

PROTECTING INNOVATION PANEL

KURT J. NIEDERLUECKE, SHAREHOLDER, FREDRIKSON & BYRON
EMILY TREMBLAY, PARTNER, ROBINS KAPLAN
COURTLAND MERRILL, PARTNER, SAUL EWING
MODERATOR: BLAKE KLINKNER, PROFESSOR, UND SCHOOL OF LAW

Blake Klinkner: Thank you all for joining us. And thank you to our panelists for joining us today for a great discussion. So, I'll start off with a question for everybody. I'll start with Courtland first, because it's, of course, for everybody to answer. So, our very first question today is, tell us about your background, your current role, and how you became interested in intellectual property.

Courtland Merrill: Thanks, Blake. Hi, everyone. I'm Courtland Merrill. Good to see you here for this presentation. It's great to be here. My background, I graduated from UND School of Law in 2001, and had zero IP experience. I wanted to practice litigation; I got a job in Minneapolis at a 20-person firm. It was a bulky, complex litigation firm. And the first case they assigned me to work on was a patent case that I knew very little about, and that was involving dental products. And it led to another case, and another case, and one after the other. And it's been twenty years of practice, primarily enforcing intellectual property rights. My current role, after twenty years at my prior firm, it's a twenty-person firm, Anthony Ostlund. I moved to a much larger firm, Saul Ewing, approximately three years ago. It has four hundred lawyers, offices across the country, and one of the reasons, the cases that we'll be talking about and the matters that we're working on, one of the reasons I went to a firm of that size was to be able to handle cases of this magnitude. It was a struggle at a smaller firm when your competition has the horsepower to keep up. So, that's kind of my story and my background. I originally grew up in Bismarck and enjoyed attending UND School of Law, and it was great to hear that Nick is now taking over for Professor Kraft for torts. Professor Larry Kraft was kind of a historical person, at least when I was there, and it was great to hear that Nick's moving on and following in those footsteps.

Emily Tremblay: Hi, everyone. Emily Tremblay from Robins Kaplan. So similar to Courtland, when I was in law school and even coming out of law school, IP litigation was not on my radar. I think this goes back to something that Professor Datzov said, which is you don't need a technical background to be an IP litigator. But I think law school is often structured in a way to

specifically target the students who do have that very valuable hard science background and to push them into the channels of patent litigation or patent prosecution or other IP avenues to really leverage those science skills. But as Sarah mentioned when she did my very kind introduction, I clerked for two different federal judges coming out of law school, and in my second clerkship in particular, my judge was a former patent litigator. And he was relatively new to the bench, and at the time, the district that we were in, which was the Western District of Wisconsin, this was before a significant change in patent venue law, we had a lot of patent cases. It was known as a rocket docket for patent litigation, and I had the opportunity to clerk a few patent trials.

I was really interested in the intersection of law and technology, and in particular, the fact that every time you pick up a new case, be it patent specific or any other type of IP case, you're really encountering new technology and not just the new nuances of the law or how you're applying the law to the new facts that your client has in front of you, but new technologies, new innovations, and understanding how to really advocate for your client in multiple dimensions. And so, that's kind of how I found my way to patent litigation in particular. I ended up coming to Minneapolis to start my post-clerkship litigation career, and I've been at Robins ever since. My practice primarily lives in two different worlds. One is representing plaintiffs, patent owners, inventors in asserting their patents and monetizing their patents and protecting their innovations, typically in the computing and semiconductor spaces. The second aspect of my practice lives in life sciences, primarily representing medical device or pharmaceutical companies and the nuances of what it means to be in the patent realm as a pharmaceutical company and the different laws and regulations that affect that particular type of litigation. So, I'm happy to be here.

Kurt J. Niederluecke: Thank you, Blake. Again, I'm Kurt Niederluecke. I have the last-minute fill-in, so hopefully I'll hold up my end. My path was a little different than what you've heard and gives you an idea of the different paths to our careers. I actually started off as an aerospace engineer, so I have connection with. . . don't have literal connection with UND, but obviously a great aerospace school. So that's how I started off. I was an aerospace engineer, went out and started working for Honeywell, planned that to be my career for my whole life. I didn't like to read or write; I liked math and science. So that's how I started off, and then the Cold War came, or Cold War ended, and the defense industry and the aerospace industry went down, and I thought, what's a better, more stable career? And so, I decided to utilize my engineering and go back to law school. I did that in the 1990s, and came out

and became a patent attorney, and quickly realized that actually applying for the patents isn't as fun as litigating them. So I went into litigation, and I have been doing that for, you know, a little over twenty-five, going on thirty years. Then I'm with a general practice firm. I was with a general practice, different one in the Twin Cities earlier, and then kind of wanted to expand my career. So that's when I joined Fredrikson & Byron in the kind of early 2000s, and have been doing IP litigation, various types, but primarily patent litigation and trade secret litigation is what I've focused on throughout my career, representing a lot of work in a variety of industries.

The other fun part about being a litigator, is that you get to go out and do more than just what if you have a technical background you're specialized in. So, I do a lot of work in the, certainly in the medical device field, but in a lot of other mechanical computer science fields. The other connection I have here is I did get to, back in the early 2000s, litigate a patent case relating to what I learned at the time, what a skid steer loader was, versus a Bobcat. I didn't know there was anything but what was called a Bobcat. Nick, a trademark. That's obviously a very strong trademark. But then I learned it's a skid steer loader and got to represent and work with the daughter of one of the inventors of the skid steer loader on some technology and had a case that almost went to trial before Judge Erickson here in the district. So that was a lot of fun, a nice connection with North Dakota. So, thanks for having me.

Blake Klinkner: Of course, thank you. So, my next question is for the panel; I'll start with Emily. What are the potential risks and consequences of not adequately protecting intellectual property, especially in very competitive industries?

Emily Tremblay: Sure. So, I think, you know, Professor Datzov gave us a nice foundation going into this panel, just in terms of what are we talking about when we're talking about IP? In the patent realm in particular, it's a disclosure to the public in exchange for a roughly twenty-year monopoly on that technology before it's re-released back to the public, right? So, the main consequence of not being vigilant if you're a company that's doing a lot of innovation, and in applying for your patents, and maintaining your portfolio, and ensuring that you have that broad coverage to protect your products, is that it's free license for anybody to copy that product, to rip you off, and to directly compete with you in the marketplace. So, I work with a number of companies who are at different points on the spectrum, right? We have some companies who are very vigilant in terms of how they are monitoring their patent portfolio, how they're working very directly with their engineers and

their inventors to create this broad-based protection for their products that they're putting into the marketplace, often on tight margins with a lot of competition. Because that's the reality of most marketplaces these days. And if there's a lapse in your patent protection, or, you know, you had a patent and you thought it would cover you for a while, but then it expires and you don't have anything else in the chute ready to go, that's an opportunity for your competitors who have probably been monitoring your patent portfolio in the marketplace to come in, directly copy your product, probably undercut your pricing, and steal your customer base. So, the most direct impact of not adequately monitoring your IP is that it's open season for your competitors.

On the other side of the patent realm is what Professor Datzov talked about in terms of trade secrets, where maybe your innovations are not publicly available to your competitors. Maybe it's not easy for someone to have the visibility to be copying your products or your technology. But in that sense, you need to be vigilant in terms of how you're maintaining the secrecy of what your company is doing and what sets it apart in the marketplace, and ensuring that access to your innovations, if they are secret, remain secret. Because as soon as they're not, again, it's an opportunity for competitors to really trade on the hard work and the R&D that you might have been doing in that space.

Kurt J. Niederluecke: Sure. And excuse me, Emily makes a good point on the, really, I won't repeat on the kind of the knockoffs. If you don't protect your innovation, it just comes in for somebody who didn't make the investment to utilize and take advantage of that. I was speaking with Nick after his presentation and on his remark about inventors and patents. And it's not that North Dakota doesn't have inventors. I can promise you, and I've worked with a number of North Dakota companies, there's a lot of invention that goes on in North Dakota. But the difference between whether you have inventors and whether you have patent applicants is really the question, and the issue that that can be improved. Because that's the disconnect. You can have inventors, but if you don't take advantage of that invention and turn that into value through patents or other protection, that's where you can lose out. The other thing I'll just mention, practically speaking, the cases I see quite often on the trade secret side that Emily mentioned was not just your competitors getting your ideas, but your own employees perhaps leaving, deciding they can do it just as well. And they go off and they start their own little company. And they take your ideas and they start developing on their own. That happens a lot. So that's another reason why you have to be diligent in terms of how you set up your procedures and proceed with your own employees, not

just as they need to go to competitors, but on their own. So, that's just a couple additional points.

Courtland Merrill: I think one of the important things to remember when we're talking about protecting intellectual property is the value that it creates. And while I'm not a businessperson, I've always just only been a lawyer, many of the clients that we deal with, they often seek outside investors, whether it's venture capital or private equity, and those type of investors want to see how a company that they're investing in can protect that company and create that value. And they want to see a robust patent portfolio in particular, as well as the other, what we sometimes refer to as the soft IP of trademarks and copyrights and whatnot. But the patent portfolio, I can't emphasize how important it is for a startup or a new company to show that it has not only created value, but that value can be transferred to others because it's protected. Many of the clients that I deal with, the core clients that I've been dealing with over a decade or so, they have stiff competition, particularly foreign competition, particularly coming out of Asia and when they are having their products built over there or they're selling over there. And it's really, it's a game changer if they don't have protection. It seems to me that the end customers, whether that end customer, for example, in the chip industry, the chip houses in Silicon Valley, price matters, and whether your end customer is a whole, a retailer, a Target, or a Walmart, they're looking for bottom line. And if the competition can offer that competing product, the end customer doesn't seem to care. They leave it up to those that are creating that product to enforce it among themselves. It seems that way. And I can't emphasize the importance to have some way to do that.

Blake Klinkner: Great. So, my next panel question, I'll start with Kurt, is how can attorneys advise their corporate clients to potentially avoid IP issues?

Kurt J. Niederluecke: You know, as you're developing products, first of all, I think as every company wants to do, invented here is a great philosophy. Develop your own technology. There's a lot of it you can develop; don't copy. Importantly, as you are developing, because I think Nick noted in his presentation, you know, the interesting element of a patent law is that you don't have to copy someone to get in trouble. You can develop something, you can develop it yourself, and you can find out that someone patented it and has protection on it and can stop you, even though you don't even know who the company was. So, one of the important parts, I think, that I would throw out for companies that are developing products or services is to make

sure when you develop those, you do what's called the freedom to operate investigation. Look into what patents are out there. Find out if there are patents that cover this that are still unexpired and get advice relating to that to ensure that when you do bring a product to the market, that you're not going to get in trouble. Because the courts and the law put a notice on you, not just of being ignorant of patents, but put a notice on you to, before you go out there, investigate and ensure that you aren't infringing on other people's patents. So that's one of the areas that I think you have to be careful of, and I'll let the others kind of give some other ideas.

Courtland Merrill: I think one of the important things is, when you're speaking of intellectual property and, you know, the big boy in intellectual property often is patents, is many companies don't realize that a patenting process of foreign invention, it's an ongoing process. So, it's really important to get that early submission to the patent office. What we refer to as a disclosure statement; it's a provisional patent application, followed by, you know, a non-provisional a year later. To have that in there, you can, year after year, file additional continuations and can keep that invention alive. And so even though the market, after you've developed a product, and it doesn't hit the market until three or four years later, you can change that patent and you can change the way you claim it and define what you own. It's really critical. I can't emphasize this enough to get that in there early, because once the product is out there, it's too late and you're stuck protecting it through other mechanisms which aren't nearly as powerful.

Emily Tremblay: Yeah. I totally agree with all the comments that have been offered so far. You know, it is critical that we think about not just here is the core invention, and it's patented, and I'm done, and I've got my protections. It's about how incremental improvements that your engineers are doing every day are monitored and recorded and are made part of the protections that the patent portfolio is offering to the company. You know, I think Kurt and Courtland have already largely covered all the value of how to counsel a corporation and how to protect their innovations. The only thing I'll add is: think about layering the other types of IP into the process. I totally agree that patents are usually first of mind when you're talking about technological or other mechanical innovations. But think about how you're branding the product, how it looks. I go back again to everything that Nick left us with this morning. Are there other ways that you're distinguishing your product, your name, your reputation to your consumer base? And are those things that should be protected and should be monitored by the corporation in terms of how it's using its marks, the trade dress, maybe design patents, and how it's

really making a recognizable product in the market that has the technological protections from the portfolio and then has these additional recognizable protectable marks to it as well?

Kurt J. Niederluecke: And if I can just add one thing in all of our comments, the old adage, “an ounce of prevention is worth a pound of cure.” We all make most of our living off of litigation, off of dealing with the cure. And if you deal with things up front, you are planful, you invest properly, whether it’s in protecting that information, ensuring, for instance, your trade dress, your trademarks are properly utilized and that you’re not utilizing other people’s technology. Doing that up front is going to save you a lot of money rather than you take shortcuts and find yourself on the wrong end of someone else’s accusation. So that old adage is very true in the IP area.

Blake Klinkner: Great. The next panel question will start with Courtland. When should you seek outside counsel who specializes in IP for client matters?

Courtland Merrill: Well, my best advice would be for businesses to have an IP attorney, not particularly a litigator like the three of us who are primarily litigators, but have a counselor role with an IP attorney that they deal with on an ongoing basis that advises them each step of the way. This doesn’t have to be a major sinkhole of money. This is a counselor type role that helps them with their patent applications. A given product can have utility patents. It can also be covered by design patents. The same product can be trademarked. You can register that. And you can even copyright, you know, physical things now. Articles of manufacture can be copyrighted in certain circumstances. All of those protections ought to be evaluated. Having that ongoing relationship would be my best advice for a company.

Emily Tremblay: I think Kurt already previewed the key advice that I would give in this scenario, which is: before you think you need to. I agree with Courtland, they’re working with clients of many different sizes. Some are large corporations that have an in-house IP team that are able to kind of monitor the businesses, support businesses, and identify the needs. But we work with many smaller companies, startups, fledgling companies who don’t have the resources to bring that role in-house. There are roles in outside counsel that aren’t, you know, “bring in the litigators and get ready for war,” but dedicated outside counsel that act as almost a quasi-in-house outside counsel who can provide counseling, who can know your business through regular contact that can be there to talk about diligence and innovations and where

you are in the space and other ideas that you might bring back to the business. So, I totally agree with Courtland's comments in that sense. Kurt mentioned freedom to operate. If you're about to launch a new product, hopefully it's much earlier than the launch that you're talking to IP counsel to understand the marketplace, to understand where competitors might be in space and the protections that they might have. So, before you need to is when you need to be talking to IP counsel. And if you're not sure, there are lawyers out there who do not need to be engaged at the point where there's a suit, or at the point where there's a fight, or at the point where you think you're about to get sued by a competitor, or need to sue a competitor who's maybe copying your innovations. Talk to IP counsel earlier and often because it gives them the opportunity and the requirement that they know your business and be your partner in that process as you're developing your ideas.

Kurt J. Niederluecke: Yeah, and I'll just reiterate, it's like if I think about hiring an accountant, or God forbid hiring a lawyer; nobody wants to do it. Nobody wants to hire a lawyer. It's just an expense. And it is, but to Courtland's point, whether it's someone like one of us who can counsel. I love counseling small clients because it's easy. Their questions are usually something I just know off the top of my head and can give them advice. It's more about issue spotting. So, it's not a tremendous expense to have an IP attorney involved and throw questions off of. It's simple. It's relatively inexpensive, and that's why I think it's important. And to Emily's point, I like that adage, before you think. Before you think you do. And that's probably pretty true because a lot of times we get the emergency calls after the fact.

Blake Klinkner: Great. Courtland, as some of the significant litigation experience enforcing patents and intellectual property rights, how have changes to the law and changes to the court's perceptions or understandings of these issues changed you and your practice?

Courtland Merrill: I think one of the biggest changes that's occurred in my practice occurred with the America Invents Act of 2012. It was implemented approximately 2013, so we've been dealing with it for ten years. That has significantly changed the way patents are enforced in the United States. It used to be, if someone sued you for patent infringement, as a defendant accused infringer, you could try to invalidate that patent through district court as well as you challenge infringement. You could also request a re-examination of the patent at the patent office if you wished. It was a long process. It wasn't optimal for the defendant, and they could have little involvement. In 2014, about, it seems it really got going. The law changed, and a person

accused of patent infringement can now petition the patent office through these proceedings before the Patent and Trial Appeal Board. They're called an inter partes review; it's a process and it's an administrative litigation. That had fundamentally changed patent litigation in the United States. It was envisioned to make it more efficient. My opinion, I don't know if my colleagues will agree with me, I think it's actually made it more costly, and it makes cases go on longer and you really got to get geared up in any major patent campaign to stave off the defendant's challenge of the patents at the patent office. So, instead of having a jury decide the case for validity, it takes it to the patent office and a panel of lawyers, essentially patent lawyers typically, former examiners, they decide your case and it's more of a technical debate than what was a patent. If you're a plaintiff and a patent owner and trying to enforce a patent, you really want to make this a story of good and evil. We have an invention, they stole it, give us money, and it turns the debate in a fundamental way into, sort of an abstract debate about the science of it. And I think that's changed the way that we practice.

Blake Klinkner: Emily, you represent clients in a wide range of industries, including pharmaceuticals, medical device, video streaming, semiconductor, mechanical spaces. Do you think our current IP laws effectively protect these industries?

Emily Tremblay: It depends. It depends on what your invention is. So, Nick gave all these legal disclaimers up front, same legal disclaimers apply to our conversation here. These are my opinions, this is not advice, I have bias based on my practice. Et cetera. Fill in the blanks. I think that Courtland identified a big shift in how patent litigation and patent protections are afforded in this country after the America Invents Act about ten years ago. I think we're seeing a more recent evolution in how our system, how the judiciary in particular, views patent protection. Essentially, there are a number of different players who have an invested interest in how the patent system works and they all have a voice. Some voices are more well-funded than others. I know that Professor Datzov has been writing in the area of Section 101 law, which is patent eligibility law. What gives you the right to have a patent? Is your invention truly patentable? I think we're seeing that the courts are less willing to afford patent owners who have made computing innovations, real innovations in terms of how computers are more efficient and are operating and different advances in software in particular. Courts are not willing to protect those types of innovations in the same way that they are willing to protect, for example, mechanical innovations, medical device innovations, pharmaceutical innovations, chemical innovations.

Those are easier to understand, I think, for the court system. And I think if you're in the computing space, and we're talking about software, it's often claimed in these very difficult to recite ways because you're trying to translate software into a relatively concise statement of what the efficiency gain is for your computer. I think it's so important now, more than ever, to really be working shoulder to shoulder, not just with patent prosecutors and those who are actually drafting your patents, but with us, with the people who are on the front lines in the court, justifying the existence of those patents, understanding how to write those patents, and to really claim the benefits of those computing inventions. Because we're seeing changes in the law that really make it more difficult to claim computing innovations in a way that isn't abstract, in a way that isn't just talking about ideas that are then implemented in code. So, I think we're seeing distinctions in how courts are dealing with different types of technology and how the law is protecting those technologies. I think we're also seeing a push from large tech companies, from the Googles of the world, from the Apples of the world, who really haven't adopted an outward-facing, favorable opinion of patent protections. Believe me, those companies have patents. They have patents coming out of their ears. They sell them. They enforce them. They're churning them out every month, but they're unwilling to acknowledge the importance of the patent system as asserted against them. I think we're seeing a shift in how we see it go through waves, and it's cyclical. When the American Invents Act first came out, we were riding this wave of, "a lot of patents are dying. No, a lot of patents are surviving. No, a lot of patents are dying. No, a lot of patents are surviving." So, I think it totally depends on the world that you're in and the current state of court cases, to be perfectly frank, and understanding that where you are as a company, how you're innovating, and how you're claiming your inventions may really depend on the era that you're in, in terms of how the court cases are going that day, and really working shoulder to shoulder with someone who's familiar with how that may play out, when you need to enforce your protections. Because at the end of the day, we're talking about a piece of paper that the government gives you that is worth zero dollars, unless and until you can effectively enforce it.

Blake Klinkner: Great. So, Kurt, you're an experienced trial attorney. My question for you is: how have changes, recent changes in IP laws and regulations, impacted the strategies that you employ when litigating these cases, and what challenges does this all present for litigation and trial?

Kurt J. Niederluecke: Well, as both Emily and Courtland have noted, the AI has been the biggest impact more recently over the past decade. It's interesting. And 101, to Emily's point. I think, as Emily points out, I've been practicing long enough where I've seen a lot happen in IP litigation and in patent litigation over the years I've been practicing. It is constantly changing. It is a pendulum. And I think in some ways, it's an intent to you know, be true to the purpose of patent law, which is to advance the science and the arts in all IP law. I think that's the world's struggle, and sometimes it comes out directly in laws, sometimes it doesn't. I think 101 is a good example of that. I think society has looked at what patents have tried to protect and feel that, especially in the electronics area with computer innovation, a lot of purported innovation is really not innovation at all, but it's a transformation of human act to computers. I don't necessarily disagree that perhaps the pendulum has swung too far, and now it's being applied to really stifle some innovation and disregard some of that innovation. You see that out there. I had one small business owner come to me who had a patent, who had gotten it just before some of these more recent interpretations of Section 101. Had a great patent, clearly inventive. He had somebody clearly stealing his idea. I had to tell the person, "I'm sorry, this falls straight under the new law. Your patent will be invalidated immediately if we file a lawsuit." I had to tell him that. That's a terrible thing to have to say. So, you see a little bit of that.

I think the other two things I would add, the biggest practical effect for me personally, living in Minnesota and practicing, at least centered in Minnesota, although I practice all over the U.S., has been also another change in the venue laws. So, over the past, I don't know if it's about six, seven years ago. You guys, has it been almost ten? The U.S. Supreme Court changed, reinterpreted, the patent law, the patent venue laws. And basically said, it used to be anytime somebody sold a product in your state, you could pretty much sue them in your state in your own court. They came out and said "no, you can't. You can sue them where they're incorporated, or you can sue them where they have a physical location." So that changed the game drastically. So now, the District of Delaware is where there is just a ton of patent litigation because that's where everybody's incorporated. So, that's where you want to go.

You don't want to go to their backyard and sue them. So, you see a lot of that. I think you see a lot more patent shopping, the more plaintiff-friendly districts in the Eastern or Western District of Texas have, historically, especially the Eastern District, had a lot of cases because plaintiffs, fairly, want to go to a place that they think they can win. They think, perhaps some issues won't get adjudicated. You come to a state like Minnesota that has what I

think is, you know, jealously speaking, one of the most high-quality benches in any state. But if you file a patent lawsuit there, you're going to get a really fair shake. Whether you're a plaintiff or a defendant, you're going to get a fair shake. But, if you're a patent holder, and you're looking for where to sue, you're probably not going to want to come to Minnesota. So, Minnesota, from a practical aspect, the amount of cases that Minnesota has, has gone drastically down since this change in law. The benefit, the good benefit to us is we get to litigate all over the U.S. You know, it's interesting to do it. But it's kind of sad that some of the best judicial minds, they don't get an opportunity because they apply the law as fairly as possible.

The last thing I'll say is, something that used to be a dirty word and now has taken over a lot of the patent industry, is patent monetization. We used to call them trolls when they first started off. But the idea that people enforcing patents that don't have any industry involvement. So, you see a lot of this. And I would say it's, I don't know if it's a majority yet, but it's heading that way. You have a lot of private equity money. A lot of people are looking to make money off a patent as an asset and not necessarily just because they're a company that competes and thinks they've been wronged. That's a great subject for a real ideological conversation. Because when you talk about encouraging innovation versus stifling innovation, is a patent that's not being utilized by a company but then is out and forced against other companies who may be using a similar idea, is that helping innovation or is that just taking a little off the top of America? That's a good ideological conversation that we don't have time for today. But, you know, I guess it's all about your perspective. That's another thing that's really coming where a lot of our work is transforming into work either on the plaintiff's or the defendant's side of those types of cases where there isn't a competitor on one side: it's just a patent holder.

Blake Klinkner: All right. So, my next question I'll throw to the entire panel, of course, whoever has a case to share. Are there any recent landmark cases that the audience should be aware of? Are there any particularly important cases maybe that are overlooked? Are there any cases that everybody should first look to when they start to do these cases? So, what cases should everybody in this room be familiar with?

Emily Tremblay: I can start. So, I think we've already tangentially mentioned both of these. One is now very new, which is the *T.C. Harlan* case that we've referenced now, the change in venue. I think this just continues all the thoughts that Kurt just shared with us. But when *T.C. Harlan*, which was the

Supreme Court decision for 2015, changed where patent litigation can be venued [sic], it changed many of the dynamics of what it means to be in suit in patent litigation. Not just in terms of, oh, you can't sue in your own backyard anymore. Maybe you have to sue in your competitor's backyard because that's what they are. Not just like what I'll refer to for lack of a better word, the soft dynamics of where you get to be and the court that you're in and the jury you might pull. But also, how much money it is going to cost you to be in that litigation. Because there are some districts that take a very, very, very, very long time. We were talking last night about cases that have lingered for upwards of ten years. And the difference between maybe getting into a venue that's eighteen months to trial and being able to find faster resolutions or more cost-effective resolutions has now changed with the venue laws that are in place. We're seeing tons of motion practice trying to transfer cases to more favorable venues or to venues that take longer or will be more costly. I think that's just a key case that's going to live with us for the foreseeable future and really impact filing decisions today. The other case I wanted to mention is the *VLSI* case, which was, as Kurt was just alluding to, the patent game has changed a little bit in the sense that it's turned into an investment opportunity for large funds who have acquired portfolios from real innovators in the space, but the now the patent holder, as Kurt mentioned, is not the one practicing the patent.

There was a huge verdict, I think two plus billion dollars out of Texas back in 2019 against Intel on chip patents by an investment company who was not producing chips. That case recently went up on appeal at the end of last year, 2023, and the federal circuit reversed, in large part, many of that two plus billion-dollar verdict that came out of Texas. I think so important to the work that we do as litigators, and in terms of really understanding whether litigation is worth it, whether it's going to bring value to your company, whether having the patents and being able to leverage those before litigation, understanding how damages models will protect your innovation and whether litigation is worth your investment of your company's resources. I think understanding how the case operates in that sense and how damages are actually working in the court system, you have to know all of that ahead of time before you are asked to spend a dime on litigation. I think those are critical cases that we're watching. And I think more than watershed Supreme Court cases, the cases that I watch are the ones coming out of the districts that are doing this work every day. In Delaware, in Texas, where the hot patent cases are, I care less about what SCOTUS is doing every few years and more about what the judges who are actually hearing these cases and deciding these issues and deciding whether your expert gets to give an opinion or whether something

gets thrown out on a 101 motion very early in the case where it was able to counsel a client to not file and not to expend resources litigating knowing that a particular district or a particular early motion would toss the case. So, I think those are the cases that your IP attorneys should be watching more than what SCOTUS is doing.

Courtland Merrill: In terms of landmark cases, what we're talking about is essentially how the district courts and the federal circuit are interpreting some major landmark cases that happened in the last decade. One of those landmark cases, and Kurt talked about it as well as Emily, what they're talking about, section 101 is what is patent eligible. The landmark case was *Alice v. CLS Banks*, I think it was 2014. But we're still talking about it because of how the court's interpreting it. Then everyone keeps holding, the IP community keeps talking at least about whether the Supreme Court's going to revisit it again; who knows?

Emily Tremblay: Congress. Everybody's asking Congress to fix the bad law. Right.

Courtland Merrill: Will Congress fix it? Who knows. But it seems that the court composition is different, of course. Trump had a lasting effect. He's got three justices on there. And it seems that, just from reading the cases and looking at the issues that led up to the *Alice* decision, it seems that the more liberal justices, Kagan, for example, were less inclined to, for example, protect a so-called business method patent, a method of doing business in a certain way, which had been very much protectable twenty years ago. It seemed that the more conservative judges are actually more inclined to protect, broad brush here, protecting patent rights. You saw a little bit of flavor of this when Justice Gorsuch, and I think maybe Roberts joined in, when they dissented on the decision and green energy, whether the PTAB and the IPR process of review was constitutional. That came down maybe four years ago. And they, in their dissents, had said, no, there's something wrong with a system that gives a patent to a citizen and then allows an administrative judge to take it away without a jury. It, in my prediction is, reading the tea leaves, is that perhaps if the Supreme Court weighs in on this eligibility 101 issue, if Congress doesn't do something, that you might have a more patent owner-friendly decision on, that's a subsequent to the *Alice* decision. Who knows? But that's what some have predicted.

Kurt J. Niederluecke: I'll just add; I'll geek out a little bit. These are all great ones, but rather than comment on those, I'll mention another one. I'll

go back and say, when I started practicing, patents were issued for seventeen years. That was the rule. And then the law changed to match up with the world and went from twenty years from the date that you first applied or first were claiming priority off an earlier application. That got rid of a lot of issues that were going on of things called submarine patents, where companies, kind of like what we refer to as trolls now, they'd be innovators, but they'd game the system and sit around and have what are called submarine patents, and just keep them in the patent office going for twenty years. The delay windshield wiper case is one of them. Wait for industry to develop the technology and then come out and say, hey, I have a patent on this. Create your claims twenty years after you filed your patent application and go out and sue the industry on it.

Most of that went away when they changed from seventeen to twenty years, but recently, within this year, Emily, so not ten or twenty years ago, a case called *In re Select* came out of the federal circuit. *In re Select* dealt with a process that the patent office has when you file your patent application. If the patent office takes too long, you can actually get a longer period. It's called a patent term adjustment. Instead of twenty years from the date you filed, you only get your protection after the patent issue, so you've lost that initial stage. So, what they say is, if we took too long as the patent office, we'll give you some more time. So, let's say we give you another year. As Courtland mentioned, you can file continuations, keep the process going, and get a bunch of different patents on the same invention. But those won't likely get that extra year. So, you end up with one patent, usually the first one, that's a year longer than all the rest of your patents on the same invention, on the same disclosure you provided. That was always okay. The federal circuit has now come out and said, if you have those patents, the patent that got an extra year could be invalid, even though it was your very first one, because the other claims are too similar to the first patent. It's called double patenting, obviousness type double patenting. If it's generally the same invention, and even though the patent office was the one that gave you the extra year, they effectively could be invalidating that patent. So, I thought, again my own personal comments, that seemed a little crazy, and still does. It does come into play, especially for a lot of the large companies that get a number of patents on the initial disclosure. Now they're in a situation where unless all the expiration dates match, they may be susceptible to having their patents invalidated because of what the patent office did to give them more time. I thought for sure it was going to be heard in bank at the federal circuit. They denied en banc review. They had a lot of amici that came out and thought it was a bad decision, but the federal circuit didn't take it en banc. So now, it's on appeal to the U.S.

Supreme Court. I think it's a great issue, and it's a very practical issue for companies that have to deal with this and now figure out what they're going to do. You can cure it. You can disclaim that end part of that patent, but it's a huge hassle for companies that have a lot of that. So, that's the geek out interesting issue I have *In re Select* that came out of the Federal Circuit this 2023 in August.

Courtland Merrill: Let me just add on that. Some of these patents, especially in the pharmaceutical industry, if you can get one more year added on, it's hundreds of millions of dollars difference that you can get in terms of royalties that you're owed because typically the technologies get more valuable as it develops and becomes more adopted by the industry and the marketplace. And your twentieth year is at the peak of the sales typically, and that's when you want to have your extension. So, it'll be interesting to see how that shakes out.

Blake Klinkner: Great. So, Courtland, I'll ask you a specific question. In your experience with intellectual property, do you have any examples of where you've seen intellectual property encourage innovation or where, in fact, it stifled innovation?

Courtland Merrill: Well, I can certainly think of examples of where it is encouraging innovation in the sense that the product's able to get to the market and able to stay a market leader. In the chip industry, for example, once you get into the customer and you become the incumbent, the customer is going to continue to buy from you. By keeping the competitor out of that market, it's not just losing the one or two sales they make, it's keeping them from becoming the incumbent. That seems to be critical. And with the stifling of innovation, a lot of times the large monopolist companies, we'll pick on Google, for example, they're going to keep the small innovator from the marketplace. There was a company that tried to sell a keyboard; there was a physical keyboard that would attach to your phone, like the old BlackBerry, and they were able to keep that out of the market just with patents. So, it can be a double-edged sword, certainly.

Blake Klinkner: Emily, my next question is for you. Given the rise of open-source software and the push for collaborative innovation, what challenges and opportunities do you see for businesses in engaging in collaborative innovation while still protecting their interests?

Emily Tremblay: Sure, that's a big one. We are moving towards more of an open-source model. We're seeing lots, just openly available resources online on GitHub. There's lots of open-source code and codebases out there for companies to build on. I think that obviously if it's dedicated to the public and many people are using it, it's not going to have the same monopolist protections that traditionally you receive when you patent these innovations. But I think we're still seeing, you know, if we're talking about software in particular, we're seeing companies build on common codebases, but taking many of their improvements or specific implementations or other innovations that are building on that in-house, keeping that secret, treating that more as trade secret, sometimes copywriting codebase. It's not usually how we associate copyright protections. We think of copyright protections as, films and art, but you can copyright code. You can copyright how you're building on what would otherwise be open source and available to entire industries for innovation, but really knowing when your development and your implementation is going to come in-house and maybe be afforded secrecy protections in the trade secret sense, and less so in the patent sense.

Blake Klinkner: Great. I'll ask my next question. With advancements in technology, particularly in the area of artificial intelligence, how do you anticipate IP law evolving to address emerging issues and emerging ethical concerns?

Kurt J. Niederluecke: That's another big question. I'm going to answer that, but I'm going to do a presidential debate thing here. We've been focusing so much on patents. I want to mention on your last question, on different cases, I'll mention one other one, and I'm not an expert in this case, but I'm going to mention it because it's really interesting. It's in the trademark area for people who are here going, why are we talking only about patents? *Abitron Austria GmbH v. Hetronic International*. It's a case that the U.S. Supreme Court decided, and it deals with the extraterritorial protections provided by the Lanham Act. It's really an important case because it deals with what exactly U.S. companies can do to protect their trademarks when other companies utilize them outside the United States, perhaps having some connection to the U.S., or bringing products back into the U.S. that are imported into the U.S. The line they're drawing there, it's moved the line a little bit, made it a little harder for U.S. companies to protect themselves. That's another case I'll just mention.

Now to your question about the ethical issues, I'm trying to think about it while I'm talking. I think, and hopefully this afternoon we can hear more

about some of the use of AI, but I think there are really a lot of ethical issues that you're hearing about in the news, and a lot of legal issues that are going to be coming up from this use of AI, and really the scraping of all the internet to find content to develop the AI. You really are using a lot of intellectual property of others that is out there. It's obviously not trade secret if it's coming off the internet, but it is afforded a lot of protections, a lot of copyright protections. You have a lot of people who have performances, who have likenesses that are being utilized, and how do you compensate those people? Should they be compensated, and how do you do that? Or is society better for, as a society, better to say, okay, as long as you're using everything, that's okay. Where do you draw that line, and how do we come down to regulate that? I was thinking of a question. It's like if I go to ChatGPT, and I have somebody draw an image for me, or make an image for me, and it goes out and uses the internet, and what happened was a copyright infringement. Am I a copyright infringer, or is ChatGPT a copyright infringer? Who is even the infringer there if I'm just utilizing fun stuff on the computer to do that? It's going to be a fascinating area, and I think it's going to have to take a combination of Congress, and creating laws, and all of us trying to suggest what's the best for innovation. In terms of the practical use in the legal field, it is coming into the legal field, it's going to be there. I think you've seen all the stories about made up cases, and things like that, and that is a serious concern. But I would say as lawyers, we're all responsible for the work product we create. Nobody should ever be citing a case that they don't even know exists. I mean, at least pull it up, at least take a look at it. Somebody better be taking a look at that. So that's really echoing beyond just, that's not just an AI ethical issue, that's an ethical issue for us as lawyers doing our jobs.

Blake Klinkner: Great, so I have one more question I'll have from the panel before I open up to the audience for their questions. We're at a symposium on innovation, on technology, on IP. What is one key takeaway that you hope everybody walks away from our conference today, and keeps in mind as they go forward? I'll start with you.

Courtland Merrill: I think I want to get back to just the importance of early protection of intellectual property rights. I think that for those that rely upon intellectual property rights, getting in there and protecting it sooner, and continuing to protect it, would be the one takeaway that I would recommend.

Emily Tremblay: So, I'll add, similar to Courtland's remarks, the right to a patent, in particular, is in the Constitution. This is not a selective right that only large companies with giant R&D budgets are entitled to have.

Individuals are entitled to patent their innovations. Small startup companies are entitled to patent their innovations. I think the message is IP is not an exclusive club for the large corporations who are flush with cash. This is a right that belongs to everybody, and understanding how to protect your innovations, or how to navigate the world of IP, should be more accessible. I think a lot of Nick's comments this morning about how to make this a more accessible field of law are so important.

Kurt J. Niederluecke: Yeah, I'll just include and say, IP is actually there to protect the value of your invention, of your creativity. That's what it's there to do, and it creates value. It's an investment, and you have to make that choice, especially small businesses. As a very small business, you have to make decisions. What do I want to spend that ten thousand dollars on? Do I want to spend it on getting a patent on my invention? Do I want to spend it on marketing? Do I want to spend it on a trademark? Do I want to spend it on just getting out there trying to get my product out in the market? Those are hard decisions. It's easy for us to sit up here and say, "do everything right," but there is cost to that, and you have to make decisions. As you grow, be proactive. Advise your clients to be proactive in how you protect and think about IP. It should be an integral part of any business development, and constantly on your planful minds.

Blake Klinkner: Great. Well, Courtland, Emily, Kurt, thank you so much for joining us for today's wonderful discussion.