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5A Patent Law Session. Remedies

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Emily C. & John E. Hansen Intellectual Property Institute

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

Friday, April 9, 2021 – 8:00 a.m.

**SESSION 5: Patent Law
5A. Remedies**

Moderator:

Brian Cordery

Bristows LLP, London

Speakers:

Paul R. Michel

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

***Limiting Injunctions Destroys Voluntary Licensing Incentives, Devalues IP
Rights, and Overburdens Ill-Informed Courts***

Maximilian Haedicke

Albert-Ludwigs-Universität Freiburg, Freiburg

***Proportionality and Injunctive Relief in German Patent Law – A Paradigm
Shift?***

Marleen van den Horst

BarentsKrans, The Hague

Liability for Enforcing Preliminary Injunctions in Pharma Cases

Adrian Howes

Nokia, London

Anti-Suit Injunctions: A New Fad or Here to Stay?

Panelists:

Ralf Uhrich

Google, Munich

Wolrad Prinz zu Waldeck und Pyrmont

Freshfields Bruckhaus Deringer LLP, Düsseldorf

David J. Kappos

Cravath, Swaine & Moore LLP, New York

* * *

BRIAN CORDERY: Good morning, good afternoon or good evening to everyone. My name is Brian Cordery. I'm a partner at Bristows in London. It's my pleasure to be moderating this exciting and important session on remedies here at this year's virtual Fordham Conference.

Remedies is such an important topic, because whether you're enforcing a patent or challenging a patent, the remedy is probably the thing that will be most prominent in your mind while beginning the litigation, throughout the litigation and probably after the litigation. Remedies, of course, are really important in all IP-rich sectors, but it's been at the forefront of judicial thinking and sometimes legislative consideration, in particular, in the telecoms field and in life sciences. In the life sciences field, which is where I do most of my work, the question has been raised over the last decade or so whether and in what circumstances one should grant an injunction not to infringe a patent where it is possible that this will have a detrimental effect on patients and those who care for the patients. Thankfully, in the UK, we had some really strong guidance on that from Mr. Justice Birss in the *Evalve*¹ case last year.

I'm really looking forward to the debate today, particularly on life sciences, but also on the telecoms area, and looking forward to hearing what our speakers and panelists have to say.

We have four speakers today, all of whom need very little introduction. The first is Judge Michel, who I don't think will be on camera today, but I'm sure 99% of you will know him well anyway. He served for two decades on the Court of Appeal of the Federal Circuit, including six years as Chief Judge, and writing an estimated 300 patent opinions in the process.

We also have Max Haedicke, who is a professor in law at the University of Freiburg. Freiburg, many of you will know, is a charming German city in the southeast of the country, and the fifth oldest in Germany, I'm told, founded in 1547. I don't think Max was there at the time. As well as being an IP professor, Max served for several years as a judge on the higher regional court in Düsseldorf, one of Germany's most important patents courts, and nowadays, as well as his professorship also does some mediation and expert witness work.

Our third speaker is Marleen van den Horst, who's a partner in the IP and Technology Group at leading firm, BarentsKrans in the Netherlands. I've known Marleen for many years, and I know her best of all for her SPC and second medical use work, but she has many more strings to her above that, and has been with her firm for many years, and is one of the leading figures in the life science field, at least in Europe.

Last but not least, our final speaker is Adrian Howes, who is Head of IP and Standards in IP Policy at Nokia. Adrian's been with Nokia for more than six years now, but before then, worked also in the life sciences field for Mylan for a period and studied chemistry and law at university.

We also have three panelists. First, we have Ralf Uhrich, who is a senior litigation counsel at Google. He's been there for six years, and also works as a lecturer in IP law in Basel University. Before that, Ralf studied and taught at the University of Bayreuth, forgive my pronunciation if it's awful, I do apologize, which of course is well known for its music connections and for Wagner in particular.

¹ *Evalve v. Edwards Lifesciences* [2020] EWHC 513 (Pat) (Eng.); *Evalve v. Edwards Lifesciences* [2020] EWHC 514 (Pat) (Eng.).

Secondly, we have Wolrad Prinz zu Waldeck und Pymont, who is a partner at Freshfields. I've known Wolrad for many years as well, been a pleasure to work alongside Wolrad. He studied at the University of Heidelberg in Munich, but also spent time in Washington, and at one point was a judicial intern for Judge Randall Rader, who was one of the most influential figures in IP in our generation, of course.

Our final panelist needs little introduction. David Kappos, partner at Cravath at present, but obviously we know him also for his 11 years of tenure as director of the USPTO, and today, is one of the major figures at the Fordham Conference, and always happy to receive his contributions.

Those are the introductions done. I don't think I need to spend any more time on that, but I can hand it straight over to Judge Michel to give his presentation. Judge Michel, over to you if you can hear me and right happy to present.

PAUL MICHEL: Thank you very much, and greetings to all friends of Fordham and of Professor Hugh Hansen. This conference is such a pleasure – every year to learn and also to have fun as Hugh always enjoins us.

I want to address the current state of injunction law and practice in the United States. In short, it has completely changed over the last decade and a half. Today, injunctions are rare for non-manufacturers and even for some manufacturers who don't have directly competing products in the very same market. It used to be, of course, that injunctions were the norm. Not invariable, not automatic, but in the vast majority of cases, absent circumstances indicating otherwise. What has been the impact as a practical matter of this inversion of the practice of injunctions in the United States over this timeframe? I suggest three basic outcomes.

First, the value of most patents has been depressed. Second, the incentives to voluntarily license have fallen, and therefore, licensing has also fallen. Third, trial courts in America have been forced, in the absence of injunction, to try to assess future damages, which is a difficult task. Past damages are difficult enough, future damages are much more tricky to assess. And the courts are already so overburdened that a contested patent case in America today often takes a half a decade or more to come to a final conclusion. Those are rather major impacts of the change in injunction practice.

Secondly, I want to trace briefly how we got here, from where we were prior to the *eBay*² decision that was issued in 2006. *eBay* is the strangest case, because the majority opinion for the unanimous Supreme Court of the United States actually said very little. It simply held that the four traditional injunctive factors should be weighed in determining whether or not to issue an injunction. It held outright that injunctions were not to be automatic – that was actually the word used in the majority opinion. Otherwise, it said little else to my eye.

Then there were two concurring opinions. One by Chief Justice Roberts joined by two others, that basically said the practice probably should continue, as it historically has been followed for two centuries.³ Then there was a second separate minority opinion, again, a concurring opinion. This one authored by Justice Kennedy, now retired, which made a basic distinction between patent owners who manufacture products and patent owners who do not manufacture.⁴

² *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

³ *Id.* at 395 (Roberts, J., concurring).

⁴ *Id.* at 396 (Kennedy, J., concurring).

This was a sea change in the law, because that distinction has not been observed, implemented before.

The result, in my view, is that we now have two classes of patent owners. First class patent owners, manufacturers with directly competing products, and secondly, we have second class patent owners: all others who are not manufacturers. Remember that the second group includes not only the much-criticized patent assertion entities, but also many, many other types of organizations: universities, laboratories, hospitals, engineering firms, independent inventors, and many others. Those all now have an extremely difficult time and rarely are able to get an injunction.

Of course, the absence of the injunction affects the bargaining powers of the two parties. Therefore, what ultimately happens in the fairly rare cases where there is a voluntary license, is that it is taken below market prices. The problem is, more often, there is no voluntary license obtained even after an adjudication of infringement of a valid patent. So, it's a startling result, particularly since it has taken a decade and a half to mature, and it reflects not the majority opinion, I would say, and not the Roberts concurrence, but the Kennedy concurrence and minority opinion, as if that were the opinion of the court – a very strange evolution.

The Federal Circuit has struggled the whole time to figure out what the Supreme Court meant and what it wants. It, for example, has implemented certain requirements of nexus, at first very stringently, and then it backed away from that so much it's been a moving target for a decade. The results at the district court are even starker because the actual practice, and they said it is, if you don't manufacture, you're almost never going to get an injunction no matter what other equities they apply. This is an astonishing change in the law, and it reflects, in my view, failure of the Supreme Court and the Federal Circuit, and even the district judges to appreciate the decision dynamics affecting business leaders, investors, inventors, and other players in the system, because they have to make predictions. They have to rely on results that will turn out to be as expected most of the time. Instead, we have a circumstance where it's highly unpredictable, whether a manufacturer can get an injunction, and all too predictable than a non-manufacturer almost always cannot.

I find this to be an astonishing result. You could say it is, from my opinion, run amok. It's very harmful as well that in the 15 years since the *eBay* decision, the Supreme Court has declined to revisit the issue and clarify what it meant, what it wanted, what it intended. I'm sure that the Supreme Court was not trying to depress patent values or ruin the incentives to license, but in my view, that's essentially what actually happened as its decision was gradually implemented with more and more rigor and vigor in the ensuing years.

I come to the conclusion that the state of affairs now is unacceptable. It's uneconomical, it's hurting business, it's hurting innovation, and of course, it makes the U.S. an outlier because injunctions are much more common in most of Europe, and in much of Asia, including in China. So, we've reversed positions compared to competitor jurisdictions.

To me, the law is now so vague and unpredictable as to hardly be law anymore. I know other jurisdictions are struggling with concepts like proportionality to try to help guide the exercise of judicial discretion, but it reminds me of the recent Supreme Court decision in the copyright area in the

*Oracle vs. Google*⁵ case, where the Supreme Court just recently held that fair use applied, and therefore there was no infringement of the copyright. Fair use, to me, is highly unpredictable, highly subjective, way too vague, and perhaps the proportionality concepts may struggle with the same problem.

My bottom line is that since we now have more litigation at higher costs, longer delays, more uncertainty, we have a situation that requires remedy. The courts can't do it, won't do it, declined to do it, refuse to do it, and therefore I'm part of a group of people who want to have a vigorous but balanced and fair patent system. We are calling on the Congress to effectively override or overrule the *eBay* decision, and create a rebuttable presumption that in the normal case, an injunction should issue once infringement of a valid patent has been found. That's where America stands, and only time will tell whether we can get ourselves out of this tangle, or not. Thank you.

BRIAN CORDERY: Thank you. Thank you very much, Judge Michel. That was a wonderful way to start this session and loads of food for thought in that.

David, could I ask, because you're the most closely associated to America, do you by and large agree with what Judge Michel has said there?

DAVID KAPPOS: Yes, I strongly do. I'm one of those other people who joins with Judge Michel in having serious concerns about what's happened. In that regard, I don't mean to hijack the meeting here, but I have a few slides, and I know I'm a panelist and not a presenter, but I had just a few things since I had presented just a couple of slides at a previous Fordham, and I updated them, that have some very quick data that support very strongly what Judge Michel has explained.

This is an update to a presentation I made at Fordham a few years ago. This is just very quickly continued trend that's going to very much support what Judge Michel just said, the root cause and the current landscape. This is the most important thing to note, as Judge Michel said, the *eBay* decision has had a huge impact. I've updated the data to cover 2019 and 2020, and you can see that the requests for permanent injunctions in the U.S. are continuing to slide, and the grant of those permanent injunctions is also continuing to slide. There is definitely not a regime the U.S. where you can viably get a permanent injunction. That's why fewer and fewer parties are requesting.

I wanted to present one other thing. Briefly, you can see here that in the age of COVID, preliminary injunctions seem to have taken an odd turn. Just last year after they had been stable throughout this period, you can see in 2020, the request rate for preliminary injunctions in the US went way up, and the grant rate and the denial rate went up too. I'm not sure what's going on there, but if you look at the times taken to grant, that went way down. I wonder if what's going on is that because of the pandemic last year, large numbers of parties were requesting PIs⁶ because they couldn't get trials, and courts, for whatever reason, were being more accommodating about granting PIs in light of the pandemic. I'll stop there, but I just want to share this data as more food for thought as we go through the panel and turn it back over.

BRIAN CORDERY: Thank you, David. That's really interesting looking at those statistics. Would anyone else on the panel like to make a comment on

⁵ Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

⁶ Preliminary injunctions.

Judge Michel's food for thought presentation? My only take on that is, I would be interested again in, maybe David coming back to you, because you're obviously the U.S. specialist, along with Paul on this, do you agree that there are, these days as a practical matter, two classes of patents over in the U.S.? Is that a fact?

DAVID KAPPOS: Yes, that's right, Brian. There are traditional manufacturing entities, the companies that make widgets and stuff, and then there's everyone else. If you're in the everyone else category, you're hard pressed to get an injunction. As the data shows, even if you're in the manufacturers category, given, as Judge Michel was pointing out, this dramatic move toward weighing those four *eBay* factors and courts asking the question, could money damages be adequate to address the infringement and almost always answering that question, yes. Even if you're a manufacturer, you are far from likely to get an injunction in the US.

BRIAN CORDERY: This is a big shift, as we said.

WOLRAD PRINZ ZU WALDECK UND PYRMONT: One more question. When I look at the slides, did you label them wrongly on the columns for the permanent injunction? Because I read it in a way that in the last year, there were 18 applications for permanent injunction, 17 granted, 1 denied. This astonished me. Maybe I misunderstood that data which you put on the slide.

DAVID KAPPOS: Well, I don't want to go back to the slides because it'll [laughs] take us off of the meeting. The first slide with a bar graph was permanent injunctions. What it shows is that the request rate is going down. The total number of grants are going down, and the denials are going down. What I think is going on there is, U.S. litigants are very responsive to the prospects of winning, quite frankly. Its infringers don't request injunctions, it's the patentees who are always requesting them. They're getting advice from people like me and Judge Michel, who are telling them don't even try because you almost certainly won't win. That tends to move behavior in U.S. litigation towards only asking for something if you are almost certain to get it.

In my mind, what's the most telling is that the request rate has gone down so much. It may also be interesting to note, as you point out, that most of the requests are being granted. That also to me says the parties are being extremely careful about their requests for permanent injunctions, and only requesting them when they're essentially sure they're going to win.

BRIAN CORDERY: It's interesting to see how those trends cycle.

PAUL MICHEL: One reason for that is because where an injunction is denied, future damages are going to be set. If I'm litigating a case for a patent owner and I know I'm not going to get an injunction, I know the worst thing that is going to happen is the judge, not the jury, but the judge is going to assess future damages. I don't want to irritate the judge by putting him through the exercise of request for an injunction that I know will be denied. David Kappos is exactly right. Parties don't do it anymore. They're rarely asked for anymore because you just make trouble for yourself if you asked for it and you won't get it.

BRIAN CORDERY: I understand. Thanks, Judge Michel. I think it's time we moved on. We'll come back to this. Max, if you're ready, could you begin your presentation. Thanks, everyone, for your comments so far. Max, over to you.

MAXIMILIAN HAEDICKE: Sure. Good morning. Thank you very much for inviting me to this great conference. Special thanks to you and the team for the organization, which is smooth and it's just great to be with you. Actually, when I dressed up this morning for the conference, I felt that for the first time since long, to wear a suit and a tie, is great, so thank you all for that. Of course, I'm not here to discuss my outfit, but I want to tell you something about injunctive relief in Germany. Just to see if I can click.

Until to date, injunctive relief in Germany is generally not subject to proportionality. This, however, might change in the near future. Another question which I want to address is whether there is a paradigm shift in that regard as it has frequently been stated.

Let me first say a few things about the term “paradigm shift.” A Google search yields 91 million results. There seem to be a lot of paradigm shifts all over the place, all the time. If one takes a closer look at this notion, one can see that it has a rather distinct meaning. Thomas Kuhn laid the foundation of this notion. There's a paradigm shift when there's a fundamental change in the mindset, especially in science. A good example illustrating a paradigm shift is the famous rabbit and duck picture which shows a rabbit and, if you change your perspective entirely, a duck. Paradigm shift means that something is seen or perceived in an entirely different and new way.

A good real example for a paradigm shift is a shift from the geocentric to the heliocentric model of the universe. Now to get back to patent law, we have to ask the question, if we have a paradigm shift from the allegedly strict injunctive relief to the introduction of proportionality, you can guess that the answer will probably be no. Let me first give you some background.

Injunctions are the sharpest sword in German patent law. Injunctions are obligatory under German law, and there's no discretion of the court. It's nearly like a mathematic equation: infringement and the risk of recurrent infringement, yield a cease and desist claim. There's generally no discretion of the courts, as I said.

Unlike in other countries, damages and other procedural tools do not have sufficient deterrent effects. In German law we don't have the concept of double or treble damages. Damages are frequently granted on the basis of a license fee. We don't have expensive discovery proceedings and litigation is rather inexpensive. From an overall perspective, the relief other than injunction tends to be under-compensatory and not deterrent. The effective protection under German law generally requires automatic injunctive relief.

The leading case for the introduction of some grains of proportionality is the famous “Heat Exchanger” case the German Supreme Court rendered in 2013.⁷ The patent concerned a neck-warming system for convertible cars, a so-called “airscarf.” The claimant, a NPE,⁸ had lost in two instances. Defendant's auxiliary claim was a grace period of 27 months, in which produced cars could have been sold.

The court held that in principle, under the rules of good faith, a grace period can be granted also in patent law, but only in exceptional cases if the

⁷ BGH, May 10, 2016, X ZR 114/13, juris (Ger.)

<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=18e7cd83651f17cc6c713bc9862ffd23&nr=75714&pos=0&anz=1>.

⁸ Non-practicing entity.

economic consequences of the immediate injunction would harm the infringer in an unacceptable way. In this very case decided by the Federal Supreme Court, the grace period was denied mainly because the patent was about to expire.

However, this judgement and its holdings took up speed. Now we have a government proposal to revise the section of the Patent Act which gives injunctive relief. I cite the government proposal, "The claim is excluded to the extent that it results under the specific circumstances of the individual case, in disproportionate hardship to the infringer or third parties which is not justified by the exclusive right. In this case, the injured party can, to the extent appropriate, claim monetary compensation."⁹

What are the pros and cons for the introduction of proportionality into injunctive relief? You can imagine that this proposal is under heated discussion right now. We will certainly discuss these pros and cons later on, so I'll just give a very brief overview. Those who say we need proportionality in the Patent Act say that this principle has not sufficiently been applied by the courts until to date. Implementers are at risk to suffer unproportionate harm. At least we need a fair solution for untypical cases.

There are some arguments, of course, against this enactment, that it may not be necessary. We have the sharp sword of injunctive relief which we need as deterrent measure. We also have the heat exchanger decision which is sufficient as it gives guidance to the situations in which proportionality is necessary to tame the harsh consequences of an injunction, we have the FRAND¹⁰ defense and third-party interests are captured by compulsory licenses. They say that there's no need for that.

There are still some issues under discussion. I think it's rather certain that some kind of change will amend the law. I don't know yet the features because as I said, this is all under fierce discussion. One issue which is to be discussed is whether the interest of the patent holder should be inserted into the Act, and whether or not third party's interests should be considered.

Let me come back to the initial question which I was asking as to whether we have to expect a paradigm shift regarding proportionality-driven injunctive relief law. This is a clear no. Fundamental changes are neither necessary nor are they intended by the legislator, nor should they be implemented.

We can leave the question open, whether the paradigm shifts can ever appear in law or if we should leave the notion to science. However, it's clear that injunctive relief may not be meant to be a free ticket for the infringer, and one has to be careful that we keep the sharp sword of injunctive relief. We should not throw the baby out with the bathwater. Meaning one should not go too far. Injunctions may, under no circumstances, lose their deterrent effects.

Thank you very much for your kind attention.

BRIAN CORDERY: Thank you very, Max. That was great, and I love the duck rabbit image. Always a winner.

⁹ Entwurf eines Zweiten Gesetzes sur Vereinfachung und Modernisierung des Patentrechts [Second Draft of Simplification and Modernization Act of Patent Law], available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_2_PatMoG.pdf?__blob=publicationFile&v=1 (Ger.).

¹⁰ Fair, reasonable, and non-discriminatory.

Would anyone, before I ask some questions, would anyone on the panel like to comment on Max's presentation, or ask Max a question?

DAVID KAPPOS: If it's okay, Brian. I've got a question. That was a great presentation, Max, and I also love the pictures. I'd love to get that picture of the baby in the bathtub, that's such a classic. My question, though, is, like you, I worry about Germany, which has been a tremendous leader in recognizing the importance of a strong injunctive regime. You mentioned there's heated debate going on right now. I'm very aware of that. Do you feel like in the end, the patent system is going to prevail and the German government's going to stick by its guns? Or do you feel like this really could be the end of the strong injunctive regime in Germany?

MAXIMILIAN HAEDICKE: Well, I'm very optimistic, and I think the system will prevail. I think there are many voices, both in the academic and the direction from the judges, and also from practitioners who say that we may need, for special circumstance, for special cases, some kind of proportionality. The overall concept of injunctive relief should not go away, and the original tension of the proposal, the government proposal was merely to enact the heat exchanger decision, and now things have been taken a little bit further. The general idea still today is that we should not do more than to bring exceptions to exceptional cases, and this should be all. Of course, we don't know if this will get more of an effect and will get broader and broader. I think the judges will be very careful there and not throw the baby out with the bathtub.

DAVID KAPPOS: That's helpful. While I don't pretend to speak for all Americans on anything, let me just say, with respect to Germany's strong injunction regime, I think I can speak for a lot of people who care about strong intellectual property rights and innovation incentives worldwide to say, we are strongly supportive of Germany retaining a strong injunctive regime, and many of us are in there to help. I in particular published an article¹¹ within the last few months, congratulating the German courts on some of their decisions, and I'm sure others who are watching this right now would love to be helpful to you in ensuring Germany retains its strong injunctive regime.

MAXIMILIAN HAEDICKE: Thank you. I appreciate that.

BRIAN CORDERY: Thanks a lot, David and Max. Wolrad, would you like to weigh in on this? Obviously, you're a German practitioner as well.

WOLRAD PRINZ ZU WALDECK UND PYRMONT: Yes, I want to take the devil's approach, essentially, to that. I'm also in favor of a strong patent system. It's my business. Most of the time I defend implementers. One point I want to say, I mean, right now we have a system, as Max pointed out, where it's a mathematical formula. You infringe – an injunction will be granted, there's no proportionality. The Heat Exchanger decision by the Federal Supreme Court essentially stated there is a possibility of an exception, under specific circumstances, while rejecting the exception in the case at issue. The lower courts have mainly seen it primarily that the Supreme Court has denied an exception even the circumstances, and I haven't seen any decision where an injunction has actually been denied due to proportionality considerations.

¹¹ David Kappos and Daniel Etcovitch, *US Should Learn From German Courts Balancing SEP Right*, Law360 (March 9, 2021), <https://www.law360.com/articles/1362941/us-should-learn-from-german-courts-balancing-sep-rights>

I believe that in certain circumstances, an injunction is not appropriate, and I don't think that the currently proposed change of the German law will allow for or will result in a court taking into consideration the circumstances in any different way than at present.

If you could put up slide 11 from Max's presentation, which gives the proposed wording: It requires that you have *special circumstances of the individual case*. It is the special circumstance of the *individual case* that could likely be overly restrictive - if you look at that wording, it would seem to exclude any situation where disproportionality may arise identically in a general category of situations, because these are not special circumstances of the individual case. My view is—and you will like that, David—that it will be interpreted as the threshold remaining so high that the practice will not change at the moment.

I believe in certain circumstances, the sword of injunctive relief may be too sharp, and that ties in maybe to the later presentation where we talk about the anti-anti-suit injunctions. It will not surprise that this sharp sword of injunctive relief is used to extort sometimes disproportionate compensation for essentially worthless patents quite a number of times because the risk of an injunction based on a tiny component and the damage potentially caused by the injunction is so huge. From that perspective, German law doesn't at present have a proper way to address these situations, and I am afraid in that regard that the present proposal will be interpreted as nothing will change in the practice, and that these situations cannot be addressed.

BRIAN CORDERY: Thank you, Wolrad. Much appreciated.

RALF UHRICH: Brian, may I say a word on third party [unintelligible]

BRIAN CORDERY: Okay, I'll allow it. Yes, go ahead, Ralf, then we'll have to move on quickly.

RALF UHRICH: Thank you. I think the acknowledgement of third-party interests is a clear example where the bill goes beyond what has historically been decided by the German courts.¹² I think that this aspect of the bill is very important because both German constitutional law and European law require that third party interests are taken into account when it comes to proportionality and injunctions. Furthermore, the bill really brings German patent law in line with the other German IP regimes, whether it's trademarks, copyrights, or trade secrets: Either the CJEU¹³ or the German Federal Supreme Court¹⁴ have recognized third party interests or the statute itself specifically calls out for third party interest to be taken into account when it comes to injunctions and other remedies.¹⁵

¹² See, e.g., LG Düsseldorf, Mar. 9, 2017, 4a O 137/15, openjur (Ger.) <https://openjur.de/u/2151715.html> (expressly rejecting that third party interests can be taken into account when it comes to injunctions in patent).

¹³ See, e.g., Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, 2014 EUR-Lex CELEX LEXIS 62012CJ0314 (Mar. 27, 2014); Case C-484/14, Mc Fadden v. Sony Music Entm't Grp., 2016 EUR-Lex CELEX LEXIS 62014CJ0484 (Sept. 15, 2016).

¹⁴ See, e.g., BGH, July 26, 2018, I ZR 64/17, juris (Ger.) <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86943&pos=0&anz=1>.

¹⁵ See, e.g., Gesetz zum Schutz von Geschäftsgeheimnissen (GeschGehG) [Trade Secrets Act], April. 26, 2019, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at 3, § 9, para. 6 (Ger.).

BRIAN CORDERY: Thank you, Ralf. Good comments. We are glad we have it, thank you. We must move on now. Marleen, I'll come straight over to you, if I may, for your presentation, thank you.

MARLEEN VAN DEN HORST: I thank you, Brian, for your flattering words of introduction. Let me start with my contribution in which I will discuss the liability for PIs, preliminary injunctions, that are enforced in patent cases and pharma cases in particular. To set the scene, I will be talking about an innovator who enforces his pharmaceutical patent against a generic party, and subsequently in final relief proceedings, this patent is either invalidated or found not to be infringed. The consequence of the enforcement of the granted PI¹⁶ is that the generic will be off the market and will suffer damages as a result. But not only the generic company, also health authorities bear the consequences of such enforcement.

Now, in September 2019, the Court of Justice of the EU (“CJEU”) was called to hand out a decision in the case of *Bayer v. Richter*.¹⁷ Normally, it would have been discussed, I think, in last year's Fordham Conference, but as that did not take place, it is still to be discussed. In that particular case, the facts are that Bayer enforced its patent and obtained a PI against Richter. This took place before the Hungarian Court. Bayer subsequently executed this PI, whereas later, in separate final relief proceedings, this particular patent was found invalid. Now, the legal background is Article 9, Subsection 7 of the Enforcement Directive¹⁸ which has been implemented in the EU, and which in turn is based on Article 50, Subsection 7 of the TRIPS agreement,¹⁹ which I will read.

That paragraph says, "*Where the provisional measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.*" That's the general rule.

Now, let's turn to the findings in this case. Though the patent was eventually held invalid, the Hungarian Court did not award compensation to Richter. The CJEU said that national legislation should ensure that courts have authority to award appropriate compensation as set forth in Article 9, Subsection 7, which should be interpreted in a uniform, harmonized way. However, national legislation, according to the CJEU, may still allow the national court, and I find that not very surprising, to look at the circumstances of the case and determine whether either party has acted – as is a criterion, apparently, under Hungarian law – as generally could be expected of such a party.

In this case the Hungarian Court had to answer the question: did the defendant, the alleged infringer, the generic party in this case, Richter, try to

¹⁶ Preliminary injunction.

¹⁷ Case C-688/17, *Bayer Pharma AG v. Richter Gedeon Vegyészeti Gyár Nyrt*, 2019 EUR-Lex CELEX LEXIS 62017CJ0688 (Sept. 12, 2019).

¹⁸ Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, §4, art. 9 (7), 2004 O.J. (L 157) [hereinafter Enforcement Directive].

¹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 50 (7), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

avoid or mitigate damages, and on the other hand, did the applicant, Bayer, not abuse its right to claim provisional relief? Apparently, under the circumstances the Hungarian Court came to the finding not to award damages to Richter. There has been discussion in Europe about the impact of this decision. Some claim that this will be a big step forward stimulating innovation. I doubt whether that is really the case, but it remains to be seen how this is further interpreted in EU court cases.

My personal opinion is that I do not expect much to change, because civil law principles always allow courts to take into account the circumstances of the case, and of course, you always, in PI situations, will also weigh the interests of both parties and look at how they have behaved.

At the outset, I said that parties can sue for damages as a result of an unjustly granted PI that is executed, forcing a generic party off the market. That holds true not only for the generic party as such, which was a point of the discussion in the *Bayer v. Richter* case. But there are, of course, also other parties who bear the consequences of such an unjustly executed PI, like national health authorities and health insurers, who have to reimburse for medicaments that are priced either at the originator price, not challenged, or priced after price drop through the introduction of generic alternatives.

Now, to turn to my own country, the Netherlands. We had a landmark decision in October last year when, for the first time, the District Court was asked to assess whether a health insurer could claim damages from an innovator who had enforced and unjustly granted PI against a generic company, as a consequence of which the generic was no longer on the market, and the health insurer was forced to pay the originator price.

In this case, it was health insurer Menzis against AstraZeneca²⁰ and in an interim relief decision of October 2020, the Court found that AstraZeneca (“AZ”) was liable for compensating the health insurer for the damages to the extent of AZ’s enrichments. The basis for this action was not so much infringement or wrongful act. The basis was unjust enrichment, as AZ, by enforcing its later invalidated patent, had been enriched to the extent of getting the full price of its product for the entire period.

Now, this is new in the Netherlands. I would like to invite the public from other countries to also say something about the situation in their country. I do know that in the UK this is a principle that has been already much longer in practice because you have there the principle of cross undertakings. The cross undertaking is an agreement with the court where the pharmaceutical patentee undertakes to compensate generics that are being kept off the market as the consequence of the granted preliminary injunction. This undertaking was often also made for the benefit of the National Health Service (“NHS”) if the latter would intervene.

I recently learned that even the UK Patents Guidelines have been changed to the extent that I believe Article 10 of the Guidelines²¹ now obliges pharmaceutical companies to inform the NHS whenever they ask for a PI so that the NHS can intervene in the proceedings and require a cross undertaking. This

²⁰ Rechtbank Den Haag 14 oktober 2020, HA ZA 17-1084, m.n.t. (Menzis Zorgverzekeraar N.V. and AnderZorg N.V./AstraZeneca B.V. and AstraZeneca AB) (Neth.).

²¹ *The Patents Court Guide*, COURTS AND TRIBUNALS JUDICIARY, at 6 (issued Apr. 2019), <https://www.judiciary.uk/wp-content/uploads/2019/04/Patents-Court-Guide-April-2019.pdf>.

is all that I wanted to share with you today, and I'm most happy to answer any of your questions. Thank you.

BRIAN CORDERY: Thank you very much Marleen, and for finishing in good time. Appreciate it. I confirm what you said about the obligation to notify the NHS was brought in and codified in the last couple of years. It was always a practice that some people did and some people didn't, but now everyone has to. Look, I suspect when Adrian gets talking, we're going to get into the murky world of anti-suit injunctions, and before we go down that rabbit hole, there's a question coming from the audience that is relevant to your practice, Marleen, from Delia at Takeda.

The question is compulsory license proceedings are mentioned as a possibility to ensure interests of balance. How do we see compulsory licensing practice developing in future in light of the developments? Compulsory licenses, an unexplored area really in the UK, and the Netherlands and Germany, and the U.S., do we see that as a way for the balancing interests? Maybe I could ask Wolrad to come in first then come back to you, Marleen. Wolrad.

WOLRAD PRINZ ZU WALDECK UND PYRMONT: Yes, I think compulsory licenses won't too much take into consideration (specific) third party interests. In fact, it has been advocated that third party interests should not be taking them into consideration at all, but it's about the public interest where the applicant has to show the preconditions are fulfilled. If you have a general public interest question in the pharma space, the additional question could arise whether the government could step in. I don't think that the compulsory license really would address specific third-party interests other than the public interest, if only, on a very indirect way.

BRIAN CORDERY: Okay. Thanks, Wolrad. Marleen, do you have a view on— Do you see compulsory licenses as part of your future in the Netherlands?

MARLEEN VAN DEN HORST: Well, not immediately. They have not been playing a substantial role in the past in any way, and I don't see it directly in the context of PI proceedings, so I'm a little bit at loss what is the situation the person has in mind who asked this particular question, because that could help me answering the question.

BRIAN CORDERY: I understand. One thing, I think just a very brief look of the UK. One thing we've seen in the telecoms field, quite astonishingly, in my view was this idea of a “Crown User,” that the government could commandeer the use of a patent in order to fulfill, say, as in this case, the use of a particular telecoms patent, but it might come back in the pharma industry if the government decided that it wanted to use a patent in order to, say, vaccinate its population for one reason or another.

MARLEEN VAN DEN HORST: I don't know whether this discussion is about to finish, but I haven't heard anyone addressing a recent German referral which is interesting for our discussion on preliminary injunctions. Part of my task here was to look at the CJEU's recent case law, and I think it's worthwhile mentioning—I did not bring it up so far, as I thought maybe, it would be to the German participants to bring this forward—that there has been made a recent

referral, in January 2021, from the Munich District Court to the CJEU²² on Article 9, Subsection 1 of the Enforcement Directive.²³ It deals with something that has developed in Germany over the recent years. Apparently, German Courts tend to require that a patent should first have passed a certain validity test before the Courts are willing to grant a PI. The question is whether this is in line with Article 9 Subsection 1. I do think that's an important referral, an important thing to note. I don't know whether it would have to come up in the section remedies if any of the speakers is addressing this, but I do want to mention it as an important development in Germany.

BRIAN CORDERY: We have a minute left, so if anyone— David. Yes, go ahead.

DAVID KAPPOS: I would agree with Marleen, and there's been a lot of chat in the general chat sidebar about it not making sense to grant injunctions before validity has been determined. That's a very valid point and applies, I think, globally.

MARLEEN VAN DEN HORST: Well, I don't think that that is the point here. I think you jeopardize the tools that a patentee has been given to be able to enforce its rights, and the consequences are for the risk of the enforcer. The idea of Article 50 of TRIPS and of Article 9, of the Enforcements Directive is to provide for provisional measures. If you demand such patents to be rock solid, proofed and tested, then I think that would be too harsh on the patentee, but that's my personal opinion.

BRIAN CORDERY: I'm reckoning—

WOLRAD PRINZ ZU WALDECK UND PYRMONT: Let me comment on that. I think that is not the case. It sprang out, this particular reference. The Munich Court of Appeals, half a year before the reference came up, decided in a case that it adopted also the approach taken by the Düsseldorf courts and also the Karlsruhe Court of Appeal.²⁴ The Mannheim court essentially only seldom granted injunctive relief in PI proceedings because they were very quick. You could get into decision main proceedings in four to six months in suitable cases. That came out that they adopted the standard except for in pharma cases that was not so much an issue, but that you needed to have established the patent validity.

Since preliminary injunction proceedings are so quick, you cannot complete a complete prior art search and challenge the patent in the same manner as in main proceedings. If you look at studies on the patent gap, for example, one by the team of Katrin Cremers and Dietmar Harhoff, which has done an empirical study and found out that in about 40% of the decisions which went to trial and where injunction was granted, the patent was revoked or restricted in the later decision on validity²⁵. That puts you at about a 40% of cases injunctions in main proceedings are granted where the patent is later invalidated in the bifurcated invalidity proceedings.

²² LG München I, Jan. 1, 2019, 21 O 16782/20, openjur (Ger.)
<https://openjur.de/u/2316820.html>.

²³ Enforcement Directive, *supra* note 16, art. 9(1).

²⁴ OLG München, Dec. 12, 2019, 6 U 4009/19, rewis, (Ger.)
<https://rewis.io/urteile/urteil/p3h-12-12-2019-6-u-400919/>.

²⁵ Katrin Cremers et al., *Invalid but Infringed? An Analysis of the Bifurcated Patent Litigation System*, 131 J. OF ECON. BEHAV. & ORG. 218, 234-35 (2016).

Before that background, this risk, and the limited time for the defendant in PI proceedings, I think that is a part of the balancing act that you need to show particularly that the patent is valid, and the key way to do that is if it has been challenged in the part in proceedings. We all know how many patents survive if they are seriously challenged. I think that is an appropriate approach. It would be interesting to see what the ECJ makes out of that. Yes.

BRIAN CORDERY: We must move on. Thank you, Wolrad and Marleen. Thank you for everything you've done. We have about thirteen minutes left and we want to hear from Adrian and have a debate on his landscape as well. Adrian, if I can hand over to you, please. Thank you.

ADRIAN HOWES: Thank you, Brian. Firstly, thanks to Fordham and the team there for their help in pulling this together and inviting me. Very much appreciated. Especially to be able to talk on this particularly hot topic of the time of anti-suit injunctions, and asking a question really, is this just a new fad or is it here to stay? It's tempting to go into a review of each of the cases that have been happening in this area for the last couple of years, but I think that would be missing the woods for the trees.

I won't focus on that so much, just sort of give a little background to them and how they came about, and then trying to answer the question whether they're just a new fad or here to stay. I fear that if they are here to stay, we might be then seeing what, in essence, was a pebble tossed by Microsoft in 2012 into the pond of SEP²⁶ licensing being turned into a kind of asteroid hitting an ocean on the future of standards development due to some of the decisions that are coming out of the Chinese courts recently.

Firstly, for the uninitiated, what is it we're talking about when we're talking about an anti-suit injunction? Very simply put, it's an injunction where a party in one set of court proceedings seeks to prevent another party to those proceedings acting in some other jurisdiction against what it perceives would be contrary to the decision taking place before the court. The court then grants an anti-suit injunction to then prevent that party trying to conduct itself in some way, seeking some relief or injunction in that other jurisdiction. In the past few years, we've seen quite a proliferation of them. I suppose the question that has to be asked to them is why? We've also seen a countermove to them, which is the proliferation of anti-anti-suit injunctions or anti-interference injunctions, which are, in essence, the attempt to stop the consequences of an anti-suit injunction sought in a court, say, in China or the U.S.

Where did all this start, at least in the world of SEP licensing? The concept of anti-suit injunctions and anti-anti-suit injunctions have actually been around for centuries in different arenas. They only really entered the world of SEP licensing back in 2012 when Microsoft sued Motorola²⁷ in relation to a FRAND dispute between the companies on the basis of a FRAND commitment. Motorola took a strategic decision then to sue in Germany and seek an injunction for its patents there. Microsoft in turn decided, and it's quite a clever tactic if you think about it, however controversial it may have been, to seek an anti-suit injunction before the U.S. courts and succeeded in getting that anti-suit injunction, which was, in essence, preventing Motorola seeking a patent

²⁶ Standard essential patent.

²⁷ Microsoft Corp. v. Motorola, Inc., 696 F.3d 872 (9th Cir. 2012).

injunction in Germany. So, a U.S. court was telling German court what to do. This was upheld by the Ninth Circuit.

Everything went quiet for a bit, and then in 2019, it got kicked off again when Continental brought proceedings against us, as in Nokia, seeking to prevent us from enforcing our patents in Germany against Daimler, which is a customer of Continental.²⁸ Now, at that point, it was only seeking an anti-suit injunction, and so we decided to try to seek an anti-anti-suit injunction in Germany that, in essence, was seeking to stop Continental bringing its anti-suit proceedings in the U.S. of A.²⁹

Behind that was my colleague, Clemens Heusch and our litigation team. They succeeded. The Munich Regional Court gave an anti-anti-suit injunction. The defense arose in Germany to the anti-suit injunction attack in the USA.

Now, then we move to China. I think what we're starting to see China is a pebble that was thrown into a pond of SEP licensing by Microsoft being turned from a ripple into a tsunami effect. This has happened particularly in the last year following the Supreme People's Court's decision in a case between Huawei and Conversant.³⁰

Conversant had bought proceedings in a number of jurisdictions, and Huawei sought from the courts an anti-suit injunction to prevent that. The Supreme Court granted it, and it gave some basis on which it can do so, including one of the factors was international comity. Now, to be understood here, I think there is a distinction here between some of the later Chinese cases, as Huawei threw the first stone in this case, or pebble.

What's been interesting is what's happened most recently in a case between Ericsson and Samsung.³¹ Before that, there had been several other proceedings. You can see the list of the various anti-suits or attempted anti-suit injunctions and anti-anti-suit injections that have taken place. In the interest of time, I'm not going to go through them, but I think probably the most interesting one of the lot is the most recent one which is between Samsung and Ericsson, where Samsung is a Korean company actually succeeding in getting an anti-suit injunction against Ericsson in China even though only about 1% of Samsung sales are in China. Whereas prior to that, it had only been Chinese companies that have been successful in getting an anti-suit injunction.

Why are the Chinese courts doing this? I think most claim, or blame even, UK courts behind that. This is because of a decision that occurred in the *Unwired Planet* decision,³² which probably most of you have heard of, where the UK Supreme Court backed the lower courts in a determination, on a global portfolio basis, of a FRAND license, and the key there being global.

What the UK court was doing wasn't really going much beyond its normal powers of granting an injunction in a patent case, but because the patent

²⁸ Continental's Motion for Anti-Suit Injunction, Cont'l Auto. Sys., Inc., v. Avanci, LLC, No. 5:19-cv-02520-NC (N.D. Cal. June 12, 2019).

²⁹ LG München I, Oct. 2, 2019, 21 O 9333/19, openjur (Ger.)
<https://dejure.org/ext/e060e14bfe1d703c054d6836a98ed960>.

³⁰ Huawei Tech. Co./Conversant Wireless Licensing, translation available at <https://patentlyo.com/media/2020/10/Huawei-V.-Conversant-judgment-translated-10-17-2020.pdf> (Sup. People's Ct. Aug. 28, 2020) (China).

³¹ Samsung Elec. Co./Telefonaktiebolaget LM Ericsson, translation available at <https://www.ratnerprestia.com/wp-content/uploads/2021/01/English-translation-of-Wuhan-Order.pdf> (Wuhan Intermediate People's Ct. Dec. 12, 2020) (China).

³² *Unwired Planet Int'l v. Huawei Tech. Co.* [2017] EWHC 711 (Pat) (Eng.).

was subject to a FRAND condition, being an SEP, the court went on to say, "Well, we don't believe that the offer made by *Unwired Planet*, the patent holder, was FRAND, but we're going to go forth and determine one." And because the industry practice is to license on a global basis, they took the position that only a global license would do.

It's important to remember in this case that the only remedy or consequence of Huawei not accepting that the UK court's determination was an injunction that is limited to the UK only. However, I think what we're starting to see in China is a shift in that. What we're seeing is the Chinese courts going another step even further than that by using the FRAND commitment as the foundation stone, as a contract and an enforceable one. Also using antitrust laws as the basis to grant a global determination, and also it seems from some of the decisions that the Chinese courts are almost trying to say, "We have the right, irrespective of whether you're a Chinese company or you have much business in China, to determine a license, a FRAND license on a global basis."

The question is really, of course, does that make sense? Is it fair? Well, I think everyone's going to have a potentially different view and perspective on that, but I'd say that there's very little legal grounds really by which the Chinese courts are operating at the moment, at least, by normal international norms and the understanding, and patent law and the understanding of the FRAND commitment. I think—

BRIAN CORDERY: Could you wrap it up in 30 seconds, please.

ADRIAN HOWES: Sure indeed [crosstalk], but I think a few takeaways of this is whether or not this is going to continue. I would say probably not, and the reasons for that, is it's not in the interest of courts to go to war with one another between different jurisdictions. There's no need for one court to become a global arbiter of FRAND. If the parties really want to get the decision decided on a global basis, there's always arbitration available. Other courts should have the competencies to cite their own territorial rights, which are patent rights.

The other aspect is contract law, the FRAND commitment isn't intended to be a third-party cause of action that can be used to compel an SEP owner to accept the terms set by a court without its consent, and this is what seems to be being understood by the Chinese courts. Also, antitrust laws seem to be irrelevant if there is a FRAND commitment because it's recognized both in the USA and the UK and other courts. Once there is a FRAND commitment, that really negates the competition elements to it.

Also, I think that the Wuhan Intermediate Court may well have gone beyond what actually even the Supreme People's Court was saying, and it seems to be failing to recognize one of the criteria, at the request of the Supreme Court, which is to consider international comity in making its determinations about whether to grant an anti-suit injunction. My hope is that this isn't something to stay, but actually, just a simple fad, because the consequences are being seen at a political level, both the EU and U.S. have concerns with how the Chinese courts operate in using anti-suit injunctions.

If they become the arbiter for global portfolio licensing, there is a concern that the rates and the incentives to continue developing standards would be reduced, so this has far-reaching consequences for the future of standardization as well. Looking forward to an interesting discussion, no doubt, about this and what the other panelists have had to say so far. Thank you.

BRIAN CORDERY: Thank you, Adrian, and we probably have two minutes, and then we must break to make sure we stay on track, but Ralf, do you have any views on this? I'd like to hear from you on this if you have views.

RALF UHRICH: It looks like there's always one court that has to have the last word when it comes to anti-suit injunctions, so that is— I'm not quite sure whether it's really that helpful, so I do share some concerns about that. The other thing I want to note: I'm not sure whether courts should penalize parties that make use of legal procedures in other jurisdictions, no matter whether it's implementers or patentees in that regard. For example, it is a worrying trend that nowadays, a court in country A will consider you an 'unwilling licensee' for FRAND purposes, if you were to seek an anti-suit junction in country B. That's certainly very aggressive and I'm also not sure whether that would resolve this issue.

BRIAN CORDERY: Thank you, Ralf. I confess, FRAND is an area that I have very little experience of and not much interest in, to be honest, but does anyone have a comment on where we're going with this, in particular, Adrian's sense of direction of travel?

DAVID KAPPOS: You mean, Brian, the anti-suit injunction issue?

BRIAN CORDERY: Yes, I do. Yes, yes.

DAVID KAPPOS: Yes. This is something that I also follow very closely, and I would say we stand in a very, very dangerous place right now. I agree with the comment that Adrian made that this is— The U.S. anyway, it's about national sovereignty. It's about the Constitution and the constitutional right for American property to be adjudicated in American courts. It's something that many of us feel very strongly about. I do not agree that the UK Supreme Court's decision and *Unwired Planet* is anything like what the Wuhan Court has done in Germany, in the U.S, and in India. I applaud the German and the Indian courts in stuffing that gambit and calling it for what it is. I applaud Judge Gilstrap for doing the same thing, and I hope the Federal Circuit now follows suit in the U.S.

WOLRAD PRINZ ZU WALDECK UND PYRMONT: All right. I have maybe a slightly divergent view. I've represented both defendants against anti-suit injunction, and I have also obtained anti-anti suit injunctions, so I've done both, worked on both sides. I think most anti-suit and anti-anti-suit injunctions are obtained, nearly exclusively in the context of FRAND litigation. At the heart of this is always the issue of essentially trying to confine the effects of a decision in a jurisdiction to the jurisdiction where the decision issued.

In the "original" case in German patent litigation, *Microsoft v. Motorola*, there was already a rate-setting proceeding for a FRAND license contract in the U.S. ongoing. Motorola tried to do an end-run and obtain an injunction in Germany in an attempt to leverage market exclusion in Germany into a global settlement which would have entailed the termination of the rate setting proceedings. The anti-suit, or more precisely: anti-enforcement, injunction was meant to prevent that.

In the other points that gave rise, I think Adrian correctly put the finger to it that the UK High court determined that it could set a global FRAND rate for the worldwide portfolios, so one jurisdiction assumed competence for a worldwide decision. In Germany, courts require implementers to make a FRAND (counter)offer for a *global* portfolio and essentially offer to have the rate determined by court in order to have it accepted as a valid FRAND defense.

Consequently, you always can use Germany as a proxy for getting a worldwide adjudication of a FRAND rate.

I believe that triggering ASI³³ and AASI³⁴ is the fight about jurisdiction. I appreciate that litigating FRAND rates country by country is not very favorable. However, but patent rights are territorial, and if that consequently observed in that – absent agreement of the parties to the contrary - the decision of a country would really be limited, then, to that country, I think the whole issue about any anti-suit injunction and the anti-suit injunctions wouldn't arise.

BRAIN CORDERY: Very briefly and then we must finish.

MAXIMILIAN HAEDICKE: Just a very quick question to Adrian. I think I completely share the view that this is a very dangerous development, which can eventually lead to trade wars. So, my question would be, do you think it would make sense to ask maybe WIPO to set up something like a code of international comity, because the main issue is which court should be in charge to decide these cases. Everybody seems to have a different opinion on that, so what is – what solution would you see apart from arbitration which needs always the parties to consent? What about a code which could maybe bring some peace to that field?

ADRIAN HOWES: Yes, and that's an interesting idea. I think practically, it's going to be difficult. There's a foundation stone on which all these issues arise, functionally speaking, it's patent rights. You have to fundamentally deal with that, or you end up with some agreement that everyone accepts, as companies around the world, that they're bound to come to some single court's determination for SEP cases and somehow distinguish SEPs from other patent rights.

That, I think, is where the challenge would lie in that, and functionally speaking, why is it that SEPs should be really dealt with in a different way, in this way. When it comes down to it, they're patents with national rights, and so the means by which an SEP holder enforces it and wants to seek a license, should it choose to seek a license, is through those national courts. Now the UPC might've helped with that, but I don't think until we have a global system and one patent on a global basis, we're realistically going to be able to get WIPO to come to a solution on this.

BRIAN CORDERY: Thank you, Adrian. Thank you, Max, for the question and Adrian for your answer. Very insightful. There were times over the last five years when I've frankly been ashamed and embarrassed to be British for various reasons, Brexit being the main one, but I would like to say that I'm very proud of our judges, and I think probably Justice Birss had it correct when he said, "When... various public interests are engaged and pull in different directions, [the judiciary] should have in mind that the legislator is better equipped than the courts to examine these issues and draw the appropriate broad balance. The [discretion of a judge to refuse a qualifying injunction] ... should be used sparingly and in limited circumstances."³⁵ I think that's the right approach. We must leave it there. Thank you all, panel and speakers for excellent way to begin today, and I can hand the reins back over to the Fordham colleagues. Thank you.

³³ Anti-suit injunction.

³⁴ Anti-anti-suit injunction.

³⁵ *Evalve v. Edwards Lifesciences* [2020] EWHC 513 (Pat) [73] (Eng.).