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Partner, Milbank LLP, and Jasper Tran, Associate, Milbank LLP**

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**INTERVIEW BY ZACH SHEPARD AND CHRIS McMILLAN WITH DAVID GINDLER, PARTNER,
MILBANK LLP, AND JASPER TRAN, ASSOCIATE, MILBANK LLP**

Chris: Welcome to Fire of Genius, a podcast dedicated to all things intellectual property presented by the Indiana University Maurer School of Law's *IP Theory* journal. My name is Chris McMillan, I'm a 3L at Maurer, and I am the audio editor for *IP Theory*. Today's podcast will be cohosted by our Editor-in-Chief, Zach Shepard.

Zach: Thanks, Chris. I'm Zach Shepard. I'm a 3L at the Maurer School of Law, and it is my pleasure to be here with Chris today to talk to two incredible scholars and practitioners in the IP community. Today's episode is part of *IP Theory*'s eleventh volume, and we're pleased to welcome David Gindler and Jasper Tran to the show. David Gindler is a partner at Milbank LLP's L.A. office whose work spans a broad array of industries and technologies across the country. Mr. Gindler, would you like to tell the audience a bit about yourself and your career?

David: Well, my career began in an odd way because as an IP litigator, when I was in college, the one thing I wanted to avoid, like the plague, was anything that looked like science because it looked like really, really hard to me. So math classes, biology classes, things that involved equations were sort of not my thing at all. Then I became a lawyer. And it wasn't until about 10 years into my practice where I sort of stumbled into doing a patent case. And it was actually a case involving technology to render graphics on a computer. This was a long time ago. The technology has moved on since then. But I discovered this incredible thing about IP law. People pay you money to learn how stuff works, and then you get to teach jurors and judges how it works, and I found that to be a lot of fun. And so now, although I have literally no scientific training, I have an undergraduate degree in philosophy, I deal with science all the time, and it is an incredibly rewarding part of my life and my practice.

Chris: That's great, and I feel like I'm in your shoes a bit because I was a professional musician before I came to law school, and I have encountered it in the past four years, so I totally get it.

David: One added note, I have a friend who's also an IP litigator; he was an English major, and he says, "you know what, having been an English was the perfect undergraduate major for me because all the patents that I worked with are written in English."

Zach: That's one way to look at it.

Chris: Now, Jasper, you're an associate at Milbank and a member of the firm's litigation and arbitration group. Would you like to tell us a bit more about yourself?

Jasper: Yes, thank you for having us here today. I'm a 7th year associate of Milbank L.A., focusing on patent litigation and a little bit of technology transactions. I have a more traditional IP career than David. I studied science as an undergrad at UC Berkeley, and then I heard from a class, an

organic chemistry class, about the rights of inventors, and that kind of piqued my interest. So I took a legal study class and an undergrad class, and it just sparked my interest in law school overall. So I went to University of Minnesota Law School, and after law school, I clerked for a federal judge in Denver. Then I kind of started doing a lot of IP work since then. I am what people would call a legal nerd and often share my thoughts on just current trends in legal scholarships focusing on IP law, technology law, and health law. In fact, I co-wrote an article on how judges, jurors, and lawyers can properly and reliably use Internet research in volume 9 of *IP Theory*,¹ and happy to be involved with *IP Theory* again today in a different capacity and appear with David on the show.

Zach: Yes, that's great, Jasper. And I'm sort of like you; I have the hard science background, I got my engineering degree from UT Austin, and you know, ownership and inventors rights sort of piqued my interest when I was in school, too, and I think that is what lead to me to be IP interested. So that's great, and we're very pleased to have you back and are grateful for your continued support of *IP Theory*. So Mr. Gindler, let's get into some questions. I would like to start by asking you briefly about your impressions of the state of IP law today. You have a storied career. We've read your bio, and we know you have got an incredible career that spans multiple continents. Are there one or two topics that you identify as particularly pervasive and worthy of the IP bar's attention?

David: So the IP bar thinks about lots of wonky IP issues. And I could talk about that first, but actually, let me talk about something else. Which is most Americans actually think about IP issues every day. They just don't know they're thinking about IP issues every day. So what am I referring to? Most Americans ask themselves frequently; why are my drug prices so high? Well, I know the answer to that question. The answer to that question is it involves an enormous investment in order to bring a drug from someone's idea in a lab to actual commercialization. And by a lot of money, we're talking about for certain kinds of products, a half a billion dollars, a billion dollars, and sometimes they don't work out. So, who would invest that kind of money for a product unless you get some kind of protection from competition the day after you launch your product? Well, that's patent rights. So, at its core, a patent is simply the right to exclude others from using what you patented.² Now there is a deal though that is part of the trade-off to get a patent. To get a patent, you have to teach the world how you did it. Your patent has to disclose enough information so that any other scientists working in the field would know exactly how to do what you're doing. So that advances science, it advances knowledge. But, for the investment, companies like Genentech and Biogen and other leaders, they get a period of exclusivity. And now there's this debate that's going on, it's going on now, it will continue to go on, which is where to draw that line? How much exclusivity should somebody get? How broad should patent rights be? Should they be limited to the specific invention that's covered? Or what if you cover—you're the very first person to come up for a kind of a new drug? Should you get a patent on all drugs of that kind or just the one that you came up with? This is actually a debate that affects Americans every day. I think it's a debate

¹ See H. Albert Liou & Jasper L. Tran, *Internet (Re)Search by Judges, Jurors, and Lawyers*, 9 IP THEORY 1 (2019) [<https://perma.cc/6AWG-EA5R>].

² 35 U.S.C. § 154.

which is coming up now that we're in a pandemic and new medications, new vaccines are coming on the market, and so people are thinking about IP rights and how they affect the health, not just here in the United States, but around the world.

Zach: Fascinating topics. It's something we study the basic bargain for a patent in patent law and other IP-related courses. Enablement is such a huge issue, and I know it's been a hot topic of debate at the Federal Circuit for quite some time now. And so great to hear that all those issues are still relevant, and I'm sure we'll get plenty of practice and with enablement and the like in our careers. Jasper, I want to follow up with you, do you have any IP hot topics issues that you think are particularly pervasive right now? We'll give you an opportunity to respond to the same questions.

Jasper: Yes, so I think the other issue outside of the COVID-related issue was patent waiver that David kind of hinted on, is the § 101 issue and patent eligibility and subject matter eligibility. That it's kind of been debated since early 2010 when the Supreme Court gets into the four cases,³ the *Mayo* case,⁴ the *Alice* case,⁵ the *Bilski* case,⁶ that they started establishing a new framework. After that, it just becomes a huge mess—the § 101 issue—that cert. petitions have been going up every year and there is a lot of legislative bills going on about § 101 that it is worthy of the IP bar's attention. And I think everyone is still following up on that issue.⁷

Zach: Yeah, that's great, and we're going to follow up on you on § 101 and your analysis on the *Alice* and *Mayo* framework and maybe its vitality here in a little bit. But it's great to hear that those are also hot topics right now. Mr. Gindler, back to you. A hot topic that you hinted at earlier was the potential for IP waivers or a shying away from enforcing patent rights with certain COVID-related inventions. Could you briefly walk us through this concept of IP waiver and some of the mechanisms that U.S. and other WTO countries have in place to effectuate the waivers?

David: Well, this is, in my view, an interesting and virtually irrelevant debate. There are lots of discussions going on about how to effectuate an IP waiver, whether through the World Trade Organization, World Health Organization, on a country-by-country basis, on a company-by-company basis, whereby each company would agree out of the public not to enforce their IP rights. So why do I say this is completely irrelevant? If every patent holder tomorrow morning announced, "we will not be enforcing any of the patents that we have that relate to COVID vaccines," you know what would happen to the worldwide manufacturing distribution of vaccines? Absolutely nothing would happen. Nothing would happen. It would make absolutely no change whatsoever. Patents are not standing in the way of anything. You know what's standing in the way of this—it is really hard to make vaccines. It requires extraordinary technology. Vaccines are a kind of product called a biologic. They are made of biological material. They are incredibly hard to

³ See also *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 132 S.Ct. 1794 (2013).

⁴ *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012).

⁵ *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

⁶ *Bilski v. Kappos*, 561 U.S. 593 (2010).

⁷ See 35 U.S.C. § 101.

manufacture. And there are a limited number of places in the world that have the facilities and the scientific expertise to do so. The idea that starting a manufacturing facility from scratch tomorrow morning to build a facility that could manufacture COVID vaccines is nonsense. That is not going to happen, not at least in the time frame that would be required to actually have it make a difference in the pandemic. But technology that has involved to synthesize the mRNA and to have it expressed, and then you have to put it into a nanoparticle, which is its own separate technology so it can be ingestible into the human bloodstream and then digested by a cell and the cell expresses the mRNA which codes a portion of the spike protein. This is not easy work. Biologics are hard to make.⁸ What would be required to change everything, you would have to have an enormous, historic, unprecedented, public-private partnership to distribute biologics on a global scale, but the idea of someone coming along with no experience in this and starting up and building a facility to manufacture vaccines, people need to stop thinking about that.⁹ Let me give you an example of what I mean. So there's a biologic product that is used to treat a number of diseases, including not non-Hodgkin's lymphoma. It's called Rituximab. One of the very first biologics to come on the market. It was approved by the FDA in 1997. Now 20 years later, a number of companies wanted to make what are called biosimilar version of that, essentially a generic.¹⁰ Many companies tried, including a hugely successful European-based multinational pharmaceutical company named Boehringer Ingelheim. So they have the leading scientists and their job was to basically copy Rituximab. That's it. Make it. All they had to do was copy it and run clinical trials on it and show that it worked as well. And you know what happened? They failed. It didn't work. They got poor results on a clinical trial, and they gave up. That's not for want of trying. Now imagine a company with the expertise of Boehringer Ingelheim was not able to duplicate a product that's been on the market for over 20 years. Just try and imagine replicating brand new vaccines from scratch. This is the wrong conversation. This is not an IP conversation. I don't think IP should stand in the way. I don't really think anybody in the industrial world thinks IP should stand in the way. The United States doesn't. China doesn't. Russia doesn't. But that's not going to solve our problem. If it was that easy, we would all be eating at restaurants right now.

Zach: Yeah, and that is the frame I've never thought to look through, that maybe it's not IP rights that stand in the way, it's supply chain and obviously the immense difficulty that it would take to get a vaccine or a biosimilar to market. That's ridiculous. Wow, I never thought about it that way.

⁸ See, e.g., Ludwig Burger, *BioNTech Says It Won't Challenge Vaccine Copying in Africa*, CTV NEWS (Feb. 16, 2022) [<https://perma.cc/KU7R-B4LY>] (noting "the complex vaccine-making procedure that the company [BioNTech] says involves 50,000 steps to complete").

⁹ See Gary Locke, Andrei Iancu & David J. Kappos, *The Shot Heard around the World: The Strategic Imperative of U.S. Covid-19 Vaccine Diplomacy*, CTR. FOR STRATEGIC & INT'L STUD., at 4 & 6, [<https://perma.cc/28N2-M6WD>](“The truth is that every qualified manufacturing facility on the planet is churning out as many Covid-19 shots as is safely possible. . . . Waiving IP protections would not lead to the manufacture of a single additional dose of a vaccine. One key reason is that there is currently no capacity to make more; production facilities are running at full tilt, and the supply of key ingredients in the manufacturing process has already been fully tapped. . . . More and larger facilities will be needed to fight future pandemics, so the United States should start expanding capacity now.”).

¹⁰ See generally Carlos A. Garcia & Jonathan Stroud, *Ships in the Night: Resolving Administrative Conflict between FDA- and Patent-Related Legislation*, 68 AM. U. L. REV. 1111 (2019) [<https://perma.cc/3AFR-G8SX>].

Jasper: Yeah, Zach appears to be surprised to hear David's answer. So let me put it a different way to be kind of more intuitive. So you learn the basics of IP exchange, the quid-pro-quo is that the inventor would disclose his inventions to the public in a public way in a patent application, and it gets examined by an examiner, meet all these qualifications including enablement, and in exchange for the right to exclude others. And others still make the products, and the invention and the inventor has to sue them in court, but the disclosure is already out in the public, the inventor patent, he or she already disclosed everything that is needed to be using the vaccines or the pills related to COVID. So tomorrow, if the inventor just loses that right to exclude, the knowledge of how to make the vaccines or the pills have already been public. So, nothing is stopping them from making the vaccine, it's something else. It's how do you get to actually make the vaccine in a practical sense not and not in a radical sense.

Zach: So let me follow up now. So if there is no reason to enforce the patent right, what's the purpose of you even getting a patent in the first place then? If that quid pro quo, there would be no incentive to police then, right if other people would be able to practice the invention?¹¹

David: Well, people get patent rights, as I mentioned, because they expect to make enormous investments in vaccines and other medications, so that's true of companies like Pfizer and Moderna. One of the very interesting questions to ask yourself is this, how is it that industry was able to come up with a vaccine for COVID-19 in like 6 months?¹² So I know the answer to that question, which is that people didn't think up mRNA vaccines last Thursday. There were scientists who were specialists in this. One of those scientists is a woman who works, who used to work at the NIH, whose name is Kizzmekia Corbett. She is, in some sense, the parent of COVID vaccines because she is an expert in mRNA vaccines.¹³ All sorts of work had been done, all sorts of investment had been made in this technology, and then a global pandemic came around and now those investments are paying off, and companies with smart scientists were able to use and harness that technology to create remarkable vaccines that went from the laboratory to clinical trials in six months. That is extraordinary, but it didn't happen last Thursday. It happened because of investments over time. mRNA vaccine, that technology, it's not a 2020 thing, but its use became profound in 2020 and 2021, and that's why our system of patent protection encouraged that research and encouraged that research at a time when we needed it most.

Zach: Let me follow up quickly then. In your experience Mr. Gindler, do you worry ever about pharmaceutical companies or vaccine manufacturers not being able to produce an invention say because there is a patent thicket in a way preventing them—like one piece of IP that they need to help them get this vaccine to market, but they can't get around this IP that exists?

¹¹ See Sean B. Seymore, *Introduction*, 69 Vand. L. Rev. 1455, 1455 (2016) [<https://perma.cc/UWP4-R8KY>]; Timothy R. Holbrook, *Possession in Patent Law*, 59 SMU L. REV. 123, 131–32 (2006) [<https://perma.cc/KX2C-EPHL>].

¹² See Jasper L. Tran, *Causes of COVID Vaccine Hesitancy*, BILL OF HEALTH (Nov. 30, 2021), [<https://perma.cc/R3B9-JM7R>].

¹³ See, e.g., Kizzmekia S. Corbett et al., *SARS-CoV-2 mRNA Vaccine Design Enabled by Prototype Pathogen Preparedness*, 586 NATURE 567 (2020) [<https://perma.cc/23ZV-QAMK>].

David: Well, yes, I do worry about that. And so do many others. You use the term patent thicket.¹⁴ That's become a bit of a rallying cry. It first came up in a number of contexts, but it came up with respect to a product called Humira, which is maybe one of the largest selling products in the world.¹⁵ Humira has like an army of patents that surround it. We are talking about 30, 40, 50 patents that get litigated when somebody wants to try to bring a generic version of Humira to the market. And there's been a lot of outcry around the question of how can you possibly have 30 patents or 40 patents on a given product. And the answer is, well, you don't actually have 30 or 40 patents on one product. But they often have is a patent on the product. Then they have a patent on the way of using the product. Then they have a patent on another way of using the product. Then they have a patent on the way of manufacturing the product. Then they have a patent on way of manufacturing many different kinds of products, but it's also really useful to make Humira. And the question then becomes one of policy, which is well OK but should you really be able to extend your monopoly like that much further. So that is a very important question, and I think it's a question that legislators are debating right now. It is a completely fair question to be asked. How much patent protection is appropriate, and is too much patent protection a problem? Should there be just a limit on how long you can erect an army of soldiers—patent soldiers—around your pharmaceutical exclusivity.

Zach: Yep, very interesting.

Jasper: I have a different take on that. I mean, I appreciate what David said with the whole evergreening process,¹⁶ you might hear the term, it's kind of similar to patent thicket when they keep extending deadlines of the patent. They just kind of have some different aspects of the same product of the same invention. But a different take on that is that companies don't really worry about IP in the sense that there are these compulsory licensing, the term that you might have heard thrown around. They can actually infringe on IP and then pay up later. And that's fine. The only thing they really need to worry about is preliminary injunction and actual injunction, stopping them from actually making the product and just halt everything, which is an extraordinary remedy that courts rarely enforce. But otherwise, even if there is a piece of IP, it's kind of stopping them in the way they are trying to get a license from it, they are just going to infringe it. Willfully, yes,

¹⁴ See generally Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, 1 INNOVATION POL'Y & ECON. 119 (2000) [<https://perma.cc/C6CU-CAJP>]; Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165 (2011) [<https://perma.cc/NC92-9G97>].

¹⁵ See generally Ana Santos Rutschman, *Regulatory Malfunctions in the Drug Patent Ecosystem*, 70 EMORY L.J. 347, 377–89 (2020) [<https://perma.cc/J58P-7SLF>].

¹⁶ See, e.g., Janice M. Mueller & Donald S. Chisum, *Enabling Patent Law's Inherent Anticipation Doctrine*, 45 HOUS. L. REV. 1101, 1106 (2008) [<https://perma.cc/NC3N-2ATQ>] (“[E]vergreening refers to attempts by owners of pharmaceutical product patents to effectively extend the term of those patents on modified forms of the same drug, new delivery systems for the drug, new uses of the drug, and the like.”); Rebecca S. Eisenberg, *The Role of the FDA in Innovation Policy*, 13 MICH. TELECOMM. & TECH. L. REV. 345, 348–49 (2007) [<https://perma.cc/6UKH-QZUT>] (asserting that in recent years innovative firms have made skillful use of current patent law doctrines, becoming “quite creative about strategies to secure ‘evergreening’ patents in order to defer the date their products go off-patent”); Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285 (2009) [<https://perma.cc/J8UC-XRFZ>].

they may have to pay up a little more. But unless they get an injunction later, then nothing is stopping them.

Zach: Yeah, I know. Thank you for that.

David: Let me add one thought here because when we were talking about patent thickets, how a pharmaceutical company can use patents to create perhaps too much exclusivity. But I want to give an example of the opposite. Pharmaceutical companies are frequently generous with their technology, and let me tell you what I mean. Sometimes pharmaceutical companies have what are called platform patents. They develop an underlying technology that could be generally applicable to a broad array of applications and diseases. It is not uncommon for large biotech companies to license that technology on commercially reasonable terms to anybody who wants it, as long as they are not developing a product that directly competes. So let me give you a real-world example. Genentech is the owner of a patent, which expired at the end of 2018.¹⁷ It was the foundational patent for creating genetically engineered antibodies. Specially created antibodies which could treat diseases that had been really untreatable. Genentech, since that patent issued, has always licensed it on commercially reasonable terms to anybody who wanted it as long as they were not directly competing with Genentech. It is among the most widely licensed patents in the biotechnology world. That is not the only example. There is a company called PDO biopharma, which also had a patent in the antibodies space. They found out a way to make antibodies, which are first made from mice, to look human. And they licensed that patent to anybody who wanted it on commercially reasonable terms. So it is important to understand while you hear often sort of the bad boy stories about patent thickets and the like, there are as many heroic stories where pharmaceutical companies use their technology to enable the proliferation of new medicines even by their competitors.

Jasper: If you think about the fact that a foundation or basis of IP is to recoup the R&D investment,¹⁸ companies want to license out these patents. They don't want to stop people from making these drugs and vaccines because they want the money to recoup their investments, so they can fund the next research. So IP is used in a more positive way than this negative way that people imagine it to be.

Zach: Right, and there is obviously this notoriety and there is, oh, what is the word I am thinking of, good well-being, a positive image that you create for your company when you play nice in the sandbox and when you freely and fairly license your products out. So that's good, and it's good to see that there is still hope despite large patent thickets, and I am glad to see that a patent thicket isn't as horrible a term as it has come to be in some scholarship.

¹⁷ See Debra Robertson, *Genentech Awarded Critical Antibody Patent*, 20 NATURE 108 (2002) [<https://perma.cc/FQB9-F44W>].

¹⁸ See, e.g., Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223, 224–25 (2004) [<https://perma.cc/ULW9-4NEA>].

Jasper: Well, companies want to develop goodwill not just for the public but also for competitors as well. So, later on, when they need a patent from a competitor, they can actually get a license from it. So not everyone is locking each other up and fighting each other; rather, they want to work collaboratively.

Zach: Exactly, great, ok, let's transition now. Jasper, I wanted to come back to you and talk about eligibility and your interpretation of where we stand with subject matter eligibility and § 101. We saw that you had recently co-authored a piece on *Alice* and *Mayo* and sort of how it's come to be 7 years after the *Alice* decision. Why don't you talk to us a little about that article, and then why don't you talk to us briefly how you feel about eligibility and where it stands today.

Jasper: Sure, so I briefly discussed the *Alice* case earlier, and that came from the *Mayo* case from 2012, and the impact of *Alice* is that it really solidifies this 2-step framework to analyze the § 101 issue. The first step is, are the patent claims directed to an abstract idea? And if it is a no, then you get a patent on it, and if it is a yes, you ask the second question which is does the patent embody an inventive concept that amounts to significantly more than an abstract idea? If it's yes, then is it patentable. But if it is a no, then you don't get a patent on it. It seems simple enough, but no one really understands what an "abstract idea" is or what an "inventive concept" is. And these are very subjective issues that depend on what the judge eats for breakfast that day¹⁹ and how they feel about the case law. And so what I have done is that I've done these statistical studies on the impact of *Alice* after 1 year,²⁰ 2 years,²¹ 5 years,²² and 7 years²³ that you've alluded to about the invalidation rate, new rates. When someone brings an *Alice*-based challenge. And the results are pretty stark at the 1-year and 2-year mark, roughly 80% invalidation rate across courts when a party brings an *Alice* challenge. But at the 5 to 6-year mark, you see the invalidation rates drop to about 56% and stay there consistently. And I concluded that what you see with *Alice* is really, in effect, a reversion toward the means as its approach long term equilibrium, which is a very well-known concept in economics.²⁴ To explain, at first you have these alleged infringers would rush to bring the § 101 challenge and succeed in the majority of them because there were just too many *Alice*-susceptible claims asserted at the time. And as time passes, the patent owners wise up and refrain from asserting *Alice*-susceptible patents in light of the high invalidation rates. And the patent office got better too in issuing worthy patents that would pass the § 101 challenge. You have these alleged infringers just become overconfident and keep challenging these patents using

¹⁹ See Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PNAS (Apr. 11, 2011) ("test[ing] the common caricature of realism that justice is 'what the judge ate for breakfast' in sequential parole decisions made by experienced judges.").

²⁰ Jasper L. Tran, *Software Patents: A One-Year Review of Alice v. CLS Bank*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 532 (2016).

²¹ Jasper L. Tran, *Two Years after Alice v. CLS Bank*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 354 (2016).

²² Jasper L. Tran & J. Sean Benevento, *Alice at Five*, 2019 PATENTLY-O L.J. 25 (2019).

²³ Jasper L. Tran, *Alice at Seven*, 101 J. PAT. & TRADEMARK OFF. SOC'Y 454 (2021).

²⁴ See generally Francis Galton, *Regression Towards Mediocrity in Hereditary Stature*, 15 J. ANTHROPOLOGICAL INST. GR. BRIT. & IR. 246, 246–63 (1886). For a historical account of regression toward the mean, see Stephen M. Stigler, *Regression Towards the Mean, Historically Considered*, 6 STAT. METHODS MED. RES. 103, 103–14 (1997).

the *Alice* framework anyway. So the net effect of these two natural responses, it would drive the *Alice* stage invalidation rates down toward the equilibrium point. And we see another instance of this in patent law when IPR first came out—the inter parte review. The first few months of 2014, the PTAB invalidation rate was more than 90%, and this led to the then accepted view that the PTAB was called the patent death squad, where patents go to die.²⁵ But you kind of observe the same two natural responses is that patent owners wise up and just refrain from asserting the IPR-susceptible claim, and the defendants still remain overconfident so at some point if they regress toward the means and kind of equate the same invalidation rate which is in the low 40%.

Chris: Great. Well, in the last couple of minutes that we have, we would like to ask you maybe some more mundane questions like about what your practice at Milbank is like. So for instance, David, you were telling us before we started recording is that your practice is very international. You are working with clients in Germany, in China. Can you maybe talk about that?

David: Oh, absolutely. So one of the great aspects of being an IP litigator is I get to work with companies local, international startups, huge companies, individuals, multi-national corporations. I represent and currently represent people and companies of all sorts of flavors. A lot of my work historically has been in life sciences. What do I mean by life sciences? Everything from pharmaceuticals to diagnostic tests. I remember in 2011, I was contacted by a startup that was called Ariosa Diagnostics. They said we need to talk to you; we think we are going to be involved in some patent litigation. I said, ok. I said what do you folks do. And they said here is what we do. We have this technology where we can take a blood draw from a pregnant woman, and we can find actually the fetal DNA that's in the pregnant woman's bloodstream, and we can sequence the DNA, and we can figure out to about 99.9% accuracy if the fetus is at risk of Down Syndrome or other chromosomal abnormalities. And what that means is that we're basically going to put amniocentesis out of business. I said this sounds like science fiction to me. And they said oh no, we can do this. In fact, they can do it. And it is now the standard of care for pregnant women. They are not the only people who do it. This is like one of those remarkable things that I get to do in my practice. I also represent a surgeon who is based in Columbus, Ohio, who came up with a novel stent which treats abdominal aortic aneurisms. It is something that creates a path for blood to flow when somebody has a weakening of their arterial wall. And he was the first to come up with this remarkable idea. And he spent years trying to convince a company which we think is infringing on that patent to take a license. He was not trying to be unreasonable. He tried very, very hard, and ultimately he came to us, and so now we are his lawyers, and we are pursuing his claims. So the practice is really remarkably diverse. We are neither plaintiff-side nor defense-side. We do both. That I think makes us probably a bit different than many firms that what we call big law. A lot of big law firms are really on the defense side. We do both. We enjoy doing both. We like having a broad array of clients and technologies. I like working with really smart people like Jasper, who

²⁵ See Jasper L. Tran, *Unconstitutional Appointment of Patent Death Squad*, 89 GEO. WASH. L. REV. ON THE DOCKET (June 29, 2021), <https://www.gwlr.org/unconstitutional-appointment-of-patent-death-squad/> [https://perma.cc/AR8D-VMF9].

can help me understand the technology. Jasper has training in Chemistry. I do not. That makes us a great team.

Chris: Yeah, that's great. Really quickly. Now we are approaching the end of our time. For any law students who are interested in learning more about Milbank, how can they learn more about your firm?

Jasper: You can always do your own independent research, of course. But here is an option that I don't see many students take advantage of. Reach out to any one of us at Milbank and have coffee, do local, or have a virtual meeting. It used to be intimidating to dress up and meet in person with a practicing attorney, but now it is much easier to just jump on a zoom call from the comfort of your own home, located anywhere in the U.S. really, and meet lawyers in LA, NY, DC, for example. Lawyers take pride in their work, and they like to talk about what they do. Maybe David can talk about some of the people he spoke with during the pandemic.

David: You know, during the pandemic, I had recent law grads reach out. I had people reach out who were at other law firms. People who I did not know at all, who just wanted to talk about, not just Milbank, but they wanted advice about their career, about what the market for lawyers looked like. I pretty much got a half an hour for anybody. And I am pretty sure that I am not alone. I am sure that my colleagues at Milbank would do the same. And I am pretty confident that actually people at other law firms would do the same, but I like talking to students and others. People were good enough to talk to me when I was trying to figure out what I was going to do in the practice of law, what law firm I was going to go to, and so I try to be just as good of a citizen as others were when I was growing up. So if you want to talk to Jasper, you want to talk to me, as I tell people, I'm an email away.

Chris: Great, so that is all the time we have for today. All of us at *IP Theory* would like to thank both David and Jasper for their time. We really appreciate it. If you have anything else you would like to add, the floor is yours for one last final thought from both of you.

David: I just want to thank you for this opportunity. It has been a lot of fun. Jasper and I, we are both sort of nerds. We like talking about IP issues, and so any chance we have to talk about IP issues with other people who like IP issues, well, it sort of makes our day.

Jasper: I echo what David said. Thank you for having us today.

Chris: Thank you for joining us on this episode of Fire of Genius. You can follow us on Twitter [@ciprmaureripth](https://twitter.com/ciprmaureripth) or reach out to us on our website at iptheory.indiana.edu. Thank you for listening, and we hope you tune in again next week.