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INTERVIEW
TRIAL BY JURY OF PATENT CASES SYMPOSIUM

ANNE HASSETT & JULIAN PYMENTO

In this interview, Anne Hassett, the Executive Director of NYU School of Law's Engelberg Center on Innovation Law & Policy, discusses her experience conceiving and bringing to fruition the Trial by Jury of Patent Cases Symposium. The conference was co-hosted by NYU School of Law's Engelberg Center and the Civil Jury Project on September 30, 2016. Distinguished federal jurists, academics, and practitioners discussed whether the 7th Amendment guarantees a right to a jury trial in patent cases and analyzed, in presentations and roundtable discussions, current issues and trends in how patent jury trials are conducted. Given her rich and varied background in the patent law sphere, Anne Hassett also discusses her own views on the matters brought up in the symposium, including the observations and experiences that shape her perspective on patent jury trials.

Anne Hassett joined NYU School of Law's Engelberg Center on Innovation Law and Policy following a distinguished 30-year career as a trial lawyer in complex business litigation, and in particular, intellectual property litigation. Anne most recently was a senior partner in the patent litigation practice at Goodwin Procter LLP and previously a partner in the intellectual property practice at Kirkland & Ellis LLP. Anne received her BS summa cum laude in chemistry from SUNY Albany, AM in chemistry from Harvard University, and JD cum laude from U.C. Hastings College of the Law. Anne was editor-in-chief of the Hastings Law Review and named to the Order of the Coif and the Thurston Society. She is currently President-Elect and serves on the board of the New York Intellectual Property Law Association (NYIPLA), is Board Liaison to the NYIPLA's Legislative Action Committee, and is a member of the Honorable William C. Conner Inn of Court. Anne is Of Counsel to Amster, Rothstein, & Ebenstein, LLP. Anne is also a research scholar at NYU School of Law, with a particular interest in how diversity enhances innovation.

Julian Pymento is a student at NYU School of Law graduating in May 2017 and the Senior Notes Editor for the NYU Journal of Intellectual Property and Entertainment Law. Julian has focused his studies on patent law and was co-chair for the Patent Committee of the Intellectual Property and Entertainment Law Society. Julian received both his BS and MS in Electrical Engineering from New York University Polytechnic School of Engineering and a minor in Business Studies from New York University Stern School of Business.

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JP: Thank you for taking the time to speak with us. Before we get your views on the symposium topics, what was the inspiration behind Trial by Jury of Patent Cases, the choice of panels, and the order in which they were presented?

AH: So it was multivariate as you might expect. The question of what is the best way to handle deciding patent issues in litigation is something that is of interest to several of us at the Center – for me, because I've spent many years working in the area, and in particular, Rochelle Dreyfuss, and Jeanne Fromer are also involved in looking at some of these issues, and other people as well. This issue has been of interest to us for a while, and then the Civil Jury Project approached us about doing a program on why civil jury trials are decreasing and what can be done about it. So it seemed like a good opportunity for the two of us to put our resources together. Just to give you a sense of how long it takes to get these things, we probably started talking to

the Civil Jury Project, maybe February or March 2016 for a program that was at the end of September.

As for the choice of panels – when the Engelberg Center co-directors talked about the proposal to do this program, the co-directors had a number of ideas about what were important components of the question. And so a lot of the framing of the panel questions came out of that brainstorming discussion that we had. And then we proposed to Steve Susman of the Civil Jury Project our ideas for the framework. He and I also met to talk about what kinds of questions we thought would be of value, and then we put all this together and came out with a plan to fundamentally look at the issue of the 7th Amendment and whether there is, in fact, a constitutional right to jury trial in patent cases – and what parts of a jury trial might be protected by that right and which parts might not be.

And so we concluded that question should probably be the starting point of the conference, so everybody would have the same point of reference and be on the same page as we moved forward with the discussion for the day. So then we went to the judges' perspective, because judges are the practical funnel for everything in patent litigation. Getting their perspective on things was, I think, the next most important thing. And then after that we had the scholars look at their issues, and then the practitioners. Why the practitioners last? Because they're the ones who have to deal with all the attitudes of everybody else, including their clients. So it seemed reasonable for them to have a very broad sense of the overall discussion to frame what they were going to talk about and to be responding, in part, to issues that earlier panels were questioning. So the program would follow an iterative thought process.

JP: A theme throughout the symposium was an increased onus on advocates and judges to make jury trials more efficient, for example, by appointing an impartial technical advisor to the judge and allowing technological demonstrations in the courtroom. Do you agree with this assessment or do you find any potential problems with these approaches?

AH: I'm going to quibble with the question a bit here. I'm not sure that I agree that the two things you cite in the question, impartial technical advisers to the judge and technological demonstrations in the courtroom, necessarily make trials more efficient. I agree that there certainly is an interest in making trials more efficient. That is, using your time wisely and making sure that, as an advocate, you're pushing the arguments that really matter and not just every argument that's in the briefs. You want to make sure that those points are in the record to be dealt with but you may not want to present every single one of those at trial because that likely won't make things more

efficient. Efficiency is about how much time you use and how well you use it, whereas avoiding confusion and making it possible for the trier of fact to understand what is important may take more time.

For example, I think technological demonstrations in the courtroom can be very useful for the trier of fact, and depending on what the advocates propose to do, I would say most cases, you get permission to present them. I'm not aware of there being a time when we wanted to use, in my own trial practice, either through demonstration or a video, a way to explain and show how the technology worked, where it was not allowed.

Now the question of an impartial technical adviser to the judge – that is fraught with a lot of issues, so let's talk a little bit about that. It may or may not make the case more efficient. Under the Federal Rules of Evidence, an impartial technical advisor can be appointed, and some judges, in fact, routinely have someone appointed who is available to them to use as a technical advisor. But most of the judges that I know and that I've spoken to at the program are very careful to say that they only want to use a technical advisor as someone to whom they could go and say, "Is this how that wiring diagram should be understood?" Or if I'm writing my opinion, and I'm putting in a picture of something from the patent that I am using to help explain my decision, "Technically, is this correct? Are the electrical ions are flowing in the right direction?" I think most judges are very reluctant and wary of using technical advisors in a fashion that says, "Tell me what the answer is" to how the law applies to the technological facts. Having technical advisors can make the judge's decision making process more efficient. But it mostly means that there is a greater opportunity for the judge to be able to really evaluate what he or she is hearing from the experts on either side because these are advocates. Advocates can sometime emphasize certain things over others because that is better for their case. But advocacy can sometimes give a view of things that needs to be balanced, and judges' access to their own technical advisors can be a way for these impartial technical advisors to be very useful.

So I agree that there are a number of techniques that advocates can use to make the process more helpful, but whether they make it more efficient is another question.

JP: Certain courts such as the Eastern District of Texas and the District of Delaware already have the lion's share of patent jury trials. Might those advances in courtroom procedure lend further to the problem of forum shopping in the jurisdictions which do adopt such measures? And if so, is this downside outweighed by the benefits?

AH: Well, there are some assumptions implicit in the question, so let's just talk about those first. One is a concern about having a lot of cases go to only a few courts – is that a bad thing? That's actually an interesting question. One might say, and I'm not taking a position – just pointing out the assumptions built in there – that courts that handle a lot of these cases may have a better system to manage them. They can have a faster learning curve for any particular case, and they may be bolder, sitting down with the advocates and saying, "You know, let me tell you X, Y, and Z." They may be able to give more direction to the parties than other judges who don't have as many of these cases and may feel more intimidated by the process. So you have to think about this, whether in chambers with the parties before the case gets to trial, whether more experienced judges in patent-savvy courts are better able to signal to the parties news they may not want to hear, but news that they need to know so they can reconsider their assessments of whether they should go to trial, and what they should present at trial. So what I'm trying to focus on is that judges who handle patent cases infrequently, and I think this was suggested by some of the judges on the panel, can be somewhat intimidated by the process, just as jurors are going to be intimidated by the process because jurors only do this once. And the more you do it, the more comfortable you feel, and therefore, perhaps the more frank you may be in communicating things to the parties that they should know and should take into account. So that's some food for thought on the assumption in the question.

Why are people forum shopping? They are looking for a perceived advantage – whether it's true or not, whether they really have that advantage is another question. We don't have a lot of empirical data to back up these perceived advantages that people bank on when they are making these forum selections.

I think to the extent that any district court can develop more effective ways to get the cases ready for trial and to help the parties appreciate what arguments are better for them to move forward with than others, and to the extent that the court respects the technology and allows the parties to have an opportunity to present it, that's a very positive development. To my mind, such a court would make an excellent venue for a patent trial.

Of course, if the advocates want to do an animation or demonstration to explain the technology, it's on the parties to make it technically correct. Judges should be evaluating whether it should be permitted in terms of how helpful it may be for the jury, not on whether it might prolong the trial.

Just as an aside, there's a whole issue about demonstrations and animations, which can become very problematic in jury trials. You want your demonstration to be

in evidence in the jury room, and not just something that the jury sees in the court room and then doesn't have a chance to look at again. So you have to be very careful when you make these things to be sure that every piece of it is correct. And then, you want to be able to freeze a frame and say, "Okay, that's the document I want to introduce – that picture of that frozen frame – as an independent piece of evidence to go into record." The jury needs a way to have it during their deliberations, and that's a can of worms on how you to accomplish that.

Bottom line is you're never going to stop people from doing venue shopping. So really the issue is how we can make our courts the best at handling patent trials. And if people are picking a court because it's the best, I don't think that's bad.

JP: Shifting gears a little bit, in her opening address, the Honorable Judge O'Malley described herself as an unabashed believer in juries: a jury's competence, their good faith efforts, and their importance in patent trials. Taking all the speakers in sum, do you think that there was a majority dynamic in one direction or the other?

AH: I would say that the overwhelming dynamic, certainly from the judges, was that juries can do it. They can decide the issues they are presented with, and they can do it well. I would say this group was more pro-jury on the whole than you might have found twenty years ago, or even ten years ago, or that you may find among certain other judges who are not very pro-jury. One of the questions that Scott Hemphill asked the judge's panel was, "When you're sitting in a jury trial, do you agree with the juries and the results that they come to in the patent cases?" And what was interesting is that, at one level, the judges all said "Yes," but then they all kind of said, "You know, we don't listen the same way so it's not the same as if we were making the decision." So you have to recognize that there's a little bit of a tension there. They're saying, on one hand, that the juries get it right, but then that they didn't really listen with the same degree of scrutiny that they would have if they were at a bench trial.

Then I think there's another piece of this. They didn't come out explicitly and say this, but I think it's definitely a component that undergirds why judges these days are much more open to juries in patent cases: There is this a fear of the law becoming too elite. So if you have decisions about important things – and everybody I think agrees that what affects innovation is important to society – if you have those decisions being made by a smaller and smaller group of people who are the cognoscenti, the ones who "know," the law becomes very elite and removed from everybody else. I think that even though some people might say, "I'm not sure the juries always get it quite right," those same people might say they would rather have

the process involve the public than have it become the domain of just the experts. That's an attitude that I think is very strongly held these days.

The last thing I'll say is that one problem in evaluating what juries do is that it's kind of a black box. Judges, in their opinions at bench trials, have to explain their reasoning piece by piece by piece. But it is rare that jury verdicts break down how the jury has evaluated each piece of the case and so we don't necessarily have as good a read on their analysis.

JP: There were a number of statistics presented by the symposium participants, particularly from Professor Lemley, one of which showed that the number of jury trials in patent cases have risen since the 1970s. Among reasons given for this phenomenon are the trend shift of litigation conducted by IP boutiques to general practice firms and the 1982 formation of the Federal Circuit. Which way do you think these developments cut and to what extent do these explanations suffice?

AH: Certainly the number of patent cases tried to juries has changed tremendously. Kimberly Moore wrote a very interesting article, which is dated now, but contains a very good analysis for a certain period of time. One of things she points out is that in the late sixties and early seventies, the number of patent cases going to juries was two to five percent – something like that. Twenty years later, it was like fifty-two percent going to juries. That's a huge change. So the evidence, as you can see from the statistics we presented at the conference, shows that jury trials are more common than bench trials in patent cases. I don't think anyone has demonstrated empirically the "why."

I kind of lived through some of this change. When I came out of law school in 1985, I was interested in being a trial lawyer. Yes, I had a technical background, and a lot of people said I should do patent litigation. But I wasn't interested in it then because those cases rarely went to trial, certainly not jury trials, and jury trial were what I wanted to do. So I did other kinds of complex business litigation for almost fifteen years and got lots of jury trial experience. Then I had to try a criminal defense case for which we had to do present technical evidence – scientific evidence in a court. Long story short, that was my first opportunity, as a trial lawyer, to present scientific evidence to a jury and I decided, "Wow, that's really a lot of fun!" So I started looking around for how I could do that more. I knew it wouldn't come up come up more than once every fifteen years in the federal white collar criminal defense practice I was in at the time. I saw there are two places you could go to: product liability and patent litigation. That's how I decided switch to patent litigation. I went to a boutique patent practice firm and kind of knocked on the door and said,

"Would you take me in and teach me patent law?" There was already this phenomenon of general practice firms having identified how lucrative an IP practice could be and blending their IP teams with people having a lot of trial experience. The boutiques were also looking for people with trial experience because they could see this is what clients were now looking for.

By the time I was making this practice switch, the move to more patent jury trials was well underway. General practice firms had identified how much opportunity there was and started moving into this area and bringing in the focus of litigators, which was a very different perspective from what the predominantly prosecution-oriented lawyers who handled the boutique practice had. So my personal speculation is that the increase in jury trials in patent cases came because general practice firms identified IP practice as a kind of ore that could be mined, and brought the perspective that they had to treat these like regular trials. And quite honestly, from my talking to judges, it seems a lot of the judges thought, "Thank you!" When these cases were going to trial before that, many judges felt that the cases were just impossible to understand because it was very rare for people from the patent prosecution boutiques to be trying to make the technology and the law something that the average person could understand. They treated explanations to the judge like their explanations to the patent examiners at the USPTO. Many practitioners coming from the patent prosecution world didn't want juries because they figured, "It was hard enough to get the judge to understand. How do I get twelve jurors?" I don't know what to call that phenomenon. But honestly I think that's what happened. So I agree the trend shift does have a big impact. But why did that trend shift take place? I think it's because general practice firms were looking for places to expand, and not because we concluded that our system should have more jury trials in patent cases. It was more like general practice firms thought, "Here's an area of practice we can take up,' and then when litigation partners look at the cases, they applied their skills and that's what led to those changes. In my view, the formation of the Federal Circuit was not important to this trend shift.

JP: Jury trials may tend towards certain biases, for example, tilts toward the patentee and possibly pro-American companies versus foreign corporations. Is jury bias something that should be worried about?

AH: I think certain biases that really exist. The statistics seem to bear it out that if you compare judge bench trial resolutions versus jury trial resolutions in patent cases you find that, overall, patent holders tend to win more often before juries when they are the ones who bring the lawsuits. And why is that? There are a couple of factors. I think juries often feel like litigation is a tough process and so you're not

going to bring that case unless you're really sure you are right. And they give credibility to the party who brings the lawsuit, so there's that component. And actually what's interesting, if you look at the statistics that Kimberly Moore talks about in her article, when the alleged infringer brings the action through a declaratory judgment action, they tend to win more often before juries than judges, which credits the notion that jurors are biased in favor of the party that sues, inferring that if you take the time to go to court, you must really believe in the strength of your case.

There's a second component to juror bias: There is an evidentiary advantage to the patent holder in assessing patent validity. I think a lot of jurors believe the Patent Office does a good job and so they give the patentee credit for that. The presumption of validity and the high standard of clear and convincing evidence to overcome patent validity – that's a tough standard to meet! I think juries are impressed by those standards. And you can compare that with bench trials – the patentee-plaintiffs' win rate on bench trials tends to be higher than the alleged infringers' win rate – might be 53% to 47%, or something like that, whereas for jury trials, it's even higher: About 65% in favor of the patentee-plaintiffs. But the patentee win rate is lower in bench trials than in jury trials, and it's lower in a way that you cannot explain by anything other than bias differences. And so one thing I would infer is that this difference occurs in part because judges judge cases all the time. That's their business. I think that, with experience, judges are less intimidated by patent cases and become bolder in their willingness to conclude that the U.S Patent Office was wrong and the standard for invalidating a patent has been met, and because they have the opportunity to judge these types of cases over and over again, they get better at applying a standard of evidence. I think experienced judges are less overwhelmed by the standards of evidence they have to apply to technical facts. But jurors are only doing deciding a patent case once. And I think their lack of experience handling such cases makes it harder for them to say, "Sorry, the U.S. Patent Office was wrong when it granted this patent."

JP: Moving to the idea of specialization – by mere virtue of the existence of voir dire, isn't that a de facto "special" jury that may not be representative of their community? And if so, does that mean that the creation of "special" juries comprised of individuals deemed ordinarily skilled in the art is not too far flung?

AH: Well, there's a huge leap! It's a provocative question, but I don't think you literally mean a "special jury." There's a huge leap between a special jury of technical experts and the actual voir dire process. The actual voir dire process is "Okay, we're going to call in everybody from the venire and then figure out who among those people are the ones who we think cannot be impartial." You're not specializing in

anything except in the ability to be impartial: to not have any obvious prejudice in favor of one party or the other. Of course, a lot of prejudices we know we are not really getting at very well in the voir dire process. But voir dire is very different from selecting persons of ordinary skill in the art. That's like saying we're only going to have engineers, chemists, or coders, and nobody else, as jurors for any particular case. And it assumes that those "specialized" jurors lack biases about the technical field. They won't. There are attitudes and assumptions and biases about scientific matters, too, just as in other things. You can't expect that a "special jury" of microbiologists will be impartial on points in microbiology – you're going to find scientific biases apart from the evidentiary biases we discussed before. Some people will say, "Oh no, CRISPR method is the right way." Some people will say, "No, this other method is better." And so you're not necessarily getting a better set of decision makers. So that's a problem: The notion that, "Oh, just get these experts and they'll all be able to agree." You might find you have more disagreement among them because they have their own biases about science.

That being said, it certainly was common to have people experienced in a commercial field assist judges in 18th-century England. Let's say you came to the court in that era with an admiralty case. What was the judge going to do? He'd likely say, "I don't understand this stuff. Here's a bunch of folks who are admiralty experts. Go sort it out with them and come back and let me know what they figured out about these five things." So there's some logic to think that, at least in commercial cases, there may be value in letting the commercial community sort it out. But this is subject to the same concern, of course, that we spoke about earlier, which is letting elites make decisions and excluding the public from participating in those decisions when the public may be affected – I really don't want to do that.

So I'll say one more thing. This is a personal view. Since the America Invents Act was implemented, we have IPRs. You don't have to be involved in a district court litigation to file an IPR, but if you are involved in a court litigation and file an IPR in time, you may well find that the judge will grant a stay on the district court action, hoping the Patent Office [PTAB] will resolve the issue of patent validity. So that is de facto giving us something that I think people wouldn't swallow if we just proposed it flat out: Having the Patent Office resolve the validity issues, leaving infringement for the district courts. You could say, "Gee, that sounds like what those judges were doing in the admiralty situation, telling the experts to deal with these questions and come back with the answers." My personal view is that we ought to be looking more carefully at whether that division of issues is a good pro-innovation way for our system to function, perhaps to always have validity issues go back to a special court like the PTAB, and let the general public decide infringement issues – perhaps that's

the question that the society in general should be involved in. Whether that solves the concerns about elitism, I don't know. But I think it's something that's worth considering.

JP: So, as you mentioned, a highlight of PTAB proceedings is adjudication by specialized administrative law judges. Why may specialized judges be okay while specialized juries are not in district courts?

AH: Well, so if we just deal historically with how IPRs came to be part of the AIA, there was something called inter partes reexamination that the Patent Office had previously set up hoping to provide a forum for the people who fashioned and implemented the patent system to help make the decisions in reviewing validity. And that process wasn't being used very often. I think they analyzed a few reasons why it might have been infrequently used, and they really wanted to change that. That was a big reason why the AIA implemented the PTAB with IPRs and PGRs. There was a strong interest on the part of the people who were pushing that reform to make our system more like the European patent courts where none of these issues are jury issues. The PTAB brought in specialized judges to focus on questions of validity, which was what the Patent Office was really all about. And so, the goal was to bring in people to be judges and not examiners – you know their basic job function is very different – we could develop a system that would be more harmonious with the rest of the world. Whether it's the best solution, I can't say yet, but I think it offers a lot of advantages because it enable having technological experts judge patent validity and it allows the public to decide the questions of infringement and what innovation can go forward.

And I think one of the advantages of the way the PTAB is set up is that you have three judges, not just one, so there's an opportunity similar to the kind that happens in a jury, which is that people with different points of view can challenge each other. And I think that PTAB judges generally feel comfortable challenging each other, so that's a good thing. And in my view, it's better than a bench trial in district court where the poor judge – it's all on him or her. That can be very difficult. I think it's very difficult for a single person operating alone to get these decisions right. Willfulness – or questions of inequitable conduct – those might be jury issues along with infringement. So yes, I think it's something we should explore much more.

JP: On one side the 7th Amendment favors instituting jury trials for civil cases. However, on another side are practitioners, who prefer greater consistency in court outcomes, which is less feasible with jury trials. Is there a sense of whether one policy should weigh more heavily than the other?

AH: I'm going to interpret what you're saying to mean that, because bench trials produce opinions supported by fact and legal principles, we can better discern principles of law from them and apply them whereas jury verdicts – well, all we know is that's what the jury did. And what that jury verdict means for other cases, might be very hard to discern. So jury results provide less consistency in our understanding of the law and make it harder to advise your clients. Our conference did not explore the process that advocates go through to advise their clients before they decide to go forward with a jury trial – the legal and technical evaluations, the asymmetries of information, the estimations made for clients.

My personal view is that, because I care about the law, I'd like to encourage things that make the law more consistent and more apparent. The advantage of having judicial opinions is that it puts reasoning out there that can be studied and applied or criticized for failing to take into proper account facts or law, and it makes the law more apparent. Whether you are citizens – potential jurors – or judges, lawyers, or law students, everybody can look at that and try to understand it, which is not true with jury verdicts. In the case of juries, all you know is their decision; exactly what they relied on is very hard to appreciate. Even if you interview jurors afterwards, you're not necessarily getting anything that's very useful for the next case.

I suppose the benefit that, in the case of jury trials, post-trial motions may generate a post-trial opinion by the judge granting or denying the JMOL and therefore providing an analysis of why there is or is not enough to support a jury verdict, which would help explicate the principles that the judge views as important and relevant in that case. It's tough. I believe firmly in the notion that we don't want this to be a law of the elite. And yet, you want law that you can understand and apply, and that has consistency. So I guess I'm waffling but probably a little bit more in favor of having judicial decisions rather than black box jury verdicts.

JP: To close, during the symposium, an overarching theme was the dichotomy of patent exceptionalism and American exceptionalism. Patent exceptionalists argue that jury trials are inappropriate for patent cases because the issues are too complex and American exceptionalism stresses the importance of juries even in complex cases. With the passage of the AIA, PTAB proceedings, and other shifts in patent law, do you see the direction of our nation's patent law structure shifting towards one view or the other?

AH: Well, certainly if I look at the proposed patent reforms that are on the radar screen today, I don't see anything that is anti-jury. So I think they are all jury-neutral.

And actually in some ways, they are geared towards making patent cases fit the same standards that a lot of other litigations must meet, like the standards of *Iqbal* and *Twombly*: "Throw out that Form 18! You should be like everybody else, patent people!" And the judges, when they decided *eBay*, said to the patent bar, "Why should prevailing patentees always get injunctions? You should go make your injunction case like everybody prevailing party." So to a certain extent, there's actually a move against patent exceptionalism, and I think that's a good thing. Part of this is because I don't agree with the attitude that ordinary people cannot decide patent issues. They can, if you, as the advocate, present them the facts and the law in the right way. You have a big responsibility as advocates to understand, for decision makers, which components of law matter, which facts matter, and how you can present the facts so that the jurors get it visually and orally. Always, advocates need to present information so every juror has the opportunity to understand. I know it can be done because I've seen it happen. I believe that jurors can make these decisions so long as we advocates teach them the right way.