

Conference Report: Zurich IP Retreat 2018 – Injunctions at a junction?

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I. Topic and Introduction

This year's topic of the Zurich IP Retreat, held on 2 and 3 November 2018 at Zunfthaus zur Waag, organized by INGRES and ETH Zurich was another fundamental question of intellectual property law: Is there or should there be room for a balance of interest analysis before the issuance of an injunction, or are injunctions to be granted unless the requirements for compulsory licensing are met? What are the alternatives?

In the opening statement, *Michael Ritscher* (President of INGRES, Attorney, Zurich, Deputy Zurich Court of Commerce Judge) pointed out the conference's goal of having a discussion with contributions and insights not only from across borders, but also from across disciplines.

II. Injunctions and Balance of Interests

1. Use of models for choice of remedy?

Stefan Bechtold (Professor, ETH Zurich) challenges the traditional view, as to which exclusivity is the main element of property rights, by quoting *Henry Smith* (2012): "Exclusion is not the most important or 'core' value of property because it is not a value at all (...) Exclusion is a rough first cut – and only that – at serving the purposes of property." Intellectual property rights and patent law in particular should be viewed from a functional perspective by linking the scope of patent protection to patent law's underlying purpose. Patent law's underlying purpose presumably is to provide incentives for inventions. A model developed by *Carl Shapiro* wants to provide objective criteria whether an injunction or a royalties regime serves this purpose better in case of a patent infringement.¹ According to the model, an injunction regime correctly compensates a patentee if the switching costs for an infringer are zero. "If and only if the switching costs are roughly greater than the standard deviation with which the court estimates the lost profits of the patentee and the switching costs of the infringer", a better performance of the royalty regime is to be expected. One must keep in mind though, that a court will rarely have perfect information on the lost profits and the switching costs. This leads to the conclusion that if the switching costs are low, an injunction should be imposed, whereas if high switching costs exist a royalty regime is preferable. If the court is able to accurately estimate the patentee's harm and the switching costs it should deny an injunction and go for royalties.

A more economical approach in patent law, similar to the approaches used in antitrust law, would require using empirical observations, which at this point cannot be made since there is a lack of data. Either this data has not yet been gathered or it is protected by trade secrets.

Tobias Bremi (Second Ordinary Judge, Swiss Federal Patent Court) expresses his doubts on whether such models are helpful to the discussion. It is also criticized that the model is not considering patent value and that it could never be applied on SEPs, since there is no possibility of switching costs being zero if a standard patent is essential. *Mario Franzosi* (Attorney, Milan) thinks it is possibly more of a procedural issue whether an injunction or a royalties regime comes into play.

Stefan Bechtold responds to the criticism on the Shapiro model that it is just one model, which cannot solve all problems. But the example of antitrust law showed that where many models have been created it can lead to certain applicable rules, which are generally accepted.

2. Balance of Interests by Means of Remedies

Regarding the availability of injunctive relief as a remedy for the Infringement of a US Patent, *Rochelle Dreyfuss* (Professor, NYU School of Law) first presented a brief historical overview differentiating between

suits in equity and at law, and describing conditions for obtaining preliminary injunctive relief and permanent injunctions. In the first half of the 20th century an increasing willingness of courts to use injunctions to enforce contracts not related to land could be observed, as jurisdictions and doctrines of equity increasingly being considered as “standardized and mostly static”.² The Supreme Court of the United States dramatically altered this doctrine, when it established the “four-factor test” in *Ebay Inc. v. MerkExchange L.L.C.*, 547 US 388 (2006). Although Justice *Thomas* held that the four-factor test was based on “well-established principles of equity”, the ruling was a shock to the industry since, as a matter of fact, it established a new approach. Impacts of the ruling can be extracted from data gathered on injunction grant rates by US Courts between May 2006 and December 2013.³ Data show that injunction grant rates vary *inter alia* depending on the patent technology and industry sector. The injunction grant rate for software technology is at the very bottom of the list with only 53 % in 36 decisions, whereas the rate for pharmaceuticals is at 92 % in 25 cases. Most strikingly is the difference of injunction grant rates between operating (80 %) and non-operating (16 %) as well as competing (84 %) and non-competing (21 %) companies, which shows how tough the four-factor test had hit non-operating many of them being Patent Assertion Entities (PAEs) and non-competing companies.

Ebay Inc. v. MerkExchange L.L.C. has had far-reaching implications regarding the distribution of bargaining power in licensing negotiations, the calculation of royalties, FRAND licensing situations, deterrence against infringements and on incentives to innovate.

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It is doubtful whether the four-factor test makes any sense for European Civil Law jurisdictions. First, litigation in Europe is fragmented among jurisdictions, leading to fewer PAEs. Also, the significantly different legal landscape and framework, e.g. regarding the handling of business method patents in the USA or the possibility of compulsory licensing and the experimental use exception in Europe, do not seem to render a four-factor test rule favourable for European jurisdictions.

Franz Hofmann (Professor, Friedrich-Alexander-Universität Erlangen-Nürnberg) then went into detail of the legal nature of remedies and injunctions by presenting three different views on the matter.

According to the traditional German definition, a remedy is qualified as a claim provided by substantive law (see e.g. § 1004 BGB regarding property rights). The court’s role is passive, granting a remedy if the claim’s requirements are fulfilled. Accordingly, injunctions, also within the range of intellectual property rights, are normal claims. The German wording (“bei Wiederholungsgefahr auf Unterlassung in Anspruch genommen werden”) of the respective statute (§ 97 Copyright Act, § 139 Patent Act, § 14 Trade Mark Act) is backing this view.

In the European system a remedy is not viewed as a claim but rather as a court order with the court having an active role. According to the wording of various statutes, the granting of an injunction could depend on a balancing of interests, proportionality considerations or even the exercise of discretion by courts (see e.g. Art. 130 Trademark Regulation, Art. 63 Agreement on a Unified Patent Court, Art. 3 Enforcement Directive or Art. 12 Trade Secrets Directive). Thus an infringement of a patent does not automatically lead to a claim for injunctive relief.

The modern view looks at the consequences of injunctions. Often the consequences of an injunction might be too harsh. Instead of automatically granting injunctive relief, judges should balance interests more carefully and use different doctrinal instruments (e.g. grace periods, account of profits, etc.) for a more “sophisticated enforcement”. A recent example of such an approach is the *Wärmetauscher* ruling by the German Federal Court of Justice (“BGH”).⁴ The judicial balancing of interests though should not be confused with judicial exercise of discretion.

In the following discussion it was brought up that there is probably not a huge difference between the common law and the civil law system. The use of judicial discretion in a common law context can be compared to the balancing of interests in a civil law context. Comparing the Ebay four-factor test with

Hofmann's modern balancing of interest approach, *Rochelle Dreyfuss* concluded that she is pro balancing of interests but does not think that the test or its factors make sense.

Mark Schweizer (President, Swiss Federal Patent Court) added to the discussion by stating that the Ebay four-factor test was the wrong solution to a serious problem. Other instruments, e.g. fee shifting should be taken into account.

3. National views

The panel on national views' goal was to present different approaches and standpoints from national legal systems regarding the enforcement of patents and the specific handling of injunctions. In the introduction to the segment, *Mario Franzosi* held that the true definition of the patentee's right is often confused. It should be described not as a right to "make" but as a right to prohibit. The right to prohibit in the SEP system is replaced by the right to compensation, thus the traditional patent law system and the SEP system are moving in different directions.

a) Japan

Christoph Rademacher (Professor, WASEDA University) noted that also in Japan the patent right is a right of exclusion (Art. 68 Patent Act). Still the enforcement of patents is connected with difficulties, which is why in 2009 the government rejected the idea of introducing an equity test similar to the Ebay four-factor test. Also notable is that, other than in Europe, the competition law defence (abuse of a dominant market position) against an injunctive relief claim, has not yet been recognized by Japanese courts. Regarding SEP cases, the 2014 decision by the IP High Court in *Samsung v. Apple* was fundamental.⁵ In SEP cases a patent infringer can use the civil law abuse of right defence against injunctive relief and damages claims exceeding the FRAND amount. The evaluation of the defence relies mainly on whether or not the parties complied with the obligation to good-faith negotiation and the obligations out of the FRAND-declaration. For the calculation of reasonable royalties the IP High Court defined simple and clear rules, starting from a consensus within the industry, with the approximate maximum license fee at 5 % for all existing Universal Mobile Telecommunications Systems (UMTS) SEP.

b) United Kingdom

Daniel Alexander (Barrister QC and Deputy High Court Judge) provided intriguing insights on recent developments and jurisprudence in UK patent law.

Awarding damages instead of an injunction is not completely new in the UK, e.g. in copyright cases.⁶ With the Enforcement Directive coming into effect, principles such as "proportionality, efficacy, dissuasiveness ..." have to be taken into account (Art. 3 and Art. 12 Enforcement Directive). Exemplary for the importance of those principles "when deciding whether or not to grant an injunction" are the remarks in *HTC Corporation v. Nokia Corporation* [2013] EWHC 3778 (Pat) (3 December 2013). *Arnold J.* emphasizes that "it should also be recognized that the proportionality of an injunction to restrain infringement of an intellectual property right may depend on which, if any, other rights are in play. A number of the CJEU cases (...) have concerned conflicts between intellectual property rights and other fundamental rights guaranteed by the European Convention on Human Rights and/or the Charter of Fundamental Rights of the European Union (...)".

So according to the UK Supreme Court, when being asked to award damages in lieu of an injunction, courts should exercise discretion. In *Lawrence v. Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 (UK Supreme Court) it held that the discretion exercised by the court should not be fettered but, in the spirit of legal certainty, still be as predictable as possible. The basic rule is that "the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not." A defendant has to present good and strong reasons to displace the prima facie injunction.

Remarkable also is the consideration of the public interest in essential medicines in *Edwards Lifesciences LLC v. Boston Scientific Scimed Inc* [2018] EHC 1256 (Pat) (24 May 2018). The court weighed Boston's

interest in maintaining a monopoly on heart valves against “the public interest in ensuring that patients with aortic stenosis receive appropriate treatment.” The latter were deemed to be worthier of

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protection. This shows that the model of the patent system is not being used the same in every type of industry sector.

Franz Hofmann asked how wide the discretion of UK Courts is and whether the discretion is bound by certain rules or if it just leads to a case by case analysis. *Daniel Alexander* replied that UK courts use a wider, methodological approach. Meaning that a court is not completely free in its decision, but it is free to take certain aspects into account. The Supreme Court on the other hand follows a more general thread, maybe not being helpful for legal certainty.

c) Germany

First *Jörn Feddersen* (Judge, German Federal Court of Justice) opened up on the German perspective on scope and content of injunctions, stating that the exercise of discretion in general is not inherent to German law of remedies. The proprietor of an absolute right (patent, trade mark, copyright) has a claim to cease and desist against an infringing party. This claim obligates the infringer to refrain from further violations. It also obligates action if a violation has caused an ongoing unlawful situation and if actions to eliminate the situation are possible and reasonable for the infringer. Just as with every other state action, which touches the rights and duties of private parties, measures of the court must comply with the constitutional principle of proportionality. This is still a very high bar not to render an injunction. Hence, on the European level there is more room for considerations of proportionality and balancing of interests. Furthermore there was a heavy debate among courts, if the claim to cease and desist can comprise an obligation to exert influence on a third party. Exceptionally such an obligation may exist according to recent rulings,⁷ namely if (i) the liable party has legal or factual influence on the behaviour of the third party, (ii) the infringer benefits from actions of the third party or (iii) the infringer foresees or should have foreseen the infringing acts of the third party.

Andreas von Falck (Attorney, Düsseldorf) singled out some characteristics from German patent law. Especially striking are the consequences arising from separating the competences of courts regarding the infringement and the validity of a patent. Only the Federal Patent Court in Munich is competent for the latter. Across Europe, such a division is only known in the German patent law system. The division leads to parallel proceedings, which often take a lot longer in front of the Federal Patent Court and requests for stays in front of “normal” civil courts are unsuccessful most of the time. Thus, the defendant often is either forced to enter into an expensive settlement or to risk an injunction based on an invalid patent.

Concerning the exercise of discretion in granting injunctions by German courts, in the already above mentioned *Wärmetauscher* decision, the Federal Court of Justice held that a limitation of the claim for injunctive relief (*in casu* a grace period) requires the following:

- the infringing part is only one of many elements in a complex device;
- the infringing part is an essential element for the functioning of the device;
- there is no (or no appropriate) licensing option; and
- an unconditional injunction would have serious and disproportionate commercial effects on the commercial operations of the defendant or, at least, a separable part of those operations.

Third party interests, such as public interests, are not being considered for grace periods. Similar to the UK System the defendant has a high burden of showing why the claim of injunctive relief should be limited in favour of a grace period.

Mark Schweizer thinks that it is quite evident that the prerequisites for the granting of a grace period were not fulfilled in the presented case since the infringing part was neither only one of many elements in

a complex device nor was it essential for the functioning of the device. Mercedes could have just disconnected the system in all the cars.

d) Netherlands

In Dutch law there are permanent and provisional injunctions. Since for permanent injunctions the wording leaves no room for interpretation in Art. 3:296 Dutch Civil Code (“shall order”), there are only a few general exceptions for not granting a claim for injunction. In all of his cases as a judge, *Peter Blok* (Professor, Utrecht University School of Law) has only once not granted an injunction. Still theoretically there are exceptions such as abuse of rights, abuse of a dominant market position, precontractual obligations or compelling public interests. Third party interests on the other hand do not constitute an exception. The Dutch Supreme Court explicitly stated that the interest of patients in the availability of pharmaceuticals should not be included in a balance of interest.⁸

Alternative measures instead of injunctive relief are known to Dutch patent law, such as grace periods. Also conditional injunctions are possible under certain relevant circumstances, particularly if:

- the patentee has offered to make the injunction conditional;
- there is a public health interest and the infringer is the only one that brings the patented product on the market; and
- a reasonable royalty rate can easily be determined on the basis of a terminated supply agreement between the parties.

e) Switzerland

Regarding Switzerland, *Cyrill P. Rigamonti* (Professor, University of Bern) explained that the default rule in all fields of intellectual property is that a finding of infringement generally entitles the owner to an automatic injunction. The statutory rules on remedies do not leave any room for discretionary decision-making or for an ad hoc balancing of the interests. Moreover, the existence of statutory provisions on compulsory licensing is often understood as excluding the possibility of a judicial recognition of liability rules beyond those contained in statutory law. The basic assumption underlying the default rule is that injunctive relief is generally proportionate in the event of infringement, because it restores the exclusivity intellectual property rights are supposed to provide to their owners as property rules.

However, intellectual property law is part of a broader legal framework, and there are some general doctrines whose application may lead courts to make exceptions from the default rule, namely on the basis of (i) antitrust law in the event of an abuse of dominant position, (ii) the general civil law doctrine of abuse of right under Art. 2(2) of the Civil Code, and (iii) the constitutional principle that all state action must be proportionate as recognized by Art. 5(2) of the Constitution. The combination of these doctrines provides sufficient flexibility for Swiss courts to tailor injunctive relief to the facts of each case even though the default rule calls for an automatic injunction.

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III. Injunctions in specific Industries

For the second day valuable contributions of industries’ representatives were expected, since totally different needs and expectations are often revealed, depending on the industrial sector and market level in which the company is operating. The discussions were moderated by *Peter Picht* (Professor, University of Zurich).

1. Essential Medicines

Hermann Deichfuss (Justice, German Federal Court of Justice) opened the discussion on essential medicines. In German patent law, cases of public welfare and public interest need to be distinguished. For the former the legal basis is § 13 Patent Act, which says that the government can suspend the legal effects of a patent for public welfare. This is a very high threshold for cases of extreme hardship and could e.g. be applied in case of the outbreak of an epidemic. § 24 Sec. 1 No. 2 Patent Act mentions granting of compulsory licences, if required by the public interest. In *Raltegravir*, the Federal Court of Justice had to deal with a claim by the defendant who was asking for compulsory license based on public interest.⁹ Compulsory license claims must be filed separately from the lawsuit for injunctive relief. Same as in matters regarding the validity of the patent, this leads to two parallel procedures: one in front of a civil court and one in front of the Federal Patent Court. The lawsuit for compulsory license was *in casu* combined with a request for preliminary permission to use the invention. The invention at hand was “Raltegravir”, a pharmaceutical used for HIV patients. The court focused on the question whether a compulsory license was indeed required by public interest and if there was an urgent need for preliminary permission. “Raltegravir” was an important pharmaceutical for certain groups of HIV patients. Thus, a compulsory license required by public interest and an urgent need for preliminary permission were affirmed by the Federal Court of Justice.

Daniel Alexander then presented some case examples from the UK regarding essential medicines and public interest with similar situations as in *Raltegravir*. When it comes to life saving pharmaceuticals, it seems as courts find it inappropriate to grant an injunction. But also in other cases, e.g. a blood test kit for Hepatitis C, injunctive relief was denied by a court. In this regard it is not clear to what extent judges have to take into account the fundamental right to preventive health care as per Art. 35 EU Charter.

In the discussion the question was raised if public interest would be denied if, e.g., there was a replacement pharmaceutical for HIV patients other than the infringing one, but that that replacement was more inconvenient for patients. *Daniel Alexander* is not sure how courts would decide in such a scenario. But the price of flexibility or flexible terms (“public interest”) is legal uncertainty. This also puts a lot of weight on judges deciding those matters.

Regarding compulsory licensing there are a lot of open issues concerning the fixing of royalty rates. Can courts set and impose reasonable royalty rates? *Hermann Deichfuss* is very sceptical of putting judges in that role. Especially when judges do not know all the facts and have only little working experience as a practitioner.

Simon Holzer (Attorney, Zurich) asked about the interplay between the compulsory licence and the claim for injunctive relief. What should a judge do if he sees that a party has failed to file a suit for compulsory licence with the Federal Patent Court? Should there be a stay of injunction? *Andreas von Falck* stated that courts should be a bit more creative if such a situation arises and should seek and consider all possible and appropriate solutions.

2. Essential Telecom Devices

Beat Weibel (Chief IP Counsel, Siemens) wished that more representatives from the industry attended such events. Obviously, this conference is needed, as many different approaches and open questions in connection with injunctions are being discussed. He mentions that the injunction as primary remedy is under pressure. While the pressure of patent trolls, who abuse injunctions to get deals, has become negligible, there is still a lot of pressure coming from mobile phone technology implementers, from competition law or the *Huawei v. ZTE* ruling and from the car industry.

Technology implementers have a strong interest in a weakening of the injunction, like e.g. Apple, which invested a lot in Graphical User Interface (GUI) and design but had to buy large patent portfolios for their basic telecom technology. The car industry on the other hand has shifted their responsibility for clearing patents to their suppliers. This is not working anymore, as the car industry is implementing more technology from the telecom sector, where patents are enforced much more aggressively.

Huawei v. ZTE brings many disadvantages for technology developers.¹⁰ It is mainly critical that the alleged infringer can wait until the latest stage to make his counter offer. The ruling casts “patent hold-

out” in stone. Financially there is no risk for the infringer as even profits can be optimized by waiting and providing for accrual for royalties or trial costs.

The injunction has a certain function in the system, which is for the patent owner to get control back if other measures fail. It is neither understandable nor desirable to abolish this tool. Instead the patent system should be adapted to new developments and needs. This requires the consideration of technology developers’ interests with solutions for flexible and fast protections for digital inventions. But it is also time to implement mechanisms for a reliable examination of the standard essentiality of a patent.

Gabriele Mohsler (Vice President Patent Development, Ericsson) comes from a non-legal background. Without discussing any specific legal skirmishes, she shared a brief but strong message on why injunctions are so important for technology developers. She informed the participants of the specific difficulties of a developing company to enforce their patents. Confirming *Weibel’s* statement, that due to the recent developments, implementing companies are not interested in clearing the way of patents and most importantly do not at all seek negotiations. Also car companies are required to get licences directly from the patent owner and should not be able to shift the liability to their suppliers. Technology developers have created many opportunities, such as patent pools for implementers. But since many companies are ignoring such opportunities, what other remedies should there be for developing companies if not an injunction when nothing else works?

Approaches from Japan regarding SEP matters were then explained by *Christoph Rademacher*. Since April 2018 there is a new Advisory Opinion System to determine the standard essentiality of a technology with the goal to enhance transparency. If a specific part of technology is disputed among patentee and implementer, upon request of the interested parties, the Japanese Patent Office (JPO) can be asked for a non-binding advisory opinion, which is then published on the JPO website. Additionally, the SEP Negotiation Guide was published, which cites relevant case law from different jurisdictions. It is separated into two chapters of licensing negotiation method and royalty calculation method. The guide also takes up the above mentioned patent

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portfolio approach by *Gabriela Mohsler* with the idea of patent portfolios and global portfolio licensing for globally active implementers.

In the discussion *Dominic Bauer* (Legal Counsel, Audi) responded to the accusations against the car industry. He mentions the long supply chains in the car industry, which make it extremely difficult for car companies to detect a possible patent infringement. In this regard *Christian Fischer* (Patent Counsel, Swisscom) mentions the problem of royalty stacking, since many standard patent portfolios overlap, so double payments are being made.

Stephan Freischem (Patent Attorney, Cologne) has sympathy to the notion of a strong injunction claim. But he also understands the reluctance of paying licence fees in patent pools, because the calculation of the fee is not transparent. Many participants agree that it is unclear who should set the tariffs for the patent pool licence fees. It is clear though that the tariffs have to be accepted *ex ante* by patentees and implementers and that the fees should not be challenged *ex post* in front of courts. This means that an independent auditing authority would be required.

IV. Case Study

Thierry Calame (Attorney, Zurich) presented a case study involving two patents for medical devices used in the diagnosis of musculoskeletal complaints and four different fact patterns. Three groups were formed, and each group had to come up with solutions to the problems and questions arising in the different scenarios. The outcomes were then discussed in the plenary.

One scenario in particular left room for different interpretations and solutions. The key question was about the circumstances and factors which justify imposing a compulsory license instead of granting an injunction. For instance, should it be considered in favour of compulsory licensing when a patent infringing medical device of company A has lower production costs than the patent owning company B and is thus affordable also in poorer countries and as a consequence ten of one million children can be saved from being crippled?

One group argued that compulsory licenses should only be considered if an infringing product uses an advanced technology based on the infringed patent or in cases of public interest. Are ten out of one million children from foreign countries who end up unnecessarily crippled to be considered as public interest? Does it depend on the number of children or is the number irrelevant because the patent law system cannot consider if a country is wealthy enough to afford the medical device produced by the patentee? Those are difficult questions to which the groups could not find a final satisfying answer. *Thierry Calame* mentioned that at a recent conference European patent judges acknowledged the difficulties in addressing questions concerning compulsory licensing since there is not a lot of experience in that area.

V. Final Discussion and Conclusions

In the end there was some time left for panellists and speakers to voice their findings and take-homes of this conference.

Tobias Bremi found it interesting that in a truly capitalistic and strong property law related country as the USA, a decision such as *Ebay* can be made. At the same time in a comparably more social democratic country like Germany, injunctions only seem not to be granted in cases of extreme hardship. Also, there seems to be different views about the terms “may” (Enforcement Directive) and “public interest”.

A lot of details need be known, and those details do not lie only in patent law itself but also in civil procedure, said *Stefan Bechtold*. He thought that it is important to acknowledge that there are different layers and perspectives to a problem. On each level the problems are complex and cannot necessarily be solved in harmony with the problems of other levels.

Peter Picht was troubled that there is such a weak common framework for all these patent law issues. He found it surprising that the Enforcement Directive and proportionality measures were discussed so little. A big question is also whether courts have the right to set conditions on a transnational level. *Ex ante* conditions regarding patent pools should be combined with *ex ante* control. Industry players’ positions are very important. One should keep in mind that the positions depend on where a company stands in the market and that solutions to these problems are vital to their businesses. Regarding the discussions in essential medicines, not only a legal perspective but also a civil society perspective is important.

Andreas von Falck was uncertain if it is possible to find a single set of rules that does justice to all interests of the different industries concerned. A global approach is necessary with the liberty of setting new rules. Since legislators are surprisingly silent in this matter, it is up to academics, practitioners and think-tanks such as INGRES to come up with new ideas.

The possibility of conflict of jurisdictions has not been talked about, *Daniel Alexander* stated. He found it striking that in matters before the Unified Patent Court (UPC) there is not a lot of consensus on a lot of important topics.

The big question to *Rochelle Dreyfuss* is when is there going to be a global solution? Many defences against injunctions are left to national law, which shows the lack of solutions on a global level.

Beat Weibel thought that there was a high level of agreement among the participants of this year’s conference. Still reality shows a lot of differences and not just agreement.

Gabriele Mohsler emphasized that she very much respects the wisdom of judges, but she is not happy how judges create the rules they came up with in recent decisions. She expressed her worries regarding judges starting to set royalty rates.

Michael Ritscher ended the conference, replying to *Gabriele Mohsler*, that judges are only given this kind of power when the parties themselves are not able to set the rates autonomously. It is also the

responsibility of the industry to come up with solutions which they deem to be adequate.

- * Student Employee at a law firm in Zurich.
- 1 *Carl Shapiro*, Property Rules vs. Liability Rules for Patent Infringement, Berkeley 2017 (retrievable at: <<https://faculty.haas.berkeley.edu/shapiro/propvsliab.pdf>>), last retrieved: 8 November 2018.
- 2 *Sidney Post Simpson*, Fifty Years of American Equity, 50 Harvard Law Review 171 (1936).
- 3 *Christopher B. Seaman*, Permanent Injunctions in Patent Litigation After eBay: An Empirical Study, 101 Iowa Law Review 1949 (2016).
- 4 BGH, 10.5.2016, X ZR 114/13 – *Wärmetauscher*.
- 5 IP High Court, 16.5.2014, 2013 (Ne) 10043 – *Samsung v. Apple*.
- 6 *Banks v. EMI Songs Ltd* (No 2) [1996 EMLR 452; *Navitaire Inc v. EasyJet Airline Co Ltd* (No 2) [2005] EWHC 282 (Ch), [2006] RPC 4.
- 7 BGH, 30.7.2015, I ZR 250/12, GRUR 2016, 406 – *Piadina Rückruf*; BGH, 19.11.2015, I ZR 109/14, GRUR 2016, 720, – *Hot Sox*; BGH, 4.5.2017, I ZR 208/15, GRUR 2017, 823 – *Luftentfeuchter*.
- 8 Hoge Raad, 21.4.1995 – *Boehringer/Kirin Amgen*.
- 9 BGH, 11.7.2017, X ZB 2/17, GRUR 2017, 1017 – *Raltegravir*.
- 10 CJEU, 16.7.2015, C-170/13, ECLI:EU:C:2015:477 = GRUR Int. 2015, 942 – *Huawei v. ZTE*.