

*WIPO - Advisory
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Enforcement : Thirteenth
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4-6 September 2018

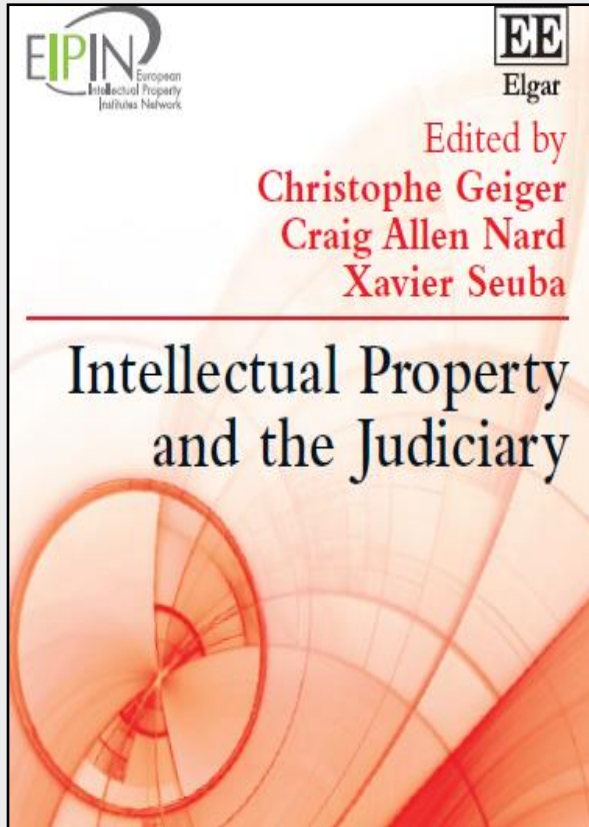
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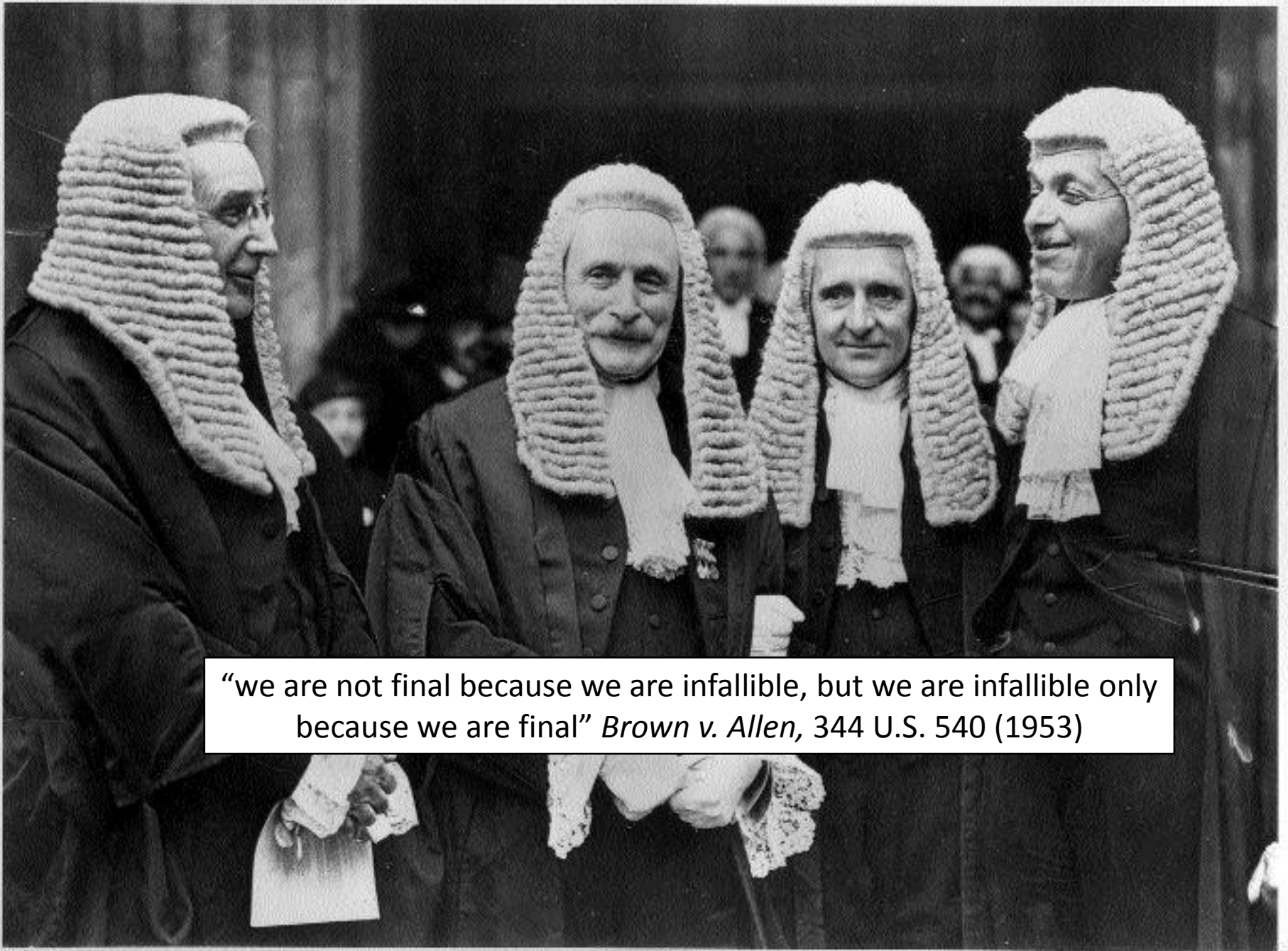
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Intellectual Property and the Judiciary



- Jointly edited volume that provides a comprehensive picture of judicial specialization in intellectual property
- Three parts
 - Intellectual property and European courts
 - Intellectual property and US and Japanese courts
 - Intellectual property and international adjudication
- 20 chapters and 26 contributors (19 countries) analyzing the work of international dispute settlement bodies, human rights tribunals and arbitration panels, as well as (IP-specialized) national and regional courts
- October 2018



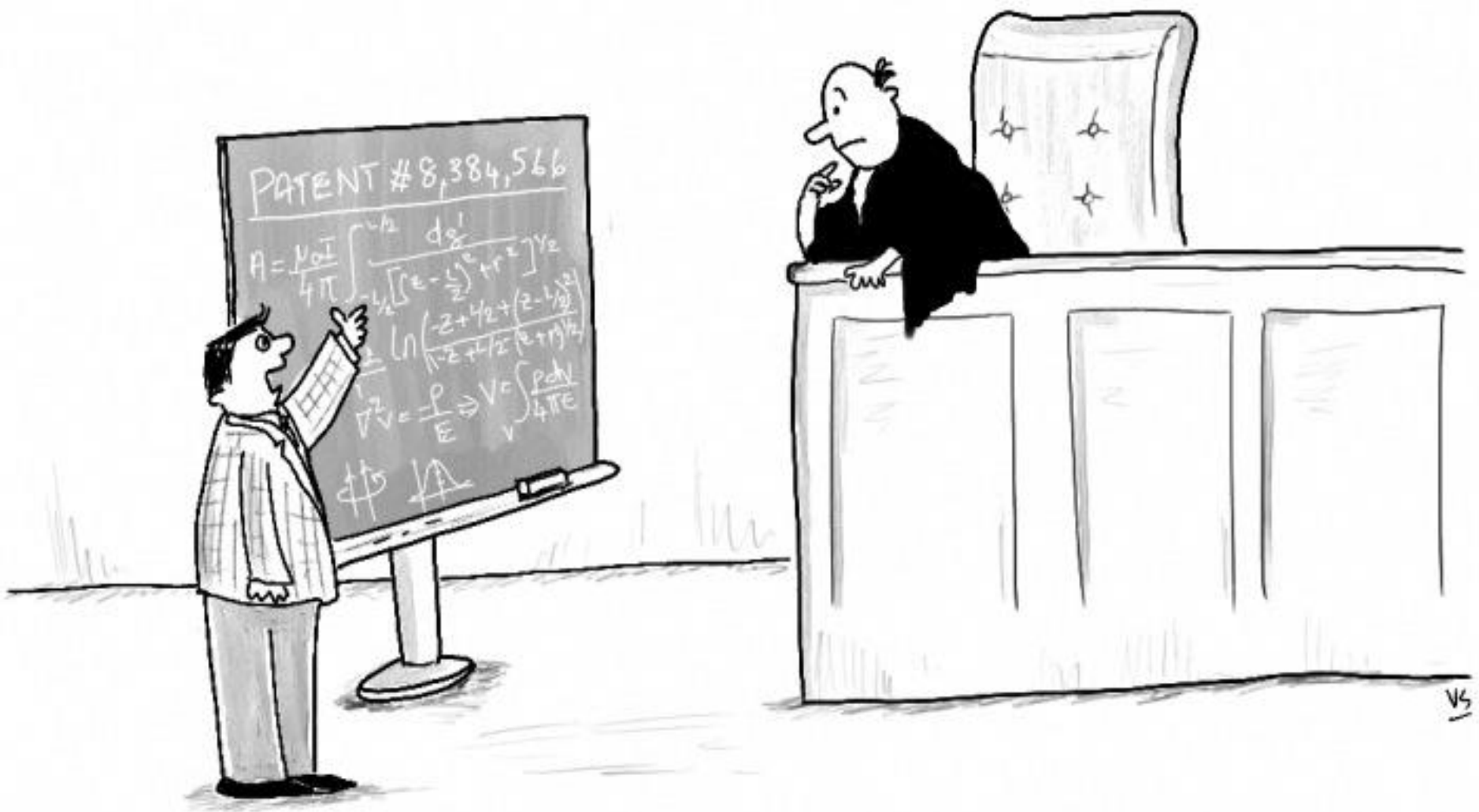
“we are not final because we are infallible, but we are infallible only because we are final” *Brown v. Allen*, 344 U.S. 540 (1953)

Patent-inexperienced judges must often spend an “inordinate expense of time” merely to understand the technological jargon and pass on technological issues. *Parke-Davis v. Mulford*, 189 Fed. 95 at 115 (S.D. N.Y. 1911)



“This patent appeal is another illustration of the absurdity of requiring the decision of such cases to be made by judges whose knowledge of the relevant technology derives primarily, or even solely, from explanations of counsel and who, unlike the judges of the Court of Customs and Patent Appeals, do not have access to a scientifically knowledgeable staff”

General Tire & Rubber Co. v. Jefferson Chem. Co., 497 F.2d 1283, 1284



"So you see your honor, it's obvious."

Reason

- Catch up with the specificities of IP litigation

Channels

- Existing courts concentrate cases
- New bodies are set up

Jurisdiction

- Over all IP cases
- Solely some IP categories
 - All type of disputes
 - Just some disputes in respect of that category

Hierarchy

- First instance
- Second instance
- Fully-fledged

Specialisation

**Two groups of norms
that interact... Idea of
dynamism**

**Enforcement as a process of
weighing and balancing
rights and interests of
different natures**



**In *eBay*, SCOTUS
differentiated “the
creation of a right”
from “the provision of
remedies for
violations of that
right”**

**Enforcement
describes an
action, not a
pre-established
outcome: other
norms,
principles and
objectives enter
into play**



**Judge's work resemble to
that of a potter**

**A multiplicity of factors
(and rules) enter into play
in the process of enforcing
IPRs**

+

**Judicial discretion &
flexibility**

Most international IP treaties explicitly order States to leave discretion to judges on a range of key issues

More broadly, there is space for adjustment...

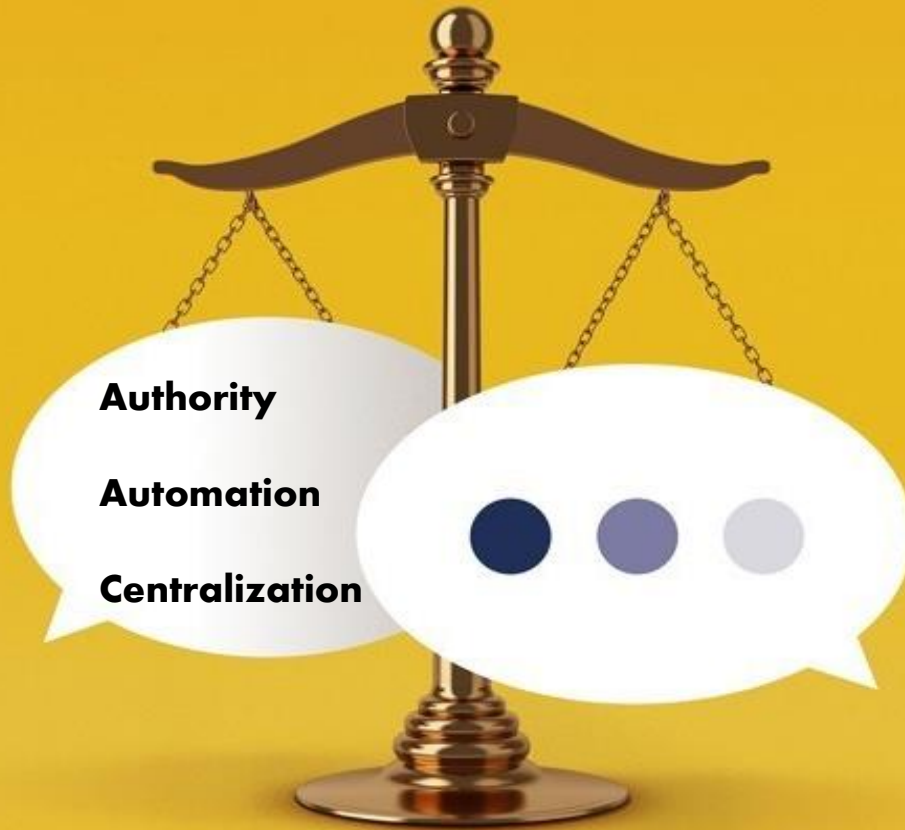
... clearly in TRIPS, which requires an overall satisfactory level of intellectual property enforcement but leaves ample margin guided by Arts 7 and 8

.... but also in the context of vague bilateral and plurilateral agreements



Challenges and opportunities

- Combine public interest, fundamental rights, free trade and competition principles when adjudicating IP
- Judgecraft
- Automation of the law



AI changes (IP) law

Authority

Privatization of law enforcement & delegation of public authority

Automation

Machines implement law: legal decisions from a database of sources

Centralization

A single action produces legal decisions for many individuals at once

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