Dutch judicial entrepreneurship towards legitimizing intellectual property rights

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Abstract
In its recent judgment in the Sisvel v. Xiaomi case, the Court of Appeal of the Hague has demonstrated how European national legal systems and judiciary therein strive to uphold legitimacy of the intellectual property system. Involving dimensions of both substantive patent law and competition law, the case emphasized proportionality etched in European Union law to determine the legitimate cohesive balance for stakeholder economic interests in the protection, enforcement and use of intellectual property rights. This case note documents the salient features of the judgment and further comments on striking legal concepts that marked the case.

Keywords
Intellectual property law, legitimization, proportionality, competition law and FRAND

1. Introduction
The legal fraternity’s efforts to constitutionalize intellectual property law have increased in the last two decades.¹ Such efforts are the result of a growing discontent with seemingly brusque efforts to maximize intellectual property protection and enforcement without due consideration of closely

¹ C. Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’, 37 International Review of Intellectual Property and Competition Law (2006), p. 371–406.

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interfacing fundamental human rights and freedoms. A deep-rooted fear thus looms large in scholastic circles about the regressing legitimacy of the intellectual property system, particularly in knowledge-based economic frameworks. The ever-increasing mesh of the rights framework, lack of transparency in delineating the rights, conferring undue powers to economic players who could then abuse legitimate competition in society, and under-specifying true beneficiaries of protection are vital components of this legitimacy problem. Relief for the legitimacy crisis can be found in the understanding that intellectual property rights are not ends in themselves. Intellectual property rights are seen as relativized propositions that are limited like any other form of property. Individual rights to intellectual possessions are thus noted to entail responsibilities and duties to other individuals. All fundamental human rights and freedoms, including rights associated with intellectual property, are then considered conjointly, accorded equal value and protected uniformly in the light of science and technological changes that promise societal progress and development. Legitimacy per se is not vested in legal rights associated with intellectual property. Legitimacy is rather established when these rights are held in balance with other human rights and freedoms. To this end, the judiciary has the prime responsibility to legitimize intellectual property rights in every possible instance by balancing varied economic interests that different stakeholders hold for these rights. The recent Sisvel v. Xiaomi case turned out to be one such judicial balancing exercise, where the Court of Appeals of the Hague (the Court henceforth) legitimized understandings of intellectual property rights, their protection, use and enforcement. The judiciary temporarily set aside exclusivity considerations associated with intellectual property to give way to a more detailed contextual analysis of stakeholder economic interests for those rights. It clarified, within the nature and context of the case, why a preliminary injunction was not the appropriate enforcement means for allegedly infringed standard essential patents (SEPs) that covered mobile communication technologies in the Netherlands. Such analysis is noteworthy given that exclusivity is understood to be considerably deficient to effectively accommodate

2. C. Geiger, ‘Intellectual Property shall be protected? Article 17 (2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope (Opinion)’, 31 European Intellectual Property Review (2009), p. 113–117.
3. C. Geiger, ‘The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law’, Max Planck Institute for Intellectual Property and Competition Law Research Paper 13-06 (2013), p. 2.
4. Ibid., p. 2–3.
5. A. Peukert, ‘Intellectual Property as an End in itself?’, 33 European Intellectual Property Review (2011), p. 67–71.
6. R.H. Coase, ‘The Problem of Social Cost’, The Journal of Law & Economics (1960), p. 44; A.A. Alchian, ‘Some Economics of Property Rights’, 30 Il Politico (1965), Vol III p. 818.
7. Charter of Fundamental Rights of the European Union (2000/C 364/01) (‘CFR’). See Preamble.
8. Ibid.
9. C. Geiger, 37 International Review of Intellectual Property and Competition Law (2006), p. 377.
10. Ibid.; P. Drahos, ‘Intellectual Property and Human Rights’, 3 Intellectual Property Quarterly (1999), p. 349–371.
11. C. Geiger, J. Griffiths and R.M. Hilty, ‘Declaration on a Balanced Interpretation of the “Three Step Test”’, 39 International Review of Intellectual Property and Competition Law (2008), p. 707–713. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), 15 April 1994 (as amended on 23 January 2017) WTO legal texts. Article 7 of the TRIPS Agreement noting that ‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’
12. Sisvel v. Xiaomi, NL:GHDHA:2020:711.
multiple economic uses possible for intellectual property.\textsuperscript{13} Exclusivity according to the social contract theory of intellectual property rights is a privilege enjoyed by the creator or the rights holder in exchange for the primary commitment to diffuse and deploy these rights for intellectual enrichment of society, scientific progress and development.\textsuperscript{14} In the \textit{Sisvel v. Xiaomi} case, the judiciary saw that this commitment was threatened. It stepped in to clarify and assert the right balance required between intellectual property rights and rights of third parties by contextually legitimizing a notion for intellectual property rights conducive to the fostering of competitive market entrepreneurship and consumer welfare.\textsuperscript{15} The judiciary’s balance of interests approach stood testimony to a Court’s important role in policing the legislative boundaries of the intellectual property rights framework that are prima facie politically derived,\textsuperscript{16} and in convincing the general public of the beneficial relevance of intellectual property rights as political institutions capable of conferring socio-economic stabilities and performances over time.\textsuperscript{17}

2. Relevant facts of the case

The \textit{Sisvel v. Xiaomi} case was about the business model of non-practising entities (NPE) to license out standard essential patents (SEPs) to third parties under the ‘Fair, Reasonable and Non-Discriminatory’ (FRAND) conditions. Sisvel as a member of the European Telecommunications Standards Institute (ETSI) offered to license European Patent No.1129536 B1 (EP536 patent henceforth) which it owned along with other patents as part of its Mobile Communications Program (MCP) portfolio under ETSI IPR Policy. The portfolio fundamentally involved technologies used in mobile communication systems. Xiaomi produced and provided mobile phones. Since October 2013 Sisvel had communicated to Xiaomi to conclude a licence to its MCP portfolio. Following Xiaomi’s decision to enter the Dutch market in March 2019 without concluding any licence agreement, Sisvel applied to the Court for a preliminary injunction that will prevent the commercialization of Xiaomi’s mobile phones in the Netherlands. Primarily, the injunction was sought under the pretext of Xiaomi’s infringement of the Netherlands part of EP536 patent. Xiaomi’s defence included that a ‘balance of interests’ approach would preclude the grant of injunction, that EP536 was invalid, and any claim of infringement was an abuse of dominant position by Sisvel given Sisvel’s commitment to FRAND conditions. In August 2019, the Court’s judgment favoured Xiaomi, noting that the case was unsuitable for preliminary injunction in view of its complexity and in requiring a balancing of interests of both Sisvel and Xiaomi. Sisvel appealed again to the Court to set aside the judgment of August 2019, seeking the grant of an injunction and ordering Xiaomi to pay for the cost of proceedings. Pending this appeal, Xiaomi,

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\item \textsuperscript{13} Henry E. Smith, ‘Intellectual Property as Property: Delineating Entitlements in Information’, 116 The Yale Law Journal (2007), p. 1742–1822.
\item \textsuperscript{14} C. Geiger, ‘Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles’, Max Planck Institute for Intellectual Property and Competition Law Research Paper 14–10, (2014).
\item \textsuperscript{15} J. Cornides. ‘Human Rights and Intellectual Property – Conflict or Convergence? 7 Journal of World Intellectual Property (2004), p. 155–160.
\item \textsuperscript{16} R.P. Merges, ‘Intellectual Property Rights and the New Institutional Economics’, 53 Vanderbilt Law Review (2000), p. 1875–1877.
\item \textsuperscript{17} C. Geiger, Max Planck Institute for Intellectual Property and Competition Law Research Paper 13-06 (2013), p. 4; D.C. North, ‘Institutions and the Performance of Economies Over Time’, in C. Menard and M.M. Shirley (eds.), \textit{Handbook of New Institutional Economics} (Springer, 2005), p. 21–30.
\end{itemize}
through an agreement with the company Intertrust, in January 2020 put up security (in escrow) in an amount that would cover royalty payments to Sisvel. Here, the royalty rate was calculated at the high end of comparable rates for the type of mobile phone technology in consideration. Three related arbitration proceedings between Sisvel and Xiaomi merited consideration along with this case. The first one, initiated by Sisvel in the High Court of Justice, London, pertained to declaratory judgments on the FRAND compliance of the licensing terms for the MCP portfolio or, alternatively, determination of the licensing terms and conditions for the MCP portfolio, the validity of patents in the MCP portfolio and the infringement of these patents. Two other proceedings brought forth by Xiaomi in Beijing pertained to establishing FRAND conditions for the licensing in China and the abuse of dominant position by Sisvel, respectively.

3. The Court’s reasoning and decision

Sisvel’s appeal following judgment in the first instance constituted Kort Geding. To this end, the Court adopted the ‘balance of interests’ approach. In fact, this approach qualified more as the ‘balance of conveniences’ approach. It sought to relativize the outcomes of the injunction for Xiaomi with the damages for Sisvel if the injunction was not granted. The important aspects of the Court’s approach are discussed here.

A. The import of injunction for Sisvel and Xiaomi

For Sisvel, the Court noted that the injunction would serve the purpose of preventing continued infringement of only the Netherlands part of the EP536 patent that was soon to expire. In terms of its business model, the damages for Sisvel from continued infringement were interpreted as simply the loss of licensing income and not the loss of its exclusive market position in the Dutch mobile communications sector. The Court opined that financial damages could be retrospectively estimated and compensated given the impending expiry of the EP536 patent. For Xiaomi, the Court noted that the injunction would have far-reaching consequences, including the complete termination of mobile sales in the Netherlands, closure of stores, the termination of agreed-upon commercial supplies and jeopardy of customer relationships. Further, the impact of the injunction was also seen to have the effect of constraining Xiaomi to accept the licensing offer of Sisvel for its entire MCP portfolio of patents, including the EP536 patent. This meant a substantial licensing fee for Xiaomi.

As part of these considerations for injunction, the Court systematically highlighted important criteria that determined the basis of grant or denial of injunctive relief, the foremost being the nature and scope of damages for both Sisvel and Xiaomi, and whether there were remedies in law that could compensate for these respective damages. In the Court’s assessments, the damage for Sisvel in the event that an injunctive relief was not provided was short-term and retrospectively easy to determine. It was possible for Sisvel to unilaterally claim compensation using the escrow agreement through which Xiaomi securitized a licensing fee for Sisvel. The Court also took into consideration that any recoverable damages would be based on royalty determinations in accessory arbitrations in London. The sufficiency of these royalty determinations in London were substantiated given that it was Sisvel which initiated these accessory arbitration proceedings. As noted previously, Sisvel sought declaratory judgments that its MCP licensing conditions were FRAND and, alternatively, that the London court itself determine the licensing terms and conditions for its
MCP portfolio. The Court also favourably considered Xiaomi’s offer to modify the escrow agreement if Sisvel sought so, under mutually decided terms. This, in the view of the Court, was an opportunity for Sisvel at the time of the appeal proceedings. However, the damage for Xiaomi if the injunctive relief was granted was more profound, difficult to assess and undo, in the opinion of the Court. Particularly the financial damages that would result from the closure of its business and sales, and also the compensations Xiaomi may have to pay for its customers who may be losing out on their profits in view of the injunctive relief and severance of business relationships with Xiaomi. Also, the Court saw the injunctive relief as tying Xiaomi down irrevocably to Sisvel’s licence offer and associated enormous licensing fee. Xiaomi’s contention that damages it would suffer from the injunction were hard to determine given the number of market players in the mobile communications sector in the Netherlands, and that it was still establishing its position in the Dutch market, was favourably considered by the Court. These considerations led to Court to opine that damages for Xiaomi upon grant of the injunction were not reversible or hardly reversible. These considerations of the Court highlighted yet another important criterion for grant or denial of injunctive relief, namely the relative hardships of Sisvel and Xiaomi that required to be balanced before a decision on injunction may be pronounced.

B. Complexities surrounding injunction

An injunction order in the opinion of the Court required detailed assessments of the validity and scope of the EP536 patent, and factual considerations underlying FRAND defence which were possible only in full trial proceedings such as those of related arbitration proceedings. Further, the Court saw that an unsure situation prevailed in the related arbitrations proceedings. There were equal chances of the EP536 patent being held valid or declared invalid. Similarly, Xiaomi’s FRAND defence could be successful or unsuccessful. In the view of the Court, a preliminary injunction was beyond the scope of the Kort Geding nature of the appeal. It thus precluded the imposition of an injunction given that there was no justification to order Xiaomi’s withdrawal from the mobile communications market in the Netherlands or Xiaomi’s acceptance of Sisvel’s FRAND licensing terms for the MCP portfolio. Also, Sisvel’s appeal for injunction was interpreted by the Court as an attempt to pin down Xiaomi to agreeing to a royalty for the MCP portfolio prior to the expiry of the EP536 patent in the Netherlands. The Court saw the situation as being that Sisvel feared Xiaomi’s keenness to settle matters of FRAND licensing and abuse of dominant position in Beijing, which was indeed the appropriate forum for Xiaomi given its predominant Asia-based trade. To this end, it also considered whether Sisvel wanted to use the Dutch proceedings to force Xiaomi into a licensing deal in the Netherlands before the expiry of the EP536 patent so that it could speed up proceedings in its favour in London, an excessive royalty setting forum for global licences. Further, the Court also observed that injunction would involve components of mobile phone technology and designs that were not part of EP536 patent. In response to Sisvel’s argumentation that Xiaomi was acting as an unwilling licensee and that this could negate its FRAND defence in accessory proceedings, the Court opined that the FRAND defence was separate from the ‘balance of interests’ in summary proceedings. To Sisvel’s allegation that by acting as an unwilling licensee Xiaomi created an unlevel playing field in the mobile phones market where other players were willing to conclude Sisvel’s license for the MCP portfolio, the Court cited the fact that Xiaomi’s security arrangements regarding a licence fee for Sisvel through the escrow agreement were indeed a level playing field strategy.
C. Proportionality and the ‘balance of interests’ approach

The Court applied the proportionality principle in support of its balance of interests approach. Proportionality is primarily etched in Article 52 of the Charter of Fundamental Rights of the European Union.18 Sisvel’s demand for injunction under Article 9 of the intellectual property enforcement Directive 2004/48/EC was then considered in the light of the emphasis for proportionality in Article 3 and Recital 22 of that directive.19 The Court pronounced that an injunction restricting Xiaomi’s commercial operations in the mobile communications market in the Netherlands was not proportionate under the ‘balance of interests’ approach, given the import and complexities of the injunction involved. Conjoint interpretations of both proportionality and a balance of interests approach were also evident when the Court considered Sisvel’s subsidiary claim seeking a ban on the commercial activity of Xiaomi in the Netherlands for as long as it did not accept the Sisvel licensing terms for the MCP portfolio established in accessory arbitration proceedings. The Court noted that such a ban would still have far-reaching consequences for Xiaomi in that it might still have to conclude the worldwide license to the MCP portfolio and accept arbitration unconditionally, thereby relinquishing its fundamental rights to access courts established by law in addition to curbs on its fundamental freedom to conduct a business.20 Here yet another vital criterion for the grant or denial of injunctive relief was highlighted. This was whether an injunction to prevent continued infringement of the EP536 patent could disserve common general interests.21

18. CFR 2000/C 364/01. See Article 52 (1) noting that ‘Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.’

19. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L 195/16. See Article 9(1)(a) noting Member States shall ensure that the judicial authorities may, at the request of the applicant, issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder. Recital 22 notes that, ‘It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.’

20. See Article 47 CFR noting that ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’ See Article 16 CFR, noting the freedom to conduct a business in accordance with Community law and national laws and practices is recognized.

21. C. Geiger, ‘Copyright as an Access Right: Securing Cultural Participation Through the Protection of Creators’ Interests’, in R. Giblin and K. Weatherall (eds.), What If We Could Reimagine Copyright? (ANU Press, 2017), p. 80. Article 3 (2) notes that ‘Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'
In addition, Sisvel also sought that Xiaomi should deactivate specific parts of technology protected under the EP536 patent in its mobile phones in the Netherlands. This in the opinion of the Court constrained Xiaomi more than the primary claims, as an order of this sort would force Xiaomi to not only deactivate patent-protected technology from mobile phones that are still to be sold, but also to do so in mobile phones that have already been sold in the Dutch market. The ‘balance of interests’ approach tilted in favour of Xiaomi again when the Court simply took into consideration the import of injunction for both Sisvel and Xiaomi, the provisional nature of judgment that was required of the preliminary proceedings and complex assessments in the case to obviate the injunction request by Sisvel. In all, the Court ratified the interim relief judgment of August 2019 rejecting all Sisvel’s primary and subsidiary claims in the appeal using the ‘balance of interests’ approach.

**Sisvel v. Xiaomi – The American analogy**

*Sisvel v. Xiaomi* conceptually mirrors the contextual reasoning adopted and explained in the *eBay Inc. v. MercExchange, L.L.C.* case in the Supreme Court of the United States in 2006. Justice Kennedy in the US case had cautioned how some firms whose primary business interest was income through patent licensing fees could use the threat of injunctions and associated sanctions for violation to seek undue leverage in licensing fee negotiations with third parties who might want to use the patented technologies of these firms. To this extent, Justice Kennedy concurred with the opinion of the Supreme Court that decisions to grant or deny injunctive relief must be based on separate assessments of the principles of equity, and not automatically follow positive determinations of patent validity and infringement. In the *Sisvel v. Xiaomi* case, it is noteworthy that Sisvel’s primary business model and income involved licensing fees and it was using the threat of injunction to make Xiaomi accept its FRAND license for the MCP portfolio in the Netherlands. The Court even set aside assessments of validity, infringement and FRAND licensing terms to give way to equity assessments that impacted the injunction order. To this end, the four criteria for the grant or denial of injunctions highlighted in the *Sisvel v. Xiaomi* case, namely the nature and scope of damages, remedies available in law that could compensate for damages, relative hardships of the parties in the case and whether an injunction could contradict common general interests, were the same four-factor equity considerations for injunction emphasized in the US case.

**4. Comments**

**A. Conceptual foundations**

The *Sisvel v. Xiaomi* case is significant for its rich conceptual foundations. Primarily, the case involved an intellectual property rights paradox that had to be calibrated based on sound justifications. The paradox compounded varied economic interests (choices) of Sisvel and Xiaomi for the EP536 patent in a Kort Geding scenario with the validity of the EP536 patent and its FRAND licensing conditions still to be affirmed in accessory arbitration proceedings. For Sisvel, the ongoing infringement of the EP536 patent and loss of its licensing fees were important. For

22. 547 US 388 (2006).
23. P. Drahos, *3 Intellectual Property Quarterly* (1999), p. 349–371; T.J. Chiang, ‘The Paradox of IP’, *30 Harvard Journal of Law & Technology* (2016), p. 9–32.
Xiaomi, it was the need to use the technology of EP536 patent for its business and growing market position in the Netherlands. A ban on such use meant a ban on business activities, closure of establishments, loss of consumer goodwill and relationships, constrained acceptance of the MCP portfolio as a whole and the associated burden of undue licensing fees. The judiciary thus operationalized both sets of economic interests for an intellectual property context, the scope of which had to be concretely ascertained through accessory arbitration proceedings. The judiciary’s approach was that even under a presumptive validity of EP536 framework and successful FRAND defence in accessory arbitration proceedings, the framework must exist in balance with other fundamental human rights and freedoms that interphase with it. It is here that the judiciary embarked on an economic proportionality approach to balance Sisvel’s fundamental rights to the protection, use and enforcement of its EP536 patent with Xiaomi’s fundamental freedom to conduct a business in the mobile communications sector in accordance with community law, national law and practices and its rights to effective remedy and fair trial, with no constraints to unconditionally accept arbitration. The judiciary’s approach thus corroborated the teaching that balance is the highest virtue of the legal system.

Balance is the key concept that lies behind the social function. If law is a question of balance, there cannot be an ‘absolute’ right that can be exercised in a totally selfish manner with no consideration for the consequences that this exercise involves, but only rights that are ‘relativized’ by the rights of others and the wellbeing of the community.

Judicial operationalization of economic choices within the legal context of the Sisvel v. Xiaomi to guide entrepreneurial transactions is part of the ‘new institutional economics’ (NIE) paradigm. NIE thus formed another important conceptual foundation in the case. For Sisvel, the broad economic choice was its licensing business model for SEPs (EP536 patent and other patents – its MCP portfolio) under FRAND conditions. This choice was shaped by its fundamental right to lawfully acquired intellectual property that was protected subject to statutory limits for such protection. Sisvel’s economic choice was also based on provisional and precautionary measures.

24. H. Kelsen, Introduction to the Problems of Legal Theory – A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law (Clarendon Press. OXFORD, 2002), p. 40–42.
25. P. Drahos, Intellectual Property Quarterly (1999), p. 349–371.
26. See Article 17(2) CFR noting that ‘Intellectual property shall be protected’. Article 16 and Article 47 CFR.
27. J. Cornides, The Journal of World Intellectual Property (2004), p. 167.
28. C. Geiger, Max Planck Institute for Intellectual Property and Competition Law Research Paper 13-06, (2013), p. 5.
29. C. Menard and M.M. Shirley, ‘Introduction – What is New Institutional Economics’, in C. Menard and M.M. Shirley (eds.), Handbook of New Institutional Economics (Springer, 2005), p. 2.
30. Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50. See explanations regarding conjoint interpretations to Articles 17(1) and 17(2) CFR 2000/C 364/01, p. 19–20. The explanation provides that Article 17 provides for the right to property and reads in paragraph 1 that, ‘Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.’ Article 17(1) is based on Article 1 of the Protocol of the European Convention on Human Rights which reads, ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’ The explanation further provides that ‘Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. Intellectual
it was eligible for in enforcing its intellectual property rights. However, this economic choice was also subject to the establishment of the validity of the EP536 patent and clarifications pertaining to FRAND conditions, both part of pending arbitration in the UK and China. Also, for the Netherlands part of the EP536 patent, the economic choice was affected by the imminence of patent expiry. The possible income through Sisvel’s economic choice was only the licensing fees, and any damage to this income by virtue of infringements to the EP536 patent was ascertainable and capable of being recovered retrospectively. For Xiaomi, the economic choice was dependant on deployment of technologies covered only by the Netherlands part of EP536 patent in its mobile phones in the Dutch market. It did not require the entire MCP portfolio that Sisvel offered to license under its FRAND conditions. Xiaomi’s economic choice to continue to use the Netherlands part of the EP536 patent was based on the presumed invalidity of the patent, and more clarifications it sought on Sisvel’s FRAND conditions and abuse of its dominant market position in accessory arbitration proceedings. Xiaomi’s primary economic choice also included the sales revenue it sought to generate in the Netherlands through adequate investments in business relationships and strategies. Basically, Xiaomi’s economic choice was shaped by its fundamental right to conduct a business. Given the complexities of pending assessments for the validity of the EP536 patent and FRAND conditions, both of which were required for the injunction order, and the unsure outcomes of these assessments, the judiciary set aside the economic choices of Sisvel temporarily to prioritize those of Xiaomi within the pertinent intellectual property rights milieu defining the case. Xiaomi’s level playing field strategy in securing sufficient licence fee to Sisvel that could be claimed following validity and FRAND determinations in accessory proceedings supported its economic choice satisfactorily. The judiciary opined that there was not enough justification to order Xiaomi to withdraw from the Dutch market or accept the licence for the entire MCP portfolio under FRAND conditions established by Sisvel. The judiciary thus deployed principles of NIE to guide Sisvel’s and Xiaomi’s respective entrepreneurial interests in the EP536 patent and FRAND licensing conditions thereof. In doing so, judicial entrepreneurship was automatically exemplified in the case. Judicial entrepreneurship stands out as the next important conceptual foundation in the Sisvel v. Xiaomi case. Judicial entrepreneurship is the outcome of judiciary’s learning processes in unfolding legal contexts in which a judge’s alertness to new information facilitates better reasoning and engenders new ways of solving cases and pragmatic decision-making. In the Sisvel v. Xiaomi case, judicial entrepreneurship simply subsumed multiple competition values in the mobile communications sector that were associated with innovation benefits and consumer welfare for Dutch society. It basically sought to balance the prevalent rights framework of the EP536 patent, entrepreneurial competitive values held by Sisvel and Xiaomi and pro-competitive

property covers not only literary and artistic property but also patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.\footnote{31. Directive 2004/48/EC.}  
32. Article 16 CFR. 
33. S. Voigt and H. Engerer, ‘Institutions and Transformation — Possible Policy Implications of the New Institutional Economics’, in Klaus F. Zimmermann (ed.), Frontiers in Economics (Springer, 2002), p. 131–132. 
34. E. Krecké, ‘The Role of Entrepreneurship in Shaping Legal Evolution’, 12 Journal des Economistes et des Etudes Humaines (2002), p. 9. 
35. Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, Federal Trade Commission (2003), Chapter 3 (IV), p. 38.
consumer welfare benefits sought from EP536 patent-based market arrangements. In this balancing exercise, the judiciary was careful to ensure that the rights associated with the EP536 patent were not enforced in a manner that contravened legitimate competition and associated consumer welfare in terms of benefits of mobile communication systems incorporating the technology of the EP536 patent. Judicial alertness in the Sisvel v. Xiaomi case was particularly evident in considerations of Sisvel’s business model around the EP536 patent, the imminent expiry of the 536 patent, the Kort Geding nature of the appeal proceedings, the complexities surrounding the injunction order, the need for proportionality in the balance of interests approach, the fundamental rights involved, the import of injunction for both Sisvel and Xiaomi, the unsure outcomes in accessory arbitration proceedings and security towards licence payments in the case. Judicial entrepreneurship thus guided the market entrepreneurship perspectives of both Sisvel and Xiaomi.

Sisvel v. Xiaomi – some policy implications

The inevitable relevance of the intellectual property paradox in policy programmes that seek to establish multi stakeholder-based knowledge economies must be carefully noted. The European Horizon 2020 research and innovation program is a typical example. Stakeholder emphasis could be expected to provide better delineations of economic choices qualitatively and quantitatively in specific intellectual property milieus. These delineations could augment legal system’s sensitivity to other rights and freedoms, thus allowing judicial entrepreneurship to assert better the legitimacy of intellectual property rights. The Sisvel v. Xiaomi case presented one such illustrative legal microcosm that tethered the intellectual property paradox, NIE and judicial entrepreneurship to foster competitive market entrepreneurship and consumer welfare in the Dutch mobile communications sector. To this end, the case also struck a strong analogical parallel with the eBay Inc. v. MercExchange, L.L.C. case in the US which emphasized that injunctive relief for violation of granted patent rights must be in accordance with the principles of equity. The four-factor test emphasized in the US case was also replicated in the Sisvel v. Xiaomi case. The Sisvel v. Xiaomi case is certainly a foundation for critical learning that guides and supports the larger goals of improving the efficiency and legitimacy of the intellectual property system over time.

36. Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, [2014] OJ L 93/17. See Recital 4; U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, U.S. Department of Justice and the Federal Trade Commission (2017 the Institute for Globalization and International Regulation (IGIR), p. 7.
37. C. Geiger, Max Planck Institute for Intellectual Property and Competition Law Research Paper 13-06, (2013), p. 4. See comment that ‘it must not be used “antisocially”, i.e. disregarding certain fundamental values and competing rights.’ Here ‘it’ refers to intellectual property rights.
38. Uppsala University, ‘Stakeholders, experts and citizens in SIENNA’, SIENNA, www.sienna-project.eu/about-sienna/stakeholders/. The SIENNA (Stakeholder-Informed Ethics for New technologies with high socio-economic and human rights impact) project under the Horizon 2020 addresses ethics and human rights dimensions in technological areas like human genomics, human enhancement and human machine learning interactions predominantly from stakeholder points of view.
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