

**SUMMARY OF THE 2013 STANFORD UNIVERSITY – PEKING UNIVERSITY INTERNET LAW AND PUBLIC
POLICY CONFERENCE¹**

Introduction

Dean Magill

We are delighted to be hosting this conference following the success of last year's conference in Peking University. This conference has a broad topic, but this is the right place to discuss it. Not only is internet policy at the core of innovation policy in every country; each country has a role in collectively shaping the future of the Internet.

Dean Showren

We are grateful for everyone in attendance, and for having speakers and participants from every sector of society: law, policy, academia and industry. They also come from all over the globe. This demonstrates that this conference is of very high profile. Internet has the potential to change every part of our lives, and is crucial in the process of human development. Discussing and working out these issues is forward looking and important to all of us. We wish great success to this conference.

Brett Irvin

As a Stanford alum who is now general counsel at Tencent, I often get asked why become a GC for a Chinese company, and why this conference. There is huge interaction and cooperation between Chinese and American internet companies. In Silicon Valley,

¹ This summary was made by Stanford Law School students who attended the conference. The introductory summaries were prepared by Emily Zhang. The Keynote Address and Panel 4 Summary was prepared by Randy Wu. Panel 1 Summary was prepared by Joe Casey. Panel 2 Summary was prepared by Vincent Chiu. Panel 3 Summary was prepared by Ian McKinley. Panel 5 Summary was prepared by Holley Horrel. This document was edited and compiled by Emily Zhang.

Chinese internet companies are deeply involved and integrated into the ecosystem here. Also, as a GC, I do no legal work. I do issue spotting and organize strategy. Although the legal systems are different in that China employs a civil law system and the US is a common law system, the issues that Chinese internet companies face is the same as any internet company. Therefore, this conference brings those issues together and provides a platform for experts to learn mutually from each other.

Letter from Anna Eshoo

I apologize for not being able to be in attendance. I believe this Conference builds on Stanford's strength in promoting the growth of the internet. As the Silicon Valley's representative in Congress, I am pushing Congress to look at how legislation in this area can better society. For example, we are currently trying to make freeing mobile broadband a top priority. I am happy to see this partnership between these two great institutions, and I would like to work with you to develop a vibrant technology sector.

Keynote Address – The Honorable Randall Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit

Last year, Court of Appeals for the Federal Circuit went to Beijing for a joint judiciary conference with China's Supreme Court IP Division. A senator was concerned about decision to take court to China, and expressed the view that a U.S. court should have little to do with foreign courts. My political answer is that IP is critical to US economy, and cooperation with foreign judiciary will help US economy, jobs, and his constituents. But the real reason why US judiciary and Chinese judiciary have to meet is that these two nations are the leaders of 21st century, which entails great responsibility; must cooperate to fulfill this responsibility.

It was a marvelous experience with the Supreme People's Court of Beijing: 1500 people attended, including 300 judges in China. The US has as much to learn from China as China has to learn from us. We face significant problems in litigation; Chinese system is less expensive, more efficient, and we need to learn that. I am quite sincere in my professed goal of cooperating, which is a two-way communication with the judges in China.

Our leadership and responsibilities: both of our economies have profited greatly from the IP system, yet that system has come under attack, partially due to abuses in the system. This is happening in both China and the U.S. Our leadership requires us to focus efforts on improving, preserving, and strengthening the IP system, which has brought such great benefits to both of our nation.

The patent system has come under attack in the US because it's seen as causing a great deal of litigation, which is expensive for corporations to handle. There is a great problem in this area, but it's not a problem with the patent system but a problem with the litigation system. Many who have dealt with this have focused on reforming patent law, but this misses the goals of the patent system and fails to recognize its limited role in our economies and societies. The patent system is not a consumer protection system, not a system to regulate prices, and not a system that has anything to do with healthcare distribution. WHO has a list of 300 essential drugs; only three are under patent protection. You'd think it'd be a very large number, but it's not. But 298 once were patented. So the patent system is essential to provide treatments, and we have many treatments we still need. And this is the purpose of patent law: to promote the progress of science and the useful arts.

Unfortunately the system gets attacked for things it's not supposed to do. It's supposed to protect investments in research and development, many of which occur at universities. But it also has an equally important function of providing incentives and tools to make sure the technology is converted into use – that it's used as well as useful. But it really doesn't regulate many of the affairs for which it's criticized.

In India, at this kind of conference, there would be a large lamp besides the podium, with basins of oil and wicks hanging over the lamp. The sponsor would start the

conference by lighting the candle and one of those wicks, in a beautiful symbolic spreading of light. Minister told Judge Rader: India is a compassionate nation – if you can't describe the patent system in compassionate terms, perhaps you shouldn't speak at all.

It's now 2013; every invention before 1993 is now free for everyone. Our parents paid a little higher price for advances in medicine, IT; and then they gave them to you as a gift and asked only that you do the same thing for your grandchildren. The patent system is a gift-giving system: we each pay a little more for patented products in order to create a fund for R&D, which we then give as a gift to our children. Therefore, the patent system is compassionate.

This focuses us on the responsibility our nations have to protect the strength the patent system provides in protecting new technology. It's amusing to follow media coverage of big patent cases, e.g. Apple v. Samsung, which talk about restricting consumer choices and raise prices. This should cause us to chuckle. Really? You can walk into stores with 300 different phone choices. Choices in this field are enormous!

There is a problem, though—the problem of abusive litigation. There's nothing wrong with entities that buy and assert patents – that's like any entity in a commercial system that buys and circulates property – realtors. But there is a problem at the heart of the system. It's not about identifying good and bad users of IP, but in the assertion of improper value of that property. Chinese system must be careful to avoid this, where patents are asserted far beyond its contribution to the field it's improved. Some contributions have tiny value, which only deserve tiny value. But it doesn't help to decide cases based on characteristics of parties – that's irrelevant to a legal dispute in court. What's relevant is when they assert property far beyond its value, and it becomes blackmail because of the expense of litigating to closure, because they can induce parties to settle to avoid costs of litigation. I'm working hard on reducing costs of discovery, reducing the number of issues that can be asserted, required early evaluation of patent being asserted.

I hope to work with my Chinese colleagues to reduce costs of litigation to restore the system as a compassionate gift-giving system.

PANEL 1: INTERNET ANTITRUST POLICY

Judge Kong Xiangjun, Chief Judge, Intellectual Property Division, Supreme People's Court, People's Republic of China

Anti-Monopoly Civil Litigation in the Field of Internet in China

In his presentation, Judge Kong said that the Anti-monopoly Law does not have any restrictive provisions on anti-monopoly civil litigation, but Chinese courts have already accepted and adjudicated a series of important anti-monopoly cases. The major cases include Baidu Monopoly Dispute and Tencent Monopoly Dispute. Still, major issues of Anti-Monopoly Civil Litigation facing China are: 1. how to define the relevant market; 2. how to analyze what constitutes a monopolistic act -- economic analysis or other methods; and 3. the burden of proof.

Shi Jianzhong, Director and Professor, Competition Law Research

Center, China University of Political Science and Law

Prosperity Stems from Competition: Definition of Relevant Market in Internet Industry——Practices in China's Internet Industry and Their Implications

There are three typical cases violating Anti-unfair Competition Law: where it involves abuse of dominant market position, where relations between Enterprises are involved, and types of market question is involved (Traditional single market vs. Two-sided market). In the above three cases, the plaintiffs all lost because they could not prove the defendants had dominant market position. Problems and Difficulties of Relevant Market Definition in Internet Industries include: how to define relevant market of toll services? how to define relevant market of bilateral market? How to define the relevant product range of Internet platforms? The conclusion is that the definition of relevant market shall take meeting consumers demands and industry innovation as basic starting points.

Yannick Carapito, Senior Attorney, Antitrust Team, Legal and Corporate Affairs Group,
Microsoft

Antitrust Issues in Standards for the Internet

Standards for the Internet are vital to the development of the Internet and to interoperability among devices and computers. For example, anytime you use the Internet, your cell phone or a computer, you are benefitting from international technical standards. Standards are developed in a collaborative process at standards-setting organizations (“SSOs”), but there are currently issues that affect this area, such as when does seeking an injunction on a FRAND-encumbered SEP constitute a patent hold-up in violation of competition rules? Other issues relate to excessive payments, reciprocity and transfer of a FRAND-encumbered SEP.

PANEL 2: PRIVACY

Jennifer Granick, Director of Civil Liberties, Stanford Center for Internet and Society,
Stanford Law School

Principles of U.S. Government Surveillance and Privacy Law

As Director Granick explained, privacy regulation still has a lot of need for improvement and development even just in the United States. As she explained, concerns in the United States are directed not only at companies accessing our private information, but also at the government. She warned that failing to properly protect privacy can be economically disastrous, scaring people from using new technologies that could otherwise be very productive. In the United States, protection of privacy primarily comes from the Constitution (the 4th amendment), and from a handful of laws (primarily the Privacy Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act).

However, this system is far from perfect. In particular: (1) the current system protects content more than transactional information, but transactional information (e.g. IP addresses) has become increasingly revealing; (2) similarly, the system protects “personally identifying information” to the exclusion of other information, which can also now be extremely revealing in the era of Big Data even when it is not ostensibly tied to a particular name; (3) the system protects “real time” more than “stored” information, even though technology has blurred the line between the two; and (4) 4th Amendment case law has conflated “secrecy” with “privacy.” As a result of these flaws, it is unclear what is and is not protected in the United States today – for example, it is unclear what sort of privacy protection we have in e-mail, or against tracking by drones, video cameras, or cell phone locations. Overall, Director Granick warned that legislators have failed to appreciate how quickly modern technology has evolved to enable mass surveillance by the government, has undervalued transparency, and has failed to provide robust penalties connected to the surveillance laws that we do have.

Dan Auerbach, Electronic Frontier Foundation

How Users Can Fight Back Against Online Tracking

Mr. Auerbach provided two examples of just how pervasive tracking is, and how much information companies can gather about individuals. His examples were a sixteen year old who received advertisements from Target for newborns before even her family knew she was pregnant, based upon tracking of her internet activity, and a human rights activist in Bahrain whose torturers had intercepted his “private” phone calls and text messages with other activists. Mr. Auerbach stressed that to be able to protect privacy, the key is to understand the “threat model” (i.e. what it is you want to keep private, and from whom), and then select appropriate technological tools to achieve this result. For example, if your adversary is the U.S. government, Mr. Auerbach recommended using tools that are for other jurisdictions, or switching networks (through VPN or Tor) and, above all else, encrypting data. The EFF is seeking to move the whole privacy ecosystem towards cryptography, which will allow users to have more real privacy.

LI Changxi, Director and Researcher, Regulations Division, Policies & Regulations Department, Ministry of Industry and Information Technology, People's Republic of China

China's Personal Electronic Information Protection System

Director Li introduced recent developments in China's personal electronic information protection system. In particular, he stressed that existing laws have failed to protect user privacy on-line, and introduced new legislation that is being developed to meet these needs. This includes *Several Provisions on the Regulation of Internet Information Service Market Order* (effective on March 15, 2012); *The NPC Standing Committee's Decision on Enhancement of Internet Information Protection* (released and took effect on December 28, 2012); and *The Guidelines on Personal Information Protection, Information Security Technology, and Public and Commercial Service Information System* (effective on February 1, 2013). According to Director Li, the new legislation will protect personally identifying information, place restrictions upon data collection, place restrictions upon the dissemination of collected data, and impose new obligations upon internet information providers, including providing notice of personal information leaks. As Director Li explained, the personal information protection law (which will establish the basic legal system to protect personal information), and administrative regulations and departmental rules (to specify clearly the system and requirements for protecting personal information) are still forthcoming and will greatly enhance the security of private user data in China.

WANG Xixin, Vice Dean and Professor, Peking University Law School

The Role and Responsibility of ISP in the Context of Online Expression-Privacy Tension

Dean Wang then explained the impetus behind new privacy regulations in China. According to Dean Wang, in the internet age we don't really have privacy. But this has created a paradox, since we hope to gain as much information as we can about others but want them to learn as little about us as possible. The development of technology is a major risk to privacy because, even though the EFF suggests that we use technology to protect

ourselves, this is beyond the abilities of the average person and, at least in China, there is no privacy protection concerning government surveillance. Therefore, we should all be terrified of the internet because once you're on it, your privacy is gone. However, it is not only private citizens who need to be terrified of the internet; government officials are also, rightly, afraid of the internet because their privacy is also at risk from on-line activities. While Chinese laws provide both civil and criminal protection for privacy, the development of actual privacy protection has been slow and has only recently become to come to fruition. Dean Wang warned, however, that increased regulation might have unintended consequences as well as benefits. For example, the internet is currently used as a tool for fighting local government corruption in China, by sending out information on government abuses. However, some of this information touches upon the privacy of officials (for example, their assets or contact information) and so increased privacy regulations also threaten to potentially negatively affect public supervision of government abuses.

ZHOU Hanhua, *Professor & Researcher, Institute of Law, Chinese Academy of Social Sciences*

The Formulation of the National People's Congress's Decision on Strengthening the Protection of Network Information and Its Implications

Finally. Professor Zhou introduced the process behind the formulation of the National People's Congress's Decision on Strengthening the Protection of Network Information and its implications. As Professor Zhou explained, while the *Decision* is short (only 12 articles) it is still very significant as it creates legal liabilities and protects personal information, junk mail controls, provides for a real-name registration system and provides responsibilities for law enforcement. These developments are required for protecting user's rights and promoting fair competition, in addition to maintaining information security. According to Professor Zhou, privacy is a common interest between the U.S. and China because neither country has comprehensive legal protections. For example, while President Obama has issued a Privacy Bill of Rights, it is still unclear what real effects this will have in the U.S. In China, Professor Zhou explained that there are multiple stakeholders

pushing forward privacy law making in China, but it is unclear precisely when China will have a final privacy law. Nevertheless, recent developments have already been welcomed by the public and have sparked a lot of debate. Moreover, there is still a lot of room for development – for example, enforcement is still lacking even on regulated areas like spam control. Therefore, there is still a lot of work to do.

PANEL 3: INTERNET SERVICE PROVIDER LIABILITY

The third panel at the symposium, on Internet Service Provider Liability, gave unique insights into ISP liability in various jurisdictions around the world, as well as the changing face of the legal terrain in this area. Panel member Paul Goldstein provided some historical background of ISP law, as well as general commentary on the contributions of the other panelists.

***LIU Jiarui**, Assistant Professor of Law, University of New Hampshire School of Law*

ISP Copyright Liabilities and Safe Harbors in China

***WANG Qian**, Professor, East China University of Political Science and Law*

DMCA's Influence on ISP's Liability in China: the Good and the Bad

Panel members Jiarui Liu and Qian Wang discussed ISP liability, safe harbors, and the influence of the Digital Millennium Copyright Act in China. Liability for ISPs has shifted from direct liability to no liability to indirect liability, and safe harbors are generally unavailable in China, due to the strict requirements for qualifying. The DMCA has had both good and bad influence: it provided a “red flag” test, which allows for no liability if an ISP did not know or had no reasonable grounds to know of infringement, but it also introduced the possibility of vicarious liability for ISPs due to the economic benefits received from hosting infringing material.

Giuseppina D'Agostino, Associate Professor of Law, Osgoode Hall Law School, York University

ISP Copyright Liability in Canada

Panel member Giuseppina D'Agostino discussed ISP liability in Canada, pointing out ways in which Canadian law in this area differs from U.S. law. The Canadian Copyright Modernization Act of 2012 specifically addresses ISP liability, addresses exemptions from primary infringement, recognizes secondary liability via enablement, and provides for a “notice and notice” system, in which the ISP must simply forward notice of infringing material to the alleged infringer to be in compliance, rather than removing the infringing work.

Fred von Lohmann, Legal Director for Copyright, Google

Copyright as Innovation Policy: How Intermediary Liability Defines the Innovation Landscape

Panel member Fred von Lohmann discussed the DMCA and provisions of the Communications Decency Act, arguing that reduced liability for ISPs allows for greater freedom of information. In general, the trends in ISP liability law have been favorable, and as more nations adopt regulations limiting liability for ISPs, less energy and resources will be wasted on self-policing and censorship.

PANEL 4: VIRTUAL ITEMS

Andy Sun, Visiting Chair Professor, Tongji University College of Law

Introduction to Virtual Items

In the not-so-distant future, 3-D printing, which is currently in development, will allow virtual items to become real. It is hard to imagine what will be a reality in a decade, much less 20 years down the road. Today, most virtual items appear on massively multiplayer online role-playing games (“MMORPGs”). We are also seeing digital currencies,

which raise questions about how and whether we will recognize them as property before they are widely accepted.

How do we currently order virtual items? Many websites already provide guidelines; as an example, take the World of Warcraft licensing agreement's treatment of virtual items and how they are owned: "All title, ownership rights and intellectual property rights *in and to the Game* and all copies thereof (including without limitation any titles, computer code, themes, *objects, characters, character names*, stories, dialog, catch phrases, locations, concepts, *artwork, character inventories*, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard."

Virtual items do carry value, as they are traded on the secondary market for sums as large as several hundred thousand dollars. And the values that people accord them are reflected in real-world crime – for example, two people were murdered in China in separate cases in 2005, one over a "stolen" "dragon-slaying sword" (murder of Qui Chengwei), and another to "avenge" the death of the killer's character (murder of Lee Hungwei).

Thus, virtual items have value – but how should we treat them? Alternative schemas include imposing licensing agreements; treating them as personal property; affording them credits or points (like airline miles); treating them as services; applying intellectual property rights; or applying *sui generis* rights. An extra consideration is whether they should be taxed, and whether the theft of virtual items should result in civil or criminal liabilities. Each category has problems; none fits perfectly.

Joshua Fairfield, Associate Professor of Law, Washington & Lee University School of Law

Virtual Gravity: The Path and Velocity of Virtual Property

This talk begins with the acknowledgment that people invest in property and real estate in virtual worlds, and also are increasingly using virtual currencies outside the virtual world. The motivation for this talk (and a related paper) is that that as interactions with SimCity and now even with iPhones demonstrate, virtual items now govern our physical, real space, not just video or online games. You spend money on a game but are limited in how you play it; you buy a phone but cannot “jailbreak” it. Maybe tomorrow, your car will come with a license and conditions that will prevent you from fully using the car as you wish. With the advent of 3-D printers, even our clothes might come with a license. The laws of virtual property will govern physical property.

Currently, we have three ways of funding the internet: (1) subscriptions; (2) targeted behavioral advertising, although it faces increasing resistance on privacy grounds; and (3) microtransactions, i.e. buying little things in games for a small amount of money. Contracts and intellectual property (IP) rules play a part in these models of internet funding, and now also increasingly play a role in the “ownership” of physical property, too – as we see with cell phones. The question of the hour, then is whether over the next couple of years, the worldwide trend will continue in which consumers own less and less of what we buy. Put differently, are we inventing a new form of property, in which consumers own less and less of what we buy?

As a basic premise, we must understand that technology law is common law. It responds to the openings of new markets caused by new technologies. And at the same time, law shapes what technologies are developed. There is a feedback loop between law and technology objects. Our new digital items are changing the law.

With regard to virtual items, which are generally governed by terms and conditions of use or end user license agreements (EULAs), “ownership” means nothing. The EULA typically says that you, the person buying something, own nothing. How does this altered concept of “ownership” fit in with common law? As in the classic case of *Hadley v. Baxendale* – in which the common carrier was not held liable where the mill owner failed to notify it that a late delivery would cause it to lose business – the law reflects what risks corporations will take on. Yet the use of contract law to alter a purchaser’s ownership

fundamentally alters our notion of property law. A contract governs the relationship between two parties. Property law, by contrast, is broader, defining rights against third parties. Yet when a person buys an e-book and it disappears from his or her device, contract law has just affected the broader concept of property.

We currently treat virtual items as a contract (the relationship between a maker and a buyer), as property, and as intellectual property. We see these three conceptions reflected in various business models relating to virtual items:

- Subscription models – contract – characterized as service;
- The “free to play” model or microtransactions – property – characterized as sale;
- Downloadable content – intellectual property – characterized as license.

In using different models for the same goods, sellers try to differentiate between what the buyer “buys” and what happens to the good. In summary, technology is defining the law in this space, is defining away what property means, and is profoundly affecting our business models.

Jason Si, Associate General Counsel and Secretary General of the Legal Research Center, Tencent

Research on Issues Concerning the Ownership and Transactions of Virtual Property

This talk discusses (1) online games and markets, the categories of virtual items in those games, and their values and transactions; (2) attributes of and ownership of virtual items in online games, and (3) theft and illegal transactions involving virtual items on third-party platforms.

What follows is an overview of online games and markets, the categories of virtual items in those games, and their values and transactions. First, there are two main models for revenue growth. In China, the market for virtual items has skyrocketed. The games, including those on mobile phones, have grown about 30% year over year. In 2010, the

large companies generated a volume of about \$2.5 million in the United States, and the market in China is even bigger. In the United States, the typical model is based on selling software to consumers. In China, the market is more focused on online games. Even the models for online revenue tend to be different. As an example, in the United States, World of Warcraft charges a player based on how long they play. While some companies in China use this method, most have graduated to a model in which players pay based on the “acquisition” of virtual props, like a gun with a distinctive bright color. There are two main categories of virtual props that one can buy: functional props that change a player’s attributes, and props that are purely aesthetic. Examples of the former are items in Zynga social games. An example of the latter is dress-up champion skins in the game League of Legends. Another example is China’s QQShow, in which players pay for different clothes, accessories and hairstyles as part of a fashion show; that game is based on a monthly subscription rate. Both types of items drive a lot of transactions. In addition, we can categorize the types of transactions involving virtual items as official and unofficial. Official transactions are on the game’s platform; unofficial transactions are on third-party platforms like Taobao or through professional gaming channels. About 30% of users have participated in unofficial transactions, buying virtual currency, virtual equipment, power leveling, or other. There are also unofficial transactions directly between users. The volumes of both unofficial and official transactions are growing.

Now that we have an idea of what types of virtual goods there are and how they are bought, we should discuss ownership. The Chinese Ministry of Culture is currently considering how to regulate ownership of virtual items. Since virtual items have different attributes, figuring out what has value is important. Virtual property is composed of text, images, audio-visual resources and codes, and is completed in the development phase by online game designers. Some actions, such as the use and purchase of virtual items, are also realized through codes. So how would a government measure their value? Considerations include the time players invest to earn items (labor income); the money players invest to buy or earn items; elements of creativity or design that players contribute (which may merit IP protection); or the theory of debt (in which players acquire an item,

and the operator must provide corresponding services based on agreements, like increasing attacking abilities).

Apart from ownership, a separate problem is preventing theft of virtual property. Some groups create Trojan codes that allow them to steal accounts, or first access accounts to determine what they contain. It is the speaker's personal opinion that the government should regulate illegal trade on third-party operators' sites. One solution could be establishing a cooling period for any transaction of virtual items, so that an account owner could discover and stop a fraudulent transaction on his account before it went through.

Stephen Smith, *Managing Partner, Greenberg Glusker LLP*

Virtual Property: Two Real World Case Studies and the Nightmare Scenarios

What's going on in the virtual items world is a bootstrap, transforming one type of property into something else. A lot of companies use end user license agreements (EULAs) that are fine if used appropriately, but if abused can create a nightmare situation. Increasingly in the future, we will see a combination of game playing and online lives (as an example, look at what is happening on Facebook), so how the license agreement is used to transform property is important.

Several real case studies lead into a discussion of what nightmares the future might bring.

In the lawsuit *Blizzard Entm't v. In Game Dollar* (C.D. Cal.), the defendant was accused of creating a marketplace for players with virtual gold coins to sell it to each other. Activision/Blizzard did not choose, in litigation, to test its theory of ownership of the coins. Instead, it argued that it was a violation of its site's terms of use to accumulate gold and sell it on a marketplace. On that argument, it won a preliminary injunction against In Game Dollar. The question of who owned the gold – the game operator or the players who “acquired” it – was never decided.

Several years later, in a case involving the Computer Fraud and Abuse Act (CFAA), the dangers of EULAs became more apparent. In *Facebook v. StudiVZ* (N.D. Cal.), Facebook alleged that StudiVZ, a German social network, violated the CFAA, which provides for civil and criminal liability for entering a website without authority or, pertinently, beyond the scope of one's authorization. The claim in this case was that StudiVZ was improperly "inspired" by what its founders saw on Facebook through their personal accounts. Many individuals at StudiVZ were terrified that, apparently, because of their use of their Facebook accounts, they risked being sent to jail.

Similarly, in another case, a game publisher that had been licensed to operate a game, but on a server owned by the licensor, made a copy of the server after the licensor threatened to shut down the game by shoving a poison pill code into the server before terminating the parties' contract. The licensor sued under the CFAA, filing criminal charges against the publisher for making that copy. This lawsuit again caused the clients great concern that they could end up in jail for what was, in this case, merely a defensive business tactic.

The dystopian concern is that corporations may one day dictate by contract what people can do on the Internet – making the regulation of people's activities entirely a matter of private contract ordering.

These cases also raise the question of whether we can fairly impose criminal charges under the CFAA on users who never even read the EULA what happens with users – they don't read the EULA, and therefore do not even know what rules they have agreed to. Is it fair to impose civil or criminal liability on a user for going beyond the scope of her authorization when she doesn't know what that authorization is? The combination of EULAs and the CFAA transforms a contract into property (the site owner's) and goes one step further to impose criminal liability. As the sad history of Eric Schwartz demonstrated, users often do not know what they are signing up for when they sign a EULA. At some point, the government may have to step in and solve the problem.

Yang Ming, Assistant to the Dean & Associate Professor, Peking University Law School

The Ownership of Virtual Items

The problem of the ownership of virtual items has existed for over ten years, but as fewer scholars appear now to be discussing this problem, it is worthwhile to consider a few theoretical concerns.

To begin, why do we care about the ownership of virtual items? And how does the traditional legal system deal with virtual items? We care about virtual items because, depending on how broadly one defines them, many people and their accounts could be implicated on a routine basis. Take, for example, the question of succession. When a person dies, what will happen to his instant messaging (IM) account? Will the ISP own it, or heirs of the original user? Each has a different view – the ISP believes they own the account, and the user believes he owns it.

As noted, the question of definition is important. Should virtual items be considered a service, or a property? If property, who owns it? Virtual items may be defined broadly as every digital resource that exists in a particular network virtual space and is of sufficient specificity. Or they may be defined narrowly as digital items that can be obtained through payment or some form of interest through transactions in an online or offline market. According to the speaker, the broader definition is better, reflecting the ongoing development of the internet. We can understand the scope of virtual items from three aspects: (1) network environment standard, (2) the commercialization of the virtual world, *i.e.*, the probability of virtual items transactions, and (3) users' participation, or their role in forming virtual items.

Another important theoretical question is what is the legal status of virtual items? There are several different theories: IP, contract, or property. According to the speaker, the best approach is to treat virtual items as a new form of rights *in rem*, still to be defined. Contracts more appropriately deal with the network service, not the accumulation of virtual items. Instead, features of virtual items make them a better fit for the rules of rights *in rem*. That is, even though virtual items are intangible, the right holder can, by his control,

directly affect the usage of the item; and the item cannot be used by two or more people. Moreover, treating virtual items as a new form of rights *in rem* avoids having to craft a new legal system, which would seem to necessitate a new legal system every time there is a new technology.

The ISP thinks it is the proprietor because it is the rule maker, setting the rules for how users can obtain and accumulate virtual items. But it is the user who puts in the effort to accumulate the goods. One of the issues with holding the ISP to be the owner is that if a third party infringes the virtual property, the user, who has put in effort to accumulate this property, would have no remedy against the third party under tort law. Another is that usually, because of a clause in the terms of use, the ISP can close the service without compensating users at all for the virtual items they have accumulated and now lost. People are spending real money to obtain these items. Their ownership of the items should not vary just because a contract is involved.

Finally, it is important that we protect users' virtual property. The ISP should be responsible for the safety of the property bought on its site. When an ISP closes its site, it should compensate the users. The ISP should also have a duty to keep relevant electronic data.

PANEL 5: PATENT LITIGATION

Judge Ronald Whyte, U.S. District Court of the Northern District of California

Remedies for Patent Infringement in the United States

Judge Whyte introduced the talk by discussing the statutory authority under which patent infringement damages are awarded in the U.S. – 35 U.S.C. § 284, which states that the court “shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” The statute sets lower bounds on the award, and the court may also increase the

damages up to three times as a punitive measure. Damage awards may be based on expert testimony.

There are two basic theories of patent damages: lost profits and reasonable royalty. Lost profits are based on the patent owner's loss of sales, price erosion damages and lost collateral sales. Reasonable royalties are calculated based on a hypothetical negotiation between the patentee and infringer at a time before the infringement began; critically, the hypothetical negotiation presumes that the patentee is a willing licensor and the alleged infringer is a willing licensee, with both parties assuming the patent was valid, enforceable, and infringed. Reasonable royalties are determined using a set of factors from *Georgia-Pacific*, and using last licenses on comparable technology.

Judge Whyte focused on the courts' recent efforts to curtail unreasonably high jury awards. First, trial judges now have broad discretion to exclude expert testimony that is not based upon sound economic proof. Second, courts have limited application of the "entire market rule" for determining patent damages related to multi-component products. Third, the relationships of prior licensees are now assessed to determine whether past licenses relate to the particular hypothetical negotiations at issue. Fourth, courts have abolished the "25% rule of thumb." Fifth, litigation-driven license are generally not admissible now to establish reasonable royalty damages.

Duane Valz, Senior Patent Counsel, Google Inc

The U.S. & Chinese Patent Systems: The New Dialectics of Innovation?

The U.S. marketplace is well-known for entrepreneurship and innovation in technology; it's also a big marketplace for high end technology products and services. Chinese firms don't always face a warm welcome in the U.S. – e.g. Huawei and ZTE (but compare Alibaba). The U.S. patent system is currently known for: NPEs, software patent proliferation, secondary marketplace innovation, big damages, high stakes operating company disputes, and the ITC as a new gatekeeper at customs. In contrast, the Chinese marketplace is rapidly expanding across all sectors. China is a growing market place for

high-end technology with huge upside potential, but expanding foreign firms don't always face a warm welcome there, either. The Chinese government has been pushing to strengthen its patent system and home-grown innovation. The Chinese patent system is currently known for rapid growth, high numbers of litigations with low damages, and uncertainty over quality and consequences.

Do patent really promote innovation in the IT section, and it is enough that they merely function as “scaffolding” for business relationships in IT marketplaces? Mr. Valz examined some empirical data regarding the skyrocketing number of invention and utility model applications in China, as well as the rising number of litigations. As we move forward, the key questions are: How will patent proliferation in China be used in industrial and trade policy over time? Will a growing secondary market for Chinese patents primarily benefit local companies, foreign companies or large NPEs? Will the Chinese Government tamp down on Troll activity? Or itself foster secondary market activity?

In conclusion, patent proliferation in itself will not promote innovation and there are danger signs that it may promote negative behaviors and impede innovation in China. A patent system properly balanced with competition laws and market-driven economic development policies will best promote and protect innovation.

Roger Shang, Chief Patent and Technology Counsel, Alibaba Group

Patents and Innovation in China

Patent prosecution in China differs from the U.S. in a number of ways. First, claim scope must be closely aligned with patent specification, which limits broadening of claims. Second, there are strict requirements on showing ***technical*** aspects of invention, as well as limits on software and business method patents. Third, there are procedural restrictions on prolonged prosecution and on obtaining multiple patents for the same invention.

In terms of patent litigation: First, discovery is very limited; plaintiff must provide specific and notarized evidence of infringement. Second, forum shopping is very limited;

jurisdiction is often where infringement occurred. Third, cases are decided entirely by the judge. Damages are small (average in tens of thousands of dollars) but plaintiffs often win (over 60% of the time).

In the face of this patent system, Alibaba has innovated to serve customers. To deal with the lack of credit data/trust: Alipay established to provide online escrow service between buyers and sellers. Alibaba has had to innovate to process the massive number of transactions securely and accurately: Alibaba sites processed more transaction volume than Amazon and eBay combined. To help small businesses: Alibaba Finance established to provide microloans to small sellers on Alibaba sites using data analysis.

Neel Chatterjee, Co-Chair, Intellectual Property Group, Orrick

Does the U.S. Litigation System Promote Software/Internet Innovation?

The bottom line: The U.S. system is broken in many ways but it does, on the whole, protect software/Internet inventions. Software and Internet is rapidly moving, but the U.S. patent system does not quickly protect innovation. The U.S. current legal framework sometimes promotes personal wealth at the expense of national wealth by empowering patent trolls, and legitimate companies feel victimized at times by flaws in the system.

The difficulty of software and Internet patents is that the U.S. patent system focuses too much on invention, but not innovation and discovery. Patent Damages are exceeding difficult to value for software/Internet inventions, innovations and discoveries. Great people innovate/discover even when there is no financial reward through patent protection. Sometimes disruptive technology is not inventive.

The innovation/invention/discovery problem creates errors in our system. U.S. current legal framework sometimes promotes personal wealth at the expense of national wealth by empowering patent trolls who can behave irresponsibly, and legitimate companies feel victimized by the flaws in the system. Part of the problem is in the patent enforcement system in the U.S.: there is a split patent litigation system involving U.S.

courts, the ITC, and the USPTO. There are heavy discovery costs and time to complete can be 3 years or more. Litigation costs, not innovation, often drive licensing. In contrast, while China has a split patent litigation system, its time to completion is only 6-8 months (on first instance), attributable to the fact that no discovery is available.

ZHANG Ping, *Professor of Law, Peking University Law School*

In Hatred and In Love: Patent Competition on Internet Open Platform

This talk examines the role of patents in the development of open source internet platforms. There is marked contrast between the IP policies of open source platforms and open interface but closed source platforms. Closed source platforms are characterized by strong copyright protection, patent protection (often used offensively), trademark protection in the establishment of private standards. Open source platforms are characterized by waivers of copyright, joint patents (used defensively), trademark protection, and an open technical standard. If the spirit of the internet is freedom, openness, and sharing, then it would seem that patents are a “natural enemy” of open source software.

The talk discussed a case study of patent policies when companies contribute code to the Android open source program. Whereas contributors to the Linux core are required to grant free user licenses to any patent applicants pertaining to it, there are no such restrictions on the application layer. Thus, patent litigations with respect to open platforms have arisen: e.g. litigations raised by Yahoo, Amazon, and a number of NPEs. In response, web providers such as Google and Facebook have set out to mitigate risk by a strategy of patent acquisition. The patents aren't used to prevent others from imitation but instead are strategic operating assets used for maintaining and supporting various collaborative relationships. Internet open source platforms have contributed much to the recent trend of patent accumulation by “patent aggregators,” as described in Ewing and Feldman's “The Giants Among Us.”

Thus, patents now play a complex role in the open source software environment today: patent are pursued for the sake of sharing innovation and for the sake of establishing defensive barriers to IP risk. Patent litigation will have positive effects in eliminating lagging-behind products and spurring innovation, but will have negative effects in fueling patent thickets and allowing monopoly formation. Both successes and failures of open source internet platforms will arise from the patent system.