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7B Competition, Two Concurrent Sessions & Trademark Law. Multilateral Developments

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Steven Tepp

Annabelle Bennett

F. Scott Kieff

Paul Maier

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Session 7B

Emily C. & John E. Hansen Intellectual Property Institute

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

Friday, April 22, 2022 – 9:15am.

**SESSION 7: COMPETITION, TWO CONCURRENT SESSIONS &
TRADEMARK LAW
7B. *Multilateral Developments***

Moderator:

Michele Woods

World Intellectual Property Organization (WIPO), Geneva

Speakers:

Steven Tepp

Sentinel Worldwide, Washington DC

What is the future of Global IP Norm-Setting?

Annabelle Bennett

Federal Court of Australia, Sydney (retired); Bond University, Robina,
Queensland

Have Changes Brought About Changes in Judging?

F. Scott Kieff

Kieff Strategies LLC, Washington, D.C.

IP Causes of Action in Trade Tribunals

Michele Woods

World Intellectual Property Organization (WIPO), Geneva

Copyright Update from WIPO

Panelists:

Paul Maier

European Union Intellectual Property Office, Alicante

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MICHELE WOODS: Thank you very much everyone and welcome to our panel this morning on Multilateral Developments. We will be talking about a whole range of topics. Everything from changes brought by technology and international developments in the fields of trade and multilateral organizations, as well as impact on the Judiciary. And our excellent speaker lineup includes Steve Tepp from Sentinel worldwide, Judge Annabelle Bennett, retired from the federal court of Australia, and currently with Bond University, F. Scott Kieff from Kieff Strategies LLC.

And Then I will also give a few remarks and we hope Paul Maier from the EUIPO will be joining us as a panelist. He's currently traveling, but we hope he'll join us shortly. So, I think we should just jump in and get started. And Steve, we will start with you, please go ahead. If I could, I'm not seeing the clock. Matt, should we be seeing the clock?

STEVEN TEPP: We don't need a clock.

MATT REPHEN: It'll be here in a second. We don't time you're intro but now it comes.

MICHELE WOODS: Okay, there it is. Okay, great. Please Steve, go ahead.

STEVEN TEPP: Thank you, Michele. My thanks to Hugh and the entire Fordham team. It's a pleasure and an honor to have this opportunity to speak with you. Let me note that my remarks at this conference are my own and do not necessarily reflect the views of any client or employer. And I will say, I'm honored to be here, notwithstanding the fact that our particular panel has the code mud for the CLE credit. Okay. As you reminded us, this is the 29th, annual Fordham IP conference. It is perhaps not a coincidence that the TRIPS Agreement was concluded 28 years ago. I'd like to use some of my allotted time to review the significance of the TRIPS Agreement.

For the first time, Global IP norm setting occurred outside the context of WIPO and its predecessor organizations. And more than that, it moved into the trade context into a body staffed not by IP experts or by trade officials. In many ways, there was logic to this move. The economic value of IP had become clear beyond question, as had the economic harm from failures to adequately protect and effectively enforce IP. The new WTO structure created by the Uruguay round offered the dispute settlement process to enforce commitments vis-à-vis governments that had not fully implemented their commitments.

TRIPS also represented movement forward in the substance of obligations to protect IP, and especially the obligations for governments to enforce the IP rights they had agreed to provide. So since then, what have we seen? Well, For the first 15 or so years, I would say the system seemed to be working pretty well. We learn that bringing a dispute was as much a political decision, as it was an assessment of the legal merits of the issues, but when cases were brought, they were handled properly, if not always expeditiously.

The admission of China into the WTO was perhaps the first sign of strain on the system. China was not nearly the economic powerhouse it is today back in 2000, but its future was evident. So, it was never realistic to think China could be excluded from a truly global trading system. At the same time, China has not

distinguished itself as a rule of law market and the governing powers there have displayed an unfortunate tendency to test the weaknesses in the system. So, while in most, if not all, regards China may comply with the letter of its commitments, there are long-standing frustrations with the inability of the WTO system to rein in perceived abuses and foul play.

We saw those boil over during the Trump administration here in the US, which unmistakably preferred unilateral trade moves to the WTO process. At the same time, the WTO has not provided a venue for further evolution of global IP norms. On the contrary, the WTO has distinguished itself as a place for retrograde motion on IP. This brings me to the proposed TRIPS waiver related to COVID.

Offered before any vaccines were even approved by the governments of South Africa and India, it went far beyond vaccines. As originally put forward it will allow national governments to throw an IP kill switch for not only their entire patent law, but also trade secret protection and even copyright. It's no surprise to me that the proponents of such an overly broad proposal were the same governments and private sector advocates who sought to weaken IP rights for decades.

The most recent development is a purported Quad agreement between the EU, EUS, South Africa and India that is much narrower than the original proposal. For example, copyright is no longer within the scope. However, as stated yesterday, the proposed waiver was never needed and the facts bear that out. At this point, over 12 billion vaccine doses have been produced.

Anti-IP activists point to disparities in global administration of those doses, but they do so without reference to actions of national governments that have hindered the administration and practical considerations like vaccine hesitancy and lack of qualified professionals to administer the vaccine. It's telling, for example, that South Africa has publicly stated it doesn't want any more vaccine doses because they can't use them. Production is not the problem. Nevertheless, some consider the waivers institutionally needed for the WTO to remain relevant. To me, that is damning praise. If the WTO can only remain relevant by suspending its rules, it has failed as an organization.

That brings me to Russia. The response in the west to Russian aggression against Ukraine was on pace to isolate Russia as a rogue state. However, China has not joined that effort and Russian behavior does not appear to have been altered. Rather, Russia seems to have accepted its movement out of the global trading system. Of particular relevance to this conference, Russia briefly threatened to ignore the IP rights of Western countries, although as we speak today, it's unclear whether and how that will be implemented.

The larger point here is that if Russia and perhaps China are content to buck the global trade structure, excuse me, does the WTO continue to serve its original purposes? If the WTO is a place that can only move backwards on IP, at the very least we need to identify a new venue so that global rules are not stagnant. With due regard for our moderator, WIPO has proven marginally better than WTO in norm setting, but still remains at the mercy of many of the same dynamics among member states that have hurt the WTO.

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So, I believe, in wrapping up, that if Global Trade Rules are going to continue to evolve, we need to find a new venue to do that. The United States tried to do so for some time through a series of bilateral and multilateral free trade agreements. The European Union and others have adopted that strategy as well, and there was some success to that. But That no longer seems like a viable step forward or venue to move forward either. So, I throw the question out to all, to the panel and to the audience, how do we move forward on IP? Thank you.

MICHELE WOODS: Thank you very much Steve, for getting us started. A lot of interesting material in what you said. I love the teddy bear by the way, it's very cute.

STEVEN TEPP: That's the soft part of my presentation.

MICHELE WOODS: Yes, to soften. I don't see any hands but wonder, do any of our panelists want to jump in here at all? Let's see, do we have any audience questions? I don't think so. If not, we will definitely have the time to discuss some of Steve's ideas when we have the broader discussion and more material from all of us. And Perhaps at that time I'll take his invitation at least on the WIPO side to talk about where we go from here. So not seeing any questions. Let's move to our next speaker, Judge Bennett. And Judge Bennett, you have six minutes.

ANNABELLE BENNETT: Thank you. Look, I'm not sure I'm in the right session and I'm not sure whether really, I'm talking about Multilateral Developments. But I think the reason I'm slotted in here is because people talk about institutions and I did a WTO arbitration involving IP and I thought it worked extremely well. I can say that because I was one of the three panelists, but it was basically copyright and TRIPS and I thought the system did work well.

Really what I was going to talk about was the fact that the one aspect that should be taken into account when you're talking about anything to do with multilateral, multijurisdictional questions, is the fact that the people who are making a lot of these decisions are judges. And you have judges coming from all over the world, with both similarities and differences in the civil law and common law worlds, and a lot of intersection between those two worlds.

There's an enormous range of experience with the judges but, while there are a lot of people who say that they do IP work, many do largely copyright and trademark. Some of those judges are then quite concerned at the prospect of facing complex patent cases which, of course, will come up to them as IP Judges. While you've got no international bodies that can deal with these things across jurisdictions, it seems to me that what everyone should be doing is supporting the Judiciary, the Judiciary internationally, in helping them to work out how best to deal with multinational litigation cases that have international impact.

Some of the matters that Steve raised are matters that many judges are aware of. These are issues that are out there in the public arena. There certainly can be a lot of pressure on judges in some countries to take public policy questions, as perceived in that country, into account. So, what do judges do? I think this is a really difficult question. Some effort is made to enable Judges to discuss matters of common interest, such as by means of the European Patent Judges' meeting each year. However, there is a need for more far-reaching

interactions. Thus, WIPO introduced the Judicial Institute. That has had a positive impact in enabling IP Judges from all over the world to meet privately, as it were, because it only involves judges - there are no outside lawyers present, so the Judges can have open discussion. This has proved to be really beneficial and it's going to keep going forward.

There are many examples of potential benefit. How do you train judges in technology, because the technological changes are significant. Some of the bigger jurisdictions have training programs that they can use, but what do you do with the fact that people will forum shop? If you have judges from jurisdictions that don't have those abilities, how do they develop those skills?

One of the ways in which this can be done is by providing this international framework where judges can talk freely to each other. And It does work, but it has to continue because, in the end, the only way some of these matters are going to be resolved properly internationally is if there is a general understanding, or some general principles that can be evolved within the framework of individual judicial independence in individual systems but with people having an understanding, or at least awareness, of the determination of issues in other countries.

I think that is happening now. The last conference that WIPO had, and it was helped of course, by the fact that people could Zoom in rather than attend personally, was attended by, I believe, some 400 judges over the two-day meeting. The impact cannot be overstated. Judges from not just the big IP courts, but also from a number of countries that don't have an extensive IP practice but are developing it.

I do think that it's important that these developments are encouraged and promoted, because it extends not only to substantive law, but also to procedural matters. I think the comment was made in one of the earlier programs about how procedures that don't work well can stultify justice being done.

If procedures are enabled across the whole world and people understand what other judges are doing to make cases more efficient, they can adopt them within their own systems. International bench books are being created so that judges who don't have that experience in dealing with complex IP disputes and do not have the necessary rules and procedures, can actually see what other countries are doing with IP procedures and adopt those considered useful into their systems.

So, it's multilateral in a different way. It's not institutional, it's individual and judge-based. I think that anything that can be done by the international bodies or by governments or, indeed, even by law firms, to try to promote that sort of understanding and education should be encouraged. It's not impacting upon the independence of the individual judge in making a decision, but it is creating international awareness that, I think, can only make for better decision making worldwide.

To what extent judges can exercise discretions to deal with some of the matters that are arising in policy questions? This also can help in those jurisdictions where the pressures are high and can help those jurisdictions where they haven't thought about some of those issues and then understand how that works. It also assists in evaluating the existence of, and exercise of, available

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discretion, a development that's happening and it's going to continue. I hope that these developments continue to get the necessary support. Thanks, Michele.

MICHELE WOODS: Thank you so much. See whether we have any comments from anyone else on the panel. If not, I'll take the opportunity myself to say that this particular activity you pointed out in terms of the Judicial Institute is a great example of what WIPO has been trying to do during the pandemic. That is look for ways to use our convening power, our extensive outreach in various fora, to continue to be effective in other ways while at least our member states have told us during the pandemic up to now that they're really not ready to engage in multilateral norm setting.

So that feeds really nicely into the remarks that I'll be giving in a few minutes. Appreciate that, but wondering whether others have any points they'd like to pick up on either from this or the prior intervention. Steve, please go ahead.

STEVEN TEPP: Thanks, Michele. Judge Bennett, thank you for highlighting the importance of the Judiciary because with the gridlock in international norm setting and in many national legislatures as well, many policy questions are being put to judges, as you said. And I wanted to ask a question of you particular really to the copyright field, which is where I spend more of my time. We have seen in copyright policy debates that some use technological tools to, what we used to say, flood the airwaves. Now it's not the airwaves, but to flood the debate with comments that are in fact, artificially generated.

This was uncovered for example, in the context of the European parliament's consideration of the digital single market where tens of thousands of comments that had come in were revealed to have been automatically generated or generated from outside of Europe and these sorts of things. The parliamentarians, once they discovered that, were actually quite unhappy about it and I think it probably backfired. But I wonder sometimes to what extent the judges see that. Are they influenced by it? Do they recognize that in many instances it is Astroturf? If a legitimate grass roots movement is, public movement is grass roots, then a fake one is Astroturf.

ANNABELLE BENNETT: I think it's fair to say judges have to decide cases according to law. You've got statutory provisions, and, in some countries, a judge has more discretion and in others the judge has less discretion. But I don't think that judges take notice of the Twittersphere comments in particular. I think that's why it's important. The one thing that is important is that the judges who are doing IP get experience in IP and get a feel for IP.

I think that's more important and that's where there's a difficulty in some countries where suddenly a judge is getting IP work and having to educate those judges in the areas of IP. Some of the help you give doesn't always work and people are suspicious of assistance or advice provided.. You talk about norm setting, and norm setting is not an expression, I have to tell you, that was in front of my mind as I was going through all my years in the law. It was only when I got involved in writing a guide for judges, also funded by WIPO and the Hague Conference, a little handbook that was written by myself and Sam Granata from Benelux. The biggest concern from country representatives was whether it was an

attempt at norm setting? It wasn't. It was simply a guide to help judges. It concerned questions of jurisdiction, to determine whether you have jurisdiction in one country or another, and some guidance in relation to that. "Norm setting" seemed to be the most pejorative expression that anybody could think of, to suggest that that's what we were trying to do. We kept saying, "No, this has got nothing to do with norm setting. This is just a guide. It's an advisory thing." Judges have to work within the statutes and the jurisprudence of their own countries. So, yes, the areas in which public policy comes in is not so much in the decision-making process but, in my view, it's probably rather when you're looking at remedies and what remedies are appropriate. I think that's where some of these questions can rise.

MICHELE WOODS: Great. Thank you very much. And maybe we'll pick up on the remedies in some of the further discussion, but now I think it's time to go over to Scott. So, Scott, please go ahead.

F. SCOTT KIEFF: Oh, thanks so much, and echo the thank yous to the organizers, especially to Hugh, and of course, to Michele Woods for hosting our panel and moderating. May I, would it be terribly inconvenient, perhaps even fun, if I shared a screen to show some slides? Is that consistent with norms on the panel?

MICHELE WOODS: That's fine. Go ahead.

F. SCOTT KIEFF: Great. Let's do that and here we go. So, this is a set of remarks I thought I'd give that are really joint from me and a colleague, Tom Grant. Tom and I put out a piece just last week in Law 360 that covers these ideas. So, for folks who are interested in diving in, there's a little bit more in Law 360. And Tom's over at Cambridge, I'm here at GW in DC looking out over a sunny quadrangle. And of course, we collaborate in academia as well as through our strategy work.

We in the US, at least at our age and stage, remember back to television before the internet and television content that was just calm and happy. There was this great fellow, Bob Ross, who spent an hour on public television teaching people simply how to paint trees. He would talk about happy trees. And for so many of us, we look around the world and we thought about happy countries. Happy countries just getting along and planting themselves around the globe. And it was nice.

It hasn't been so nice recently. And it's generally recognized to not be so nice across the political spectrum. This is a set of terms, great power competition that kind of sounds scary, but our goal here was to highlight that people in and around the United States, outside the US, across the political spectrum, actually use these words. These are not incendiary valenced words. Of course, we've seen conflict in the United States, we're still having lots of lawsuits about what happened with our 2016 election. And we are past that, at least chronologically. And we've seen fights over trade continue.

And of course, in Europe, what a lovely, generally consistent collaborative approach from early days of the cold and steel community all the way up to the union and of course, the burgeoning unified patents court. So ultimately as the

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fellow in the chair here, we do think some calm could be warranted, but we think that that calm is going to come from professionalism and collaboration.

So, when we think about private lawyers and public judges or tribunal administrators, what we want to try to encourage folks to think about at this interface of trade and IP in the face of so much conflict is to notice a lot of consensus and opportunity through that consensus. So, in particular, we're thinking about antitrust type causes of action that are mostly about collusion rather than a given amount of market power or price and false advertising.

What do we mean? If you think back to the range of government agencies in just the UK and the US that ultimately got involved in the LIBOR, London Interbank Offered Rate dispute, the central agreement about the dispute was collusion. Just plain old fashion collusion. Similarly, especially at this conference as we think about those of us who we've looked up to for so many years at conferences--

MICHELE WOODS: Hey, Scott, sorry to break in, but we are still seeing the opening slide. We didn't know whether you've been trying to advance the slides.

F. SCOTT KIEFF: Oh, I'm so sorry. My slides had been advancing. I apologize I'll-- thank you.

MICHELE WOODS: Thank you to Courtney because she prompted me.

F. SCOTT KIEFF: Thank you so much. I apologize.

MICHELE WOODS: You can add another minute to count for the interruption, sorry.

F. SCOTT KIEFF: No, I apologize. I will flag Bob Ross. [laughs]

MICHELE WOODS: Yes, we see them.

F. SCOTT KIEFF: And our great power competition. Our fights over elections and trade, our calm and the unified patents court. Our invitation to consider false advertising and collusion, to think about LIBOR, to remember Chuck Hieken and the famous false advertising case he brought that drew the distinction between opinion and data, and to think about specific tribunals that through the structure of the arguments lawyers can make and the structure of the tools the administrators can use, largely coerce a much more moderate or modest approach to the issues.

So, if you think about the Starship enterprise going back to modern-day United States and running into a taxi cab driver who proceeds to yell at them, "You dummy." In fact, he uses a more derogatory term than dummy. Captain Kirk's response is "Double dummy on you." So many of these policy debates can boil down to this exchange when they are not in these kinds of tribunals on the one side of the slide where the structures encourage a much more moderate approach. So, Tom and I notice, for example, in this interface, whether you're talking about tribunals like the ECJ or the ITC, there are a range of causes of action that can be brought before a range of tribunals at this trade and IP interface.

MICHELE WOODS: Scott, I'm going to just break in here to say your time is used.

F. SCOTT KIEFF: Great. So, I will wrap up and invite students if they want help to go here for help for how to get jobs and I'll stop there. Thank you.

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MICHELE WOODS: Did you want another minute or two to wrap up?

F. SCOTT KIEFF: No, I'm good. Thanks.

MICHELE WOODS: Okay, great. Thank you. I see that Paul is joining us or has joined us. Yes, he's joining us here. So, while we wait to see him, does anyone else have a question or comment on what Scott was saying? Anyone want to jump in here for a discussion on that? Scott, since we've got five minutes here, do you want to briefly talk about what the causes of action were that you were going to mention or?

F. SCOTT KIEFF: I believe I've covered them in effect. Collusion and falsity are the central two. Thank you so much.

MICHELE WOODS: All right, great. So, any other comments, questions, discussions at this point?

ANNABELLE BENNETT: The only thing I was going to say very quickly, not about that. Everyone else had made the point at the beginning and I forgot to say my great big shout out to Hugh. We're all here because of him, I should say. It's all right for you guys. It's now midnight for me. So, there aren't many people I would've done this for, and I would only do it for Hugh, and I think it's amazing that he's managed to make this conference so fabulous for so many years. I'm only sorry we're not doing this in person.

MICHELE WOODS: I think that feeling is shared by all, and we're really hoping that next year we will be doing this in person. So, Let's hope. All right, with that, I will move on to my own remarks about the copyright situation at WIPO. Like Annabelle, I think I would say that perhaps this panel isn't necessarily the right fit or the best fit for this discussion. But There are certainly some themes in terms of the effectiveness of multilateral organizations that are relevant here. So specifically with respect to copyright at WIPO, we will be having in May our first meeting of the Standing Committee on Copyright and Related Rights that's somewhat back to "normal."

For the two years since the pandemic, we've had two meetings, but they were in a hybrid format, severely truncated with much less discussion time and probably most importantly, in terms of the ability to reach any results, the member states decided that because of the hybrid format and the inability to see each other in person and discuss effectively in regional groups, that they would not have any substantive discussions or make any decisions. And to a large extent, that was followed during those two meetings.

There were a lot of presentations of pending studies, et cetera, but not a lot of discussion. One item that was decided on was to have an information session on the impact of COVID-19 on creative industries, and on libraries, museums, archives, educational and research institutions. That is scheduled for our upcoming meeting. The upcoming meeting will be back to five days, six hours of meeting time a day, probably will go by very fast, a very typical agenda.

So, Before I get a little more into that, what have we been doing in the meantime? While surprisingly, I think to most of us, we felt very busy, in fact kind of overwhelmed during the pandemic period working from home. Some of that is because it was not only us, but also our counterparts with whom we work

frequently. For example, for copyright, that would be the National Copyright offices were focusing on areas that could move forward during the pandemic.

So, for my area, that's specifically legislative assistance on updating national laws, as well as assisting countries to join international treaties. We actually had a very high continuing rate of countries becoming party to WIPO Copyright and related rights treaties. Some of that was the continuing success of the Marrakesh Treaty to assist with accessible works for persons who are blind and print disabled, which is perhaps a little bit outside of the norm in terms of the treaties. There were steady increases in adhesions to, for example, the WCT, WPPT, the internet treaties.

So, all of that work continued, as well as the work of the accessible book's consortium, work supporting collective management organizations, work on setting up copyright offices where they don't exist. What I describe is in some sense, our day-to-day bread and butter of when there isn't a norm-setting process going on, at least in the copyright area. And The future may be that this is the work we'll be doing more. Putting together guidelines, putting together toolkits like, remember editing, some material for judges, for example, working with our Judicial Institute.

So, all of that continued, but we're now going to have the SCCR again. What do we anticipate for that? Well, we've run out of all the things the committee had asked the Secretariat to do in terms of studies, providing information. But for this particular meeting, we do have pending new documents on the two main topics, broadcasting. This broadcasting treaty has been on the agenda for I believe, 23 years now. There is a new proposal from the acting chair. Perhaps a little complicated is that we don't know if the acting chair will continue as the chair or we'll have a new chair, and that's in negotiation right now. So, the fate of that proposal may be somewhat affected by that.

Nevertheless, there is a new textual proposal, and there is a process going on right now of introducing that to member states, to broadcasters, so that a meaningful discussion can take place at the committee. And What in the past has happened is that recommendations have gone to the general assemblies for, for example, referencing when a diplomatic conference could take place. So, Member states will have to decide if they're in a position to move forward in that way. But There's an opportunity there to revive the broadcasting discussion after two years where there were some side meetings of a small group called The Friends of the Chair, but the committee itself had little substantive discussion time.

Then on limitations and exceptions, here, we had finished up extensive action plans on this topic over two years, just before the pandemic. We have not had the full substantive discussion in the committee about what happens next. So will We anticipate having that, but we also have a new proposal from the African group, African Regional Group of Countries for new work going forward on this topic, and we will have to see how that plays out.

All of this will be taking place in a multilateral context where we are affected by what's going on in other organizations and elsewhere at WIPO. So, Steve mentioned the waiver discussions at the moment. It seems like perhaps copyright's out of that, but definitely there's been an eye on that by the member

states participating in our discussions. And We will be having this COVID-19 panel information session where perhaps some of that discussion will be repeated.

Then, of course, the situation in Ukraine. We're told that like all our other meetings, there will be statements on that. There will be a brief probably walk out and walk back in before we get started with the substance. So, we are also being affected by all that. In the end, the secretariat is hoping that there will be some direction from member states on how to move forward substantively with the items on the agenda.

If that does not take place at this meeting and we have to wait for the next meeting, then we'll be continuing with all of the background work on helping to develop the international copyright framework that's our day-to-day work. So really remains to be seen whether this first normal meeting can be a really normal meeting. Finally, just like to flag, as you can see from the background for my screen, next week, April 26th, World Intellectual Property Day. Focused on IP and youth innovating for a better future. So, I hope everyone will take part in those activities.

I'll wrap up there and see whether there are any comments or questions. I do not see anything. I see that Paul has joined us. I wondered Paul, I don't want to put you on the spot, but wondered whether you'd like to maybe give about five minutes of comments on the topics you had listed as potentially interesting. If so, you're welcome to do that. If not, we'll move into the more general discussion period. I think we can basically segue right into that so, please.

PAUL MAIER: May I intervene?

MICHELE WOODS: Yes.

PAUL MAIER: Michele, thank you very much indeed. The point that I wanted to raise is that of course, a number of us are worried by the fact that at international level, it's getting increasingly difficult to get substantive IP law further.

What you mentioned for WIPO is exactly that. I think a similar situation happens in the World Trade Organization. This is a personal view and personal words that I will use. There is some disappointment, to say the least, when you look at what has happened in TRIPs Council for the last two decades and how things go on. During this time, intellectual property has been attacked in this forum.

There have always been IP skeptics and IP has been under attack in the past as well, but the main developments internationally were positive and not in the sense of decreasing protection for the rights holders or only trying to introduce exceptions to the exclusive rights. I believe that we must first have strong intellectual property rights. In the Observatory on infringements of IPRs, we focus very much on enforcement. IPRs are not of much value if their enforcement is not swift and effective, What can we do in these matters at the international level? At the international level, the only forum we found where we can discuss about eventually improving the situation of IP enforcement is the OECD where we work on free trade zones. The OECD Council decided to adopt 21 October 2019 a recommendation on "Countering illicit trade: Enhancing transparency in Free Trade Zones", and we're presently working on the implementation of this

recommendation via a code of conduct to be applied by the free trade zones. This move will take us a bit further in ensuring international trade is about “clean trade” instead of just free trade whatever by all means and whatever the consequences for legitimate traders! This soft law approach has its limits of course but it is a new attempt to progress, even if modest at first sight. Internally, OECD directorates are for free trade in general and there is still some hesitations about this new instrument and its implementation. But one can see a slow evolution and intellectual property has gained visibility. The notion of “clean trade” is also gaining ground. The whole issue in the end, is that we need to find a balance between apparently diverging priorities.

For the time being the work of OECD concentrates on this particular aspect but in the future, we will work also about container maritime shipping, and, of course, everybody is interested in that subject, e-commerce. The approach will continue to be a soft law type.

This being said, we need more “enforcement” in the sense of effective IPRs on the ground. We need to be efficient and effective in the way we fight against infringers, be it on the piracy side or counterfeiting. I'm glad to say that at the European level, we have managed to reintroduce IP Crime in the priorities to fight against serious crimes, so-called EMPACT (European Multidisciplinary Platform Against Criminal Threats) priorities.

We have 13 different operational projects dealing with IP crime. For the next four years, we will be working hard to make sure that we fight efficiently against the professional and organised crime pirates and counterfeiters. The operational actions are opened not only to EU Member State police and customs, but also to non EU forces and international organisations. This openness is vital in this fight as organised crime groups are by essence international and operate on a transnational basis. We will also seek support from international organizations like Interpol.

You mentioned, Michele, that you're working with prosecutors and judges. Such workstreams are essential. In EUIPO we have been organising judges seminars for more than 10 years. We have traditionally concentrated on trade mark and design issues but we deal more and more with enforcement subjects. We have created 8 years ago a European Network for IP Prosecutors. The latter do not necessarily deal only with IP cases, actually very few of them deal almost exclusively with IP, but they must be ready and trained in case an IP case comes on their desk. It is also simply important to raise awareness of judges and prosecutors about the importance of IP for the economy, the protection of citizens as consumers and the revenue of countries.

We are of course ready to help WIPO also in their endeavour to work with the judiciary. This being said the global scale that WIPO covers is very large for us but if we can help we will.

Again, we're worried that IP is constantly under attack lately and that it is very difficult to improve the situation at the multilateral level. The fear is that all coming developments will be bilateral only. Our colleagues from DG Trade in the European Commission do not enter any negotiation with third countries without including a serious chapter on intellectual property. This is necessary but is not

the ultimate solution. The big organization like WIPO and the World Trade Organization have faced many difficulties as all of you said but we must hope that they will again bring positive developments. The OECD work will go on and hopefully prosper. The World Customs Organization is working more and more on IP issues. This is at a more technical level though.

So there are plenty developments internationally but we need more initiatives and measures that will take improve the situation on IP.

Thank you.

MICHELE WOODS: Thank you very much, Paul. I see that Annabelle wants to react. Please go ahead.

ANNABELLE BENNETT: The comment that Paul made about the attitude changing towards IP more broadly. The other way in which I think some damage is being done in some jurisdictions is, if you've got an ultimate court of appeal in the country and there are judges who are not at all experienced in IP. They have the highest decision-making power and then all the lower judges, including the specialist IP judges, have to go along with that.

And if you have a perception that one or more of the judges is active and anti-IP, that has a trickle-down effect that cannot be changed. That, in turn, then affects all those international trade negotiations because if that is happening within one country and you can't get your IP protection within that country, then what is going to happen when you do get those trade discussions going.

MICHELE WOODS: Very interesting. I wanted to ask you, and I heard some interesting discussion actually about the US cases obviously on other panels during the conference. But I wanted to ask you, Annabelle, going back to your earlier comments. You mentioned that you were on what you felt was a very successful panel at WTO and that it really worked. I wonder if you could tell us a little bit more about that. That sounds a little different from the message we're perhaps getting a broader sense, but maybe there're some grains of hope there or some ideas that could be applied a little more broadly.

ANNABELLE BENNETT: I hadn't done any work with the WTO. It was a panel that was convened to hear a case between Saudi Arabia and Qatar. It was over satellite transmission. They convened a panel that brought together expertise in TRIPS and in WTO rules and IP. The process is not all that quick and there is support from within the WTO Secretariat. We received a lot of really good submissions from the parties and from other countries. The other countries put in submissions that raised a lot of very interesting TRIPS and IP issues, including the security provisions.

And I thought, looking at it from a classic judicial point of view, I thought that the procedure worked well and the decision-making side of it worked well. I don't know what the parties thought about it necessarily, and I don't know how the broader community thought about it, but I found it a rigorous and well-structured procedure. I can't really say much more about it. That's what I was getting at really.

MICHELE WOODS: Great, that's good to hear. I do see Steve has raised his hands. Steve, did you have--

STEVEN TEPP: Oh, Paul was first, if you want [crosstalk]-

MICHELE WOODS: Paul's hand has been up continuously. Paul, did you have a comment? No.

STEVEN TEPP: Okay, okay. Thank you. Judge Bennett, I agree. I litigated a case, a dispute before the WTO. I was on the US team in a case brought against China for three different IP issues, GS362. That was decided in 2008 or '09, I forget exactly, but I thought that process went well. I thought the panel that had been put in place was excellent, and they rendered a measured decision that I thought was faithful to the TRIPS Agreement. I intended to and hope that I reflected that in my initial remarks. That Particularly, for the first few so years, those sorts of things worked well.

One of the things I didn't get through into my initial remarks that you alluded to was that there's no appeals right now, and that is because the Appellate Body has been controversial. I'll just leave it at that without wanting to open that entire can of worms, but the actions of the Appellate Body became controversial. That has not been resolved, and so now the Appellate Body is not able to function. My remarks try to take into account several different aspects of what the WTO does. The dispute resolution function is one of them. The role of a norm-setting and I don't

You reflected on the term "norm-setting." I think in that context, your comments reflected exactly what I was describing. The concern among member states that because norm-setting is so difficult in the actual TRIPS Council, that there might be backdoor attempts through academic works or guides to slip in pejorative of statements that could be used by one side or another. That's the situation we're in right now. When we can't do it the right way and explicitly as amendments or new instruments, then people would start looking for backdoors. And so, the controversy trickles down, and I think that's what you probably perceived.

But as a norm-setting body, the WTO, and WIPO, are at the mercy of the member states. And The member states are widely split, I think, in retrospect, putting IP issues into a trade context probably exacerbated that situation because trade officials with no particular knowledge or allegiance to the purity of IP laws but simply looking at bottom line, "Am I net importer or exporter? If I'm a net importer, I don't want stronger IP rules because that hurts my balance of trade. "And for some people, that's the entirety of the analysis. That's unfortunate, but it's realistic.

And There're more IP importers than there're exporters. These bodies that act as consensus or neo-consensus organizations have a difficult time moving forward. And WTO is at the mercy of that. That's particular to IP. Then the third aspect I was trying to speak to was more broadly the entire global trade system and the stresses and strains that it is experiencing. Not Again, not the fault of the WTO secretariat. They didn't invade Ukraine, but here we are. And If countries are willing to conclude that in their national interests, they're okay with moving outside of the global trade system. That's Russia, Russia is not the world's biggest economy, but it's still a significant country.

But China is not joining the criticism of Russia to put it gently, and so that raises questions, "Well, is China willing to do something similar at some point?"

If that's the case, China is the world's second-largest economy. Can we really have a global trading system that the second-largest economy is not adhering to? Now that's speculative, of course, but I think the stresses and strains that we're seeing invite that question.

MICHELE WOODS: Thanks, Steve. Scott, you've been waiting for a bit. Want to jump in here?

F. SCOTT KIEFF: Thanks so much. I do think that in these, let's call them tensions around more or less IP or more or less antitrust or more or less trade or more or less security or more or less privacy. I think what we have noticed and, in our work, Tom and I, and as in working with governments quietly or with private parties quietly is that in a very, very short-term setting, you pick the case, you pick the day. You will find outcomes, winners, and losers. They are totally unstable. So, the winners get to celebrate and dance for a day until the exact same arguments they made don't work or are used against them.

And That requires professionals among us to collaboratively engage our colleagues around governments or around the private sector to remember to ground their strategies as a business matter and their legal arguments as a legal matter in something other than, "I'm awesome in your terrible. More is better and less is better, or more is worse and less is worse." These kinds of hyperbolic bold-red, easily tweetable, often clickable great for the ad market slogans do wonders for the communications market, and they otherwise destroy trade and cooperation and development and diversity and inclusion.

And you know if what we want collectively is the opposite of that outcome, the opposite of that requires engaging collaboratively, productively. For example, a senior official higher up in a Court system or higher up in an executive branch who might not be steeped in the details of, say, patent law but nonetheless collaboratively substantively walking them through the specifics. Because If not, if decisions aren't grounded in these legal rules that developed across a broad-range of cultures and religions and languages. The reason those rules developed is that they work across that broad group of people. They are inherently predictable and inclusive.

And when you instead yield to just the power of the moment, things can play out quite badly, quite quickly. So that's why returning to the basics within IP is helpful. And Returning to the basics of private law, commercial law, administrative law, whether you're in a common-law system or a civil law system, those basic approaches can be used in the meantime. They can be used in IP tribunals and trade tribunals. They can be used across tribunals.

MICHELE WOODS: Thank you, Scott. And Paul, I see your hand has been up for a while, and then we'll go to Annabelle. Paul.

PAUL MAIER: I think we need to explain IP to people. We need to convince them that it is good for the economy and ultimately for them. Here we're a group of IP knowers and we're convinced. We're on the right side, and we've been working on IP for some of us for decades. Such is not the case for the huge majority of citizens and even judges, What Annabelle said is very telling. For decades and even centuries people have been fighting to get IP as a property right on an equal footing with other fundamental rights. Now IP is in "competition"

with other important principles of our constitutions. This is certainly positive for IP believers but a number of judges who are not knowledgeable or remain unconvinced of the importance of IP then just weigh one constitutional principle against the others. In doing so they disregard the technical aspects of IP without which this complex set of laws cannot make sense. They also sometimes simply put them aside and forget about the real substance of the protection afforded. If one misunderstands IP and puts it in balance with freedom of speech, the likelihood that the latter should win is high.

Therefore, we need to explain to the judiciary that IP is important, that it is a structural and necessary element of any market economy. Each IPR has its specificity and was considered carefully by the legislatures to be balanced. This is one of the endeavours of the European Observatory. We work on this matter with our studies on the importance of IP intensive industries in the economy and other major studies that one can find on our web page. The US was first to publish such a study. We have helped four South American countries (...) to publish such studies too.

Beyond the importance of IP for the economy, we must also explain the soundness of what a patent, trade mark or copyright are made for needs to be explained. This is a huge task! We must not let our arms down. To achieve results we need more fora in which to carry the message. We also need substantive IP law to be dealt with on a multilateral level. If WTO and WIPO do not manage to get things forward also from the substantive law, we will have to find some other forum and another way of doing it. I just leave this in the room as a question.

MICHELE WOODS: Thank you, Paul. Annabelle, over to you.

ANNABELLE BENNETT: My point was pretty much the same. I thank you for stealing my thunder Paul, that was very nice of you, because I had exactly the same reaction. I'm picking up Scott's comment about marketing. I think that, to me, it's not just the judges that need to be educated. The judges you can educate a bit more easily, because they're forced to get on top of some of these principles when they make the decisions.

But you know if you are talking about people in trade, I know of trade deals that were done where there were no IP specialists on one side. When you get that, you get one side who are really pushing the IP, and the other side are going, "That doesn't matter that. We are more interested in wool and wheat than we are in intellectual property. What's this funny intellectual property?" It is a broader education. IP is not well marketed, and the anti-monopoly attitude is well marketed. You ask people in the street now and they are likely to say, "Oh, no, we don't want monopolies." And that's a gut reaction. We all get together, and we know it, and you're at the same point as Paul is making. We all talk amongst ourselves, we get it - but that is not sufficient.

And if you point out to people that patent laws all really started in 1623 with the Statute of Monopolies in the UK, and that has been applied in every country. It was done to stimulate trade, to stimulate innovation and it has worked over the years. The man in the street doesn't understand that and I don't know how it's done and I don't know who's going to do it. But It's not just educating the judges. There has to be a marketing program somehow that gets it out there.

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And it can't just be Pharma doing it because then it is seen to be purely for self-interest. There has to be a way in which somehow these basic proposals of the importance of innovation and the importance of intellectual property are disseminated. Everyone understands you don't go in and just take somebody's house, why can you take the property of someone's mind? That's where it's a basic concept. You have to look to people like WIPO or someone who's got the ability to transmit this sort of thinking broadly. I'm with Paul. I think that's a huge issue and a huge problem.

MICHELE WOODS: Great, thank you very much, and certainly, all of those comments are consistent with our relatively new director-general, Darren Tang, and his idea that IP should work for everyone everywhere, but putting that into practice is another story. And while there are a lot of efforts, there's absolutely a lot more work to be done on the education side. And guess I think it is important to separate education from marketing. Both are important, but you also don't want to conflict them. So, any other comments or? Steve, go ahead.

STEVEN TEPP: I'll just jump in on this point quickly. Who's going to disagree that there should be more education about the importance of IP, of course? I alluded earlier to the reality that there are commercial interests who are spending large sums of money in the opposite direction, and they've had some effect. Either they do so directly, they do so indirectly through funding academics, through funding organizations that ironically characterize themselves as representatives of consumers. When in fact they're funded by some of the large largest corporations on earth.

There's nothing wrong with large corporations. They make a lot of money, they create things, they employ people. But There is not just a headwind, a counter-effort that's underway from commercial interests who believe that IP is counter to their business model, and so that contributes to the problem. I'll just conclude on this point saying that I would also distinguish that from educating judges because those are big-picture policy arguments to the point of educating judges.

There's a risk that cases get decided poorly simply because a given judge is not familiar with the particulars of the law and how a term of art applies or a judge who may be familiar with patent law and is quite accustomed to formalities in the creation of the rights might be lost in a copyright case where, of course, formalities are generally anathema to copyright in a global system. That I think is somewhat different from the big picture policy arguments.

ANNABELLE BENNETT: Can I just jump in? I think I agree with you about the deal with educating judges. I think the trouble is that every aspect of IP law has become quite technical. There are a lot of technical rules and specifics and I think it's a difficulty. You are right. There should be a way of getting basic principles passed across before you get into the detail of these specific statutory provisions and rules. Sorry, I interrupted. Scott raised his hand.

MICHELE WOODS: Scott, please go ahead. Thanks.

F. SCOTT KIEFF: Thanks. I was just going to say to join in this phase of the discussion that it is important to remind audiences. For example, whether they're public audiences or government official audiences about some of the--

Let's call it rhetorical flourishes that are used to these conversations. so you know, If the case for patents is made, for example, is grounded entirely in I'm innovative, then your infringer community will talk about how innovative they are. If you ground the entire argument in how many patents you have, people will talk about how many patents they have. I at least have found it useful to remind people that it's not about the number of the assets but rather how the rules operate around these things.

So, for example, if a potential infringer is interacting with somebody who has an IP right that's been perhaps issued but not yet thoroughly tested in court, a patent, for example. Hey, gosh, there're going to be some interesting open questions about where really is the hidden piece of prior art out in a library somewhere in the world or a lab desk somewhere in the world. Those are interesting fact questions, but at least they're fact questions, and they provide tension. Tension for both sides of the argument.

So, the IP owner, the patentee, she doesn't want her claim to be so broad that it will cover the prior art, and the alleged infringer simultaneously doesn't want the claim to be interpreted so broadly that it will cover her allegedly infringing product or process. And those self-disciplining tensions in the system get much more predictable outcomes that are fact-based. If instead an antitrust regulator or a safety regulator or a privacy regulator or an environmental regulator can simply interact with a given market participant, that market participant can respond to the regulator.

Well, I'm especially good or bad in this investigation, but going forward, I'm going to be even better. Trust me. Count the number of patents or copyrights I've got. Then you are going to find really odd interactions with tribunals and bodies who don't have an actual interest in assessing infringement or validity but are nonetheless in effect regulating market clearance and market exclusivity de facto in the name of all of these other games while everyone's talking about innovation and patent counts. That's a totally different orthogonal system, and it can be crazy-making and disappointing.

MICHELE WOODS: I hate to end on that note of crazy-making and disappointing, but does anyone else have any comment they'd like to bring in here?

F. SCOTT KIEFF: I'd just say that we can all avoid that by collaboratively engaging the substantive rules and keeping the conversation around that. That's an upbeat note.

MICHELE WOODS: Thank you for that. Paul, something quick. Over to you. We have two minutes left.

PAUL MAIER: I think we have to go along all the avenues if we want to make sure that IP is properly protected. It's not one against the others. You need proper laws that are socially accepted. You need that determined fight also under criminal law for all the pirates and the counterfeiters. You need awareness and education in general. The private sector needs to do its part too. They need to cooperate fully with enforcement authorities and make sure they react to infringements properly. Business responses to cover the demand of the consumers is another essential aspect. It is not for an official to tell industry what to do but it

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is worth noting that in the field of copyright for example the fact that we have so much formidable legal offer now has brought down piracy considerably.

Actually, each part of IP patent, copyright, trademarks, designs, are really different branches of the law. They all have their specificities that do not apply to the others. This renders messages complex, but we need to pass them on through all useful avenues. Improving substantive IP at multilateral level may prove impossible at this moment but we should at least make sure that we are fully committed to defending the law as it is now and make sure it is fully applied. We need to spread the good word for IP.

MICHELE WOODS: Thanks very much. With that, we are going to need to wrap up here, and I want to thank everyone for an interesting wide-ranging discussion. Some good ideas have been thrown out. Hope we can find a way to move those forward toward implementation. So, thank you all very much and look forward to talking with you in the rest of the conference and in conferences to come. Thanks a lot.