

The 2nd Annual Patent Colloquium: Panel on Competition law and IP
by Aman Gebru

[Professor Edward Iacobucci of the University of Toronto Faculty of Law](#) opened the last panel of the colloquium and invited the panelists to comment on issues at the intersection of competition and intellectual property laws.

[Professor Jay Thomas of the Georgetown University Law Center](#) was the first to comment and he cited two major developments that are essential for the interplay between competition law and intellectual property in the US. The first of such developments is the *FTC v. Actavis* case in which the Supreme Court of the US declared that the rule of reason is the applicable analysis in case of reverse payment settlements. The Court refused to adopt a per se illegal analysis that would have made reverse payment settlements presumptively illegal. However, Prof. Thomas stated that we do not know what the realm of patent settlements is now. The second development is legislation before the 113th Congress. As part of a grand legislation reform – ‘the innovation act’ – congress might deal with patent trolls through a fee shifting mechanism in which the loser in a suit pay the victor’s fees. But it is not clear how fee shifting will be introduced into patents. Prof. Thomas cited an example in which a party sent 7,000 cease and desist letters and stated that congress might be targeting such type of entities in the proposed legislation.

[Professor Ariel Katz of the University of Toronto Faculty of Law](#) was the second panelist to comment on the interplay between the two areas of law. He started his comment by considering the implications of the *Actavis* case for Canada. Prof. Katz noted that the interplay between antitrust and patents laws involves multiple tensions. He cited the tension between encouraging settlement versus preventing unwarranted patents grants and that between judicial correctness versus *administrability* as examples of the complex tension between the two areas of law. This tension is also further complicated by the involvement of left-leaning and right-leaning elephants in the room. Prof. Katz used a metaphor of an island to explain the interplay between patent rights and competition laws in which a patent right is a small island in the vast ocean of competition law and the beach is the gray area in which the complex question of where to draw the line is debated. The law seems to state that a payment is to be considered a payment to delay competition if a large payment is made from patentee to alleged infringer in return for the alleged infringer refraining from a certain act. Prof. Katz cited to a number of differences that could change the outcome of the case if *Actavis* was litigated in Canada. He claimed that the sanctity of the scope of the patent, the cost and affordability of healthcare, the presumption of validity and private enforcements as some factors that could have changed the outcome of the case. Prof. Katz concluded his comment by stating that Canada is a small market and therefore there is little it can do once the US Supreme Court decides the case. He stated that it is hard to be more catholic than the patent pope, more secular than the Parti Québécois and more drug-loving than Rob Ford.

[George Addy, a senior partner at Davies and former head of the Canadian Competition Bureau](#) was next to comment. He stated that the average smart phone uses 200 – 200,000 patents and so getting the balance between patent rights and competition is essential. Addy opined that what the industry is doing is monetizing the gap within the law. He claimed that even if some people consider trolling to be a US

problem only, it is a Canadian problem because trolling is coming to Canada through patent acquisitions, among other methods, and innovation in Canada has decreased by 20%. The problem, Addy believes, is that the competition bureau is not able to address the issue under the current law and the fast smart phone industry would move on during the period of injunction. He explained that the current system forces companies to become a troll or outsource their litigation to private trolls.

Addy proposes a three prong solution to the problem. The first is amending the competition law. He cited to the powerful imagery of the beach space explained by Prof. Katz as a space that the commissioners should be allowed to regulate. The second is collecting a Canadian data on the issue. And lastly, Addy believes that attacking political attention is needed if Canada is to address the issue effectively. He stated that Obama was able to address the issue in the US because he received support for it. Addy stated that politicians should take note of the issue because Canadian consumers and startups are being targeted and our innovation is suffering from the chilling effect.

[Catherine Lacavera, Google's director of litigation and graduate of the University of Toronto](#) was next to share her thoughts. She stated that she was excited to be back in Toronto and remembered waiting in the Great Hall (in which the colloquium was held) before going to Convocation Hall for the graduation ceremony from her engineering and law degrees at the University.

Lacavera claimed that there is no reason why software should not be patented. She added that most of the abuses result from the fact that there are broad patents that should not have been granted. Lacavera explained that trolling was not common in the early 2000s but it started picking up in 2007. Google suddenly found itself facing 300 lawsuits. Lacavera stated that she led team of lawyers to fight the cases and they have never lost a case. But she stated that Google spent a lot of money in these litigations. The main issue in the litigations were not about the patentability of software, but with the wide scope of the patent rights granted. Lacavera explained some proposed changes in the US to address the problem including the American Invents Act.

She stated that in the cellphone industry cross-licensing is essential as no one company has all the rights needed to function. In that way, the cellphone industry is different from the pharmaceutical industry. Google has a large licensing office that is involved in licensing of intellectual property rights. Lacavera opined that the pendulum is now swinging favor of patent expansion. She concluded by stating that the landscape has shifted as suits used to begin from non-practicing entities but now "everyone is suing everyone."

After the panelists shared their thoughts, the participants were eager to ask them questions and to provide comments.

Participant asked Lacavera if Google does any search in advance of launching a product and if it is involved in cross-licensing. Lacavera responded by stating that Google has a team that does searches while products are being produced. She added that Google has not asserted a patent as long as she has been there and it has taken a defensive position to patent litigation.

The difference between trolls and generic companies was discussed during the Q & A and both Addy and Katz agreed that the distinguishing factor is that the troll business model is focused on maximizing rent seeking while generics have a product line. Prof. Katz added that the common law tort of maintenance may still be applicable in Ontario and that could be used to address trolling in the province.

A participant opined that use of dominance provisions usually required the entities have a certain amount of market power, so may be the best answer is to raise the cost of bringing troll litigation. Lacavera agreed with the proposal and stated that Germany does not have a trolling problem because if you lose you will pay. Addy concurs and opined that the current financial incentive is heavily weighted in favor of trolls.

Trolling has been one the major concerns within the pharmaceutical and cellphone industries and the US has done some work to address the problem. It seems that Canada would do well to find a Canadian solution to the problem.

At the end of the colloquium, Jennifer Milson, Co-director of the Center for Innovation Law and Policy thanked the keynote speaker, panelists and participants for a thoughtful discussion. She mentioned that the third annual patent colloquium will be held on third Friday of November, 2014. Prof. Simon Stern co-director of the Center thanked Milson for her excellent work in organizing the colloquium.