property and trade in developing countries, and I just put out a book on competition in sub-Saharan Africa.¹

PROF. LIM: Excellent. Thanks, Eleanor.

MR. KRISTOF: My name is Milan Kristof. I work at the Court of Justice of the European Union (CJEU). It's always great to escape Luxembourg a little bit and come here. I think this is my fourth time here. I mostly focus on competition and IP but also deal with other areas in the Court of Justice.

PROF. LIM: What is your title, Milan?

MR. KRISTOF: My title in French (which is also used in English as a *terminus technicus*) is called *référéndaire*, and that's basically a senior advisor to a judge or an advocate general.

PROF. LIM: Is that like an exalted law clerk? Is that like an attorney advisor? What is the equivalent, if there is any, in the United States?

MR. KRISTOF: I have to be careful how I describe it. It's different from the typical law clerks that you have here, in particular at the Supreme Court. At the Court of Justice people are quite senior and it is common for them to be judges themselves in their own home countries. Basically, we are not research assistants. We have to draft the judgments or the opinions ourselves, obviously under the supervision of and with the agreement of the judge or advocate general, but we are responsible for drafting it.

PROF. LIM: It sounds like a tremendous responsibility, significant influence on the outcome.

MR. KRISTOF: Yes.

PROF. LIM: Thank you.

MS. MUNCK: Hi. I'm Suzanne Munck. I am the Chief Counsel for Intellectual Property at the Federal Trade Commission. These are my own views, not those of the Commission or any former Commissioner. I'm so excited to sit next to Maureen.

MS. OHLHAUSEN: We sometimes share views.

MS. MUNCK: Yes, that's right. Something about me is I am a patent assertion entity (PAE). When I had twins a few years ago while working at the Federal Trade Commission I named them Axel and Eva, and it took 0.5 seconds for someone to write back that I was a PAE, a parent of Axel and Eva. So that's my unique thing.

PROF. LIM: Thank you.

MS. OHLHAUSEN: I'm Maureen Ohlhausen. I am co-chair of the competition practice at Baker Botts. I recently left the FTC where I was a Commissioner for six years, including a year and a half as the Acting Chairman. I have written extensively on the intersection between IP and antitrust.

¹ ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA: MARKETS, DEVELOPMENT, AND COMPETITION LAW IN SUB-SAHARAN AFRICA (2019).

PROF. LIM: How's life in private practice?

MS. OHLHAUSEN: It's very good. I am enjoying it a lot. It is a very comfortable transition. Thank you.

MR. PEASE: I'm Tom Pease. I am a Partner at Quinn Emanuel here in New York. I mainly do patent and trade secrets, and for the last ten to fifteen years I have done quite a few cases at the intersection of patent and antitrust law, mainly FRAND/SEP-type cases over that time period.

PROF. LIM: Thanks, Tom.

Just for reference, Tom P. and Tom C., if I say "Tom," both of you can respond.

Competition in itself is an entire discipline. Even competition and IP is an entire discipline. It is easy to think of competition/IP these days in terms of just FRAND, but this is really more than FRAND, although we will be talking about FRAND, so you can also think about this, at least in part, as FRAND 2.0 or FRAND: The Sequel or FRAND: End-game.

We are going to cover, I would say, three major themes, maybe a few satellite themes. We will be talking about big tech, the Amazons and Googles of the world, and competition agencies' approach to these companies. We will be talking about FRAND and perhaps scooping back into some of the themes that we talked about both yesterday and in the session earlier today. We will be talking about pharma, including pay-for-delay and some post-pay-for-delay developments. Depending on how much time we have — that's always hard to say, even with a moderated discussion—maybe we will talk about sham petitioning, trademarks, for-sale restrictions, and whatever else is on the minds of the panelists and the folks in this room.

Just to get us started, Milan, tell us about what is going on in the European Union in big tech.

MR. KRISTOF: I think everybody knows by now that the current European Commissioner of Competition, Mrs. Margrethe Vestager, has been investigating several tech companies. Mostly it is on the basis of complaints that have been lodged with the Commission.

We have in particular the *Google* cases, as I think everybody has heard by now. There are three separate antitrust cases: the *Google Search (Shopping)* case;² the Android operating-system case;³ and the third one is Google AdSense for Search.⁴ All three have by now reached the decision stage, so the Commission has issued decisions in which it found that Google abused its dominant position in these three different cases. Two of them Google is appealing at the first-instance General Court of the European Union, and the third one is very recent, the last decision, and may also be appealed.

To briefly summarize the first case, *Google Shopping*, the main idea is that Google has abused its dominant position as a search engine because it was allegedly illegally: favoring its own product (the comparison shopping service called "Google Shopping")—Google's search results predominately displayed Google Shopping results regardless of their merits; and it was not treating other comparison-shopping websites and other providers equally—Google did not apply its system of penalties to its own Google

² See Commission Decision 2017/4444, 2018 O.J. (C 9) 11.

³ See European Commission Press Release IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (Jul. 18, 2018).

⁴ See European Commission Press Release IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019).

Shopping results as it did to its competitors; and that it was also demoting rival comparison shopping services in its search results. That is the main gist of that case.

The second case is the Android case. The Commission's case is that Google has abused its dominant position in Android, which is the operating system for smartphones. Google's argument was that the main competitor is Apple and iOS, but basically the Commission has found and defined the relevant market differently. That, amongst other issues, will be interesting also in the court in the appeal.

The main argument in the case is that Google has used Android as a vehicle to cement the dominance of its search engine by imposing three types of restrictions on Android device manufacturers and network operators to ensure that traffic on Android devices goes to the Google search engine. In particular, Google has allegedly: (1) required mobile manufacturers to pre-install the Google Search app and the browser app (Google Chrome) and required them to set Google Search as the default search service on their devices as a condition for licensing certain Google proprietary apps (in particular Google's app store, the Play Store); (2) gave financial incentives to certain large manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices; and (3) has prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on competing operating systems based on the Android open source code that were not approved by Google (called "Android forks").

The final and very recent decision is in the Google AdSense case. Basically, the Commission says that Google has abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites that prevented Google's rivals from placing their search adverts on these websites. Google allegedly required direct partners to exclusively use Google's AdSense and they couldn't engage with its competitors; Google required that partners take a minimum number of Google ads and predominantly place them above any other advertising, nor could they place ads from other services above or alongside Google's ads, and Google required partners to get confirmation from Google before making any changes in how they displayed Google's competitors' ads. These websites often have an embedded search function (search tab) and when a user searches using this search function, the website delivers both search results and search adverts which appear alongside the search result. Google provides these search adverts to owners of "publisher" websites; therefore, AdSense for Search works as an online search/advertising intermediation platform. The Commission said that Google used exclusive agreements, so it is in particular about exclusivity; and the Commission says that it was also discriminating against competitors.

PROF. LIM: I think we've got quite a lot of material there to think about.

Now, in terms of this rhetoric, coming back to the age of populism, some people in antitrust circles call this "hipster antitrust," where antitrust is really being used as a response to the disquiet that people feel against concentration of power from these big tech companies.⁵

To what extent is antitrust the appropriate or inappropriate tool to respond to these types of pressures, and to what extent are current efforts justified or not justified?

You can say something and then we'll just go around and see who else — Eleanor has something to say—but in just thirty seconds do you have a quick response to that?

⁵ See, e.g., Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 296 (2019).

MR. KRISTOF: At least in the European Union, the Commission's argument is that these are genuine antitrust issues that should be dealt with using antitrust tools. You then have other issues which we can discuss, like privacy, and that is getting a bit more complicated insofar as that probably should be addressed by privacy law and regulations instead.

But I think the main gist, at least in the Google cases I mentioned, is that they are genuine antitrust cases and I wouldn't call it hipster antitrust.

PROF. LIM: Eleanor?

PROF. FOX: I wouldn't call it hipster antitrust either because that's a pejorative word and I think it is really important to try to sort out what is happening.

I think there are three big different issues that come out of these high-tech cases. Europe has been taking the lead and some people in the United States are saying nobody should lead it because it is suppressing innovation. The three big issues are:

Number one, like in *Google Shopping*, does the most powerful platform have any duty to be, for example, non-discriminatory or non-exclusionary with those who use its platform?

Number two is the Google Android case. It's really a question that is much more typical antitrust as to whether this combination between the Android operating system and the tie-ins with Google's searching service is increasing the market power of Android as an operating system.

Number three is mergers, where the acquisitions may be below the radar screen in most jurisdictions. For example, Facebook snaps up Instagram before it has earned much in revenues, and therefore it hasn't caught the attention of a lot of authorities. That is a very different issue. It is a question of whether Facebook, for example, has market power and whether it is increasing market power by acquiring one of its most viable potential competitors.

In all three of these cases there is the other side of the coin, which I will call the U.S. side of the coin, saying, "These are very inventive companies; don't touch them. Even if there might be some market power, it is very important to leave these companies alone and let them do what they do without handicapping them."

PROF. LIM: Thanks.

Tom?

PROF. COTTER: It seems to me there are a couple of different ways you could approach the sorts of issues that Eleanor and Milan are talking about.

On the one hand, there are people like Tim Wu, who recently published a book, *The Curse of Bigness: Antitrust in the New Gilded Age*,⁶ calling for a more populist, sort of Brandeisian approach to antitrust, as opposed to the exclusive focus on consumer welfare.

I am not personally so persuaded that that is the route to go. There may well be problems in mergers—use of platforms to favor one's own content over others; possibly long-term predatory pricing, the sort of thing Lina Khan has described⁷ — that again fall beneath the radar under current antitrust law.

The question, I think, is whether antitrust/competition law itself needs to adapt and change and evolve in ways to reach some of this conduct, or if we would be better going some alternate route.

Hal Singer, for example, has suggested maybe there should be some new body of regulation that would impose an anti-discrimination norm on big platforms so that they

⁶ TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

⁷ See Lina Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 722-30 (2017).

cannot favor their own content over others’,⁸ and maybe that would take it out of the anti-trust box altogether.

PROF. LIM: What is your view on that?

PROF. COTTER: Well, he does make a good point, that in any sort of antitrust intervention, first of all, there is a lot of uncertainty, antitrust cases can take years to resolve, so maybe it would be better to have some new standalone body of law. But at this point I think I’m agnostic on what the best route is.

PROF. LIM: Okay.

MS. OHLHAUSEN: May I jump in?

PROF. LIM: Go for it.

MS. OHLHAUSEN: I see really two issues — I mean there’s a host of issues, but two major ones.

The first one is: are there competition problems that current antitrust is missing in using the consumer welfare standard still as the standard for antitrust? So, are our tools accurate enough? Are we missing competitive problems that are going to show up down the road?

I think we should always be mindful of trying to improve our analytical tools. So I don’t want to reject outright the criticisms that you as an antitrust agency missed a problem down the road.

I do think for some of these issues there maybe isn’t a sufficient understanding of the things the agencies can and have already done.

Eleanor, you mentioned the *Facebook/Instagram* case. The question that people are raising now is, “Oh, did Instagram have that special sauce and Facebook grabbed it; or was it the fact that there were a host of other entities like this—e.g., Photo Sharing—and the fact that Facebook chose to invest in this one is what made it the successful one?”

You can look at a case that the FTC brought against a merger between a big software company that made software for auto dealers and a startup in a rather concentrated market, a case called *CDK Global and Auto/Mate*. The big player was trying to buy a startup, and the argument was, “Oh, it’s just fringe, there’s a big fringe.” But this startup was very, very well-positioned to actually take on the big players, was starting already; the economic evidence showed it, the documentary evidence showed it. It all lined up. The FTC brought a challenge and then the companies abandoned the merger.⁹

If you have that type of evidence, that is a situation that the antitrust laws can already address. I think that in some ways this discussion is taking place without a sufficient appreciation of the tools with which, if you have the evidence, you can bring that case.

Second, I think one of the other themes that we are hearing in the debate on antitrust is: should antitrust be doing something different, something else, other than pursuing consumer welfare? That is where I really start to get concerned on several grounds.

One, is it is hard enough to just pursue that consumer welfare goal. Once we start putting in conflicting goals — e.g., you were going to put in a goal of environmental regulation or labor protection or privacy — how do you balance that, and why do you think

⁸ See Hal Singer, *How to Stop Amazon from Swallowing the Internet*, FORBES: WASH. BYTES (Jan. 28, 2019, 5:50 AM), <https://www.forbes.com/sites/washingtonbytes/2019/01/28/how-to-stop-amazon-from-swallowing-the-internet/#52a0d8f63664>.

⁹ See Order Dismissing Complaint, *CDK Global, Inc.*, No. 9382 (F.T.C. Mar. 26, 2018), https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_order_dismissing_complaint.pdf.

the antitrust regulator has the right expertise to do that? Typically, if we are concerned about those kinds of things, we look to other specialized regulators to put that regulation in place.

And then, I think as a corollary to that, some of the critiques that have been raised about that—there’s a lack of business formation or there are these other issues — I also think there are other regulatory policies that are much better levers to address those things than antitrust. I think antitrust is a rather attenuated tool. There might be things like tax policy or zoning or other kinds of things that could also be having these effects.

I think there has been the assumption that these problems that some people are perceiving — “Aha, antitrust didn’t do its job and antitrust isn’t the solution” — I would be hesitant about jumping to that conclusion so quickly.

PROF. LIM: We have people who are appointed by government, politicians, and so on. The politicians are feeling this pressure, whether they are in Europe or whether they are in the United States. Certainly, in the United States it is cutting across the political spectrum. You hear Elizabeth Warren talking about it;¹⁰ you hear Donald Trump talking about it.¹¹ As enforcers, I think it is very difficult to be insulated from those pressures. Even at the Commission, where Margrethe Vestager will compete to be the next President of the European Commission, these are things that have to play in the mind of the Commissioner.

How then can antitrust keep that principal approach of focusing on consumer welfare—whatever it is or might be, at least it sounds like a more middle-of-the-road thing—rather than veering to populism, to the left or to the right?

Eleanor and then Suzanne?

PROF. FOX: I agree with Maureen that issues get confused. There are market issues and there are non-market issues. When we are talking about consumer welfare, we are talking about making the market better; we are not talking about other aspects.

I think there are two different sides in the populist debate: those who simply say “antitrust isn’t doing its job”—Maureen referred to some people who are saying this—that antitrust should be more aggressive, while limited to markets; Carl Shapiro wrote an article to this effect a couple of years ago, *Antitrust in a Time of Populism*.¹² And then there is the neo-Brandeis movement, which does conflate issues. Their message is: “We are in a world now where big data has control of all of us and we’ve got to do something about it.” I put Elizabeth Warren into that camp: “Big data is too big; these companies are too big; break them up or do some kind of regulation. Some of it will be antitrust and some of it won’t be antitrust but do something about it.”

Mostly, in my view, the neo-Brandeis school does not consider costs and consequences of break-ups. Will we lose connections with our friends; will we lose integration efficiencies? It is a very political issue and the proponents of breakup are very intent on somehow cabining the power of these huge companies.

PROF. LIM: Suzanne?

¹⁰ See, e.g., David Dayen, *Monopolist’s Worst Nightmare: The Elizabeth Warren Interview*, AM. PROSPECT, Summer 2019, <https://prospect.org/article/monopolists-worst-nightmare-elizabeth-warren-interview>.

¹¹ See, e.g., Berkeley Lovelace, Jr., *Trump Says Administration is Looking into Antitrust Violations by Amazon, Other Tech Giants*, CNBC (Nov. 5, 2018, 2:20 PM), <https://www.cnbc.com/2018/11/05/trump-looking-into-antitrust-violations-against-amazon-other-tech-giants.html>.

¹² Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. OF INDUS. ORG. 714 (2018).

MS. MUNCK: I think that as a government enforcer you have a responsibility to the public to being open to all of these issues and to engaging in important research to explore what people are raising.

The FTC over the past six months has held a series of hearings. We have had almost twenty-five days of hearings with more than three hundred unique participants and at this point around eight hundred substantive comments. It has been incredibly helpful because you hear about these issues.

Everyone is sort of at the poles, right — “everything is fine” versus “everything is chaotic.” As an enforcer you need to drill down into that and say, “Okay, you think this isn’t working. What is the theory that you think we should have engaged in? Based upon the facts that are available to you in public, how do you think we should have interpreted those facts; what else should we have asked; what else should we be thinking about?”

I’m making a pitch honestly for our hearings because our public comment period is still open. If this is raising any issues for anyone in the audience, it is incredibly helpful for us to hear from a diverse community in terms of how they think the FTC is approaching these issues.

Our hearings are looking at essentially everything that we are talking about — What do you do with nascent competition? What is the intersection of data and privacy and competition? How do you promote innovation?

You guys have been panelists at our hearings, and it has been really great, making sure that we are reaching out to a broad community. But then also the comments that come to us that say “Here’s what we think you missed” or “Here’s the theory that we think you should have brought” or “Here’s why we think the theories that you are applying are fine and why the issues that folks are talking about are outside the scope of antitrust” — all of that is incredibly helpful, and I think that it is crucial that any enforcer engaged in that research and development—to borrow a phrase from former Chairman Bill Kovacic — so that you can make sure that you are adapting to modern economics.

PROF. LIM: I think that is in some sectors the root cause of why antitrust is not developing, because there is this sentiment that we have the Chicago School, or even the New Chicago School, and there isn’t an effort to incorporate things like behavioral economics, which are widely used in many other areas.

How do you use, for example, artificial intelligence in agency decision-making or judicial decision-making when that is ubiquitous in so many other areas of our lives that we take for granted, whether it’s shopping on Amazon or shopping for a theater ticket? We are so comfortable with using artificial intelligence and being open to the idea of being guided by heuristics and biases in how we go about our daily lives, yet we seem to be slow to incorporate these tools both in agency decision-making and judicial decision-making.

What would your response be to that? More importantly, what would your recommendations be to that?

PROF. FOX: I wonder if I could challenge the premises. I’m not sure that our agencies are slow in incorporating the tools. I think, as Suzanne said, that is what the agencies are trying to do. Everybody has to do a lot of learning. So, for example, the agencies are looking at new ways of thinking about collusion in view of the greater ease of collusion with artificial intelligence and machine learning.

PROF. LIM: Let me just push back gently and slightly on that.

Howard Shelanski was interviewed in 2012 about incorporating behavioral economics into FTC analysis.¹³ It might be that they are doing it behind the scenes, but it seems

¹³ Kevin W. Christensen, *Interview with Howard Shelanski, Director, FTC Bureau Of Economics*, ANTITRUST SOURCE, Dec. 2012, at 12 (“Behavioral economics has much to say about the

like that's one of the many examples of advocacy actually within the FTC at that point in time where it has just been lost in the ether.

MS. MUNCK: I'll make a point on that just quickly. Howard Shelanski has done at least two tours in the Bureau of Economics, so there is obviously a lot that happens behind the scenes. I think it is critical that we engage with researchers and economists and that we understand what is being written in the literature so that we can think about how to incorporate that.

You're right, there is a lot that goes on behind the scenes that we can never talk about. But I think, from a public-facing view, being open to different ideas — I have been at the FTC for twelve years, and every Chairman and every Commissioner I've worked with has had a staff who has been interested in looking at these issues.

This sounds Pollyannaish, and I'm sorry about that. But it doesn't really matter if you are a Republican or a Democrat; there is a real interest in that, and I think continuing to be open to that is critical.

PROF. LIM: That's great.

PROF. FOX: A word on behavioral economics. It is about how people behave, and the actors are not always the logical man — I say "man" purposely.

There is a philosophic point, too. People who hold Chicago School premises probably will not want to incorporate behavioral economics because it tends toward more enforcement.

But I think any party that has behavioral economics on its side will bring that before the Commission, and it will be heard, and the argument will be disposed of one way or the other. So I definitely think it is on and not off the table.

PROF. LIM: I know Tom wants to say something.

PROF. COTTER: I want to say that we also have to think about not just the FTC and the Department of Justice but ultimately the courts decide what the law is.

From my perspective, I think the Chicago School got a lot right in terms of showing how certain types of behavior actually didn't harm consumers and were either competitively neutral or even procompetitive. But it's also important to realize that the economics profession didn't end in 1970. We have learned a lot. But I think some of that newer learning about behavioral economics and other more recent developments in economics hasn't always percolated through to the judiciary, which in some ways I think is still in this sort of 1970s–1980s mindset.

PROF. LIM: So what can be done?

PROF. COTTER: Well, that's a good question. It is up to the parties as advocates to try to bring this new learning to the courts by means of expert witnesses, and I'm sure they do that. Federal judges themselves are educated in new developments in many different fields. But it is an ongoing process, and I would just hope that the ultimate decision-makers are as open-minded about some of these new developments as the antitrust enforcement agencies have shown themselves to be.

MS. OHLHAUSEN: Daryl, may I jump in?

PROF. LIM: Sure.

MS. OHLHAUSEN: On my last day as an FTC Commissioner, I spoke at a conference. I said, "I'm here to give a very boring speech, and this speech is about how you actually make progress in antitrust law. It is case by case and it is incremental."

If you look, there have been improvements in detecting anticompetitive behavior. Look at hospital mergers. Look at some of the bargaining literature that is out there that

ability of consumers to understand what they are buying, to make calculations about what the total price of a product is when they're subject to drip pricing.").

the agencies have incorporated. It's not a change like a seismic change all at once, but it is case by case, moving the line from here to here, and getting a court to accept it, because it's really only by getting courts to accept it that you make a durable change. One agency or one commission gives way to another with another way of thinking, but once you get case law that cements that, it has a lot more impact.

PROF. LIM: What about Congress? Is there room to influence Congress?

MS. OHLHAUSEN: There is a lot of debate going on right now in Congress. Some in Congress are floating bills that things should be done differently. And, obviously, a lot of presidential candidates are coming up with different proposals.

To get from that to actual legislation that — what would it do; would it change the Sherman Act? The Sherman Act is very much a common-law, case-by-case, incremental learning kind of approach. Senator Klobuchar wants to switch some of the presumptions when you've got a merger over a different size. There could be some tinkering like that.

But right now, I haven't seen the kind of energy you would need to actually get something through Congress.

PROF. LIM: That's a great point.

A lot of people, especially outside of antitrust, don't realize how much discretion courts have, perhaps more than any other area of the law, in shaping the law. This wasn't an accident. Congress decided—and I think this is also true in Europe — that because competition law regulates so many different industries, there is now a possibility to legislate in a meaningful way. So influencing the courts is really the key way of getting reform done in an area.

I do want to end with you, Milan.

MR. KRISTOF: I just want to briefly say I think what is very interesting in this specific area is that, at least in Europe, we have now had two main expert reports. We have the U.K. report, which is also called the *Furman Report*¹⁴ because it was prepared by a panel chaired by Professor Jason Furman, former Chief Economist to President Obama. It examines and makes recommendations for changes to the United Kingdom's competition framework that are needed to face the economic challenges posed by digital markets both in the United Kingdom and internationally. It recommends updating the rules governing merger and antitrust enforcement, as well as proposing a bold set of pro-competition measures to open up digital markets.

We have also the 4 April 2019 *EU Report on Competition Policy for the Digital Era*.¹⁵ Commissioner Vestager asked three experts ("special advisers") to prepare a report on what should be done in this area — Should we change the framework? Should we change the rules? Therefore, the report is an input to the Commission's ongoing reflection process on how competition policy can best serve European consumers.

I am more familiar with the *EU Report*. It is very interesting. It is approximately 130 pages. It is publicly available. I recommend people who are interested in these issues to have a look at it. The experts are looking in detail at whether we have to adapt the rules, the consumer welfare standard. The report finds that digital markets require vigorous com-

¹⁴ HM TREASURY, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

¹⁵ JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA (2019), <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

petition policy enforcement. The report also recommends changes to the standard and burden of proof in competition enforcement, because of the high costs of under-enforcement in the digital markets.

The experts also talk about how you should define markets in these specific industries. They also say that you should have a competition for the market but then you also need to have a competition on the platform.

The report also discusses the implications of data and data access for competition law (more demanding regimes for data access, sharing and pooling of data) and it also floats the idea of a future block exemption regulation in this area).

The experts also looked at most-favored-nation or best-price clauses; multihoming, switching, and complementary services; leveraging and self-preferencing, all those issues, as well as a key area of concern in the report being the hot topic of “killer acquisitions” that Eleanor talked about (where dominant firms acquire smart startups with quickly growing user bases that might otherwise have developed into important rivals). The report concludes that it is too early for changes to jurisdictional thresholds under the EU Merger Regulation¹⁶ but recommends monitoring the issue.

PROF. LIM: Thanks, Milan.

Tom?

MR. PEASE: Maureen said that the change is necessarily slow and incremental, and I think it has to be. Given the possibility of what potentially could be negative consequences from some change in the regulatory approach, I think it is best to ease these changes in and monitor them very carefully before you unleash something that no one expected. So I think it has to be that way.

PROF. LIM: Justice Scalia would totally agree with you (see his footnote in the *Trinko* decision).¹⁷

But also, I think behavioral economics would say two things to you: status quo bias and risk aversion or loss aversion, which are legitimate aspects of behavior. I think that is what explains also some of the inertia behind being more progressive or moving forward on these issues.

MS. OHLHAUSEN: Actually, Daryl, may I mention one other thing?

PROF. LIM: Sure.

MS. OHLHAUSEN: Opportunity cost. People miss the idea that if you as an agency are chasing a bunch of cases that you are very unlikely to win, you are not going after ones where consumer harm is clearer. I am not saying you shouldn't, but there has to be a balance, and people kind of miss out on the fact that in the world of limited resources in which we all live, if you are doing *A* you are not doing *B*, and *B* might be a clearer consumer harm.

PROF. LIM: That is a great segue to the area in which people think that antitrust is doing too much in areas where it should not be, and that area is FRAND and standard-essential patents (SEPs).

Maureen, why don't you start us off on that?

MS. OHLHAUSEN: No. Let others go first and then I'll weigh in.

PROF. LIM: Eleanor?

PROF. FOX: There is a raging debate in the area of FRAND/standard-essential patents and antitrust.

¹⁶ Council Regulation 139/2004, 2004 O.J. (L 24) 1-22 (EC).

¹⁷ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004).

Under the Obama Administration, there was a general thought that if a patent holder was part of a standard-development organization and was part of an agreement under which its technology was chosen, that it would license on fair, reasonable and non-discriminatory (FRAND) terms; that it not only had to do that as a matter of contract, but if it didn't license on FRAND terms, that this could be an antitrust violation on the theory that it got its market power from being selected as a technology that was essential to the practice of the standard.

Things changed, at least with respect to the Justice Department, as we moved into the Trump Administration. Makan Delrahim, who is the Assistant Attorney General in Charge of Antitrust, gave a speech whose title mirrors new-Brandeis but it is on the other end of the continuum.¹⁸ His title was "New Madison." The "New Madison" speech was to say that FRAND is a contract matter and people can breach their contract, but a holder of intellectual property ought to be totally — almost totally — free to license or not license, and ought to be able to go into court and get an injunction against an infringer, even if it is somebody who is a willing prospective licensee of that essential patent. We mentioned that speech here last year;¹⁹ it's about a year old.

You might wonder what has happened in the meantime. There is also a history in Europe which is not the same as in the United States; in fact, it is quite different from the "New Madison" approach.

Makan Delrahim has tried to ensure that the holder of intellectual property gets its rights to deal or refuse to deal is put at the top of his agenda. He argues that we should be much more concerned about whether the implementers are holding out for a lower price than about whether the patent owner is holding up for a very high price. He said holdups don't usually happen, but holdouts happen all the time, and they are part of the worst offense in antitrust, which is collusion.

There has been almost no litigation on this matter in the United States, as opposed to Europe. There is a case that is now pending, which is called *u-blox v. InterDigital*,²⁰ in which an implementer is testing the question whether breaching FRAND by a standard-essential patent holder is not only a contract violation but an antitrust violation. The Justice Department appeared as amicus in the case to say this should not be an antitrust violation.²¹ The case probably will be dismissed on contract grounds, and I think it probably will not get litigated further.

PROF. LIM: That is actually an interesting observation. With regard to the FTC, in the most recent order from the Northern District of California, the court took the case at its face value and said: "All right, just look at it as a contractual matter. 'Non-discriminatory' means that you can't discriminate against somebody on the same level as you that is seeking access to the technology apart from any antitrust issue and, just as a matter of what you agreed to in a FRAND agreement, you are supposed to do that."²²

Does that therefore indicate in a strange way that we can solve this without resorting to antitrust but in a way that actually gets the results that the implementers want?

¹⁸ Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018).

¹⁹ See *Sunrise Seminar I: IP & Competition Law*, EMILY C. & JOHN E. HANSEN INTELL. PROP. INST. FORDHAM L. SCH. (2019).

²⁰ See *u-blox A.G. v. InterDigital, Inc.*, No. 3:19-CV-001-CAB-(BLM), 2019 WL 1574322 (S.D. Cal. Apr. 11, 2019).

²¹ See Notice of Intent to File a Statement of Interest of the United States of America, *u-blox A.G. v. InterDigital, Inc.*, No. 3:19-cv-0001-CAB(BLM) (S.D. Cal. Jan. 11, 2019).

²² See *FTC v. Qualcomm Inc.*, No. 17-CV-00220-LHK, 2018 WL 5848999, at *12 (N.D. Cal. Nov. 6, 2018).

PROF. FOX: You can ask “What’s at stake?” The stake is bargaining power. If the holder of the standard-essential patent can go into court and enjoin a willing licensee because it has infringed, it has hugely more bargaining power than if it cannot. The Sword of Damocles hangs over the head of the implementer.

PROF. LIM: I see Tom wants to say something.

PROF. COTTER: I agree with Eleanor on all of those points. Personally, I don’t think that FRAND issues should usually be a matter for competition law, but I think there certainly is a role for competition law to intervene when, as in the *u-blox* case, it is alleged — whether or not it will be substantiated — that there was deceptive conduct on the part of the patent holder in order to have its technology incorporated into the standard. That would be consistent with the existing case law in *Broadcom*²³ and *Rambus*.²⁴

I also don’t think that contract law is always going to be sufficient. If we go back to the *FTC v. Qualcomm* case that Daryl was referencing, assuming Judge Koh is correct in interpreting the standard-setting organization’s policies as requiring Qualcomm to license any and all on fair, reasonable, and non-discriminatory terms, who exactly would be suing for a breach of contract? Would it be Intel or would it be MediaTek, which were the companies that didn’t get the licenses? And, if they were to sue for breach of contract, what exactly would be their damages? You don’t normally get specific performance in a contract case in the United States.

It just seems to me that relying exclusively on contract law to try to solve some of these problems ignores some of the more disperse potential effects of anticompetitive conduct. So I think there does have to be a role for antitrust, even if it is not the principal vehicle under our U.S. framework.

PROF. LIM: Just to be clear, are you saying there is a role for antitrust even in policing breaches of FRAND agreements?

PROF. COTTER: In an appropriate case, where there is deceptive conduct; where the breach of a FRAND agreement—

PROF. LIM: No, that’s for holdout.

PROF. COTTER: Oh, for holdout, on the other side.

PROF. LIM: Holdup or holdout, apart from deception.

PROF. COTTER: Again, standard-setting organizations themselves when they agree on rules — you know, they are horizontal competitors agreeing on rules—there is always an antitrust issue that potentially could arise. We could talk about that more. I don’t know if you want to go into more detail now.

PROF. LIM: We can come back to that.

PROF. COTTER: There are issues there. But I think the current approach of the Department of Justice is arguably going a little bit too far along that route.

PROF. LIM: On that note, Tom actually has a short article on Law360 that discusses Makan Delrahim’s comments as being more advocacy than an accurate restatement of what the law is.²⁵

Maureen?

MS. OHLHAUSEN: A couple of things.

²³ *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

²⁴ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

²⁵ See Thomas Cotter, *FRAND and Antitrust: Misconceptions vs. Reality*, LAW360 (Oct. 26, 2018, 2:48 PM), <https://www.law360.com/articles/1094675/frand-and-antitrust-misconceptions-vs-reality>.

Eleanor, I think you articulated the argument well that in getting injunctions you've got this Sword of Damocles. But the problem is, post-*eBay*,²⁶ what is the likelihood that that is going to actually happen, that a court is going to do that? The concern that I have is saying it is an antitrust violation to even ask the court to make the decision is worrisome to me because I think there are rights to petition by the government, so there are some values there.

Second, I think in this whole FRAND/SEPs debate there has been insufficient attention paid to what the elements of an antitrust violation are. You might say, "Well, you said you were going to give FRAND and you didn't"—but have we looked at what is the defined market; who are the competitors in this market; how did the IP holder get that market power to begin with? If they had the only way to solve that problem and everyone was going to have to come to them anyway, did putting it into the standard actually give them any more market power than they already had? If they had the monopoly before putting it into the standard and they are going to eventually negotiate and get the monopoly price, is that really an antitrust violation? Their market power was not increased by putting it into the standard necessarily.

These are the kinds of issues that I think in some ways got kind of glossed over by jumping from "there's an SEP and an arguable FRAND violation" to "there is an antitrust claim."

PROF. LIM: Tom Pease?

MR. PEASE: I remember the first time I started reading the case law and literature on antitrust-based FRAND claims, I had a hard time following it. The theory is that if your patented technology gets adopted into the standard, then that gives rise to something called a technology market defined by the subject-matter of that patent and its equivalents that you can monopolize or attempt to monopolize for antitrust purposes.

But when you take a step back and try in the context of a particular patented technology to say, "What is this technology market; where would I go to buy this technology?"—you know, there's no real marketplace, and it is quite difficult in practice to visualize these claims and make sense of them in the real-world context.

Those claims are easy in a sense to articulate in terms of the case law, but they are difficult to prove in terms of what is the anticompetitive conduct at issue and what is the antitrust harm that results from it?

As a practical matter, the one issue that you never seem to see discussed in any of the literature on this is the basic question of essentiality. This entire antitrust analysis stems from the conclusion that a particular patent is, in fact, essential to the standard. If it is not essential, then your assertion of that patent does not give rise to any breach of FRAND contract issues, does not give rise to an injunction issue, and does not give rise to an antitrust issue.

For those of us who are litigating these cases day-in and day-out, the fact that a company has declared a particular patent to be essential to a standard just means that they have concluded, as they are supposed to, that it might be essential, and therefore they are going to err on the side of inclusion by disclosing it to the standards body.

But in the litigation itself it is another question to show that it is in fact essential. Just as one example, we represented Samsung against Apple.²⁷ For a short time, until President Obama vetoed it, we had an exclusion order against Apple based on a declared essential patent.²⁸ There was an extensive public-interest inquiry about that patent, so I had to

²⁶ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

²⁷ *See generally* *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016).

²⁸ *See* *Certain Electronic Devices, Including Wireless Communication Devices, Portable*

make my rounds to all the different agencies in D.C. — Treasury and the like, who help advise the President as part of the Presidential Review process for ITC exclusion orders — you wouldn't think most of these agencies would have an interest in patents at all.

Everybody wanted to know, "Is it essential?"

We said, "We don't know."

They said, "What do you mean you don't know?"

We said, "Well, it was declared essential, and at the trial we proved they infringed it, but we didn't go the extra mile and prove that you can't implement the standard unless you infringe this patent, and Apple didn't try to prove that the patent was essential either since it contended its products did not infringe."

This raised the issue, which nobody really was thinking about at the time, of: Who bears the responsibility if you are asserting a FRAND-based claim to establish that this claim is dependent upon an actually essential patent as opposed to one that is not essential?

PROF. LIM: There is at least one judicial data point on that issue, and that's again the *FTC v. Qualcomm* case, where Judge Koh had no problems without doing claim construction or anything else, just relying on the representation of Qualcomm in that case, saying that, "If you think it is essential and if other people use that standard and would otherwise have infringed it, then that at least creates a prima facie point which is sufficient, at least as a contractual matter, to say that you are obliged to license anybody that wants to come on." Agree or disagree, that's a separate issue; but at least there is one judicial point that points in that direction.

I think Eleanor has a response, and then maybe Thomas.

PROF. FOX: As I opened this thread of the conversation, I was being descriptive. In fact, I agree with Tom Cotter that Makan Delrahim went too far and that the Justice Department is going too far in proclaiming the sanctity of an intellectual property right.

I agree also with the fact issues that Maureen and Tom Pease raised. They are fact issues. I want to refer to *Samsung v. Apple*; but would you mind, Tom, if I assume that the patent was essential?

Apple cannot even sell its iPhone if it cannot reach an agreement with Samsung for licensing these essential patents. The patent owner has huge power to take products off the market if it has the power to hold out for the highest price it can get, and the highest price it can get for an essential patent is very, very high.

I know this turns out to be a distribution-of-wealth problem and there is a question as to what antitrust should do. What is the role of antitrust? I believe antitrust does have a role here. The power of a holder of an essential patent is huge and not cabining that power does affect competition in the market for our handheld devices. I think that it is properly called an antitrust problem.

PROF. LIM: I'm going to open to questions from the audience.

QUESTION [Robert Goldman, Ropes & Gray LLP (Ret.), Silicon Valley]: As I understand it, the new position of the DOJ is that the patent owner has broader discretion to license or not license as the patent owner sees fit. The *FTC v. Actavis* case²⁹ is still good law—that is, you can't take that back. And so, as I understand the law now, at least the Supreme Court has gone on record as saying that the discretion of the licensee is not unlimited.

Is it the fact then that these controversies may or may not arise, but that simply the DOJ in its current configuration is not going to participate? Does anybody on the panel believe that the declaration of the DOJ somehow changes the law?

Music and Data Processing Devices, and Tablet Computers, 78 Fed. Reg. 34,669 (Jun. 10, 2013).

²⁹ See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

PROF. LIM: Tom Cotter and Tom Pease.

PROF. COTTER: The DOJ doesn't change the law. The factual setting is a little bit different.

In fairness to Makan Delrahim, it is correct as a general matter that a monopolist does not violate antitrust law by charging a monopoly price; that antitrust is not designed to protect individual competitors; that a unilateral refusal to license IP almost always is not going to be a violation; breach of contract is usually not going to be a violation. All of that is true.

It is just a question of does that mean there are no exceptions? I think that's where he errs. I think there are established exceptions in the case law, and there should be, for deceptive conduct in the course of having one's patent incorporated into a standard, using one's patent to obtain an advantage that goes beyond what the patent is supposed to confer, an attempted monopolization theory. He cannot overrule that, and I think the Supreme Court would agree.

PROF. LIM: Tom?

MR. PEASE: The way you framed it, as whether to license or not is at the discretion of the licensor, I don't think the DOJ, even under Makan Delrahim, is taking a stand on that. I think it is a stand on whether the remedy you have should be limited to a breach-of-contract-type claim as opposed to an antitrust claim.

MS. MUNCK: May I clarify something? I will not say very much about this because the FTC is currently in litigation on this issue.

I think one thing that this conversation takes us to is: What are the facts? If we go back to the cases that the FTC has brought — and with tremendous respect for some of Commissioner Ohlhausen's dissents³⁰ — this is a very difficult and thorny issue.

But you have to start with the facts, and if you have the facts and you think that those facts can support an antitrust claim, then you should move forward. If you have the facts and they don't support an antitrust claim, then you shouldn't move forward. That takes us back to the point that coming back to the facts and the empirics and what you have in that specific case are exceptionally important.

PROF. LIM: Thanks.

Sir Robin?

QUESTION [Prof. Robin Jacob, Former Lord Justice of Appeal of the Court of Appeal, London; Faculty of Laws, University College London, London]: I want to make two points. First of all, when a patent is declared essential for a standard, it may in fact not fall within the standard. Furthermore, if it does fall within the standard, it may not be commercially important. There are lots and lots of bits of standards that are optional and, in many cases, not used at all, or used so rarely that they have no commercial significance. So commercially essential and standard-essential are not the same thing, and you have to know that.

PROF. LIM: Any response?

MR. PEASE: I don't disagree with that. Actually, the ETSI IPR Policy,³¹ for example, distinguishes between technically essential patents and commercially essential patents. Whereas you have an obligation to license on FRAND terms and conditions those that are in fact technically essential, you do not have an obligation to license those patents that are commercially essential.

³⁰ See, e.g., Dissenting Statement of Maureen K. Ohlhausen, Qualcomm, Inc., No. 141-0199, 2017 WL 410340 (Jan. 17, 2017).

³¹ Eur. Telecomm. Standards Inst. [ETSI], *Rules of Procedure*, at 39-49 (Apr. 3, 2019), <https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>.

QUESTIONER [Prof. Jacob]: Yes, that's the first point. So all this debate has always got to be in the context that that is the way it is, and there is a certain amount of over-declaration.

The second point I want to make is the full impact of the DOJ's position seems to me to be correct. Once you decide it is a matter of contract, that means any potential licensee is entitled to a license on FRAND terms, or RAND terms, depending on the standard. Once they are entitled to a license, all somebody who applies for an injunction against them wants to do is say, "I am willing to take a license on FRAND terms. I know I disagree with the patentee on how much that is, but I'm willing for that to go to arbitration." Any court in the world would then say, "Thank you very much. Come back when you have sorted it out."

You are not going to get an injunction. The whole theory that somehow the patentee can ask for more because of the threat of an injunction goes away. There have been no examples of patentees getting more than FRAND as a result of a threat of injunction.

PROF. LIM: Tom?

PROF. COTTER: Part of that, though, shows that it is important, in the United States at least, to keep the *eBay* standard, or something like it, even if *eBay* itself has been in some cases misinterpreted. It is important to have that safety valve of allowing courts to decline to enter injunctions in some cases.

I think one of the reasons in Europe why the courts have resorted to competition law to sort this out is that the courts don't have the discretion as a matter of patent law to deny injunctions.

But you need something, you need some safety valve, whether it's contract law, whether it's competition law, whether it's patent law, or all of the above, to reach what is clearly the right result.

PROF. LIM: A question in the front?

QUESTION [Judge Klaus Grabinski, Federal Court of Justice, Karlsruhe]: I think when we talk about standard-essential patents this discretionary matter doesn't come up. It is a particular set of facts that apply. In this situation, as Robin Jacob said, the courts will apply what the CJEU laid down in the *Huawei* case,³² the ping-pong (offer, counteroffer); and possibly also go to arbitration; or, if not, the court will have to sort out what is the right royalty. As long as the defendant is considered to be a willing licensee, no injunction will be issued.

But this, as far as I understand the four-factor test of *eBay*, goes beyond that. In Europe what it is now discussed under the heading of "injunctive relief, discretion and proportionality" has to be distinguished from the issue of standard-essential patents because we already have established case law on this from the CJEU and it is pretty clear how this should be dealt with.

Of course, a lot of details are not clear, but the principal proceeding is clear, and when we talk about proportionality, etc., this means different scenarios — for example, the scenario of complex products and a patent covering just one particular item of this. That's where the discussion is right now.

PROF. LIM: A quick final question on FRAND before we move to pharma and, if time permits, other issues.

³² Case C-170/13, *Huawei Techs. Co. v. Z.T.E. Corp.* (Jul. 16, 2015), <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0170&lang1=en&type=TEXT&ancre=>.

One of the issues that has crystallized both yesterday and today is what happens when you have a court that is setting a global FRAND rate, which has happened in *Unwired Planet*³³ and which is a reality we need to deal with in an interconnected world.

What is the solution to this? Are we happy with one national court setting a global FRAND rate? That seems to be, according to at least the U.K. court of first instance and at appeal, what the parties would have expected in the first place. Should we talk about judicial committee as the way forward, or should there be some kind of an international consensus and solution to this?

MR. KRISTOF: I want to say that the *Unwired Planet* case will now be examined by the U.K. Supreme Court, so that will be maybe for next year's conference.

Basically, the main issue is whether a British court should be setting a global rate. I think everybody knows that we now have the relatively recent Court of Appeal decision in this case. The Court of Appeal confirmed the High Court in *Unwired Planet*. What is also interesting is that they changed it to some extent and the appeal judges said that it actually can be a range, so FRAND does not have to be a specific rate, as was argued by the High Court. But it did confirm that a British judge can set a global FRAND rate when the holder and the licensee cannot agree.

We will have to see. Otherwise, as I think it was mentioned in the FRAND panel earlier, then everybody would be running to the British courts to set global FRAND license rates. I think the problem, as was also said earlier, is do you want to go to twenty different jurisdictions or do you want to go to one and set a global rate?

The problem is that I don't think realistically we can have some kind of international court created that would be deciding on this globally. So I think at the end of the day, if they both agree and it is a global portfolio, maybe there is an argument where this can be justified. But we will have to see what the U.K. Supreme Court says about it.

PROF. LIM: Thanks.

Tom?

MR. PEASE: I was going to say that it seems like, at least from the U.S. perspective, for U.S. courts to allow some sort of international body to decide FRAND royalty rates for portfolios that include U.S. patents, there would almost have to be some sort of international treaty adopted by Congress to facilitate that, and I don't see that happening anytime soon.

PROF. LIM: Certainly not under the current U.S. administration.

PROF. COTTER: I will say this. Ultimately, I come out on the other side of the English courts on this issue, but there is a certain logic to what they have done. If global licensing is really the norm and if a licensee is unwilling to conclude a global license, then they can be enjoined; and, if they don't want to be enjoined, then they have to accede to the domestic court deciding the terms of the global license.

Technically, the English court is not adjudicating foreign patent rights. You can still go into the other courts and challenge patent validity, and that might ultimately have some impact in terms of reducing the rate that you have to pay going forward.

As a practical matter, I've heard the English judges say, "Somebody had to do this. It's not feasible, it's not practical, to have litigation going on in twenty, thirty, forty, fifty different countries."

All that said, though, it still does at the end of the day seem wrong for any one single country to give itself the authority to decide these issues on a global basis, even with the best of intentions, the best of motivations. It will inevitably induce forum shopping —

³³ *Unwired Planet Int'l Ltd. v. Huawei Techs. (U.K.) Co.* [2018] EWCA (Civ) 2344.

if the United States might not do this, maybe China will do it or some other country would—and you would have the “race to the courthouse” phenomenon.

I think the ultimate solution, if it ever can be done, would be to have some sort of global tribunal. Maybe the SSOs themselves could implement some such policy in their IPR policies. I think that would probably be the way to go to do this most efficiently and without having any one single jurisdiction set the rate for everybody.

MR. KRISTOF: Or arbitration.

PROF. COTTER: Yes, or arbitration.

PROF. LIM: Let’s talk about pharma because this is, after all, a competition session. Drug prices is one area which, regardless of whether you are left or right, you have heard people saying that drug prices are too high and we need to bring drug prices down.

What is being done in the pharma area that folks here should take note of? I know Maureen and Suzanne have a couple of things to say about this.

MS. OHLHAUSEN: A couple of things.

Obviously, the FTC did the pay-for-delay stuff and that is working its way through the courts.

But another thing that the FTC focused on — and I actually held a workshop on this when I was the Acting Chair³⁴—is looking at whether there are regulatory barriers that are keeping drugs off the market. So antitrust, yes, is an important tool, but it is not the only tool.

I did a workshop with Scott Gottlieb particularly focusing on the issue of off-patent drugs and why they are not getting onto the market and are there regulatory issues.³⁵ One thing I would suggest is having a wider lens of more than just antitrust because there are regulatory hurdles that are keeping prices high.

Also, unfortunately, we lost the *ViroPharma* case in the Third Circuit.³⁶ But I would point people’s attention to the fact that the abuse of government process too can be a problem. There were forty-three citizen petitions filed and three lawsuits, if I’m remembering correctly, by the branded drug manufacturer to try to keep the generic off the market. They were all rejected ultimately, but it delayed the process for quite a while.

I think those are some areas that should be also considered if we are focusing on trying to get more competition in the pharmaceutical market.

PROF. LIM: Thanks, Maureen.

Suzanne?

MS. MUNCK: We tend to talk about FRAND at conferences like this, but there are a number of other things that are happening that are important to a broader economy.

The FTC continues to focus on *Noerr-Pennington*³⁷ issues. *Noerr* issues arise in cases where people say, “My behavior is protected because I am petitioning — I’m petitioning Congress, I’m petitioning the courts, etc.” This has been an issue for the agency for

³⁴ See, e.g., Maureen K. Ohlhausen, Acting Chairman, U.S. Fed. Trade Comm’n, *Diagnosing the Treatments: Issues in Post-Patent Pharmaceutical Markets* (Nov. 8, 2017), https://www.ftc.gov/system/files/documents/public_statements/1272453/pharma_pricing_workshop_mko_remarks_11-8b.pdf.

³⁵ See Scott Gottlieb, Comm’r of Food & Drugs, U.S. Food & Drug Admin., *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics* (Nov. 8, 2017), <https://www.fda.gov/news-events/speeches-fda-officials/remarks-ftc-workshop-understanding-competition-prescription-drug-markets-entry-and-supply-chain>.

³⁶ *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019).

³⁷ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

a long time. Maureen wrote a report on this in 2006.³⁸ So an area where we continue to focus is on *Noerr* and the scope of *Noerr*. There are two recent examples in this area.

One is an amicus brief that FTC and DOJ filed together last year³⁹ in *Intellectual Ventures v. Capital One*.⁴⁰ That case, together with *Biovail*,⁴¹ your report, and the Guidelines for the Licensing of Intellectual Property,⁴² show that the agency is looking at ways that *Noerr* may be expanded by the courts that is not helpful for competition.

Particularly in *Biovail* and *Intellectual Ventures v. Capital One*, the question was: Is a patent acquisition protected by *Noerr* because later on at some point in its lifetime the way that you enforce the patent right is through petitioning?

We said that should not be the proper interpretation because there is a whole range of work that we do in terms of our merger work through Clayton Act Section 7⁴³ that would be annihilated — these are my own views, but I think it deserves that strong term — if you were to say that there is no role for antitrust in any space involving intellectual property, because at some point someone will go to the court to enforce that right. I think that is a very important point.

The other case that I want to mention is *FTC v. AbbVie*,⁴⁴ also in litigation, now on appeal before the Third Circuit, so I'll stick to the facts. Essentially, the FTC proved that the petitioning was objectively baseless. I love talking to patent lawyers about this case. I have a former colleague named Tom Mays who loved this case. This case had to do with penetration enhancers. Someone disclaimed the penetration enhancer during prosecution and then claimed doctrine of equivalents infringement. We said, “You know what? That is objectively baseless.” That is on appeal to the Third Circuit.

I wanted to raise both of these cases to say that the agencies have a really deep interest in these areas of antitrust and intellectual property, and it goes to the pharma space and others.

PROF. LIM: I see we only have two more minutes. Milan wants to say something, but then I want to give the folks in the audience a chance to interject or ask questions.

MR. KRISTOF: Very briefly, this whole discussion that we are having today about antitrust and IP and what the role of antitrust is — I mean, obviously, we have to justify our panel, and maybe also next year.

PROF. LIM: You had us at “hello.”

MR. KRISTOF: Second, I wanted to mention, if people don't know, the so-called “baseball bat” quote from the U.S. Court of Appeals for the District of Columbia Circuit in the *Microsoft* case from 2001.⁴⁵ Basically Microsoft said in its copyright argument that

³⁸ See U.S. FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf>.

³⁹ Brief for the United States of America and the Federal Trade Commission as Amici Curiae Supporting Neither Party, *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, No. 18-1367 (Fed. Cir. May 11, 2018).

⁴⁰ *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 937 F.3d 1359 (Fed. Cir. 2019).

⁴¹ *Biovail Corp.*, 134 F.T.C. 302 (2002).

⁴² U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), <https://www.justice.gov/atr/IPguidelines/download>.

⁴³ 15 U.S.C. § 18 (2012).

⁴⁴ *FTC v. AbbVie Inc.*, 329 F. Supp. 3d (E.D. Pa. 2018), *appeal docketed*, No. 18-2758 (3d Cir. 2019).

⁴⁵ *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001).

they have an absolute and unfettered right to use its IP as they wish. They said, “If our IPR has been lawfully acquired, then their subsequent exercise cannot give rise to antitrust liability.”

The Court of Appeals said, “That argument is bordering upon the frivolous.” They said, “That is no more correct than the proposition that the use of one’s personal property such as a baseball bat cannot give rise to tort liability.”

But coming back to pharma and pay-for-delay, I just want to mention, for those people who are interested in this, again the comparison between the United States and Europe. In the United States I understand that there is a rule of reason after *Actavis*. In Europe this is now litigated at the Court of Justice, the top EU-law court, because the first-instance General Court said that pay-for-delay cases can be “by object” infringements/restrictions.⁴⁶ People say, “This is a terrible difference, rule of reason and by object.” We will have to see how the Court of Justice decides that.

I also wanted to say that a by-object restriction is not the same as a per se violation. Actually, when the EU Commission brings such a case, they still have to have evidence, such as the nature of the market and the potential competition. But we will have to see. I think it is interesting to compare the United States and Europe.

PROF. LIM: I want to ask one final question: What is the one thing that we should watch out for in the IP/antitrust space in the year to come?

PROF. COTTER: Will the Department of Justice investigate or bring charges, as Makan Delrahim has suggested is possible, against SSOs? Earlier commentary had suggested that joint negotiations over FRAND terms should be considered under the rule of reason,⁴⁷ and right now I would wonder whether that is currently the Justice Department’s policy.

PROF. LIM: Eleanor?

PROF. FOX: I would say watch for *FTC v. Qualcomm* because that decision is coming down any moment, and how the court decides will give, at least for that court, a lay of the land on how aggressive a court will be against uses of intellectual property that allegedly had anticompetitive purposes and effects.

PROF. LIM: Thank you.

Milan?

MR. KRISTOF: I think what is going to be interesting is the 5G and Internet-of-Things debate. We already have enough trouble with competition and patents and FRAND in smartphones, but when you see connected cars and automated vehicles, I think that’s when it goes to another level. We have a complaint before the European Commission by various companies—Daimler, Bury, Continental, and Valeo—against Nokia.⁴⁸ Watch that space!

PROF. LIM: All right.

Suzanne?

⁴⁶ See Case T-472/13, *H. Lundbeck A/S v. Comm’n*, at 115 (Sep. 8, 2016), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013TJ0472>.

⁴⁷ See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 118-21 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Makan Delrahim was a member of the commission, and he dissented from this recommendation. See *id.* at 118 n.*, 121 n.*, 403-11.

⁴⁸ See, e.g., Foo Yun Chee, *Continental, Valeo Seek EU Antitrust Action Against Nokia*, REUTERS (Apr. 17, 2019), <https://www.reuters.com/article/us-eu-nokia-patents/continental-valeo-seek-eu-antitrust-action-against-nokia-idUSKCN1RT1XL>.

MS. MUNCK: I am actually going to turn this back on you and say that if this conversation has sparked anything that you think the agency should be looking at in the next year, please file a comment in our hearings. We will be very grateful for that.

PROF. LIM: This is a “Deadpool moment,” where Deadpool looks at the TV screen and says, “I’m talking to you.”

MS. MUNCK: Exactly. That was after the flexion.

PROF. LIM: Maureen?

MR. OHLHAUSEN: I think one question down the road, however *FTC v. Qualcomm* or those other cases end up, is: Is there going to be an impact on people’s willingness to participate in standard setting? I think we need to look at the bigger picture.

PROF. LIM: Thanks.

Tom?

MR. PEASE: We are talking about global standards here and global patent portfolios. It is important, I think, to follow the different decisions that are coming out, almost in real-time, around the world, which to date can be harmonized somewhat but are also in other respects completely inconsistent with one another. As those decisions come out and perhaps begin to coalesce, maybe we will have better guidance as to how the overall practice of SEP licensing is going to mature.

PROF. LIM: All right. Thanks so much.

Please join me in thanking this great panel.