

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

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3 COMPETITION AND INTELLECTUAL)
4 PROPERTY LAW AND POLICY IN)
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7 FEBRUARY 27, 2002

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9 Wells Fargo Room
10 Haas School of Business
11 University of California
12 Berkeley, California

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14 The workshop in the above-entitled matter
15 commenced at 9:42 a.m.
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For The Record, Inc.
Waldorf, Maryland
(301)870-8025

P R O C E E D I N G S

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1
2
3 MR. BARNETT: My name is Michael Barnett and
4 I'm a staff attorney with the Federal Trade Commission.
5 I'd like to welcome everyone to the third day of our
6 hearings at the Haas School of Business here at the
7 University of California at Berkeley, entitled *Economic*
8 *Perspectives and Real World Experiences with Patents.*

9 The hearings in Berkeley are provided with the
10 support of the Competition Policy Center and the Berkeley
11 Center for Law and Technology of the University of
12 California at Berkeley as part of a larger series of
13 public hearings from the Federal Trade Commission and the
14 United States Department of Justice Antitrust Division,
15 investigating competition and intellectual property law
16 in the knowledge-based economy. This mornings hearings
17 are entitled *Business Perspectives on Patents: Software*
18 *and the Internet.*

19 Here today I would like to introduce
20 Commissioner Mozelle Thompson from the FTC to my
21 right; Commissioner Tom Leary also from the FTC here
22 to my left; as well as Susan DeSanti, Deputy General
23 Counsel for Policy Studies at the Federal Trade
24 Commission; also, Pam Cole, who is a trial attorney at
25 the United States Department of Justice; and Ray Chen,

1 Associate Solicitor at the United States Patent and
2 Trademark office.

3 Gathers with us are representatives from
4 software and Internet companies as well as academia and
5 the legal community, to provide us with their insight
6 into patents, competition and innovation within their
7 business or field, and in turn, the industry in general.
8 In my opinion, I think that this is an exciting group of
9 individuals who are impressively distinguished in their
10 fields, and I'm anxious to hear their thoughts.

11 With that in mind I think we should begin. We
12 will start by briefly introducing each panelist, and
13 following their introduction they will provide a brief
14 explanation of what their companies do or who they
15 represent or what their area of expertise is, to provide
16 us with some perspective toward their relationship to the
17 industry.

18 Following these introductions, four of our
19 participants have graciously offered to provide us with a
20 brief opening presentation to introduce us to ideas and
21 issues that they find particularly relevant and important

1 Kaplan founded Intouch Group, Incorporated. The
2 company's flagship product was a patented record store

1 collecting demographic and psychographic data on the
2 customers so that the music industry could find out a
3 little bit more about what their customers were doing.

4 The way that this worked was somebody would
5 walk into a record store, fill out a form, get a card,
6 walk up to device called an iStation, scan the bar code
7 of a CD and be allowed to listen to anything on the CD or
8 the tracks that we'd encoded. We encoded roughly 200,000
9 CD's and this was starting in 1990.

10 We received a patent on that product called the
11 iStation, which was a physical kiosk. We transitioned
12 the business in 1995 to an online business, and received
13 a patent in 1999 for the online version of the
14 interactive kiosk that allowed for previewing music and
15 collecting psychographic and demographic data on a
16 customer and tracking the customer's progress through the
17 website.

18 Since receiving the second patent we put
19 approximately 190 companies on notice and went into
20 litigation against 6 companies in March of 2000. We have
21 settled with 5 of the 6 companies. We're currently in
22 the Northern District litigating with the final company,
23 and I'll talk a little bit more about that as we go
24 further on.

25 MR. BARNETT: Next we have Robert Kohn. Robert

1 Kohn is Vice-Chairman of the Board and Director of
2 Borland Software Corporation. He is also the co-founder
3 of Emusic.com and the former Vice President and General
4 Counsel of Pretty Good Privacy, Incorporated, a developer
5 and marketer of Internet encryption and security
6 software.

7 Robert.

8 MR. KOHN: Thanks. I started my career at
9 Ashton-Tate in 1983 and before going to Borland as
10 General Counsel. While I was at Borland we were involved
11 in a highly celebrated intellectual property case that
12 went to the Supreme Court called Lotus v. Borland, having
13 to do with, in our view, the difference between copyright
14 and patent and where the lines are drawn.

15 I started a company, as he mentioned, Emusic,
16 which is the leading downloadable MP3 music service which
17 was sold to Vivendi Universal last year, and I've
18 recently done a startup company called Laugh.com, a
19 comedy record company with George Carlin, so I wanted to
20 do something less serious.

21 Borland Software today -- you know, in
22 preparing for this I looked and I had testified for the
23 FTC on November 29th, 1995, and I was reading my
24 testimony last night and it holds up pretty well except
25 Borland is almost a different company today than it was

1 MR. BARNETT: Thanks, Jim. Next we have Yar
2 Chaikovsky. Yar is the General Counsel with Zaplet,
3 Incorporated, an enterprise software and services
4 company. Before joining Zaplet this year, Yar was the
5 sole patent counsel at Yahoo!. Before that he was a
6 senior associate at the Patent and Technology Practice
7 Group at O'Melveny and Myers in Los Angeles, California.

8 Yar.

9 MR. CHAIKOVSKY: Again, Yar Chaikovsky. At
10 Zaplet, it's interesting. I have a different take with
11 respect to Internet and software patents, because at
12 Zaplet we focus on enterprise software, collaborative
13 business process management, where obviously we're taking
14 on individuals such as Microsoft, IBM/Lotus, and focusing
15 on patents from that perspective and competition from
16 that perspective.

17 On the other hand, as Chief Patent Counsel at
18 Yahoo! looking at the competition and then focusing more
19 on the Internet perspective that I bring to bear here,
20 dealing with the smaller competitors that have patents
21 and are asserting patents in order to extract rents at
22 the same time requires filing many patents at the same
23 time to protect our own innovations.

24 But I will say out front that Yahoo! was able
25 to get to a \$120 billion market cap in its heyday with

1 the E-commerce and Internet practice at the law firm of
2 Wiley, Rein and Fielding, Mr. Misener also served as
3 Senior Legal Advisor and Chief of Staff to a Commissioner
4 of the Federal Communications Commission.

5 Prior to his federal service, Paul was Intel
6 Corporation's manager of telecommunications and computer
7 technology policy, where he co-founded and led the
8 computer industry's Internet Access Coalition.

9 Paul.

10 MR. MISENER: Thanks, Mike. For those of you
11 who don't know, Amazon.com is the Seattle-based
12 profit-making juggernaut. We are the holder of 22
13 patents, 2 of which are relatively famous, or infamous
14 depending on your point of view, and hopefully we'll be
15 able to talk about those.

16 MR. BARNETT: Great. Thanks, Paul. Next
17 we have David Mowery. David Mowery is a Professor of
18 Business Administration here at Berkeley and the Director
19 of the Haas Ph.D. program. His research interests focus
20 on technological change, international trade, United
21 States technology policy and the relationship between
22 public policies and the private sector.

23 David.

24 PROF. MOWERY: Thank you. I'm obviously not
25 presenting a real world but an economic perspective here

1 today. I guess what I will probably speak to are some
2 earlier work I've done on the growth of the U.S. and
3 international software industries, and then in particular
4 a paper that I and a student here, Stuart Graham, did on
5 overall trends in software patenting and copyright which
6 was done for the National Academy's panel on intellectual
7 property rights that Mr. Pooley sits on. Thank you.

8 Oh, let me just make one other note.
9 Unfortunately, I have to leave shortly before noon
10 because of a teaching schedule conflict, so don't read
11 anything into my hasty departure.

12 MR. BARNETT: Finally, we have Brad Friedman.
13 Brad is the Director of Intellectual Property at Cadence
14 Design Systems, Incorporated, a global electronics design
15 automation company.

16 Before joining Cadence, Brad worked as Senior
17 Intellectual Property Counsel at Varian Associates and
18 Varian Medical Systems in Palo Alto. Before moving
19 in-house, Brad practiced law with the patent litigation
20 firm Fish and Neave.

21 He is a member of the Licensing Executive
22 Society, the Silicon Valley Intellectual Property Law
23 Association, the intellectual property section of the
24 California Bar Association, and the American Corporate
25 Counsel Association.

1 Brad.

2 MR. FRIEDMAN: Hi, good morning. Cadence is an
3 interesting company, fairly unique on this panel. Our
4 industry is the electronic design automation industry.
5 We develop software tools that we sell to others who
6 design semiconductor chips or smart electronics like cell
7 phones.

8 Cadence's patent portfolio has grown through
9 acquisition more than by its own internal innovation,
10 and it's not an uncommon thing to do within the EDA
11 industry.

12 I come to Cadence from a unique perspective as
13 well. My background, as you heard, was patent
14 litigation, focusing in medical devices, then moving
15 in-house working in imbedded software, semiconductor and
16 now finally in electronics.

17 I'm looking forward to providing the view of
18 the world's largest supplier of electronic device
19 software in talking about how our patent policy affects
20 this particular branch of software. Thank you.

21 MR. BARNETT: Thanks, Brad. Now we're going to
22 begin with the introductory presentations. I think we're
23 going to begin with Bob Kohn.

24 MR. KOHN: What I'd like to share with you are
25 some of my thoughts, I guess really to set the tone for

1 the morning. I think that means to upset as many panel
2 members as possible to goad them into controversial
3 discussion, but I'd like to say something about
4 intellectual property protection in general in connection
5 with patents, something about software patents in
6 particular, and then something about the system that
7 we're living with.

8 As everyone knows, we have intellectual
9 property protection, whether it's copyrights or patents,
10 so that there isn't an underproduction of goods. I mean,
11 these are public goods once they're created, and if
12 everyone else can use them without compensating the
13 author, it may not be created to begin with. So clearly,
14 intellectual property protection is needed in order to
15 have an efficient number of goods or ideas or whatever
16 products are produced.

17 But there is a problem that with too much
18 protection you're going to have the same problem as too
19 little protection. That is, you're going to have too few
20 goods produced, especially in the area of complimentary
products. Things so apparent on seminar 3pc-23.emo
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1 defining the scope of intellectual property protection.

2 Now, with that background in mind, let's think

1 patent for a particular part of a piece of software code
2 that is already protected by intellectual property?
3 Okay.

4 So I would argue or at least put out that in
5 the software area there's a real potential for
6 overprotection of what's going on in a piece of software.
7 It's already protected by copyright. Now you're starting
8 to add patents. What is the marginal benefit of this?

9 Now in the software area, just by experience I
10 think most businessmen in our field will tell you that
11 innovation generally is promoted by competition and not
12 by the intellectual property protection. Of course,
13 intellectual property protection is important, it's good.
14 You need to be compensated for your software so that, you
15 know, people can't just or shouldn't be able to just copy
16 your software verbatim and not pay you for these
17 additional copies. But most of the innovation comes from
18 a competitor coming out with a new feature or something
19 as opposed to, "Boy, I think we can get a patent on this
and protect it for 17 years."n this
aMst of the iatents.fiele, Inwould argue ,in

aur field ,in the software area, jre aiele,for ldefnsaiv

1 Counsel. We filed patents on virtually everything. Any
2 innovation in user interface design, flyover help,
3 spreadsheet notebooks -- I mean, you name it, I had my
4 guys file patent applications.

5 Those features weren't developed because we
6 could get a patent on it. They were developed because we
7 had to build a better product than our competitor. I was
8 filing them because I knew I was going to get sued
9 someday by some large competitor who had patents and I
10 needed some way to defend ourselves against that lawsuit.

11 Now, finally, the point I want to make about
12 the system is this. When you get involved in one of
13 these cases, or you get involved even with a settlement
14 discussion, and let's say you're legitimately infringing
15 somebody else's patent in some small piece of process or
16 something that you use in this ten million lines of
17 software code for your product, potentially hundreds of
18 thousands of patentable ideas in your code, somebody sues
19 you and says, "You're using our process, you're using our
20 this or that, our interface design. We want a ten
21 percent royalty on your sales, we want ten percent of
22 your gross."

23 I mean, you end up getting into these
24 discussions, "Well, wait a minute, wait a minute. This
25 is only one patent out of a hundred thousand, okay. You

1 can't ask us for ten percent of our product, it's just a
2 minor feature. Yeah, we're infringing it."

3 "Well, if you don't pay us the money, we're
4 going to sue you, and you know what the damages are in a
5 patent case."

6 And then you get into this discussion where
7 you're hiring guys like Carl Shapiro for \$500 an hour,
8 and I've been through this at Borland. We won in the
9 Supreme Court but we spent \$5 million in the damage phase
10 of the case to determine what the potential damages were
11 for infringing the copyright. It's no different in the
12 patent field in determining the damages.

13 So, my argument is at the end of the day there
14 needs to be a major overhaul of how damages are
15 determined in these large intellectual property cases so
16 that there's some reasonableness brought to the table so
17 that when there's one little process or procedure in a
18 code you don't get into this huge discussion of what are
19 your profits and what are our lost profits. Some judge
20 should be able to say, "Look, I'm going to set a
21 reasonable royalty here. It should be one-hundredth of
22 one-thousandth of a percent because this is what the
23 value of your particular idea is to the whole piece of
24 software."

25 That's what I have to say this morning, and I

1 hope that sparks some interest.

2 MR. BARNETT: Thank you very much, I have a
3 feeling that it will. I think next we're going to hear
4 from Brad Friedman.

5 MR. FRIEDMAN: I want to thank the Federal
6 Trade Commission and the Antitrust Division of the
7 Department of Justice for the opportunity to testify
8 today. My name is Brad Friedman, I'm the Director of
9 Intellectual Property at Cadence Design Systems, and
10 we're located in San Jose. I first want to state that my
11 testimony, and the views and opinions that I express here
12 today, are solely my own, and do not in any way represent
13 the opinion of Cadence or of any of its employees.

14 A little bit more about Cadence. It is the
15 world's largest supplier of electronic design automation
16 software and methodology services, both of which are used
17 in the design of electronic space products such as
18 semiconductors, computers, telecommunications equipment
19 and consumer electronics. Cadence employs approximately
20 5700 people worldwide and had revenues of approximately
21 \$1.4 billion in 2001. The company is traded on the New
22 York Stock Exchange under the symbol CDN.

23 I'm especially appreciative to participate on
24 this particular panel to represent here a distinct and
25 significant industry within the broad umbrella of

1 software, and that of software tools for product design.
2 My perspective on today's issues may be somewhat unique
3 on the panel.

4 For example, Cadence Design Systems sells its
5 software not to the end user but to other businesses who
6 in turn use those software tools to design
7 electronics-based products that ultimately reach the end
8 user. I'd like to speak to you from that perspective.

9 And personally, ideologically and

1 conferences are seen as much more useful in advancing the
2 state of the art. Business practices, in turn, have
3 adapted to the current environment.

4 With respect to movements towards open source
5 standards and interoperability, there's an increased
6 participation in standard-setting bodies. Early on,
7 standards organizations were largely based on patented
8 technology owned by the founders of the standard body in
9 an attempt to move the industry under their proprietary
10 position.

11 More recently, forward thinking standards
12 groups are premised on open source or open licensing
13 schemes for the purpose of achieving interoperability as
14 demanded by customers. There is the implicit expectation
15 that anti-trust scrutiny will be appropriately loosened
16 for these standards groups.

17 As I'm sure this committee is aware, there is a
18 general animosity to pure software patents within and
19 outside of the industry due to, one, the perceived
20 allowance of what I'll diplomatically call overbroad
21 patent claims, and two, the historically non-proprietary
22 culture of the software engineering industry.

23 There's a concern that the USPTO lacks the
24 necessary information about prior art in the field of
25 information technology software and business methods to

1 make the needed decisions on the novelty and
2 non-obviousness of patent claims, and also lacks the
3 needed expertise and infrastructure. The uncertainty in
4 the process generates skepticism, withdrawal from
5 participation in the process, as well as optimism.

6 I also want to note it's perhaps telling of the
7 role of patents in this industry, the relatively low
8 volume of patent litigation in the design software space
9 versus other industries. This holds true for software
10 in general. The maintenance of a patent portfolio serves
11 mainly as a means of keeping detente or for
12 cross-licensing opportunities.

13 Given this scenario, can anything be done to
14 achieve the policy goals of the patent system for the
15 electronic design software industry?

16 In adhering more closely to the fundamental
17 ideology of quid pro quo that underlies and should
18 motivate the patent system, the Legislature might weigh
19 in on this issue and consider more radical changes in our
20 patent system than the courts are equipped to accomplish
21 -- for example, differentiating between those inventions
22 that add greater societal value from those whose benefit
23 to society is minimal. This would be a daunting and
24 improbable task.

25 Incorporating present day economic realities

1 into the value given to the patentee through a patent
2 grant -- also a daunting task.

3 Acknowledging the enormous administrative
4 burden, an ideal, perhaps utopian patent system would
5 tailor the rights, scope and duration of a patent grant
6 to the specific industry or knowledge base to which it
7 belongs. In the electronics design industry, for
8 example, we'll take a short-term, low-level protection in
9 exchange for speed of issuance, while in another
10 industry, biotech or pharma for example, long-term
11 protection might be needed because the revenue stream is
12 in a much more distant horizon.

13 On the judicial side, we might consider
14 eliminating the presumption of a patent's validity,
15 enabling more rigorous judicial oversight of the already
16 small percentage of patents that end up being litigated.

17 In sum, largely because the current patent
18 system is poorly fashioned for the software design tool
19 industry, the industry has evolved to minimize the impact
20 that patents have on competition and has relied on other
21 more market-oriented drivers of innovation. I believe
22 this is a missed opportunity for accelerating
23 technological and economic growth in the industry.

24 Thank you again for this opportunity.

25 MR. BARNETT: Thank you. Next we have Josh

1 Kaplan.

2 MR. KAPLAN: Thanks, Mike. I'm going to give a
3 slightly different perspective this morning because we
4 are a smaller company.

5 Although we're a ten-year-old company, we're
6 based in the music space, and I think unless you're one
7 of the Big Five music labels it's been very difficult to
8 actually make a business out of the music space over the
9 past few years. I think everybody has seen what's
10 happened with companies such as Napster as well as
11 MP3.com, and a number of companies actually have just
12 disappeared, either being acquired or have gone out of
13 business in my landscape over the past few years.

14 One of the first things that we did when we
15 were granted our second patent, which covered the
16 Internet for music previewing and the tracking of user
17 and the collecting of marketing information, is that
18 instead of turning it over to our law firm I decided,
19 well, I'll write a nice, non-threatening letter to a
20 number of companies that we felt were infringing on our
21 claims. And I can tell you that out of the 30 or 40
22 letters that we sent out, we may have received 1 or 2
23 responses.

24 Typically the response went something like
25 this: "Meritless patent. We don't believe we infringe,

1 but send us a claim chart if you think that we do
2 infringe." And that process moved on for months and
3 months and months.

4 So as a small company, the problem that we
5 faced in the Internet is that while we started in 1990
6 and we have raised roughly \$30 million over 12 years to
7 build this business, the issue in our space is that once
8 something can be broken down and digitized, there really
9 is no competition. And within the Internet space what
10 you've had over the past 4 or 5 years are companies that
11 have gone out, raised massive amounts of capital either
12 through private placements or IPO's, and they have had
13 very little perception towards profitability and it's
14 been to go out and do a land grab.

15 And what's happened there is that people would
16 wholesale just simply go out and replicate your business
17 within a very short period of time, while it took us
18 three or four hundred thousand manhours to encode

1 had in a matter of six months and then give it away for
2 free.

3 So, while I've heard some of my colleagues say,
4 you know, we only have three patents and we have
5 \$150 billion market cap, the reality in our space is that
6 it's very simple for somebody to replicate your process,
7 go out there and give it away and really destroy the
8 market value of what you have, and so from our position
9 we really had no choice but to assert our patents and try
10 to defend them.

11 Which brings me to a funny story. We were

1 us two things. It gave us a deep pocketed investor and
2 it also gave us somebody we felt could become a master
3 licensee of the patents should they, you know, continue
4 to hold their validity and then go out and license the
5 music industry.

6 So Friday we were sitting in court. We were
7 the only case on calendar, but there was a motion to the
8 judge that they had somebody else that had to come in.
9 And actually there was a man who approached in shackles,
10 he was apparently a bank robber who had seven counts of
11 robbery against him. And of course we had to sit there
for an hour and waTD nu

1 guilty before proven innocent. So from our perspective
2 when you look at civil or criminal proceedings versus
3 what we have to go through, it just seems like
4 something's been turned upside-down.

5 If we were, for example, treated like the bank
6 robber, we'd be potentially given an attorney, have the
7 presumption of innocence, guaranteed the right to a
8 speedy trial, and yet we've gone through litigation now
9 for almost three years. We have to face dozens of
10 summary judgment motions that are really there
11 specifically to try to invalidate your patent versus
12 companies trying to legitimately take a license from you.

13 So why do I bring this all up? One of the
14 things that Mike and I discussed, he said, "Well, what
15 would you like to see happen through these hearings?"

16 I think there's a palpable perception problem
17 with those companies that own software patents that are
18 issued through the PTO. The one perception is that the
19 Patent Office doesn't have the resources to evaluate and
20 make a determination as to whether these patents are
21 valid or not, and the other perception is that patents
22 are handed out, you know, really like jelly beans.

23 And I can tell you from our perspective it took
24 us almost eight years to get our two patents, and our
25 file wrapper on the second patent is probably nine inches

1 thick, so clearly there was quite a bit of scrutiny to go
2 through and get our patents. We probably have fifty to
3 sixty citings between the two patents, so clearly we went
4 out and we did our homework.

5 But from everything that you read in the press,
6 every time we approach somebody to take a license or
7 negotiate a license, the feedback was always, "You have a
8 software patent. We'll invalidate it in court. It
9 probably doesn't have any merit and we'll fight you on
10 this." And I would say that that happened 95 percent of
11 the time.

12 The ones that didn't simply looked at us as a
13 nuisance case where they looked at taking a license
14 relative to what they had to spend to defend us. In
15 other words, as soon as we sue somebody you can look at
16 an instant \$100,000 retainer that they would have to pay.
17 So from our perspective, that was the gating factor when
18 we looked at trying to license to companies.

19 So one of the things I thought about was, well,
20 how can the PTO work to change this perspective? And
21 again, these are longer-term concepts, but I think that
22 the Patent Office has a perception problem. I don't
23 think it's any different than the NRA has. The
24 difference is they have Charlton Heston as a spokesman
25 and everybody feels warm and fuzzy about going out and

1 getting a gun.

2 Maybe the Patent Office needs to resurrect an
3 Abe Lincoln or an Edison to be a spokesman so that they
4 champion the software patents and all patents and the
5 innovators and not make it look like we are, I think the
6 term one of my colleagues just used here, trying to
7 extract rents. And that tends to be the perspective of
8 most people, that we're simply here as a fulcrum to try
9 to squeeze something out of the legitimate business.

10 The other thing I think we'd like to see is
11 whether there's some way that the PTO in conjunction with
12 another arm of the government, whether it's the Small
13 Business Administration, could assist small companies in
14 defending their patents.

15 Now, I brought this up to Greg Aharonian, who
16 most of you know from PATNEWS. He laughed and said why
17 would you ever want the government to help you defend
18 your patents? That would be one of the worst things you
19 could do.

20 But I think it's unlikely that most companies
21 can be that innovative, find companies or attorneys to
22 take an equity position and pony up \$2 to \$3 million and
23 spend two to three years of management time to defend the
24 patent. So if there were some mechanism for funding the
25 litigation of a small company, we think that that would

1 potentially be a deterrent from people to simply take you
2 on in litigation versus sitting down and negotiating some
3 type of reasonable settlement.

4 So, I think at the end of the day we're not
5 looking for free clothing and shelter and three meals a
6 day, but we are looking for a fair shake in an industry
7 where you're a small company going up against very large
8 corporations, a number of whom are sitting around this
9 table that we've actually met in court and gone through
10 the process with.

11 Thank you.

12 MR. BARNETT: Thank you. Now we're going to
13 hear from David Mowerypanel.

14 PROF. MOWERY: Thank you. I think I'll try to
15 preserve the PowerPoint-free nature of the discussion so
16 far and I'm just going to summarize some of the findings
17 in this paper that we did for the National Academy of
18 Sciences panel, which is a paper that I believe will be
19 posted on the website for the Board on Science,
20 Technology and Economic Policy, which is a wholly-owned
21 subsidiary of the National Academy of Sciences, and you
22 should be able to find it through their website. It was
23 a paper co-authored with Stuart Graham, as I said.

24 I began life actually before I came to the
25 business school as an economic historian, and I think

1 there is some advantage in adopting a historical
2 perspective to some of these issues, because the software
3 industry in particular has been around for a number of
4 years, number of decades, and what we're really looking
5 at in the issues created by growing formal protection of
6 intellectual property in this industry is really a
7 confluence of developments, some of which are related to
8 policy, the strengthening of intellectual property rights
9 generally in the U.S. economy that's taken place over the
10 last 20 years or so, but also technological change and
11 the growth of new markets that have greatly increased the
12 importance of formal intellectual property protection.

13 And the most recent, if you will, or a recent
14 very important technological development influencing this
15 industry, the Internet, is having effects the ultimate
16 dimensions of which I think we don't fully know at
17 present, but you can think of at least three
18 contradictory, to some extent, effects of the Internet on
19 the software industry and the role of intellectual
20 property protection.

21 The first is the role of the Internet in making
22 possible the rise of open source software itself.
23 Shareware has been around in the software industry for a
24 very long time, but open source software really is
25 shareware squared in some sense, and the Internet makes

1 feasible the maintenance of a unified source code, an
2 open source that previously I think was very difficult to
3 do. So that's one challenge in some sense to formal
4 protection created by the Internet.

5 The second is the role of the Internet in
6 facilitating low cost distribution of software, which
7 should facilitate entry by new firms in some cases and
8 the growth and intensification of competition.

9 A third and, again, somewhat offsetting effect
10 of the Internet on software development and intellectual
11 property protection is the role of the Internet in
12 creating a space for patented business methods. Most of
13 the rise in business method patenting in this area has
14 been facilitated by the growth of the Internet as a venue
15 for exploiting business methods and patented business
16 methods in particular.

17 Now let me talk very quickly about some of the
18 trends that our analysis of patenting in the software
19 industry seems to highlight.

20 The first issue I think that comes up here is
21 how we define a software patent in a way that is
22 meaningful for supporting some kind of analysis of trends
23 over time. That's not a trivial exercise, and so what my
24 student and I have done is defined software patents in a
25 way that tends to overweight packaged software patents

1 within our definition.

2 So we're looking at a definition of software
3 patents that tends to emphasize packaged software patents
4 much more heavily than something like embedded software,
5 which in fact is much less frequently the focus of formal
6 intellectual property protection, and I think there are
7 four or five interesting findings, if you will, that are
8 highly preliminary that come out of this.

9 The first is that by our definition, software
10 patenting as a share of overall patenting in the United
11 States certainly has increased during the last 15 years.
12 The share has grown to nearly 3 percent of overall
13 patents, which is a substantial growth from its level 15
14 years ago.

15 Secondly is that within software patenting,
16 large packaged software specialist firms have increased
17 their share of overall patenting. At the same time,
18 however, and a very important set of players to keep in
19 mind when one is analyzing trends in software patenting,
20 is the fact that large electronic systems firms,
21 Motorola, IBM, Intel and others, have increased their
22 share of software patenting by our definition much more
23 significantly so that they are accounting now for more
24 than 15 percent of what we define as software patents.

25 If we look at patents per R&D dollar -- some

1 sort of an intensity measure, how many patents are you
2 obtaining for each R&D dollar that you're investing?
3 This is obviously a challenge because we want to try to
4 look at software-related R&D investment -- nevertheless,
5 what we observed between roughly '87 and '97, and I think
6 this is consistent with Mr. Kohn's argument, is that
7 large packaged software firms including Borland have
8 quite significantly increased their patenting per R&D
9 dollar during this period of time, so their patenting is
10 much more intensive, relative to their R&D investment.

11 At the same time, however, if one compares the

1 increase in patenting, perhaps much of which is motivated
2 by defensive motives, is going on in the diversified
3 systems firms in addition to an increase in the
4 specialist --

5 (Tape One, Side B)

6 PROF. MOWERY: -- two other points.

7 The quality issue in software patenting has
8 been raised. And again, it's very difficult to know how
9 to measure the quality of software patents. What we have
10 done is define a very crude measure, a somewhat
11 controversial measure, that looks at how frequently
12 software patents are cited, the patents assigned to a
13 given firm, how frequently those are cited relative to
14 all software patents. So if your patent is being cited
15 in subsequent inventions relatively intensively, that is
16 one indication that this is a more widely referred to,
17 perhaps a more important, patent.

18 And what we observe in looking at patents
19 assigned to these large packaged software firms is that
20 there is no evidence during the '87 through '97 decade of
21 a significant deterioration in the intensity with which
22 these patents are cited. So that's one very imperfect
23 measure of quality. We don't see a significant
24 deterioration over this period of time in the citation
25 intensity, which at least could be interpreted as not

1 representing a significant decline in quality.

2 Finally, I think that our exploration of this
3 issue really underscores the extent to which our
4 indicators of what is going on here are very imperfect.
5 I'm going to really put on my academic hat now. This is
6 a very economically important space and we have extremely
7 imperfect and incomplete data.

8 We don't really even know. We don't have good
9 robust definitions that would allow us to look at how
10 much software patenting has been going on over the past
11 30 to 40 years, because this field has been so dynamic
12 and because the categories that we are able to use
13 themselves are changing very rapidly.

14 So I think that as policy makers begin to
15 consider these issues more seriously and deliberatively,
16 one very important issue is trying to develop ways of
17 getting our arms around measuring it as well as dealing
18 with the problems of addressing the economic and
19 competitive challenges created by it.

20 Thank you.

21 MR. BARNETT: Thank you, David.

22 MS. RODRIGUEZ: I was wondering if you could
23 have everybody turn off their cell phones. It's very
24 distracting, and he was going very, very fast. I was
25 wondering --

1 MR. BARNETT: Apparently, if we could ask
2 everyone to turn off their cell phones as well as if
3 people could be conscious of somewhat speaking at a
4 moderated pace as we are providing facilities for the
5 hearing impaired.

6 That said, and with these ideas in mind, I
7 would like to begin with a less structured portion of the
8 session. Let me start with some of the rules of the
9 game.

10 As we begin these discussions, if you would
11 like to contribute or have something to say, just turn
12 your name plate on its side and that way nobody has to
13 waive hands around or anything like that and then we can
14 get to everybody in turn.

15 Given the statements from the people who have
16 given presentations, I think we'd be interested in
17 hearing from some of the panelists who did not give
18 presentations, and it looks like Jordan Greenhall has
19 jumped into the fray already.

20 MR. GREENHALL: Yeah, this is great. We do
21 bring a different perspective from the other companies
22 that have spoken today. Let me start off by issuing a
23 few mea culpas because I'm about to agree with Mr. Kohn
24 and Mr. Friedman. First off --

25 MS. DeSANTI: Hearing is difficult. Could you

1 speak into the microphone a little more?

2 MR. GREENHALL: Yeah, I apologize.

3 MS. DeSANTI: Thank you.

4 MR. GREENHALL: My previous company, INTERVU,
5 made an egregious amount of money by virtue of its patent
6 portfolio, and my current company, DivXNetworks, also
7 stands to capitalize significantly on a patent portfolio,
8 so I have a lot to benefit personally from the strong and
9 vigorous enforcement of, specifically, software patents.

10 Second, we are a small company with very large
11 competitors. I think it's fair to say that Microsoft
12 would be considered our number one competitor on a global
13 basis, something I'm reminded of probably ten times a
14 day, and we do have, as I mentioned earlier, many patents
15 filed.

16 Nonetheless, I would tend to agree with
17 Mr. Kohn and Mr. Friedman about the state of patents and
18 software, and I could just issue a couple of concerns
19 that I have which I think are somewhat different from
20 what we've heard so far today. I'll do that really by
21 virtue of maybe throwing out a couple of concepts that we
22 might want to use or that might have some interesting
23 value.

24 The first of which is something that we
25 internally call a patent farm. How does one identify a

1 patent farm? Simply divide the software engineers in a
2 company by the number of lawyers in that company. These
3 are organizations that have very intelligently determined
4 that you can generate, again, hundreds of thousands of
5 patents in software code that you've already paid to
6 develop because you're developing a product, and if there
7 is value in creating a spew of patents, most of which are
8 defensive, although there is a uniquely offensive value
9 to those patents as well, which I will categorize with a
10 second concept that I call patent FUD.

11 Are we familiar with the concept of FUD?

12 MS. DeSANTI: I think it would be very helpful
13 for the record if you could lay it out.

14 MR. GREENHALL: Great. Well, FUD is something
15 that was invented probably 15 years ago, mostly by
16 Microsoft, which stands for Fear, Uncertainty and Doubt.
17 This is a concept where you issue press releases,

1 intellectual property landscape around digital video --
2 and asked him to evaluate a particular patent that we've
3 been hearing about in the marketplace.

4 We did a quick search on the USPTO website,
5 which by the way is very useful, and uncovered no less
6 than 120 patents that claim to be within the general
7 scope of this particular patent, which was widely cited.

8 The poor guy spent the better part of five days
9 examining all these different patents and came back to me
10 saying, "I haven't the slightest idea whether or not we
11 infringe on these patents, and frankly, they all seem to
12 infringe on one another."

13 The end result being that I have no idea
14 whether my product infringes on upwards of 120 different
15 patents, all of which are held by large companies who
16 could sue me without thinking about it.

17 The end result, much like Borland, I have now
18 issued a directive that we reallocate roughly 20 to 35
19 percent of our developer's resources and sign on two
20 separate law firms to increase our patent portfolio to be
21 able to engage in the patent spew conflict. I think the
22 concept here would be called saber rattling. I need to
23 be able to say, "Yeah, I've got that patented too, so go
24 away and leave me alone."

25 That assumes, of course, I don't get a sit-down

1 strike from my engineers, who can't understand the logic
2 behind this. And if you guys have ever dealt with
3 engineers, the lack of logic is a complete conclusion.

4 So really the thought process that I've gone
5 through -- and this is all, you know, very concrete
6 literally in my life in the past year -- is that there's
7 a bizarre inequity between the cost to create patents in
8 software and the value to be generated by purely
9 defensive patents that have no sort of innovative value
10 in and of themselves. They weren't, as we say, created
11 to innovate but simply are riding on the backs of
12 innovation to create a zone of obscurity where other
13 companies really don't know what the patent landscape is.

14 And also, let's not forget the incredible
15 windfall that can befall a company if one is able to
16 establish both a patent and a standard based on that
17 patent. We could call this the Qualcomm model, which as
18 I understand it, means a secure patent, the establishment
19 of that patent as the international standard for some
20 particular piece of large-scale technology, and then sit
21 back and make billions of dollars.

22 The time to develop a patent in my company, for
23 example, we could probably do twenty to a hundred patents
24 in a year easily, spend about a million dollars to
25 develop those patents from a technical perspective, that

1 of the process by which we resolve disputes about those
2 patents.

3 I think it's not only a feckless task to try to
4 understand whether something has quality in the abstract
5 when it comes out, but that's not really where the action
6 is in terms of the impact on the marketplace as I have
7 seen it. It's the litigation process that animates the
8 decision of any given company either to take on a license
9 or to, perhaps worse and in a way that we can't measure,
10 back away from a product or a part of the marketplace
11 that they would otherwise compete in.

12 It's in part because of the issue that's been
13 referred to already about uncertainty. That's one aspect
14 of it. There is great uncertainty in the process of
15 resolving disputes when one receives a notice of the sort
16 that Josh was sending out. And presuming for a moment
17 that there is a rational basis for challenging the
18 validity of the patent or challenging the assertion that
19 one infringes, what you face is a highly, highly
20 uncertain process.

21 It's made uncertain in part because ultimately
22 we know the decision on things like infringement and the
23 scope and content of the prior art will be decided by a
24 lay jury, and we think ahead to that when we look at what
25 our exposure is.

1 We consider the effect of the doctrine of
2 equivalents, which is often used, especially in the
3 Internet's space, to make older patents that were
4 intended obviously in their first incarnation to apply to
5 an earlier technological environment, all of a sudden to
6 become applicable broadly to the Internet space. And so
7 the issue of breadth is not in the initial issuance of
8 the patent, but the way in which it is treated in the
9 litigation process and allowed sometimes to expand
10 through the doctrine of equivalents.

11 The process is made more uncertain because of
12 entrants, and usually in my experience in the software
13 industry we have a kind of business that's easy to enter,
14 but where you enter with sometimes an overwhelming sense
15 of dread because you don't know how many pieces of IP you
16 will need in order to operate.

17 It is opaque, you can't get there, and in fact
18 the system discourages you from looking very hard because
19 your lawyers may advise you that simply by virtue of
20 poking around to find out what patents exist you expose
21 yourself to wilfulness claims which can triple the amount
22 of damages and exposure to attorney's fees.

23 And there's also the problem that Bob Kohn has
24 referred to of, you know, we don't know how much we're
25 going to have to pay. And it can seem overwhelming

1 sometimes when someone knocks on your door and asks for
2 five percent of your revenue and you negotiate that, end
3 up paying three, and then surprise, there's someone else
4 who asks for another five or ten percent.

5 Because their particular claim is measured by
6 what would happen in the litigation process, not by a
7 sane, well-informed view of all of the IP that is out
8 there that might be necessary and that would be
appropriate to reward the producers of that IPafor end 53fTj -69

1 you actually put that notion in front of a jury, their
2 eyes glaze over. It really reinforces the notion that
3 the patent with the gold seal and the ribbon on it is
4 something that they as lay persons are not really
5 qualified to look behind and question because someone
6 with training has already checked this out at the Patent
7 Office.

8 When you combine that, especially in the
9 software environment where, as Mr. Kohn has noted, a
10 piece of software that has perhaps hundreds of thousands
11 of lines of code can be stopped in its tracks through a
12 patent claim that covers one routine in that product,
13 when you deal with issues of validity and you're trying
14 to challenge it, you can be overwhelmed with a story of
15 commercial success -- one of the so-called secondary
16 factors that actually have come to be primary in
17 litigation over this issue and required to be presented
18 to the jury -- you're overwhelmed with this story that
19 the product itself of the plaintiff was successful in the
20 marketplace, and therefore the market has accepted the
21 patented feature.

22 Well, the patented feature may be buried deeply
23 inside the product, but it is very difficult for a jury
24 to understand when presented with this overwhelming story
25 of award winning products that you really have to push

1 away everything that isn't the patented feature and try

1 patent FUD and backing away from R&D, which brings to
2 mind to me just how does the issuance of a patent or how
3 do patents, whether it's patents owned by yourself or
4 patents owned by your competitors, end up affecting the
5 direction of your R&D efforts? I might direct this one
6 to Yar.

7 MR. CHAIKOVSKY: Well, in terms of what we've
8 spoken about today with respect to the effect on our R&D
9 efforts, I can talk about both. And again I'll put the
10 same caveat; these are my opinions and not necessarily
11 the opinions of Zaplet where I presently work or Yahoo!
12 prior to that.

13 But as we've seen with respect to the patents
14 that are issuing and focusing on packaged software in
15 particular because that happens to be the space that
16 we're in and it happens to be the space where you see
17 increased patent allowance from the Patent Office, I
18 can't say that there's, as opposed to coming from Mr.
19 Greenhall at DivXNetworks, a specific amount where I said
20 30 or 40 percent of R&D is set aside for patent
21 development. That doesn't occur at Zaplet or Enterprise
22 Software Development, although we recognize that there is
23 a focus, that our significant competitors are also
24 Microsoft, as any packaged software company is probably
25 going to say Microsoft is a significant competitor. IBM

1 is a significant competitor with Lotus in our space,
2 which is collaborative business process management. So
3 we recognize that there are these significant entities.

4 And also, as Professor Mowery mentioned, we
5 also have the entities such as Motorola, Intel, et
6 cetera, that are patenting software and even Internet
7 techniques that aren't necessarily in their main line of
8 business, but they happen to have a 'patent farm' or what
9 have you and they decide to file for patents that might
10 not necessarily be where their R&D lies.

11 So with respect to our company, the reality is,
12 and I was going to touch on the point that, again, it's
13 the competition that promotes the innovation. We're
14 taking a look at what competitors have out in the market
15 -- What is Microsoft developing? How is Sharepoint
16 developing? How is Lotus developing? How is Groove
17 developing a product with Ray Ozzie, the ex-developer
18 from Lotus? How is he going out there and developing a
19 product and taking a look at that product? -- and that
20 drives our R&D. At the same time, recognizing that
21 because of the way the patent system is, and we'll use
22 another infamous statement, MAD, Mutually Assured

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1 you don't have it, you're going to have problems.

2 But going back to R&D, I can't say that we've
3 set aside engineers or spent specific dollars and said,
4 "Okay, let's do this." Yes, there is -- as a patent
5 attorney I was hired to focus in on making sure that we
6 do have our intellectual property covered. As opposed to
7 another panelist here, my argument would be that
8 intellectual property is something that's useful if you
9 have a product that is very useful in the market, a
10 product that people are interested in.

11 In particular during the '95 to '99 time frame
110 -61 Befnlthiwoudkape in this valley, well, you would have

1 property, as opposed to some other companies who try to
2 establish a business and try to establish some type of
3 business opportunity, and after going around for three,
4 four, five years recognizing, "Hey, my business isn't
5 working. Well, let's see what I can pull out of the bag
6 and send at somebody, and if I've got something, it may
7 not be the greatest patent in the world but it's the last
8 thing I can do because my business is totally
9 ineffective."

10 That's not what we do and that's not the
11 perspective we take. I've seen that happen many times so
12 now I'll cut back to my Yahoo! experience.

13 Yahoo! is a perfect example of a company that
14 came about in 1995, went public in March of '96, didn't
15 have its first patent issued until 1997, didn't have a
16 patent attorney until 1999, and was able to achieve a
17 market capitalization in December of 1999 of, as was
18 previously mentioned, over \$120 billion. At that time it
19 had three issued patents.

20 Patents had nothing to do with the interest in
21 the company, consumer use of the product of the company
22 and the Internet space. There was no focus of an R&D
23 effort with respect to patents.

24 As I said, the first patent attorney was hired
25 in '99, the company had been public since March of '96,

1 backed by Sequoia and other venture capitalists in the
2 community here. Why? Because it was a great idea. Was
3 there competition out there? Sure, there was Excite,
4 there was Lycos, there was AOL, there was significant
5 competition. In fact, Excite and Lycos went public in
6 the same month that Yahoo! went public.

7 But did intellectual property matter? Did the
8 General Counsel or the CEO of Yahoo! sit there and say
9 we've got to file patents and get patents to promote our
10 products? No. And if you even looked at AOL with their
11 acquisitions of Netscape and CompuServe over the years,
12 they have a portfolio that's over 70 patents strong. So
13 it wasn't a concern of the company.

14 Sure, eventually it became a concern. And why
15 did it become a concern of the company? It became a
16 concern of the company because you did have entities,
17 such as Professor Mowery mentioned, coming at us with
18 large portfolios, upwards of ten patents at a time, and
19 Yahoo! made the realization, perhaps a little late and a
20 little naive -- on the other hand, the company was doing
21 quite well without it -- that they had to get into this
22 ball game also to basically not pay people percentage
23 royalties on the company's revenues going forward. So
24 Yahoo! obviously decided that it was time to hire one
25 patent attorney, and I was it, with no other support

1 other than that.

2 You know, at the same time I can say we
3 received letters from smaller companies such as Intouch.
4 And a patent portfolio is not going to really help me in
5 that sense, because I can't really do anything. Building
6 up a patent portfolio for defensive/MAD purposes is not
7 going to help me against a small competitor. I'm not
8 going to countersue him and try to get whatever dollars
9 he has left that he may be spending on litigation at this
10 point, so it's not going to help me at this point.

11 We had two significant litigations at Yahoo!,
12 one was by a New Zealand woman who had a patent on
13 universal shopping carts. You know, it cost us a lot of
14 money to defend that lawsuit. It was a waste of legal
15 time, it was a waste of our resources, it wasted some of
16 our VP's and engineering and commerce time involved in
17 the project. It ended up settling on terms that were
18 favorable to Yahoo! with Yahoo! paying no amount of
19 dollars of its own and settling the case.

20 The other case we had going was a Fantasy
21 Football case that was brought by a plaintiff's
22 contingency attorney with patented Fantasy Football
23 on-line on the Internet.

24 Well, you know if you think about Fantasy
25 Football, for those of you who have ever played Fantasy

1 Football where you pick the players on-line, well, people
2 have been doing that since the '80s on paper, and to
3 think that you can get a patent on that. And again, the
4 quality of patents is sometimes good, but when you think
5 you can get a patent on that on the Internet and its
6 application onto a computer, it's troubling and it cost
7 the company again a significant amount of dollars.
8 Again, the end result being that time was spent.

9 Obviously the person here, perfect example on
10 the Fantasy Football and the shopping cart examples,
11 their business models weren't working. Some of them may
12 have not even have had a business model. They end up
13 getting patent agent firms or licensing firms, as we call
14 them, not law firms. They sue on those patents.

15 They cost our companies a lot of dollars, and
16 the end result is so far none of them have been
17 victorious against the companies that I've been involved
18 with. In fact, it just cost us a lot of dollars. We've
19 never had to pay a cent; it's just cost a lot of legal
20 fees and made attorneys like Mr. Pooley some money at
21 their law firms in representing clients such as ours.

22 But going back to the point at hand with R&D.
23 Again, a little bit different from the Internet
24 perspective because of the, it's been spoken about, the
25 antipathy, I'd say, towards software Internet patents

1 from the community here in Silicon Valley.

2 If you go to engineers in general they'll say,
3 "That's patentable?" I mean, the reality is that's the
4 general reaction from most engineers. They are
5 traditional believers in the open source movement.

6 On the other hand, as you're protecting
7 intellectual property for your company you're not going
8 to necessarily dive into open source. You might get into
9 some of it, but then you've got to worry about GPL and

1 website and say, "Wow, I found these ten patents. I'm
2 going to come up with a great idea." That just never
3 happens.

4 I mean, the reality is we're looking at what
5 are good business ideas. People in the valley here look
6 for good business ideas. They back them up, they go
7 forward. They're not looking at patents. The exclusion
8 to that may be IBM who looks at their own portfolio and
9 makes \$1.5 billion a year basically on revenues of their
10 patents, at least they did in the year 2000.

11 Thanks.

12 MR. BARNETT: Josh, one of those comments
13 seemed to have brought a -- Oh, okay. Let's go ahead and
14 go to Paul. Paul's been waiting patiently.

15 MR. MISENER: I'd be happy to have Josh
16 take this.

17 MR. BARNETT: Oh, that's okay, go ahead.

18 MR. MISENER: Well, I just hope it's obvious to
19 everyone that these are not mutually exclusive business
20 objectives. You need not sit down *a priori* and say,
21 "Gee, we want to have a patent farm and we don't want to
22 innovate and then get patents." Or you don't go the
23 other way and say, "We're going to be so pure as to just
24 want to innovate in response to competition that we won't
25 actually ever use our patents in either an defensive or

1 offensive manner."

2 Let me suggest there's a third leg to this
3 stool, and that is really focusing on what your basic
4 business is and not thinking about the intellectual
5 property as the objective but rather as the means to
6 serve the ultimate business objective, which for example
7 in Amazon.com's case is our focus on our customers and
8 trying to provide them the best possible service that we
9 can. In that way we developed some innovative solutions
10 in the technical space and decided that there was
11 potentially some intellectual property there and decided
12 to and successfully patented several inventions.

13 I'd like to cycle back for a second, though, to
14 what Jim was mentioning earlier. He had talked a lot
15 about dispute resolution and said that there had been
16 perhaps too much focus on the *a priori* grant, or the
17 prior-to-grant patent quality issues. And perhaps there
18 has been relatively too much attention focused on it, but
19 still I think it's worthy of note here that -- well,
20 perhaps a historical perspective is helpful.

21 About two years ago, yet another patent was
22 issued to Amazon.com which created some controversy,
23 especially among what we'll call the open source
24 community who had been and remain big supporters of
25 Amazon as a proposition and a company. And so as a

1 result, we kind of stood back and decided to really
2 engage with the folks in the open source community,
3 primarily with a fellow named Tim O'Reilly who, as you
4 may know, is a publisher of an excellent set of computer
5 books.

6 He and my boss and I met on several occasions
7 to try to figure out, well, what's a good way to address

1 period allowed for U.S. based patents, perhaps at least
2 in this area there ought to be a pre-issuance public
3 comment period. That, tied with what has been discussed
4 earlier, some sort of a prior art database, could be
5 valuable to the USPTO.

6 And lastly, we have spent some of our capital
7 trying to ensure that the USPTO is able to at least keep
8 the funds that it raises. I'm not sure it's widely
9 known, but the USPTO serves as something of a cash cow
10 for the federal government whereby it takes in all of its
11 revenue through fees. Taxpayer money does not pay for
12 the USPTO, it takes it in by fees, but it also has to
13 turn over a large percentage of those fees, and I think
14 it's roughly 30 percent or so, to the general revenue of
15 the government. And so in other words, the Patent Office
16 is taking in more money than it's allowed to keep to do
17 its own business.

18 This to us seems like a major problem. And
19 it's not to say that the patent examiners are doing a bad
20 job now, I don't think that's the case. But frankly, in
21 order to simply reduce patent pendency, which in this
22 business is a huge issue, we ought to allow the USPTO to
23 retain the funds that it collects.

24 MR. BARNETT: Josh, do you have some thoughts
25 on this?

1 MR. KAPLAN: A couple things come to mind.
2 Again, I think I try to represent a real world
3 application of patents here. An interesting thing, and
4 I'm not going to, you know -- Yar made some interesting
5 points.

6 Number one. You know, Intouch also is funded
7 by people like Bill Hewlett, Ray Norder who founded
8 Novell, Amerindo, Bay Partners, Tim Draper, venture
9 capitalists who felt we had a great idea. And we were
10 very early on in this thing, 1990. I think the founders
11 of Yahoo!, I don't know, they were still in high school
12 probably around that time. We were out there very early.

13 In fact, when I first got my patent on
14 identifying the user, tracking the user, having the user
15 uniquely identify themselves to the system, previewing
16 music, I waved my patent around at a board meeting to
17 venture capitalists. They looked at it and they said,
18 "Let me understand this. You've got a patent that
19 somebody will have to identify themselves to a system
20 before they listen to music? What a worthless patent
21 that is." They didn't ascribe any value to the patent
22 that we had.

23 In fact, as recently as two weeks ago I read an
24 article where the venture capitalist was quoted, and I
25 think it was Benchmark that said, "We really don't

1 ascribe a lot of value to patents that small companies
2 have. It's more of getting out there quickly and
3 establishing a beachhead for their product."

4 Now, interestingly enough, I've never met Yar
5 before, but obviously he received our letter, our notice
6 letter. Okay. No follow-up, no discussion, not a call,
7 not a reach out. Hey, Intouch, what can we do to work
8 with you to see what we can do?

9 And by the way, Yahoo! I believe just became a
10 profitable company. I'm not sure if they're profitable
11 today, but like most of these companies that have spent
12 hundreds and hundreds of millions of dollars -- Excite,
13 obviously we know what's happened with them. They're, I
14 think, in Chapter 11 right now and probably will cease to
15 exist.

16 It's been a market share game in the Internet
17 industry. It doesn't really matter how quickly you are
18 out there with a product. Ask anybody who's competed
19 against Apple or Microsoft. You establish a nice little
20 product. Next thing you know, it's part of their
21 operating system. Oh, too bad, you've lost your market.
22 This has happened to countless companies in the valley,
23 all that have been venture funded. The only thing they
24 can do is go off and sell their company.

25 I think when EMusic was public it had a market

1 cap of, I don't know, \$300 million. Is that right?

2 MR. KOHN: Don't remind me.

3 MR. KAPLAN: \$300 million. They got sold for
4 \$14 million, I believe.

5 MR. KOHN: No, 25.

6 MR. KAPLAN: Okay, \$25 million. So again,
7 market cap doesn't mean anything, the public market
8 doesn't mean anything. The problem is if somebody comes
9 along with your same technology and eclipses you and runs
10 out there and gives it away, you really have nothing that
11 can protect you aside from your patent portfolio.

12 So Yahoo! was known as a search engine. They
13 got into the music space. When they did that we sent
14 them a nice friendly letter, not from the lawyers but
15 from myself to the CEO of Yahoo!. No response. And we
16 don't understand why there wasn't some type of reaching
17 out to say, "Let's take a look at this. How can we work
18 together? "

19 Actually, we did finally get a letter from a
20 gentleman at Yahoo! who said, "Show us how we infringed."
21 So we went back to our intellectual property letter and
22 we put together a massive claims chart analysis on our
23 patents versus what Yahoo! was doing, clearly showing
24 that there was at least the presumption of some
25 infringement. Nothing. No return calls, no return

1 up with the lawyers saying, "It's really not acceptable
2 to my client," and so you're right back at ground zero.

3 And so, it's my feeling that unless there is
4 something that preempts the legal process, like an
5 arbitration or like something where there's a panel that
6 is able to sit down and help these companies come to
7 terms, it's simply an issue then between the law firms,
8 and then it becomes an issue of who has the staying
9 power.

10 Luckily we were able to be creative and bring
11 in initial money from lawyers who were contingency
12 lawyers. It's not the greatest thing I would recommend,

1 now, small inventors that have interesting patents that
2 are saying, "How can you help us with this? We haven't
3 gone through Markman. You've seemed to monetize this.
4 You've gone through the process, you've gone through all
5 the pain. Can you help us with our patent?"

6 And so one of the things that we're looking at
7 is, is it worth it to take on some other patents, make
8 them a part of our portfolio and move this ahead? That's
9 what we're faced with in order to protect our market.

10 (Tape Two, Side A)

11 MR. BARNETT: Yar?

12 MR. CHAIKOVSKY: My first response would be
13 that Josh did receive response very, very quickly. He
14 may be forgetting due to the sheer number of people he
15 sent letters to, but actually our company was one of the
16 few, and was in fact congratulated by Intouch for our
17 responsiveness as compared to others, maybe even some
18 that are at this table, to your letter. So I would
19 disagree with that characterization.

20 Secondly, I would also disagree with the
21 characterization that, yes, it does get handed off to
22 lawyers, but the lawyers requested more than just claim
23 charts. The lawyer requested a significant amount of
24 information, and the information that you just set forth
25 with respect to what you provided Amazon, never

1 forthcoming.

2 I mean, the reality is -- and I won't point
3 this at Intouch -- the reality when you get letters all
4 the time from companies is that they don't provide you
5 this information. You're looking for information with
6 respect to the patent, whether it be claim charts or what
7 exactly it is that they think is problematic or infringes
8 their patent, or the damages calculations, as Josh just
9 mentioned. You know, where is all this information, or
10 maybe you could help me come to a reasoned analysis as to
11 what to do in this situation.

12 And the reality is, yes, lawyers do provide
13 advice in the situation. And the fact of the matter is
14 that Josh may be sitting there because his company is
15 sending out a letter, and this is his business and he's
16 not making money in his business and therefore they have
17 to sue people to extract rent to keep up with his
18 business.

19 Well, Yahoo! at the time when I was there, I
20 was getting a letter every three weeks, so maybe yours
21 wasn't on my priority list because I was getting a letter
22 from every other company in the world to do the same
23 thing, and being the only patent attorney there, there
24 was a lot to do.

25 So there's also a time lag when you're dealing

1 with the Yahoo!'s, the Amazons, the AOL's and all the
2 other individuals, Time Warner, et cetera, that you sent
3 letters to. These are large organizations, bureaucratic
4 organizations, and as opposed to these smaller entities
5 such as Zaplet where I could probably respond to you at a
6 quicker point in time. The bureaucracy happens to be a
7 lot larger, not as large maybe as the government's, but
8 it happens to be quite large and the responsiveness will
9 be quite longer in time.

10 MR. BARNETT: Thanks, Yar. Everybody, it
11 seems, is ready to speak. I've been informed that it
12 might be a good time for a break, though, just because
13 we're approaching the two-hour point, so let's come back
14 in ten minutes. I've got -- well, let's come back in ten
15 minutes. Thanks.

16 (A brief recess was taken off the record.)

17 MR. BARNETT: -- that these companies are
18 dealing with and that the industry is dealing with and
19 some of the problems that exist. I think it might be
20 nice to shift gears a little bit and maybe look at
21 perhaps some solutions or some ways that have been
22 attempted to try and deal with some of this, whether it's
23 at the PTO or the Business Method Patent Initiative or
24 the re-examination process.

25 Jim, do you have any thoughts on that as far as

1 the re-examination process and some of the initiatives of
2 the PTO?

3 MR. POOLEY: Well, the Business Method
4 Initiative, by all reports both anecdotal and I think
5 statistical, is very encouraging, and I think it's a
6 demonstration of the way in which an agency with a gate
7 keeper function like the PTO can properly respond to an
8 issue and do it in a timely and effective way. So I'd
9 say kudos on that one.

10 As far as issues of pre-grant input or the
11 post-grant opposition process, I think there are some
12 very interesting things to look at there to make the
13 process more rational and efficient, and I think those
14 deserve further inquiry.

15 I think the difficult thing you have to deal
16 with is trying to get the information in to the PTO so
17 that it can be used, and to make sure that that flow is
18 open and free and not discouraged or constricted by fears
19 of estoppel by participation in the process. So there
20 has to be a certain balancing there, but I think there
21 are great opportunities in both pre-grant comment and
22 post-grant opposition so long as it's extremely
23 efficient, streamlined and doesn't lead us to the kind of
24 process that we've seen in some other countries.

25 I do want to make just two very quick comments

1 on some of the observations that have been made here.

2 The notion of different terms or a reduced term
3 for certain kinds of patents rather than a
4 one-size-fits-all twenty-year term. It's a beguiling
5 suggestion and I think an interesting one; however, I
think it's something that we have to look at very, very

1 amuse ourselves with some of the patents that have been
2 issued.

3 But as I pointed out earlier, in my own
4 observation, it's not the patent as issued that really is

1 or opposition.

2 First, and I should preface this by suggesting
3 this is not, as far as we can see, the fault of the
4 USPTO, but the re-examination process as it was amended
5 in the Congress and developed really is one that operates
6 very differently from what we see in an EPO, European
7 Patent Office, style opposition process.

8 If you look at the data, which again Mr. Graham
9 has helped me collect and Bronwyn Hall collect, it looks
10 as though nearly 50 percent of the re-examinations for
11 which we have records in the USPTO covering the '80s and
12 '90s are initiated by the patent holder, all right? So
13 this new prior art comes up or they encounter problems in
14 the claims.

15 So the point here is not that this is a good or
16 a bad thing. It is that this is operating for a
17 substantial number of the patents in a very different way
18 than the opposition process that some people originally
19 envisioned the re-examination process fulfilling. And
20 again, this is not a USPTO issue, this is more a
21 congressional design of the process issue as far as I can
22 see.

23 The second point relates to the opposition
24 proceedings as they operate in the EPO. One of the
25 benefits that some people have suggested for a more

1 elaborated post-grant opposition proceeding in the U.S.
2 system is that it could resolve uncertainty about the
3 validity and the like more quickly. However, what seems
4 to be the case in the EPO process is that, partly because
5 of the need for an appeals procedure, this takes a very
6 long time. So one of the key benefits that is at least
7 held out for an opposition style process in the States
8 would be that that is a more rapid resolution doesn't
9 seem to operate based on the data that we've been able to
10 collect on the EPO opposition process. That's something
11 to keep in mind.

12 And it's also important to recognize that the
13 EPO opposition process does not preclude litigation
14 following the conclusion of the opposition process and
15 the appeals of the opposition process.

16 So it's not clear what you're buying into, at
17 least on the basis of the data we've seen. When you go
18 toward an opposition process and graft it into the U.S.
19 system, which obviously would have a very different set
20 of political dynamics in the design of this process, as
21 witnessed in the re-exam process.

22 MR. BARNETT: Brad, you've been fairly patient
23 for awhile. Do you have some comments?

24 MR. FRIEDMAN: I do, actually, on what's been
25 just discussed and I wanted to talk a little bit about

1 your question on R&D.

2 First to what was just stated, in a potential
3 U.S. opposition procedure one possible solution is to
4 allow a third party similar to what we currently do in
5 the re-exam, allow a third party to submit prior art and
6 perhaps an argument, and that's all, and have the rest of
7 the proceeding continue to be ex parte in the Patent
8 Office. And so that third party is no longer involved
9 that would highlight the efficiencies, if you will, of
10 the U.S. Patent Office vis-a-vis the inefficiencies that
11 you might see in the EPO system where the opposition
12 period can take an extraordinarily long time.

13 I also wanted to note that I personally don't
14 feel that it's ordained that all patents must be
15 identical, whether it's 17, 20 or 10 years.

16 And also with respect to the breadth and scope
17 of those rights that are given, I look to countries
18 outside the U.S. such as the petty patents in the German
19 system where the patentee or perhaps the Patent Office if
20 you might here in the U.S. can decide what type of
21 patent, what type of grant might offered to the patentee,
22 and so that creates more options for the government to
23 give particular rights to the patentee for providing
24 further innovation. I think that's something that we
25 might be well advised to look at.

1 The difficulty, as I mentioned, is the
2 administrative burden, which is enormous, in trying to
3 make those distinctions, and would those distinctions be
4 then appealable, and so it's very important to look at
5 that process as well.

6 A comment on the innovation and the R&D
7 question that we had initially asked, I wanted to make
8 this point. Outside the software industry the use of
9 patents for other business purposes such as corporate
10 intelligence or determining technology trends where there
11 are technology gaps within the IP vector of the industry
12 is fairly commonplace. In the software industry it's
13 not. Outside of software the information can be used as
14 input in, say, a continuous feedback loop for R&D, so I
15 understand where the technology is going because I can
16 see what has been patented and what is being patented;
17 therefore, I know how to direct my R&D to innovate in a
18 particular area.

19 In the software industry, as we mentioned
20 earlier, and Jim, I think you mentioned it specifically,
21 the number of overbroad patent claims allowed by the
22 USPTO, the uncertainty in the current patent process
23 going through, and particularly the uncertainty in the
24 judicial process post-grant, all combine to increase the
25 difficulties and inaccuracies of the endeavor of trying

1 to use that information in a competitive manner, because
2 there's too much information and it is no longer
3 meaningful in the same way as it might be in other
4 industries, which might seem irrational.

5 The result is that you undermine the
6 fundamental purpose of a patent system to provide
7 valuable information and incentives to innovate beyond
8 the existing art so I see where the art is and I instruct
9 my R&D, I focus my resources and endeavors to improve
10 upon that art for my profit and ultimately for the
11 benefit of society. But instead, in the software
12 industry I would say that patents are at best neutral to
13 R&D efforts, and at worst an additional risk and
14 uncertainty that slows innovation in the industry.

15 MR. BARNETT: Bob.

16 MR. KOHN: Yeah, first I'd like to clarify for
17 the record that I'm not speaking on behalf of Borland,
18 I'm speaking on behalf of James Pooley. Well, two
19 comments. One is -- actually, I'm speaking on behalf of
20 Laugh.com so that you won't take anything I say
21 seriously.

22 One comment that, actually, Jim has alluded to
23 or referred to twice, and that is that he's not unhappy
24 with the Patent Office and how their processes and
25 procedures are going.

1 And to even be more skeptical, and I'm not
2 accusing anyone and I'm a lawyer myself, okay, but the
3 Patent Office is comprised of examiners who are all
4 lawyers, all right, and they're going to -- I think their
5 career path generally is not to remain patent examiners
6 but to go out in the field and to either prosecute
7 patents or to become like a Jim Pooley and be a litigator
8 of patents where it's a lot more lucrative.

9 So isn't there something built in, may I ask
10 very skeptically, isn't there something built in the
11 system where these transaction costs and wasteful wealth
12 transfers, as economists would call them, are kind of
13 being perpetuated by the very people who would benefit
14 from those wasteful wealth transfers and transaction
15 costs? Which the transaction costs of course 99 percent
16 of it go to the lawyers, so maybe the economists have a
17 piece of that too, so they're the ones who have an
18 incentive, I would think, to create as many bad patents
19 as possible so that when they get out they litigate them,
20 all right?

21 Now, I'm not accusing anybody in specific, I
22 would never accuse a specific person, but I think the
23 incentive there is built in, and the Patent Office,
24 rather than talking about quantity, ought to really be
25 focusing on things built into the system that are, I

1 think, incentivising high transaction costs and wasteful
2 litigation.

3 On the other side of the coin, I mentioned
4 earlier my concern or my desire for a system where, as
5 Jim put it, it's *The Producers* problem where one company
6 comes in and asks for five percent, another company comes
7 in and asks for five percent, and all of a sudden you're
8 like Zero Mostel or Nathan Lane, you know, giving away a
9 hundred and twenty percent, three hundred percent of your
10 revenues to various patents.

11 And there's an infinite number of potential
12 patent claims that can come to you, that there really has
13 to be some kind of a system whereby the reasonable
14 royalty or the fee for that patent relative to all the
15 other things that go into that project can be determined
16 at a much earlier stage rather than after the liability
17 has been determined, it should be well before then.

18 And I'd like to ask Jim whether he has any
19 ideas on the subject of how, since he's a litigator and
20 would be closer to it, how he might envision that kind of
21 a system.

22 MR. POOLEY: If I could just answer that, and
23 I'm speaking only for myself. I've been in this position
24 before. One idea that comes to mind short of trying to
25 encourage either through industry sources the formation

1 of consortia or perhaps even through government
2 imposition, there is the idea similar to a stakeholder
3 lawsuit in court where you would implead all the people
4 that you think have IP that's relevant to what you're
5 doing into one place, offer to pay a reasonable royalty
6 to whatever it is that's determined at the end of the day
7 to be the necessary IP, and let them fight it out among
8 themselves in one place as to what the proportionate
9 share should be.

10 I've not had a client yet that's willing to
11 take on that burden, and of course it's an imperfect

11

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1 second, but actually MPEG was one of the areas that I
2 wanted to talk about.

3 MPEG is the significant patent pooling
4 organization in my space, which has to do with video
5 technologies, multimedia technologies. They were created
6 in response to the patent thicket that had developed in
7 the mid-'80s in the digital video space such that
8 business couldn't move forward in the industry because
9 there was simply too many overlapping conflicting
10 patents. So in order to promote standards, the
11 international organization got together to create a
12 patent pool that would try to create both a nice standard
13 for everybody to be able to work with and a comprehensive
14 reasonable and fair license so everybody could actually
15 go ahead and have rational licensing.

16 It worked quite well for the first two
17 iterations. The current iteration, MPEG-4, may be
18 exposing some of the significant difficulties that
19 have arisen since the inception of the standards
20 organization.

21 The first is the increasing politicalization
22 and economic value just found in being embedded in the
23 standard. Frankly, the first two iterations of MPEG were
24 what you might call an ideal environment, very public
25 service-oriented, lots of intellectual property dropped

1 into it, very touchy-feely and came off quite well.
2 Everybody agreed on it and the licenses were pretty
3 straightforward.

4 MPEG-4 has become considerably more politicized
5 with very significant companies being part of the
6 licensing process as well as the standardization process
7 who have significant interests in the failure of the
8 standard, for example.

9 That said, they've just recently announced
10 licensing terms for one element of the standard, about
11 two years after they said they originally would. And in
12 fact those terms will be open for another year before
13 they're finalized, introducing some quite novel concepts
14 to the licensing scheme.

15 For those who aren't familiar, MPEG-2 licensing
16 has always been driven by the encoder and decoder. Think
17 of consumer electronics, flat fees based on units sold
18 with also a small fee tied to disks.

19 MPEG-4 introduces the concept which is very
20 sort of 2000-ish of starting to also put fees on
21 broadcasts, that is per viewer, and start trying to put a
22 tax on the actual use of the technology as it scales into
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1 development is impacted by patents, our company is 75
2 percent engineering, research and development. We've
3 been around for 2 years. For the first year and a half
4 we were allocating roughly 50 percent to advanced
5 research and 50 percent to development. In the coming
6 quarter that allocation will now be 50 percent
7 development, 25 percent research; 25 percent of that will
8 also now be dedicated to assisting in the filing of
9 patents. This is actual engineer time, these are
10 physical engineering resources who could be developing
11 new technologies who will be working directly with our
12 attorneys to process the actual patents.

13 By the way, that does not include the negative
14 impact on productivity that occurs when you force
15 engineers to talk to lawyers.

16 As a complete side comment, but I think one
17 that was brought up earlier that I found to be shocking
18 and interesting, is this concept of wilfulness claims
19 that Jim brought up earlier.

20 My first introduction to the way to deal with
21 patents by my attorneys was, for the love of God, don't
22 look at them, which meant that I was in a vacuum for more
23 than a year. I simply didn't look at any patents and I
24 never went to the USPTO site, and if anybody mentioned a
25 patent I burned it as quickly as possible.

1 I've recently reversed that process, simply
2 because I've been asked to sign these warrants and I kind
3 of feel like I need to know what I'm warranting. That
4 puts me in a very precarious position. I now am familiar
5 with lots of patents, many of whom it's reasonably
6 arguable I might be infringing on, although for the
7 record I don't believe I'm infringing on any patents.

8 That just strikes me as a very odd way for the
9 law to work, so just my two cents to those who might have
10 some ability to change it: if you could fix that, that
11 would be great.

12 Last part on the concept that's been floated
13 around a little bit on reallocating the scope of patents
14 to be proportionate to the industry, the idea strikes me
15 as being very common sensical. Really, if you sort of
16 look backwards, if the concept of patents is to promote
17 innovation, and to be very bottom line as a citizen and
18 as a consumer to provide me with as much cool stuff as
19 possible for as little as possible, a patent should
20 compensate an innovator with the very least amount of
21 economic incentive that would introduce as much
22 innovation as possible, so that if I as an innovator feel
23 like I can get, say, 10-X return on my risk, I'll do it.

24 In many industries, particularly in the
25 software industry, you don't have to give me any

1 incentive because competition would generate innovation.
2 It would be great if I could get 100-X return on my
3 investment, and certainly as an executive I'll probably
4 be lobbying you to do that, but as a citizen if you look
5 at simply the risk involved in the development of
6 intellectual property in different industries, the
7 investment and time to market is incredibly disparate.

8 I mean, before I got into this IP nonsense I
9 was actually involved in biotech, and they were talking
10 about ten, fifteen years, hundreds of millions of dollars
11 and very high likelihood that it'll blow apart at any
12 moment.

13 In my business I can develop intellectual
14 property that's highly patentable in two, three months,
15 \$20,000, and it's guaranteed to work because I did it.
16 Rewarding me with the equivalent patent coverage just
17 doesn't seem to me to make sense from a pure common sense
18 perspective. I would say that the biggest issue really
19 is taking the time to go out and take a look at what the
20 actual economic implications are of changing that
21 machine, and then really taking the time as intelligent
22 people to figure out how to implement the right

1 pretty good rules when they put their minds to it, but
2 that naivete leads me to think that's a pretty good idea.

3 MR. BARNETT: I think at this point we should
4 go straight to the source as far as the Patent Office
5 goes, and Ray, do you have any thoughts?

6 MR. CHEN: Thanks, Mike. I'm not even sure
7 where to start. I'll just do the best I can to talk
8 about a few different things.

9 Yeah, I am concerned that maybe there is, the
10 more I listen, perhaps a perception gap going on with
11 regards to the Patent and Trademark Office, but first of
12 all, I think I do recognize that there's a concern about
13 uncertainty with regards to patent scope and things like
14 that, and perhaps patents being interpreted rather
15 broadly.

16 But at the same time, I think if you look at
17 the recent few years, say five to seven years, and you
18 look at what the Federal Circuit as well as the PTO has
19 been doing, you'll see that there's been a rather
20 significant conscious trend towards stressing the clear
21 notice function of what patents should have in terms of
22 what their scope ought to be, and I think that's been
23 especially stressed in these past few years.

24 If a certain Commissioner has taken pride in
25 the fact that filings have gone up and issued patents

1 quality of the examination process. We've done industry
2 outreach where we've specifically gone out to seek out as
3 much prior art as possible. Obviously, most of our prior
4 art databases rely on previously issued patents, but in
5 areas such as software and the Internet, obviously we
6 have to go to non-patent literature as much as possible.
7 And again, that's where we really count on public
8 participation.

9 One question I have from hearing some of the
10 discussion this morning is whether there's something
11 unique about the software industry -- and maybe I pose
12 this specifically to Professor Mowery and Mr. Pooley --
13 about this tension between small companies, large
14 companies, maybe a small company having a patent, and
15 whether or not there's this following perception that
16 these small companies are somehow creating a drag on the
17 larger companies?

18 And just as a crude analogy I would look at,
19 say, the auto industry where maybe an individual inventor
20 has a patent on a windshield wiper and then all of a
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1 something unique about the software industry that makes
2 it different from really any other industry that's
3 dealing with these same type of issues?

4 PROF. MOWERY: I have to go in just a couple
5 minutes. I think the question you pose is absolutely the
6 right question to pose to this group because I think that
7 there's a great deal of industry specific knowledge here
8 and a lot of what, in my view, we've heard this morning
9 could be replicated in other industries: small firms,
10 large firms, short pockets, deep pockets, etcetera,
11 etcetera, etcetera.

12 Seems to me there are probably two or three
13 things about software that are different. One obviously
14 is the fact that you have a regime change in this
15 industry in some sense where you have new markets opening
16 up where formal IP protection now is much more valuable,
17 and you have this change in the judicial deference to
18 patents and the like that has increased the perceived
19 value of patents.

20 All of that means you're in this transition
21 period where you're going to a much more patent intensive
22 regime. That means that the patent-based prior art is
23 much less abundant for examination. But again, that, I
24 think, is something that one sees in new areas of
25 technology more generally, this transition problem in a

1 system that relies heavily on reviews of patent-based
2 prior art.

3 So software is different, but software is not
4 different in that you've got this transition problem, and
5 arguably, once the transition is over, whenever that
6 happens -- and as prior art becomes more abundant that
7 may be less of a problem -- but I think the other areas
8 in which software may pose unusual challenges is the
9 potential complexity of the patent coverage of a given
10 artifact. I mean, the argument that you can have
11 potentially dozens or hundreds of patents covering
12 individual components of a product, that may create one

1 group of firms, so in some ways that may be another
2 characteristic of this industry that is different, but
3 it's embedded with the change in markets and the change
4 in technology that is driving this industry so rapidly.

5 So those are some thoughts, but I don't think I
6 have fully exhausted the possibilities of what makes this
7 industry unique. I wish I could stay and hear from
8 people who actually know more about it from a
9 practitioner point of view, but I have to go teach.

10 Excuse me.

11 MR. KOHN: If I can reiterate a couple of
12 David's points on the difference between software and
13 others. The availability or nonavailability of prior
14 art, primarily because a lot of it's behind the object
15 code, is a challenge the Patent Office has had and we
16 realize that, and also the number of potential processes
17 that could be in a million-line or ten million-line piece
18 of source code.

19 But again, something I mentioned earlier. You
20 can't get a copyright on a windshield wiper, so really
21 the only available protection for innovation for
22 windshield wipers is patent protection. You already have
23 copyright protection in that entire piece of software.
24 What is the marginal benefit of patents within that
25 particular piece of software to the people who have to

1 I think there should be some focus -- and I was
2 a little disappointed, James, that you didn't have the
3 total solution to the problem on the process of
4 litigation. Maybe when this lawsuit is filed or maybe
5 when you get a demand letter there's some kind of board
6 that goes through the evaluation of what's going on here
7 to weed out the frivolous claims or not. I don't know
8 the answer to that, but I think that's where a lot of, I
9 think, useful focus can be made.

10 MR. BARNETT: Pam.

11 MS. COLE: Yes?

12 MR. BARNETT: You've been very patient.

13 MS. COLE: I have, and I'm usually not. Just a
14 few introductory comments. First of all, my views do not
15 reflect my colleagues at the Antitrust Division or my
16 superiors, and they might not even reflect me because
17 they change every day. I actually wanted to shift gears
18 a little bit and talk about the role of the antitrust
19 enforcement in all of this since these hearings are about
20 the collision, if you will, of intellectual property and
21 the antitrust.

22 Let me first say that I work with the San
23 Francisco office of the Antitrust Division, and the
24 Federal Trade Commission also has a San Francisco office,
25 and both offices pride themselves in being very familiar

1 with high tech antitrust issues that are coming out of
2 the Silicon Valley. That is what we tend to specialize
3 in, so know that you have local friends in the antitrust
4 enforcement agencies that you can talk to.

5 Which leads me to a story that I'd like to tell
6 some of the business people here today. About a month
7 ago, a small business owner came in to meet with me.
8 This small business owner was being sued for patent
9 infringement by a very big firm. This small business
10 owner had found out that this very big firm had indeed
11 sued many companies for patent infringement, had lost all
12 of the cases that had gone to litigation, and if the
13 cases didn't go to litigation had actually purchased the
14 defendants as a way of settling the lawsuits.

15 That raised a lot of red flags with me, and
16 that type of behavior by a dominant firm or a dominant
17 patent holder can raise some interesting antitrust
18 issues. They could potentially raise some sham
19 litigation issues by the patent holder in terms of
20 bringing these infringement cases as a way of tying up
21 these small firms and because they're too busy defending
22 the case to focus on what they're there to do.

23 And it's also a way, like I said, that they can
24 be acquiring these firms. And a lot of times we at the
25 government will not know about these acquisitions because

1 they will fall below the Hart-Scott-Rodino notification
2 threshold or they will be deliberately structured in such
3 a way as to avoid Hart-Scott-Rodino notification. So
4 that type of behavior can raise Clayton Act merger
5 concerns, it can raise sham litigation concerns, and I
6 opened up a case and now I'm going to look at it.

7 Now, the good news is that if the government
8 looks at a case it doesn't cost you anything except your
9 tax dollars. Now, yes, we can move slowly, but quite
10 frankly, I'm not sure we move any more slowly than the
11 private courts do in this.

12 So I just want to raise that and I actually
13 wanted to ask any of the panelists if they've had any
14 experiences mostly as a patent defendant where they have
15 raised antitrust counterclaims such as sham litigation
16 counterclaims, patent misuse counterclaims, unfair
17 competition counterclaims. I mean, the good news is if
18 you win on that you obviously get treble damages and you
19 can get attorney's fees.

20 So I see some cards going up so I think I'll
21 just stop right there and hear from you on that.

22 MR. BARNETT: I think Bob just edged out Jim.

23 MR. KOHN: Sure. Well, when we were sued, when
24 Borland was sued by Lotus -- my God, when was that, '93,
25 1990, '91? I don't know when it was -- we intentionally

1 did not file any counterclaim for antitrust or anything
2 else, but particularly antitrust.

3 And you know, they had 80 percent market share
4 at that time, which was before Excel essentially, so
5 there were potential claims there, but the reason why we
6 didn't was it would have invoked their insurance
7 provision so the lawsuit would have been covered by
8 insurance, so we intentionally did not.

9 And most antitrust counterclaims in patent and
10 copyright cases tend to be viewed by the people in the
11 profession as just sham. They're not really going to
12 work, but you just throw something over to the other side
13 to put them on the defensive. But we decided not to do
14 that because it would just simply have all their
15 litigation financed.

16 Ours was financed fortunately by our insurance
17 because I made a claim under our advertising injury
18 provision, and we literally changed all the insurance
19 forms as a result. But we had almost all of our fees
20 covered by the cost of that, and we knew that on the
21 other side that would be the main advantage for them, so
22 we didn't do it.

23 And again, antitrust claims are generally these
24 really soft claims and very difficult to do.

25 And the analogy, by the way, of

1 Hart-Scott-Rodino, maybe there should be a
2 Hart-Scott-Rodino kind of process before patent
3 litigation begins.

4 MR. POOLEY: There's something provocative.

5 I would just say that from my own experience,
6 increasingly antitrust claims, counterclaims are made in
7 patent litigation, but you have to distinguish between
8 the sort that are the sham litigation claims which judges
9 look on generally very skeptically, tend to bifurcate and
10 put off because you haven't reached the predicate point
11 of proving that you've won the case, and then the more
12 complicated interesting kinds of claims of the sort that
13 you've recognized or you've mentioned, including refusals
14 to deal.

15 And there, I think, the experience generally is
16 that the trial judiciary, cheered on a bit by the Federal
17 Circuit, is also fairly skeptical about those kinds of
18 claims because what they're hearing at least from the
19 Federal Circuit is that patents are a very, very strong
20 bit of property and you can't blame owners for how they
21 use them. And I realize, of course, it's a much more
22 complicated issue than that, but the tone is there.

23 And so, on the other hand, we absolutely see
24 these kinds of claims coming up more and more often, and
25 somebody's going to have to deal with them at the

1 appellate level on a continuous basis, I think, until we
2 get further clarity.

3 MS. COLE: Let me just respond very quickly to
4 some of those comments.

5 First of all, there will be separate hearings
6 that the Federal Trade Commission will be holding in D.C.
7 in terms of the role of the Federal Circuit. Perhaps it
8 is because I was one of the attorneys that represented
9 Intergraph in the private antitrust suit against Intel
 that went to the Federal Circuit, perhaps that leadsvnt Intel

1 has recognized that, the natural response probably would
2 be, "Well, that's interesting, but let me see the
3 licenses so I can examine what the circumstances are and
4 weigh the context in which that kind of agreement was
5 reached."

6 But you can't see those agreements, you don't
7 know precisely who the people are, how much it is that
8 they actually are paying when weighed against other
9 contributions that they're making or obligations that
10 they're taking.

11 That, it strikes me, necessarily leads to a
12 higher general payment of royalties than otherwise would
13 happen if, for example, and this is where the idea is,
14 all patent licenses like patent assignments were required
15 to be recorded and perhaps made available for inspection.

16 You know, a radical notion and one that where
17 we have to think about the collateral consequences, but
18 it bears mention that there's a great deal of opacity
19 that inhibits the natural process of negotiation of
20 licenses, and it might be helpful if we were to free
21 ourselves from the problem that comes up every time when
22 someone suggests you ought to pay this and you say,
23 "Well, let me see your other licenses and they say we
24 can't do that."

25 And the rejoinder is, "Well, if I sued you or

1 if you sued me, we'd be able to see them." And he says,
2 "Yes, I know that, but we're not in litigation." So you
3 feel almost as if you're forced into litigation in order
4 to get the discovery that you need to make an intelligent
5 resolution to the dispute.

6 MR. KOHN: I like that. That's a great idea.

7 MR. BARNETT: Brad.

8 MR. FRIEDMAN: I had one comment, but I'm going
9 to fold it into what Jim just said, which was intriguing.
10 I'm going to, Jim, remind you of what you had suggested
11 in terms of using impleading in terms of having all the
12 people who might ask for a share of the royalties, of the
13 rents.

14 One thing that David Mowery said was that the
15 software industry was unique in terms of the number of
16 components and the patents covering the various
17 components to it. There's another industry that clearly
18 comes to mind that I've previously worked in, which is
19 biotech, and certainly pharmaceuticals, which shares that
20 problem that the final product is covered by a large pool
21 of patent owners, each of which own the naked virus, the
22 gene, certain components, the vehicle of delivery and so
23 forth that result in the final product.

24 And some system whereby you could pool these
25 interested parties, and I view them now as patentees on

1 the one hand, and then on the flip side the potential
2 licensees whose agreements you can't see, pool them
3 together and create basically a market-driven assessment
4 of the value of the patent.

5 The difficulty there is markets with few people
6 in it are extraordinarily inexact. Currently what we
7 have, though, is a one-off every time, and so I certainly
8 don't see that what I'm suggesting is a panacea, but it's
9 a whole lot better than what we currently have. Nor, of
10 course, am I suggesting a particular structure because I
11 haven't thought of one, but I think it's important to
12 look at the uncertainties that we can focus on and bring
13 to light.

14 For instance, we require some license
15 agreements to be recorded if you want to create a secured
16 interest in that license and the value, the revenue that
17 comes with it. Well, perhaps having all license
18 agreements recorded for the purpose of allowing the value
19 of the patent to be seen is a good idea. Whether or not
20 that should be public to everyone or available to those
21 who sincerely are approaching for a license, maybe that's
22 a good thing to do.

23 Which is leading me to say perhaps we want to
24 go to a compulsory license model such as in France, in
25 which case a reasonable royalty becomes out there and all

1 comers who are interested can show that they deserve to
2 have a license. I'm not sure if we want to go there, but
3 I think it's something we ought to look at if you're
4 looking at trying to shed light on those areas of
5 uncertainty.

6 MR. BARNETT: Thanks, Brad. I think at this
7 point we may start wrapping things up. If anyone has any
8 particular final comments they'd like to make or any
9 thoughts that they've had as a whole, we'd appreciate
10 them now. Jim.

11 MR. POOLEY: Just a quick comment. The
12 compulsory licensing scheme I know Brad appreciates is a
13 provocative notion, and just for my own point of view I
14 think we need to be very, very cautious about that,
15 because one of the pillars of the patent right is the
16 right to exclude, and once you create a general
17 compulsory licensing scheme you've eliminated that right.

1 apply in the patent field because the relative value of
2 the patent of the particular product is going to be so
3 varied in each case it would be very difficult.

4 And I mean, I don't know how they do this in
5 France, but in the music industry there's a value of a
6 song to a sound recording and they've set it at 7.55
7 cents and that's what the government's statutory rate is
8 set. And some songs have greater value than others to a
9 recording, but you know, there is a level playing field
10 that they can establish there for that.

11 I was looking at my testimony seven years ago
12 in front the FTC and I suggested in one instance, and I'm
13 not taking this position today, but that a compulsory
14 license might be applicable in an antitrust situation
15 where someone is controlling some kind of an interface
16 standard or something like that to such a degree or so
17 dominant that it's determined that --

18 MR. POOLEY: Essential facility.

19 MR. KOHN: Essential facility, I don't know
20 what the terms are, and I don't want to get too close to
21 that subject. But anyway, I'm not suggesting that, but
22 compulsory licensing might be confined to specific
23 instances where the antitrust field comes about.

24 MR. FRIEDMAN: I just wanted to say that I
25 think it's clear we have a lot in our arsenal in terms of

1 enhancing innovation and specifying the ways in which we
2 do that, and so if we put all of those on the table and
3 take the radical idea that we can actually change things
4 with a focus of vision as opposed to it's hard to change
5 what we have as opposed to inertia, I think we can get to
6 a place, perhaps even in our lifetime, where we've
7 improved the system quite significantly.

8 MR. BARNETT: Very good. Does anyone else have
9 any comments? On that note, I would sincerely like to
10 thank all our panelists for coming today and would like
11 to join in a round of applause for them.

12 (Applause.)

1

AFTERNOON SESSION

2

MS. GREENE: Welcome back and thank you for

3

returning for the afternoon panel. We had, as many of

8ng Patenting of DNA Sequences, 34 A. of Int'l. & Comp. L.J. 155 (1989); see also, e.g., J. D. Watson & F. H. C. Crick, "Molecular Structure of Nucleic Acids: A Tripartite Helical System," *Nature* 171: 273-278 (1953).

1 presentations scattered throughout, so why don't I just
2 get the intros out of the way up front.

3 First we have Greg Aharonian, who is the
4 publisher of the Internet Patent News Service, a daily
5 e-mail newsletter that covers intellectual property
6 issues. The newsletter has focused on the issue of
7 patent quality, in particular the problems patent
8 applications and examiners are having dealing with
9 non-patent prior art. Mr. Aharonian is also a consultant
10 to corporations and law firms conducting patentability
11 and invalidity searches primarily in the electronic and
12 computer areas.

13 We also have John Love with us. John Love is
14 the Group Director in Technology Center 2100 at the U.S.
15 Patent and Trademark Office. As director, he is
16 responsible for managing the work of several hundred
17 examiners who review patent applications for compliance
15

1 matters for many of the firm's clients in the electronic
2 software and information science, e-commerce and medical
3 device technology areas. Mr. Nydegger was invited in
4 1999 to become a member of the National Patent Board, a
5 non-profit entity founded to provide access to
experienced IP attorneys for mediating patent disputes,

1 research interests include antitrust economics,
2 intellectual property and licensing, product standards
3 and compatibility and the economics of networks and
4 interconnection.

5 And next we have Robert Taylor, who is Managing
6 Partner of the Silicon Valley office of Howrey, Simon,
7 Arnold and White. For more than 25 years he has
8 specialized in patent and antitrust litigation and
9 related fields of law. His experience covers all aspects
10 of litigation in these areas. He is the former Chair of
11 the Antitrust Section of the ABA. He was also a member
12 of the Advisory Commission on Patent Law Reform, whose
13 report was presented to the U.S. Secretary of Commerce in
14 August, 1992, proposing changes to patent laws.

15 Next is David Teece, who is participating with
16 us once again today. He is an applied industrial
17 organization economist and an economics professor here at
18 the Haas School of Business. He has testified before
19 Congress and government agencies on regulatory,
20 technology and antitrust policy, and has authored over
21 150 books and articles.

22 Additionally, we have Les Weinstein. He is the
23 Senior Litigation Partner at Squire, Sanders and Dempsey,
24 focusing on patent and antitrust matters. He counsels
25 technology clients in a wide variety of fields including

1 couple more presentations and then a discussion.

2 The bottom line is that I realize that the
3 numbers don't add up. Several of the panelists who are
4 joining us today were kind enough to forego a formal
5 presentation on the assumption that our discussion would
6 be an adequate vehicle for them to get their ideas out.
7 And what I can say is: we know who you are, and so while
8 everybody else needs to tilt up their table tent like
9 this to let me know that you have a comment to make, I
10 want to make sure that those people who won't be giving
11 formal presentations just throw their table tents at me.
12 I really want to make sure that you have your points
13 adequately included. Okay, so here we begin.

14 We talk about the social trade-offs that are
15 inherent in the patent system, and what we have is you
16 have disclosure, and what you get from the disclosure is
17 a right to exclude. As a result of that, we as a society
18 are hopefully promoting innovation.

19 What we're going to be looking at today is, as
20 a practical matter, what does it mean to implement that
21 trade-off? What are the consequences of how we choose to
22 implement that trade-off? Step one in this process of
23 implementing the trade-off is clearly the patent
24 application or the grant process. Our first three
25 presentations will focus directly on that process, and

1 then we'll have some discussion. And then we will expand
2 our inquiry into how the patentee uses the rights once
3 acquired, and part of that will be the litigation that
4 invariably, or at least frequently, ensues.

5 So why don't I turn now to our first
6 presentation by Les Weinstein.

1 system is functioning today. My view of it is that we
2 are no longer granting patents on inventions, we are
3 granting patents on investment. And that's a policy the
4 country can make, but it would be much more efficient to
5 do it through tax policy rather than handing out --
6 through the examination process with all of its
7 imperfections -- patents which are also clubs, and I'll
8 come to the nature of those clubs in a moment.

9 They're clubs to drive people out of business.
10 They can be clubs used to destroy their investment. The
11 exclusionary power of a patent, as Kodak found out a few
12 years back when it lost \$900 million because it made a
13 "mistake" can be very powerful in how our economy is
14 effected.

15 Now, in fairness to the Patent Office, which is
16 often everybody's current whipping boy, it's fair to
17 recognize that the Patent Office is caught often between:
18 the dictates of the Court of Appeals for the Federal
19 Circuit which is expanding what can be patented, the
20 statutes our Congress has passed through whatever
21 legislative process goes on commanding them to do certain
22 things; and its own shortcomings in budget and
23 occasionally in talent. So I do not want you to think
24 that I'm here to bash the Patent Office particularly, but
25 to talk about how the system works.

1 The problem as I see it is that we are issuing
2 too many patents with too many claims, each of which is
3 an individual patent as a practical matter that cannot be
4 understood. We are told that a patent is like a deed to
5 property or like a statute, that it's supposed to warn
6 people as to what is forbidden. Yet in almost every case
7 now, millions of dollars are spent and certainly hundreds
8 of thousands in Markman hearings so a judge that is
9 reversed about 50 percent of the time, can tell people
10 what that patent means. Something is wrong with that
11 system.

12 There are patents that come out today with
13 hundreds of claims, unintelligible to almost anyone
14 except the people who drew them. And yet, people who
15 violate them jeopardize sometimes a lifetime of
16 investment or their division or their product. That
17 system doesn't work well to spur innovation or carry out
18 the constitutional mandate.

19 Indeed, for those of you who were here this
20 morning and listened to the people in the software
21 industry talk about how threatening this is to their
22 businesses, as I see it, patents today are often
23 entrenching the established at the expense of allowing
24 the newcomer to come in. I question today whether a
25 Steve Jobs could start an Apple or a Bill Gates could

1 "Please tell me when the bathroom is available," you're
2 all probably infringers. This patent has in it 64 claims
3 by 4 inventors. It goes on to make a real contribution,

1 A couple big businesses chit-chatting over some
2 drinks somewhere could probably do it discretely enough
3 to not violate any laws but end up somehow abusing the
4 system in some way. To me that's not so much antitrust
5 but against trust, to abuse the trust of the public, of
6 their peers, whatever. So to me, I mean, what's at
7 interest to me in the patent system is the abuse of trust
8 that goes on, assuming there is any.

9 Now, to me, I have no problem with someone with
10 a good patent, developed patent with a new invention,
11 being as nasty as he wants. I suppose that's kind of the
12 fun of the game and the reward of actually coming up with
13 something new. I mean, I think there's very little new
14 to be discovered and I think the person who does discover
15 something new should be able to have as much fun as he
16 wants with it, or her.

17 My problem is with the quality of the patents.
18 There are just too many patents, as Les and many other
19 people have stated, that are just plain bad; and I blame
20 a lot of it on the applicants themselves and their
21 lawyers.

22 Certainly, I've bashed the Patent Office many
23 times over the years, and I think there's much they could
24 do to improve their operations, but they are hamstrung in
25 many ways by politics and budgets and things like that.

1 But what gets me is just kind of the cavalier attitude of
2 a lot of patent applicants, especially the corporations.

3 I've passed out, in the back of the room if you
4 don't have a copy, some statistics I've gathered on
5 computing patents, which is my field of expertise, and
6 the numbers, I think, are quite interesting. The data
7 ranges from 1976 to 2001, so it's a very long time
8 period. It stretches the Internet period and it
9 stretches over the '70's and early '80's when a lot of
10 the formative technologies that now are part of the
11 Internet and other areas were being developed.

12 I mean, you see some interesting things. We go
13 from a few thousand patents in the early '80's to upwards
14 of seventeen to twenty thousand computing patents a year
15 being issued now. And I mean, frankly there's just not
16 that much innovation out there to justify that kind of
17 rise.

18 One of the reasons why so many patents are
19 issuing is that the Patent Office really has no choice.
20 The examiners are obligated to pretty much process a
21 patent application in two passes so that at the end of
22 the second pass if they have no more ammunition to use
23 against a patent, they pretty much have to issue
24 something.

25 And the problem is that you look at one column

1 there, Number OREF, and the second column, Percent ZREF.
2 What that translates into is the number of non-patent
3 prior art references cited on the average patent is the
4 number of OREF. And percent ZREF is the number of
5 patents that cite no non-patent prior art at all.

6 Now, in the computing field as of today there
7 are probably about ten million publications in the
8 general area of computing. There are major
9 organizations, IEEE, the ACM, that have hundreds of
10 conferences and journals every year with thousands of
11 pages in each one. You walk into any engineering library
12 around the country and all you'll hear is the librarians
13 complaining about not having enough room on their shelves
14 for more books, more conferences, more papers. So that
15 for a computing patent today hitting the Patent Office, I
16 would say that there are about ten million potential
17 pieces of prior art that might be asserted against it.
18 Now, the vast majority of them are in different fields of
19 computing. I mean, a patent on a graphics technique will
20 have no prior art in the database area.

21 But the fact that over half of all patents
22 issuing cite none of this prior art to me is abominable.
23 And the reason is that the corporations and the
24 applicants aren't doing any searching because they're not
25 obligated to. The problem then is that the examiners,

1 who everyone knows are overworked and under-resourced,
2 they don't have time to go out and seek that prior art.
3 The end result is that they have to issue patents on
4 ludicrous ideas like a reservation for an airline
5 restroom because they don't have the specific information
6 on hand to properly issue a rejection.

7 So the solution is quite clear, it's to stiffen
8 the search requirements for applicants. Rule 56 -- which
9 is an obligation on applicants to disclose what they know
10 but not to search what they know exists -- to me, is a
11 total joke of a rule. It allows companies, especially
12 large companies like an IBM which brags about having the
13 biggest databases on the planet and the best search
14 engines in the universe, to then say, "Oh no, we don't
15 know how to find out anything, only apply for our
16 patents." I mean, come on, give me a break.

17 The other problem is that right-hand column,
18 Percent Jepson. For patent applications there's a
19 language you can use in the patent claims and there's a
20 certain phrase that appears occasionally, "the
21 improvement comprising." Now, if any of you use software
22 or any technology, almost anything you see coming out new
23 on the marketplace is an improvement on something else.

24 I mean, there are few truly revolutionary ideas
25 anymore that are just so new that they're not an

1 improvement on anything. So, I mean, to someone who's
2 naive to all this you would think that every patent claim
3 where someone's claiming what it is they've invented
4 would first say, "Here's my improvement over the existing
5 art," so that we could then focus, for example in Markman
6 hearings and other such venues, on what it is that's
7 truly new that someone might be infringing. So you'd
8 think that 80, 90 percent of the patents would be using
9 this format if they were truly sincere.

10 Given that even amongst lawyers in fields of
11 computing the thought is that at least half the patents
12 are invalid and, therefore, they're an improvement on
13 nothing. And, yet, over the last 20 years we see the use
14 of this format dropping. Why? Because lawyers will say,
15 "Well, if we specifically point out to the examiner what
16 the improvement is, he'll issue us an obviousness
17 rejection because he'll say, 'well, you have so much
18 other stuff that everyone already knows about, your
19 little improvement's too trivial, it's obvious, so no
20 patent.'"

211, it's obvious, Escap... prdb246

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1 I have seen nothing change in the subsequent time period.

2 So my concern over the past few years has been
3 harping on this one issue. There's a lot that can be
4 done very easily, very reasonably in terms of cost to
5 greatly improve the quality of the patents. And I think
6 that if applicants -- and again, if you look at one of
7 the columns, Percent Corporation, the vast majority of
8 these patents are going to corporations large or small.
9 We're not talking about some guy in a basement anymore,
10 this is corporate stuff.

11 If you really want to get a powerful weapon,
12 the patent is -- and I have no problem with the patent
13 being a powerful weapon -- I think you should have a
14 higher burden to get such a weapon. But for too long the
15 patent bar has done nothing, and the Patent Office I
16 don't think has a chance to do much of anything.

17 What happens with all these issues? You have
18 to go into court, spend hundreds of thousands of dollars,
19 millions of dollars, arguing what it is that was
20 invented, whether or not the prior art was relevant or
21 not, in front of a jury or a judge who doesn't understand
22 the technology, and the district court doesn't even
23 understand the patent laws. I mean, it's a real mess,
24 much of which could be dealt with a lot earlier in the
25 system, but it isn't. The result is that large companies

1 and smaller companies start building up these patent
2 thickets and they start suing people and it's hard to
3 fight stuff like that off.

4 I myself should know. I mean, I've been sued
5 for patent infringement on a patent that is totally
6 worthless, and you know, spent a fair amount of my own
7 money defending myself. In the end I think I'll prevail,
8 but it's not something I should have been made to do.

9 And it's the type of patent that, had the
10 applicant been required to do some searching ahead of
11 time when he was filing for the patent, or if the patent
12 assignee, once he got the patent but before he sued
13 someone in court, was required to do a search.

14 I could maybe see arguing that, you know, let's
15 not burden everyone at the patent application stage. But
16 to be able to sue someone without doing any due diligence
17 on the validity of your patent and hiding behind the the
18 canard of, you know, the patent was presumed valid, I
19 mean, again as a non-lawyer, that's silly. It may be
20 legal, but it's not very serious.

21 So I find it funny that in this era where we
22 have in Silicon Valley some of the brightest minds, some
23 of the most powerful software tools, tremendous amounts
24 of technology, some of which is being claimed, that the
25 very process for protecting that technology, the patent

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1 the PTO were both attorneys and engineers. And there
2 was, I guess, an insinuation, perhaps in jest or maybe
3 not, but that this somehow gave them incentive to issue
4 as many patents as they could because they were later on
5 brought into the private practice and would be defending
6 and suing on these patents. But I just wanted to get the
7 record straight that the vast majority of examiners are
8 not attorneys; a close percentage would be about ten
9 percent have law degrees.

10 I appreciate the chance to come and give a
11 presentation on what we're doing at the PTO to improve
12 the quality with respect to these software and, in
13 particular, business method applications. I'd like to
14 give a little bit of a background here. I think most of
15 us know this but it's been talked about indirectly and
16 sometimes directly.

17 There are knee-jerk reactions to patents that
18 are issued, and of course while the language may seem
19 clear even in the claims, the claims do define the scope
20 of the invention, but the claim interpretation is a
21 question of law and not of fact, and what you read may
22 not be exactly what would be interpreted to be covered by
23 the scope of that claim. It's very complicated. Not
24 unimaginably complicated, but it is a technical question
25 that the courts do go through when they interpret the

1 scope of a claim. They look at the specification and the
2 prosecution of the case that could have an effect on the
3 narrowness or how narrow those claims are interpreted.

4 And of course, we know that the right is to
5 exclude others from making, using or selling the
6 invention, and in response to what Les said awhile ago
7 about exclusivity rights, I think we need to keep in mind
8 that the Constitution in Article 1, Section 8, talks
9 about securing for inventors the exclusionary rights that
10 we're talking about here, so even the founding fathers in
11 the Constitution provided for a patent system.

12 There are many ways, and we don't pretend to be
13 perfect at the PTO, there are many ways that third
14 parties or others can participate in the application
15 process both before and after a patent is granted. With
16 the recently changed law, the AIPA, most patent
17 applications will, in effect, be published 18 months
18 after their filing date. After that, any member of the
19 public has an opportunity to submit prior art to the
20 Patent Office for our consideration.

21 Prior to that publication date, if an applicant
22 becomes aware -- excuse me, if a member of the public
23 somehow becomes aware of a pending application or sees
24 that a product is stamped patent pending, they can send
25 to the PTO what's called a protest under our rules, Rule

1 291, and include with that any information they'd like us
2 to consider as a protest to the grant of a patent
3 application on that particular product.

4 And we also heard this morning some discussion
5 about the various procedures that we have after the
6 grant. And we do have, in fact, at least four procedures
7 whereby the validity of a patent can be brought into
8 question after it's issued by a third party without
9 necessarily getting involved in a, except for the fourth
10 one there, without being a party to litigation.

11 The first is through a prior art citation as
12 provided for in Rule 501. Any third party can submit a
13 prior art statement and have it placed in the file of a
14 patent. Those submissions are submitted to the group
15 directors for review and will in fact be considered
16 should a reexamination request be filed in another
17 proceeding. Those prior art statements that are in the
18 file will be considered.

19 There's an opportunity for an ex parte re-exam
20 proceeding. Any member of the public can initiate that
21 proceeding, and we've averaged in the last 15 or 20 years
22 about 400 per year.

23 Also, the AIPA provided for a second type of
24 reexamination proceeding that we call inter partes. And
25 that's the one where there's been a lot of discussion

1 about the adverse or the estoppel effect that may be,
2 say, a detriment or a deterrent to people using that
3 particular process. We've only had three filed to date,
4 but part of the reason is that it only applies to
5 applications that have been filed after November of 2000,
6 so there haven't been a great deal of patents that have
7 issued since then.

8 And, of course, invalidity can be raised as a
9 defense in litigation by a party who's being sued or in
10 the preliminary injunction hearing.

11 As far as I know, the Patent Office, we do an
12 internal review of the quality of our patents, and we, I
13 believe, are the only one in the world that will publish
14 the results that we get, our findings. And these reviews
15 are done by staff that report directly to the
16 Undersecretary for Commerce and they do not report to the
17 patent core management, so we hope and we feel that this
18 gives it a certain amount of objectivity.

19 What you see there -- at the bottom line --
20 represents the core error rate. That means that in 5.5
21 percent, at least in '99, of the applications that we
22 eventually allowed, that there were 1 or more claims that
23 our internal review found to be unpatentable for various
24 reasons, either 102, 103 or 112 or 101.

25 The TC-2100 and 2600, TC stands for technology

1 center, these are the two technology centers that deal
2 with what we can, I guess, imagine as software patents.
3 There's a 95-percent chance that they would be assigned
4 to one of these technology centers. And you can see that
5 the error rate in those two technology centers is below
6 the office average. In fact, last year, 2100, which I'm
7 associated with that has the software or the e-commerce
8 patents and the business method patents, our error rate
9 went down substantially from '00.

10 In the year 2000, March of 2000, there was what
11 we called the Business Methods Initiative. That was
12 partially in response to a public concern about the
13 quality of patents that were being issued in the business
14 methods area, and to address those concerns we put out a
15 rather comprehensive program to help us in the
16 examination of these applications. The purpose of the
17 industry outreach portion of that initiative was to help
18 identify additional sources of non-patent literature
19 [NPL], to provide training opportunities for examiners,
20 and also provide a forum to discuss business method
21 issues.

22 We are partnering with over 30 industry
23 organizations that communicate with us and talk to us and
24 provide us resources for training and indicating
25 additional sources of NPL, since this initiative began.

1 These are some of the organizations that we partner with:
2 the Information Technology Association of America,
3 Software Industry Information Association, NACHA, BITS,
4 and you can see the others.

5 We've had two internal partnership meetings
6 with our customers. Representatives from these business
7 organizations and the legal community attend and we
8 discuss the issues that are common and important to all
9 of us. The initial roundtable was held in July of 2000
10 -- since I have ten minutes, I got to promise to get
11 through here in ten minutes. We published a federal
12 notice in the *Federal Register* where we indicated the
13 non-patent literature sources that we examined and we
14 asked our customers and our partners to indicate to us if
15 they felt there were other areas that we should be
16 looking at.

17 Part of the Director's initiatives were to
18 create three mandatory fields of searches for the
19 examiners. The first would be the traditional classified
20 search for the examiners, the second would be foreign
21 patent literature databases, and the third was that we
22 required the examiners in the business methods area to do
23 a non-patent literature database search.

24 Now we've identified over 900 commercial
25 databases and we've grouped them together depending on

1 exists as opposed to the 101 issues about eligibility. I
2 explained this to you a little earlier -- about the fact
3 that we have a mandatory search for all cases that are
4 originally filed in class 705, and the examiners are
5 required to search a document from each one of these
6 sources of searching.

7 A unique aspect of this program that we
8 initiated in 2000 is what we call our second level
9 review. When an examiner gets to the point where they
10 feel the case should be allowed, we pass that on to an
11 experienced examiner or panel of examiners who review
12 that case. They, first of all, review it to make sure
13 that the searching requirements have been met. They look
14 to make sure that reasonable allowances have been placed
15 in that case, and they also do a basic review of the
16 scope of the claim. If they have any questions or
17 concerns about the scope of the claim then they'll kick
18 it back to the examining group and we'll take a second
19 look at it. That's in addition to our overall quality
20 review program.

21 That is a sampling of all cases throughout the
22 office, and since this program has been introduced, for
23 the entire portion of '00 which included the first two
24 quarters of '00 prior to the initiatives, the allowance
25 rate was 55 percent. In '01 the allowance rate for class

1 705 went down to 45 percent, and that's compared to the
2 office-wide allowance rate, which is 69 percent. The
3 allowance rate is basically the percentage of cases that
4 are allowed versus those that are eventually abandoned.
5 And to give you some raw numbers of the patents that we
6 issued in class 705 for '00, we issued 899, and the
7 patents that we issued last year in FY '01 basically were
8 cut in half to 433. So I hope that provides some basis
 later for discussions following up.

1 MR. LOVE: I think we realize that we have a
2 duty to protect the public interest, and patent examiners
3 have always, their job is to protect what should be
4 protected and then not to protect that which is in the
5 public domain.

6 And when we talk about partners we don't limit
7 it to people that have filed patent applications. We
8 have members of the press, we have members of academia
9 come to us and participate.

10 MR. WEINSTEIN: Would you be happy if the FDA
11 treated people seeking new drug applications as
12 customers?

13 MR. LOVE: That would be a definition of a
14 customer certainly.

15 MS. GREENE: Bob?

16 MR. TAYLOR: I have just a comment really on a
17 couple of the points that Mr. Aharonian made. I think
18 it's certainly contrary to my experience that companies
19 start litigation on patents where the lawyers that are
20 representing them haven't done a substantial amount of
21 due diligence, because you can spend a very large amount
22 of money as the plaintiff in a patent case. And to get
23 to the end of a patent case and have a court say that
24 that patent is invalid, particularly because of prior art
25 that surfaced that you could have found, is not something

1 that any of my clients would tolerate for very long.
2 They're very insistent that we know, as best we can
3 determine before we start those lawsuits, that we're
4 going to prevail at the end of the day.

5 I also had a question perhaps of Mr. Love,
6 because I think Mr. Aharonian makes a fairly good point
7 that when you analyze the software patents the Patent
8 Office doesn't seem to be using the non-patent database
9 information as much as it might.

10 When the Commission on Patent Law Reform sat
11 ten years ago now, one of the suggestions that was made
12 to the Commission over and over again by people in the
13 business was that the Patent Office really does need to
14 create its own database for the very reason that
15 Mr. Aharonian mentioned -- that the technology develops
16 so rapidly that you really are not going to find in the
17 patent database the real prior art -- and I'd just be
18 interested in a comment as to where that's going.

19 (Tape Three, Side B)

20 MR. LOVE: -- we are relying on commercial
21 databases. And as I said, we have over 900 that are
22 available to the examiners. They have a terminal on
23 their desk that they can access these databases and
24 they're encouraged to use it.

25 I think we perhaps have a ways to go, but at

1 least the numbers show that we're going in the right
2 direction, and in fact, in the business methods area it's
3 a mandatory search right now. I would like to be able to
4 say that 100 percent of the cases that issue in 705 will
5 have at least some NPL literature cited, but I won't
6 promise perfection.

7 MS. GREENE: Carl.

8 PROFESSOR SHAPIRO: Yes, I have a couple
9 questions for Mr. Love as well from the perspective of
10 somebody who's trying to listen to all this and sort out,
11 you know, are there really a lot of bad patents out there
12 or not and what should we do about it.

13 First, the idea of imposing search requirements
14 on applicants, I'm wondering if PTO had a view on that.
15 It seems like a good idea to me, I guess.

16 And the second thing, you gave some data
17 indicating, if I saw that last slide correctly, in
18 class 705, whatever that is, less than half the number of
19 patents have been issued in '01 than '00. Do I take from
20 that that you're saying that the PTO has significantly
21 improved the quality and there were probably a good
22 number of low quality patents issued but you hope you've
23 gotten over that problem?

24 MR. LOVE: Getting to your first question,
25 there's been discussion about mandatory prior art

1 searches or IDS's [Information Disclosure Statements]
2 being submitted. I mean, it's still nothing that we're
3 advocating at the current time. Certainly Rule 56 is
4 there. One of the methods that we encourage of complying
5 with that is submitting a prior art statement or an
6 information disclosure statement, so that's one way of
7 complying with your duty of disclosure.

8 With respect to the numbers, I guess they speak
9 for themselves. We understood that there were concerns
10 about the quality of the patents that were being issued
11 in the late '90's; and with the increase in the awareness
12 of business methods as a viable form of patent protection
13 as a result of the State Street decision, we felt it was
14 important to take these initiatives. And certainly I
15 guess the squeaky wheel gets the oil and the squeak goes
16 away. So the fact that there are fewer patents in '01
17 than were issued in '00, I think is an indication that
18 we're at least searching harder for prior art in these
19 cases and we hope that we're getting the claims narrowed
20 to the point of where they should be to protect the real
21 invention and the contribution to the art.

22 MS. GREENE: John.

23 MR. PLACE: First I've got to make a
24 disclaimer. I'm not a patent attorney, I'm way not smart
25 enough for that, but the perspective that I can bring to

1 the discussion is as one who has had to manage through
2 this patent environment for a company, and I have some
3 experience as to how the patent environment influences a
4 company's behavior and influences how it allocates its
5 resources. Just to comment on a few things that have
6 been mentioned here.

7 It could be, if I recall the slide on the
8 patents allowed in '00 versus '01, it seemed like the
9 percentage allowed had gone down, but if you extrapolate
10 those numbers it seems like the number of applications is
11 much more in '01 as well. Is that correct?

12 MR. LOVE: Well, the number of examiners also
13 has increased significantly from '00 to '01, and then the
14 filings tripled from '98 to '99.

15 MR. PLACE: Okay. But the filings were, it
16 seems like they were significantly less from '01 to '00.
17 Is that if you extrapolate those numbers?

18 MR. LOVE: That were issued. Yeah.

19 MR. PLACE: Oh, okay.

20 MR. LOVE: Yeah, these were the issued patents,
21 but the filings have gone up.

22 MR. PLACE: I'm just looking at the allowance
23 rate.

24 MR. LOVE: Right, yeah.

25 MR. PLACE: And if you take the allowance rate

1 -- I'm just wondering if my premise is correct, because
2 if that's the case, if there are significantly fewer
3 number of patents applied for in '01 and that's the main
4 impact on the raw number allowed -- it could be because a
5 lot of the so-called business method patents have been
6 filed by Internet startups and other companies that were
7 in a much different financial position in '01 than they
8 were in '00 and their financial backers, either venture
9 capitalists, et cetera, they didn't want their companies
10 spending their resources on patent applications.

11 MALE VOICE: It takes longer than a year to
12 process a patent. It's not an automatic cycle.

13 MR. PLACE: All right, fair enough. Just a
14 thought.

15 With respect to who does the searching on prior
16 art, what has been my experience -- and I don't know what
17 the right answer to that is because, again, I'm not a
18 member of the patent bar -- but how it impacts companies
19 is you get a patent claim and all of a sudden you have to
20 marshall all kinds of resources, and the most precious
21 resource of a small company or a medium-sized company is
22 not necessarily cash, it's engineering resources.

23 Engineering resources are far more precious in
24 many cases than cash, and you'd have to divert a
25 significant amount of engineering resources, especially

1 in the Internet space, to go out, marshall all their
2 contacts, spend a lot of time digging up all the prior
3 art that they can. And so there's a shift, the burden
4 and the cost of finding the prior art is shifted to the
5 potential defendant. Again, don't know whether there's a
6 better system, but that's been my experience how it works
7 now. And the soft costs, i.e., the engineering resources
8 that are diverted from actually being productive and
9 actually building products and actually making a business
10 run, they're diverted now to defending a patent claim.

11 There's another diversion of engineering
12 resources that we can talk about when we get into the
13 business aspects. Again, I'm not a patent attorney but I
14 have worked with many, both in-house such as
15 Mr. Chaikovsky from this morning and with a multitude of
16 outside patent counsels, and so I've taken the liberty of
17 canvassing some of them and asking them what certain
18 problems might be and what certain solutions might be.
19 And with respect to the qualification of the examiners,
20 one idea that was presented is, if I understand it -- and
again, correct me if I'm wrong, iual1h-1(20) T.rh42r7(-2pecuea t

1 you talk about business method patents that can be a
2 fuzzy line -- but to really understand the prior art in
3 the Internet space and the business method patent, you
4 sort of have to be of that space, and in many cases
5 having a business background is very helpful. So one
6 idea that has been mentioned by a couple of my contacts
7 in the patent bar is, well gee, maybe we don't require
8 everyone to have an engineering degree. Maybe we allow
9 people from other backgrounds, other business
10 backgrounds, maybe finance degrees.

11 And then you could say, "Well, why don't we get
12 people who both have a finance background and an
13 engineering background?" But if you look at that,
14 someone who's got an EE and an MBA is going to be an
15 incredibly valuable commodity and because of the
16 opportunity cost of working for the Patent Office it is
17 probably not going to get a large number of people.

18 MS. GREENE: Okay, you've raised a really
19 interesting way of thinking in terms of where are we
20 placing the burden. Where does the burden lie? Who's
21 capable of handling it better? How much cost does it
22 impose? As the session wears on we're going to see that
23 part of the allocation of burden question up front may be
24 connected to what are the costs and benefits down the
25 line. Because obviously the patent application process

1 is -- we're just starting at the beginning. And then
2 we're going to look at the way that it's used and the
3 litigation that often results. So these are our three
4 last comments for this session and then we will switch to
5 some more presentations. Greg?

6 MR. AHARONIAN: I have a comment to Robert and
7 then a question for John.

8 I actually want to take back what I said. I

1 over the years that the good law firms and the good
2 lawyers really haven't done more to crack down on their
3 bad brethren. I mean, there are some firms out there
4 that working with their clients are just bad and, you
5 know, should be kind of stomped out.

6 MALE VOICE: Bad people.

7 MR. AHARONIAN: Now, as I said, I've done
8 invalidity studies on close to 500 software, Internet and
9 business method patents in the last 5 or 6 years, pretty
10 much working with all the firms here at one point or
11 another and many others. I have no problem, because in
12 many cases it's my money on the line, if someone asks me
13 to do a search and in the end I really don't find
14 anything of any thrilling value. I probably won't end up
15 charging on that particular search. But when people call
16 me up to do a search, lately they've been calling me up
17 with batches of five patents to bust. I don't know why
18 but it just seems they come in clumps in five. I think
19 it has something to do with IBM. IBM for many years
20 liked to throw five patents at people, and I think other
21 people are picking up on that.

22 And when I get ready to do the searching and
23 start planning to allocate time and anticipate income, I
24 figure I'm going to collect on four out of the five
25 patents. That is, I'm going to find some really good

1 that the patent system have an independent outside
2 assessment of the patent examination process.

3 MS. GREENE: Okay. And now I want to switch to
4 someone else. Les?

5 MR. WEINSTEIN: I want to ask Mr. Love another
6 question. I have some question about your statistics.
7 When I take a patent prosecutor out and buy him a
8 martini, they tell me that it's almost malpractice not to
9 get a patent issued. And what they tell me is that when
10 you take out the mom-and-pops and the nonestablishment
11 applications and subtract from that the odious practice
12 of filing continuation after continuation, which you take
13 credit for, that the actual issue rate at the corporate
14 level approaches 90 percent. And I've seen studies to
15 that effect. Is there merit to that?

16 MR. LOVE: I'd have to see the data you're
17 referring to. Believe me, we're not happy with
18 continuations either, because they do add to the
19 workload.

20 MR. WEINSTEIN: But you have not looked at any
21 data to determine what the issue rate is for the Fortune
22 500 or Fortune 100?

23 MR. LOVE: Our statistics don't take into
24 account the characterization of the applicant, if that's
25 what you're asking.

1 MR. WEINSTEIN: Take a look at Mr. Quillen's
2 study which is part of this record. You'll see that his
3 statistics, which are pretty good, looks like it's
4 90 percent issuance rate.

5 MS. GREENE: Okay. I see that we have
6 two more folks teed up to speak, Bob and Luis. Let me
7 just throw out on the table the question of, and you can
8 address whatever you want, but we've got this idea of
9 what obligation could or should be imposed in terms of
10 search?

11 MR. AHARONIAN: Actually --

12 MS. GREENE: If you did -- one second. If you
13 did have some sort of search requirement, what would be
14 limiting principles for that, and how would that be
15 converted into practice? Because I think that the
16 translation mechanisms of the aspirational goal of what
17 we want to achieve in terms of how do we actually get it
18 out of any institution is interesting and I'm curious to
19 hear what you all have experienced and what you think it
20 should be.

21 Is this going to be fast?

22 MR. AHARONIAN: Yeah. Mine was a question to
23 John, does he think we should have an independent outside
24 review of their quality?

25 MR. LOVE: Well, I think you ought to ask

1 Mr. Rogan about that, how he feels about it.

2 MS. GREENE: Okay.

3 MR. LOVE: We administer the laws as Congress
4 sees fit.

5 MS. GREENE: Bob?

6 MR. TAYLOR: I'll address the question you put
7 on the table and save for a later time the point I was
8 going to make.

9 MS. GREENE: Okay.

10 MR. TAYLOR: It seems to me that the biggest
11 difficulty with imposing a search requirement on anyone
12 who comes to the Patent Office, there are two aspects of
13 it and they're both problematic. One, the vast bulk of
14 patents that get issued really never have any economic
15 significance. And so if you add to the cost of getting a
16 patent several dozen hours or numbers of hours of
17 engineer time, you really just impose a burden which
18 really is just an additional cost of getting a patent on
19 a company. That's the first point.

20 MS. GREENE: Okay.

21 MR. TAYLOR: The second point, and I think it's
22 perhaps the most difficult one, is the task of policing.
23 How do you know whether someone has lived up to their
24 responsibilities? Right now the state of the law is that
25 if an inventor or the lawyer who represents the inventor

1 in the Patent Office can be shown to have known about a
2 piece of prior art and if, with an intent to deceive the
3 Patent Office, they failed to call that to the attention
4 of the Patent Office, then that's regarded as a violation
5 of Rule 56, inequitable conduct, and the patent is
6 unenforceable.

7 There's a specific intent requirement. And we
8 get into the things that keep trial lawyers in business
9 -- which is trying to determine from the fact of
10 nondisclosure whether the surrounding facts are such from
11 which you can infer specific intent. You rarely get hard
12 evidence of specific intent.

13 Now, just translate that problem as it now
14 exists with proving inequitable conduct into an arena
15 where you're now saying to the engineer your job is to go
16 search. You have to go, as Greg put it, to Stanford
17 University, and not stop at the McDonald's on the way and
18 spend half of your five hours having a coke and a
19 hamburger. I think it's an impossible standard to try to
20 articulate and administer as part of the system.

21 MS. GREENE: Okay. And I'll just throw out and
22 we'll take it up in our next session: What are the
23 implications of what you've just said in terms of what
24 presumptions should be attaching to the patents? And as
25 a practical matter, what are the implications of these

1 burdens in terms of the cost to search up front or what
2 issues or what comes out at the back end?

3 Luis?

4 MR. MEJIA: Yes, I'll make my comments very
5 quick. First of all, costs are extremely important to
6 universities. We generally operate our licensing
7 operations much like an individual business unit within
8 the university. We have to be able to justify our patent
9 expenses by the income we generate from licensing. So,
10 consequently, we have a different perspective on what we
11 choose to file patent applications on.

12 The difficulty in what we do is that the
13 inventions that we deal with are very early stage.
14 Oftentimes they're ten, sometimes twenty years, ahead of
15 their time before they're possibly commercializable, so
16 costs are very important to us. Some of the current
17 changes in the Patent Office, I think, have led to more
18 complicated and costly prosecution. One thing that I've
19 noticed recently is an increase in the number of
20 restriction requirements that we're getting. It's not
21 uncommon now to see a restriction requirement with four
22 or five different groups, so we're faced with having to
23 do the possibility of four or five different patent
24 applications to try to get claims allowed. So anything
25 that goes to increasing the burden on universities with

1 regard to the patent prosecution process, I think will
2 not be a welcome thing.

3 I'll address the issue of searching also

1 start with Bob Taylor.

2 MR. TAYLOR: I've got a PowerPoint presentation
3 in my computer set up. Let me start off by saying that
4 in preparing for this presentation today I thought very
5 hard about how one distills remarks on a topic that could
6 take ten hours into ten minutes, or perhaps even more
7 than ten hours. So what I've really done is to try to
8 hit some high points, and I'm going to move very rapidly
9 through them and then hopefully the questions can flesh
10 out some of the points.

11 And like Les, I have to make the same
12 disclaimer that no one should conclude from any of my
13 remarks that they're on behalf of either my firm or any
14 of my clients.

15 Fundamental principles, it seems to me, are an
16 important starting point for the work of these agencies
17 as they think about some of the many complex issues that
18 are on the table as a result of Chairman Muris's
19 challenge in his November talk on this subject. The
20 fundamental principle -- and it goes directly to
21 something that Les said although I reach a different
22 conclusion from it -- the fundamental principle is that
23 reward is essential to attract capital and to attract
24 people that are willing to undertake risk. And the
25 patent system is for many industries, particularly those

1 with high front-end costs where their products are easily
2 copied and attracting free riders, the patent system is
3 an absolutely essential requirement for those companies
4 to be in business at all.

5 I represent a small medical products company,
6 and their objective is to make the best surgical products
7 that are available to surgeons. They take 22 percent of
8 their revenue stream and plow it back into R&D. And they
9 live and they die by their patent portfolio, it's the
10 crown jewels of the company, and there are just literally
11 dozens of companies in the California economy and
12 nationwide that are in that same circumstance.

13 The second point. Patents and copyrights over
14 a long period of time have offered a proven method for
15 measuring the reward for an innovation with the value
16 that it brings. The vast majority of patents never get
17 asserted, they never have any economic value. They have
18 economic value, remember, only if there is some economic
19 advantage of saying to someone you cannot use this
20 invention. It is only a tiny portion of patents for
21 which that turns out to be true.

22 Third bullet point. Much of the concern that
23 we're hearing expressed about patents today, I think
24 derives from a couple of industries, the drug industry
25 being one where you see for a given product or a given

1 drug a very high level of profitability. One of the
2 things it's important to harken back to, however, is the
3 risk equation. High profitability for success often
4 reflects high failure rates for people that tried and
5 didn't succeed.

6 One of the wonderful examples from 50 or 60
7 years ago was the wildcatter looking for oil. The
8 wildcatter drills 9 or 10 wells that are dry before the
9 company hits one that produces any real oil, and the oil
10 that comes out of the 1 well that's producing has to pay
11 for the costs of drilling those 9 dry holes or nothing
12 happens, there's no economic incentive to do it. The
13 drug industry is the same way; every blind alley costs
14 money, and those do not show up in the profits that are
15 measured by looking only at the cost of producing a given
16 drug.

17 My final point on this fundamental principles
18 slide is that the marriage of capital and entrepreneurial
19 zeal in the California economy and in the nation's
20 economy has been one of our primary engines for growth
21 over the last 20 years. I'm going to talk a little bit
22 about the history of the intellectual property system
23 over a longer period of time in a second, but I want to
24 just focus clearly on how important this marriage of
25 capital and people willing to take risks has been. The

1 primary growth in the American economy has come out of
2 this.

3 Before we start looking at changes that need to
4 be made, I thought it was important to focus the agencies
5 on a little bit of historical perspective on where we've
6 been.

7 Early in the twentieth century, if you look
8 back over the history of the patent system, early in the
9 twentieth century the enactment of the Sherman Act in
10 1890 began to dominate the thinking of courts towards
11 what you could do with a patent. License restrictions
12 became unlawful. As a general principle, any effort by
13 the patent owner to capture value outside the patent was
14 not only unsuccessful but often held to be illegal.

15 There was a case decided in the '30s called
16 Carbice v. American Patents Development Corp. It had to
17 do with a company that was in the carbon dioxide
18 business, the dry ice business, and in order to create a
19 market for their dry ice they came up with a clever
20 two-layer box arrangement that you could stick the ice in
21 the little space between the two boxes, and they got a
22 patent on that. And when they tried to enforce the
23 patent the Supreme Court of the United States said that
24 because your patent is on a box and you're trying to use
25 it to sell carbon dioxide, that's an extension of the

1 patent monopoly.

2 This kind of thinking just took away much of
3 the incentive that companies had to be innovative. This
4 company wasn't in the box business. They were in the dry
5 ice business, and they created that box only to help them
6 sell some dry ice. That was evidence of what throughout
7 that period of time was an intense hostility by the
8 Supreme Court toward all forms of intellectual property.

9 Times change. In the early 1980's, actually in
10 the late 1970's we began to get very concerned in this
11 country about the successes of foreign competition, the
12 Japanese automobile industry, the German automobile
13 industry, the Japanese and Korean electronics industries.
14 Many industries were being afflicted by foreign
15 competitors coming in, and in the early days of that the
16 concern was that their labor costs were low. The steel
17 industry, for example, said, "Well, how can we compete
18 with these foreign competitors from Asia whose labor
19 costs are much lower than ours?" By the end of the
20 1970's, it was Japan and Korea primarily that were coming
21 in with technological superiority, and that turned out to
22 be a wake-up call.

23 In that same period of time we were seeing the
24 rationalization of antitrust to economic principles.
25 Market power became an important criteria before we would

1 find conduct actionable. Per se rules really were
2 narrowed, and the primary principle was the shift from
3 protection of competitors as an objective of antitrust to
4 consumer welfare. All of this was accompanied by an
5 upheaval in the treatment of intellectual property. The
6 first harbingers you see, at least the first that I've
7 been able to find, are the SCM v. Xerox and the Dawson v.
8 Rohm & Haas cases.

In SCM v. Xerox

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1 welfare. Everyone agrees, or at least most everyone
2 agrees, that intellectual property and antitrust seek the
3 same objective in that both seek to enhance consumer
4 welfare, but the enhancement in intellectual property
5 comes in a different time frame.

1 extent ought antitrust policy allow the patent owner to
2 share that monopoly profits in order to diminish the
3 incentives of other potential competitors that might
4 produce competing technologies? That's the question that
5 didn't get addressed in the GE case, has never really
6 been carefully addressed by any court that I've ever
7 seen, and yet it is an implicit question that underlies
8 antitrust analysis in many of these cases.

9 All right, I quit.

1 to the fact that Congress couldn't create this kind of a
2 right. The best explication of the reconciliation of the

1 was the one submitted by the Solicitor General's Office
2 in consultation with both the Patent Office and the
3 Department of Justice.

4 So that's my final slide and I've used up all
5 of my time.

6 MS. GREENE: Okay.

7 MR. TAYLOR: And then some.

8 MR. WEINSTEIN: -- in your reference to Kodak.
9 Kodak got about, by my account, 400 patents on
10 essentially the same technology. Polaroid fenced Kodak
11 out forever. There never was competition in instant
12 photography. Polaroid got lazy, didn't see the digital
13 revolution coming and went bankrupt. And this is a good
14 example of how piling patent on patent on patent deprives
15 the public of ever getting the reward that they're
16 supposed to get under the constitutional provision.

17 MS. GREENE: Okay. And why don't we take a
18 break now for ten minutes and then when we get back we're
19 going to start off with Professor Teece and then turn to
20 Carl Shapiro, and we will address the questions of what
21 are the implications of those patent layerings. Thanks.

22 **(Whereupon, a brief recess was taken.)**

23 MS. GREENE: Do you have your PowerPoint?

24 Okay. Thank you for joining us again.

25 PROFESSOR TEECE: Perhaps I can begin by trying

1 to open up the concept of the patent thicket. I think
2 we've heard today and on a number of previous occasions
3 that there may be antitrust issues when so-called patent
4 thickets exist. The suggestion is that when there's a
5 lot of patents they may not only just get in the way of
6 competition, but they may in fact get in the way of
7 innovation itself.

8 It seems to me that these discussions are
9 fairly superficial and that the right question to ask is
10 not whether or not there's a patent thicket, but whether
11 or not the patent thicket, if there is one, is
12 undergirded by a technology thicket or not. Because it's
13 one thing to have a patent thicket without technology,
14 but it's quite another to have a patent thicket with
15 technology. Needless to say, I'm not troubled by the
16 latter but one could be troubled by the former.

17 But I'm amazed that when discussions about
18 patent thickets take place and people complain about all
19 of these patents, there's never much of a discussion
20 about whether or not there's any technology; and if there
21 isn't any technology then why isn't it easy to work
22 around?

23 A related concept that I think is necessary to
24 understand the patent issue in the antitrust context is
25 the difference between patents that are complements

1 versus those that are substitutes. Many patent thickets
2 involve a complex mixture of both. And, in fact, one
3 with a large portfolio will probably never know what's
4 really a substitute and what's really a complement, and
5 perhaps it's not important to know. But, as a matter of
6 theory, if one is cross-licensing it's almost impossible
7 in my mind to find a way where you would ever be troubled
8 by complementary patents being licensed in some type of
9 cross-licensing arrangement.

10 There may be issues that arise if what is being
11 cross-licensed is substitutes rather than complements;
12 although just figuring out what a substitute is, as I
13 said before, may be quite difficult. But even where
14 substitutes are being cross-licensed it could be, for
15 instance, that by combining substitutes you in fact
16 create a new technology which is better than either. But
17 the general sense here, of course, is that maybe it's
18 better for companies not to cross-license their
19 substitutes but to pursue them independently because that
20 way you'll get more competition in the market. I mean, I
21 think that is a hypothesis that's worth exploring on a
22 case-by-case basis, but as a general matter, licensing
23 and cross-licensing really ought not raise antitrust
24 issues.

25 I believe that the question of royalty

1 stacking, which is a related question that frequently
2 comes up, is perhaps of the same ilk. Here we're talking
3 about a circumstance, and it relates to the patent
4 thicket idea, where there are multiple bits of
5 intellectual property that are needed to bring a product
6 to market. And of course if every owner of every bit
7 wants a five-percent royalty, you can't make it if
8 there's fifty patents. And indeed, in a fairly simple
9 product like a personal computer, I think someone
10 mentioned yesterday there are literally hundreds, if not
11 thousands, of patents. So the royalty stacking problem
12 arises, in theory at least, if you have a variety of
13 parties who are each asking for their piece of the action
14 in the way of a royalty, and the stacking of one royalty
15 claim on top of another overburdens the technology and
16 the technology fails. That's the concern.

17 Question: Is this an antitrust problem? Well,
18 I think it's important to ask what is the generic problem
19 underlying this and is it unique to intellectual
20 property, and I think the answer is no. You see exactly
21 the same problem in many other contexts. For instance,
22 if I'm a real estate developer and I want to develop a
23 block of city property, the guy with the holdout lot may
24 screw up my opportunity to develop the entire block, but
25 in such circumstances one typically doesn't go to the

1 Federal Trade Commission nor the Department of Justice
2 and seek relief.

3 Is it different with respect to intellectual
4 property? If someone's holding out on a patent that's
5 important for development, should the agencies and should
6 the antitrust laws be involved? I think it's a bit more
7 complicated than the urban development example I gave
8 you, but the principles are similar. If there are
9 alternative technologies, then clearly there is no issue.

10 And, in general, these things tend to get
11 worked through so long as you've got rational actors who
12 are aware of the fact that there are other parties
13 claiming value from their intellectual property. So the
14 concerns only really arise if you have negotiation that
15 is for some reason socially inefficient, but if people
16 are rational and are aware of the other bits of
17 intellectual property around, these problems should get
18 solved. So there may be transactions cost issues here,
19 but it's hard for me to see that there is a competition
20 policy problem.

21 Let me use that as a basis to circle back to
22 this whole question of patent breadth. We've heard, I
23 think for the last three days about the saga of the
24 patent that's supposedly too broad, and the Patent Office
25 takes it on the chin for supposedly granting patents that

1 are too broad. I think we must recognize that there may
2 be patents that are too narrow as well, but the people
3 that don't get granted patents that are broad enough
4 don't come forward and complain. So the political
5 economy of this process is one where people that have to
6 pay to people that have patents that are too broad
7 typically show up, and those that get patents that are
8 too narrow you typically don't hear from.

9 But clearly the sweet spot here is to align the
10 scope of the patent with the scope of the invention. And
11 what of course we all seek and I trust what the Patent
12 Office tries to do is to conceptually end up there on the
13 45-degree line, but if you listen to some people, they
14 don't want patents to be issued on that 45-degree line as
15 clearly as someplace lower than that.

16 Well, how should the Patent Office deal with
17 this or how should the antitrust authorities deal with
18 it? Well, it seems to me that if there's an antitrust
19 issue here at all, and I'm not sure there is, it's purely
20 a policy one, it's certainly not an enforcement one.

21 We don't want the antitrust authorities running
22 around playing cleanup behind the Patent Office. If
23 there is an issue, and I'm not sure there is, it seems to
24 me that discussions need to take place between the
25 enforcement agencies and the Patent Office to clear it

1 up. But I think if the Federal Trade Commission or the
2 Department of Justice jumps in directly, it simply
3 creates additional uncertainty and, in fact, perhaps
4 leads to a reduction in economic efficiency rather than
5 an improvement.

6 The other point that I think needs to be made,
7 and I think Mr. Love did an excellent job of this, is
8 that there are mechanisms for combating the overly broad
9 patent. When people speak about patents being overly

1 But it seems to me that a defensive patent once
2 again is something that's in the eye of the beholder. If
3 a patent has to be used, then there's got to be some
4 technology that's underlying it, so a defensive patent
5 must have something underlying it, otherwise it's not
6 something that would ever get in the way.

7 So my point here is that, as with the concept
8 of the patent thicket, the whole concept of defensive
9 patenting has to be blown open as well to see whether or
10 not there is anything that's deeply troubling with
11 respect to the behavior that I just described. I think
12 at the end of the day what one will discover is that, yes
13 indeed, there are some inefficiencies in the market for
14 know-how, that it takes a while for industries and for
15 the players in an industry to figure out cross-licensing
16 and other arrangements that will move the technology
17 forward.

18 But as Hal Varian described in the first day of
19 these hearings, with the sewing machine industry in the
20 early days there were patent disputes, in the automobile
21 industry there were patent disputes in the early days,
22 with respect to radio there were patent disputes, but
23 some way or another, and there's a different story in
24 each case, these things got sorted out.

25 And that one should indeed be concerned that

1 technology could be delayed, but the reality is that if
2 there is reasonable clarity around intellectual property
3 rights, people will negotiate through to solutions.
4 That's not to say that some litigation won't be involved
5 along the way, but all of this is to say that there may
6 be some policy issues here, and undoubtedly there are
7 some, that the Patent Office and the competitive
8 authorities can work on together, but in terms of finding
9 enforcement opportunities whereby the antitrust agencies
10 need to go out and use the antitrust laws to fix patent
11 problems, I think that's going to be a very, very rare
12 circumstance.

13 MS. GREENE: Professor Shapiro.

14 PROFESSOR SHAPIRO: Thank you. Well, I come to
15 the discussion as somebody who's spent a lot of time
16 doing research and getting involved in some cases
17 involving antitrust, many of which have important
18 intellectual property rights associated with them. I
19 would commend or encourage you to look at my website and
20 a paper I've written about patent thickets and also on
 patent settlements.

1 patents, the defensive patenting particularly in selected
2 industries such as we've heard and indeed some of the
3 industries that have been represented at these hearings.
4 So patent thicket is one.

5 The second is the fact that in more and more
6 antitrust cases the agencies, in order to evaluate the
7 competitive effects of what is before them, whether it's
8 a merger or a license, need to or feel they need to
9 assess the quality or strength of the patents that are
10 involved in the case, and that can be a headache for the
11 agencies and I want to talk about how they can operate in
12 that situation. So let's call the second one the
13 importance of patent strength in evaluating antitrust
14 specific matters.

15 And then a third area would be the increasing
16 number of weak patents that have been issued. And
17 actually the fact that you can have a patent thicket does
18 not mean there are a lot of weak patents. I think this
19 is what David Teece said, there may be a patent thicket
20 because there are a lot of good technology, so let's
21 break out the third point. If we believe there are a lot
22 of weak patents, that raises a whole set of separate
23 questions.

24 And when I say patent strength or weakness, I
25 would tend to define that as, if you have a patent, the

1 probability that if it gets litigated it will actually be
2 proved to be valid and infringed, that would be its
3 strength. So it's not a technical measure, it's
4 something of how strong it is in the context in which the
5 patent is being applied or considered or asserted.

6 And certainly we've heard that there's a lot of
7 concern about there being weak patents. Again, this is
8 nothing new historically whether we get into the sewing
9 machine or the radio or the airplane, but it seems to me
10 it's not a matter of indifference to the antitrust
11 agencies if there are many weak patents being issued.

12 I would certainly be in the group that would
13 encourage the FTC and DOJ to be part of a process working
14 with the PTO to improve the quality of patents, and we've
15 had that conversation today. I think we have to take it
16 as given that there are probably a lot of low quality
17 patents out there. Even if the PTO has improved its act,
18 which it sounds like they're at least indicating they
19 believe they have, there's a whole body of lower quality
20 patents that still are out there that would be enforced
21 for some time.

22 Okay. So the three areas. First the patent
23 thicket. I would pose the question as, how should
24 antitrust enforcement policy account for the presence of
25 large numbers of patents, including potentially blocking

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1 I would, in contrast, take issue with the FTC's
2 analysis in the Intel case where they did not count as a
3 competitive benefit the lower cost that Intel achieved
4 through its so-called IP-for-IP strategy, where Intel
5 hoped by trading IP they could have lower costs than
6 having to basically pay royalties on their core products.
7 However, I think these days we're in pretty good shape in
8 the U.S. and I doubt the current FTC would bring the
9 Intel case. But I might flag that the European
10 Commission is not necessarily quite in the same camp, and
11 I'm somewhat concerned actually about their taking a more
12 rigid view of various restrictions such as field abuse
13 and geographic restrictions associated with patents. But
14 I think the patent thicket is primarily a problem for the
15 quality of patents, and the agencies are doing a pretty
16 good job understanding what businesses have to do in the
17 context of the thicket.

18 Secondly, how can the DOJ and FTC enforce the
19 antitrust laws without also coming to highly technical
20 judgments about the strength of various patents that are
21 central to more and more antitrust matters?

22 Here I would say let me give an example. So
23 when Gemstar and *TV Guide* sought to merge about a year

1 lawsuit *TV Guide* was competing. After the two agreed to
2 merge, Gemstar basically went in and said to the DOJ,
3 "Look we have these patents. To the extent *TV Guide's*
4 competing, it is illegitimate competition because they're
5 simply infringing our patents. And, therefore, a merger
6 that eliminates illegitimate competition should be fine.
7 You shouldn't be in the business of preserving such
8 infringement activity, so let us merge and get on with
9 it." Now, of course the agency, particularly since there
10 was a whole slug of Gemstar patents, they didn't want to
11 have to evaluate the quality of each of these and the
12 probability they would win and so forth.

13 I would suggest an approach where much as the
14 agency would take in a case where there was a merger and
15 the acquired firm came in and said, "We're about to leave
16 the market, we're about to exit because, you know, our
17 products, we can't keep up." The agency would look and
18 say, "Well, by all indications out there on the market,
19 you're competing effectively. We have no reason to think
20 that that will change overnight, and so we're inclined to
21 look at what you do rather than what you say in terms of
22 predicting future competitive effects and we're not going
23 to simply take as given that you now say you're about to

that."

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1 such arrangements if the patent is seen to be weak.

2 Now, in this respect again a number of lawyers
3 I talked to say, "Well, the patent is presumed to be
4 valid and it's a right to exclude and the patent holder
5 should be given a lot of deference here to enter into
6 arrangements even if they eliminate competitors, because
7 after all that's what the patent is supposed to be for."

8 And my answer to that, and maybe this will be a
9 pithy end to my short remarks here, would be, well, you
10 keep hearing I guess the standard thing for IP lawyers is
11 the patent is a right to exclude. Well, I'm going to be
12 maybe controversial and say I disagree with that. I
13 think the patent is not a right to exclude; the patent is
14 a right to try to exclude.

15 If I have a patent, unless I can get a
16 preliminary injunction, I can't get you to stop
17 infringing what I claim is infringing. I can go to court
18 and try. Now if the patent is very weak I may fail.

19 So all patents should not be treated as though
20 they were an absolute exclusionary right. Some are
21 stronger or weaker than others. And the presumption of
22 validity should not mean that the patent is treated as an
23 absolute right to exclude, and of course there's no
24 presumption of infringement to begin with anyhow.

25 So I would encourage us all to think about the

1 patent not as some absolute right to exclude, but more of
2 a probabilistic right. It may be a right to exclude or
3 it may not be, and of course that will depend on how
4 strong it is. Thank you.

5 MS. GREENE: Thank you very much. And just as
6 a little point here -- many of the earlier schedules that
7 came out said we're ending at 4:30, but we'll be
8 continuing till 5:00 o'clock. Obviously, that's barely
9 enough time to fit in everybody's comments, but we'll at
10 least give it a try. And next I think we'll hear from
11 Commissioner Leary.

12 COMMISSIONER LEARY: Thanks very much. I
13 appreciate the opportunity to make a couple of highly
14 individual comments here.

15 I've been interested in this interface between
16 patent and antitrust law for as long as I've been on the
17 Commission because I see them as essentially the flip
18 side of the same issue, and the issue is how we weigh
19 present effects versus future effects.

20 Bob, with respect, I disagree with your comment
21 about the differing time lines between competition law
22 and patent law. The incipency component of antitrust is
23 forward looking, just like the patent laws are, and the
24 only difference is that they're sort of upside-down. In
25 the antitrust laws when you're looking at whether or not

1 there is some kind of an incipient antitrust violation,
2 you're looking at some present conduct that may be benign
3 or even pro-consumer in a static sense, that may have
4 long-term anti-competitive effects. And to be simplistic
5 about it and without expressing any views on the merits,
6 that's kind of what the Microsoft case is all about.

7 The patent law is upside-down. In the patent
8 regime what you're doing is you're saying we are willing
9 to tolerate certain present anti-competitive,
10 anti-consumer effects in the expectation that in the long
11 run it will lead to pro-consumer benefits, innovation and
12 so on, not only with these particular products but across
13 the entire economy.

14 So in a sense they are both incipency regimes
15 and they both involve a certain degree of wishful
16 thinking, or in the other case pessimistic thinking, and
17 I think the problem I have is that we don't really know a
18 great deal about how to weigh those trade-offs. Anybody
19 would say you have to discount future effects very
20 heavily when you're weighing them against present effects
21 because of the time value of money and the increased
22 uncertainty as you go out ahead, but beyond saying that,
23 I'm not sure I know how to do it, at least for my piece
24 of this puzzle.

25 And it seems to me that what we're talking

1 about here, a couple years ago you may remember a
2 responsible economist would say that the high-technology
3 sector is different, we shouldn't have any competition
4 rules in the high-tech sector, it's so fast moving and so
5 on and so forth, the antitrust laws have no application.
6 You don't hear that too much anymore. I don't know
7 whether that's psychological as a result of the crash of
8 the .coms or what, but we don't have that feeling of this
9 magic mystical thing that's going to turn the economy
10 upside-down.

11 On the other hand, I don't think that anybody
12 in the enforcement community and I don't think that any
13 of the critics of the current patent system sitting
14 around this table would say that there's no role for the
15 protection of intellectual property, so I don't think
16 that's the issue. I don't think we need to frame it that
17 way. Those are just straw horses on both sides.

18 The issue is what are the appropriate
19 trade-offs and what can we do to improve the trade-offs
20 given the best knowledge we have, recognizing that we can
21 never ever perfect it. To me that's what the value of
22 these hearings are, as an exchange of information and an
23 effort to accumulate some kind of body of knowledge.
24 I've certainly learned a great deal. The key issue for
25 me sitting here is the issue that some of the other

1 people have addressed and that is: what can we do about
2 it?

3 I mean, we in the Federal Trade Commission do
4 not run the world. We don't establish patent policy and
5 we don't establish energy policy and we don't establish a
6 great many other policies in our economy, but we are
7 asked to comment from time to time. We're asked to
8 comment in judicial actions. We file amicus briefs.
9 We're asked to comment about various legislative
10 proposals. And my sense is that thing that was called
11 competition advocacy about 15 years ago, I think you're
12 going to see more of it. I think you're going to see
13 more proactive commentary by the Federal Trade Commission
14 -- and I would assume, maybe, by the Department of
15 Justice as well, I can't speak for them -- in those areas
16 bringing whatever expertise we have to bear on issues of
17 public concern.

18 Just as I don't feel embarrassed to submit a
19 comment in another forum, I would hope that speakers as
20 we go forward in these hearings will not feel remotely
21 embarrassed to tell us specifically what they think we
22 can do within our limited jurisdiction to assist this
23 process. Thanks.

24 MS. GREENE: Comments on the Commissioner's
25 comments? Yes, Bob.

1 MR. TAYLOR: Let me see if I can expand a
2 little bit, Tom, on the point about the time line.

3 MS. GREENE: Which I gave you generously all
4 of, what, 20 seconds to explain?

5 MR. TAYLOR: No, 45 seconds. And it's helpful
6 to go back to some basics and just ask the question, what
7 is a patent and why do we give it?

8 If you accept the idea that the inventor brings
9 to our society something that didn't exist before and
10 that there's nothing improper or anti-competitive or
11 anything else about saying to that inventor, "If you'll
12 tell us what you did and record it here so that others
13 can do it, we'll give you a limited monopoly -- we'll
14 give you a limited exclusive right," I won't use the term
15 "monopoly." So if the only question that the court or an
16 agency is having to deal with is, is there anything
17 improper or anti-competitive about letting that inventor
18 enforce its rights in that particular technology?
19 Because it's new and because that's the bargain that you
20 struck as a government with the inventor. I don't think
21 there's even a competition law issue involved in it.

22 COMMISSIONER LEARY: I agree.

23 MR. TAYLOR: The competition law issues come up
24 when you start examining the real world behavior of
25 companies that own the patents. They don't just

1 the kind of equation that a normal antitrust analysis
2 would fit. That's the reason that I say the time lines
3 are different. I do understand the point, though, about
4 antitrust taking a longer horizon, particularly in the
5 last 15 or 20 years.

6 COMMISSIONER LEARY: I don't have any problem
7 with what you say. It's just that it seems to me, just
8 as in the late '70's and in the '80's, we in the
9 antitrust community came to the conclusion that we were
10 emphasizing long-term downside effects excessively and
11 condemning a lot of arrangements that were benign in the
12 short term out of an excessive fear of long-term effects,
13 in both of these regimes, we always need to be open to
14 the possibility that there is a present imbalance, that's
15 all I'm saying.

1 world markets are now being challenged because they're
2 too dominant in world markets. We are a much stronger
3 country, and if you think that there's any connection
4 between that and the reinvigoration of the patent system,
5 you really do have to take a macro look at this.

6 COMMISSIONER LEARY: Yeah, and that's a very
7 fair comment. We did that in the antitrust world as
8 well, because we looked at what was happening to American
9 industry in the '70s and came to the conclusion that our
10 present antitrust policies may well have been unrealistic
11 in light of what was going on around the world, so that's
12 a fair comment.

13 MS. GREENE: Rick.

14 MR. NYDEGGER: I was asked to come and to
15 comment about the kinds of things that clients that we've
16 worked with over the years take into consideration as
17 they attempt to develop patent portfolios. That's an
18 interesting question in the context of the hearing on
19 antitrust policy as it relates to the interface with
20 intellectual property laws.

21 From my experience, smaller clients tend to
22 look at patents from the standpoint of added value to
23 their business and entry into a marketplace. They're
24 interested in acquiring patents to protect their
25 innovative technologies and ideas and hopefully put them

1 on a somewhat level playing field with larger
2 competitors.

3 On the other end of the scale you have larger
4 clients. We also have some interaction with clients that
5 are fairly significant players in their respective
6 industries, and interestingly enough, I see those clients
7 also using patents in what I think is a pro-competitive
8 way, not an anti-competitive way. Although I will be
9 quick to tell you that if I'd ever sat in a discussion
10 with a client that talked about using patents in an
11 anti-competitive way I certainly wouldn't admit to it in
12 this forum. Larger clients, from our experience, tend to
13 use patents in many respects, I think, to protect, as do
14 smaller clients, their innovative technologies, but also
15 I think to protect themselves with respect to a concept
16 called freedom of design access, continued access to
17 technology. That's an important concept to many of them,
18 particularly the larger ones.

19 Turning to the question of antitrust policy and
20 how that plays into these kinds of considerations, which
21 I think admittedly is a much more difficult topic in some
22 ways. It seems to me that historically antitrust law has
23 played the role of implementing enforcement policy in
24 those circumstances where patents have been abused.

25 Unlawful tying arrangements, for example, which

1 have attempted to improperly extend the scope of the
2 subject matter of the patent to unpatented subject
3 matter, or unlawfully extending the term of the patent
4 beyond the lawful term of the patent, those kinds of
5 arrangements. And I would make the additional point that
6 typically antitrust enforcement policy has been concerned
7 with the large firms, not the small players who are
8 seeking entrance.

9 So I suppose that if there is a question, if we
10 take for just a moment as a given the assumption -- and I
11 don't want to by any means by this comment suggest that I
12 agree with it; in many respects I do not -- but if we
13 take as an assumption that there are large numbers of
14 patents that are being granted that are overly broad in
15 their scope, not high enough quality, I think the real
16 question that that seems to pose then is, does that give
17 rise in some fashion or another to large firms to
18 increase or strengthen their monopolistic positions,
19 assuming that they have them? I think that's a tough
20 question to address, particularly given the fact that
21 much of what goes on today goes on in a context that's
22 much different from when the antitrust laws first
23 developed this enforcement policy.

24 I thought that Professor Greenstein from
25 Northwestern University submitted a paper that was

1 extremely interesting on this point and I want to just
2 make reference to a couple of points that he made by way
3 of closing that will kind of emphasize the comments that
4 I've made here.

5 He made the point, first of all, and I'll
6 quote:

7 "Public policy should
8 distinguish between environments
9 where intellectual property is
10 effective and where it is not. When
11 it is not, policy should be concerned
12 when a dominant firm uses
13 noninnovative tactics to move the
14 focus of competitive behavior away
15 from innovative activity."

16 As a corollary to that he made the comment
17 that:

18 "Recent rethinking reframes the
19 analysis of the central question
20 about large firms. It presumes we
21 live in a world of widely distributed
22 technical knowledge where many small
23 firms have access to some if not all
24 of the technical assets necessary for
25 inventive activity. And, in

1 addition, commercializing those
2 inventions involves use of real
3 assets from both disinterested
4 parties such as venture capitalists
5 and deeply interested parties such as
6 incumbent firms."

7 And then he concludes with these two points in
8 relation to this idea:

9 "This approach directs attention
10 toward two questions. First, if the
11 two parties cooperate, do incumbents
12 have assets that significantly raise
13 the value of the invention in its
14 commercial form?"

15 Then he says as it turns out:

16 "Policy issues arise in markets where
17 incumbent's assets survive, which is
18 to say most innovative markets."

19 And then his second point is this: "Especially
20 crucial," and I'm quoting again:

21 "Especially crucial, if the two
22 parties compete, can entrants
23 effectively exclude the incumbent
24 from imitating their invention? Most
25 markets lie between two extremes,

1 those where entrants can exclude by
2 the incumbent and those where they
3 cannot. To be sure, the
4 effectiveness of intellectual
5 property such as patent law plays a
6 key role in determining which
7 situation arises, and when inventors
8 can exclude imitation, then markets
9 for tradeable technologies arise.
10 The larger point is that inventors
11 tend to act as the source of ideas
12 but they do not tend to overturn
13 commercial leadership."

14 A lot of what's gone on, it seems to me, in the
15 hearings is anecdotal in nature, but there are very large
16 and real questions out there. I think one of the key
17 questions, as I said at the beginning of my comments, is
18 whether if one assumes that there are problems with the
19 scope of patents being granted, does that necessarily
20 suggest an enforcement policy or something else? I
21 thought Professor Teece's point on that was a good point,
22 it was well taken. Perhaps there's a role in terms of
23 encouraging reformation. I think the Patent Office is
24 painfully aware of that.

25 They've undertaken that role last year. Just

1 "Public policy can encourage
2 dominant firms to compete by
3 innovating. It can do this by
4 discouraging powerful incumbents from
5 using non-innovative tactics that
6 discourage innovation at other firms.
7 How far does this principle extend?
8 For example, should public policy
9 selectively intervene to discourage a
10 powerful incumbent from using
11 innovative tactics such as patent
12 suits and patent blocking?"

13 MS. GREENE: Right, Professor Greenstein
14 certainly does raise a lot of very important points in
15 his comments, which I will say as a plug are on our
16 website, ftc.gov, which is where the proceedings from the
17 entire set of hearings over the next several months will
18 be put. There will be transcripts from our hearing today
19 as with all the other hearings. PowerPoints will be put
20 up there as well.

21 And you've really honed in on an interesting
22 point which is sort of delineating these roles, as
23 Professor Teece said, that the antitrust agencies have a

1 MR. NYDEGGER: I think that's the real
2 question.

3 MS. GREENE: Okay, and I'm curious does anybody
4 want to take on either one of those potential roles and
5 give us some advice?

6 MR. WEINSTEIN: Let me try and address in an
7 effort to be constructive what it's like to be on the
8 wrong end of a patent assertion. If you're a small
9 innovative company, really got something good, and you
10 get a letter in the mail that says, "If you don't pay us
11 big bucks, you're going out of business because we're
12 going to sue you."

13 First of all, the deck is stacked dramatically
14 in favor of the patent owner. Most people do not realize
15 this, but section 102 of the patent law says the Patent
16 Office shall issue a patent unless it proves that the
17 patent is unworthy. Imagine a big drug company coming in
18 armed with lawyers and Ph.D.s against some college
19 graduate two years out of chemistry battling with this
20 drug company. So there is this presumption that the
21 Patent Office has the burden of carrying the ball. Now
22 this company gets sued, and what does it find? There's a
23 presumption of validity when you might argue that it
24 could be just the other way around.

25 In addition to that, the Court of Appeals says

1 a presumption of validity is not strong enough. We're
2 going to make clear and convincing the standard to
3 overturn it. We don't like a preponderance of the
4 evidence standard.

5 So this little upstart company with a great new

1 is a strong need for an advocacy role. I do think
2 particularly where there are reckless or knee-jerk
3 assertions of these patents there's room for section 5 of
4 the Federal Trade Commission Act and there is room for
5 other various remedies under the Clayton Act and the
6 Sherman Act when things go beyond the pale when the
7 patents have been purchased in order to aggregate those
8 patents.

9 Let me just say if I can just two more points
10 and then I'll be quiet.

11 No one has addressed either this afternoon or
12 this morning that I heard the subject of whether or not
13 we're giving patents for R&D or investment versus
14 invention. This goes to the fundamental question of the
15 standard of invention. That is the essential question
16 for reform. It's not an antitrust issue, it's an
17 essential question for reform.

18 The other thing is, I'm old enough to remember
19 when the head of the Senate Judiciary Committee, Philip
20 Hart, and the head of the House Judiciary Committee,
21 Emanuel Celler, were there worrying about the public
22 interest. Worrying about it, preserving it, holding
23 hearings. I haven't seen their likes in the Senate and
24 the House on the patent front since they've been gone.

25 I've seen people come in and say, "Well, you

1 know what, you guys in the software industry, if you can
2 agree on a bill we'll pass it. You get together, go out
3 in the hall, and we'll pass it. Or you guys get together
4 and pass a new patent law just so you're all in
5 agreement, we don't want to get in this fight."

6 Well, who was protecting John Q. Public? And
7 that's the role I think that must be played by the
8 enforcement agencies or this will not get corrected.

9 MR. PLACE: I might add that the same dynamic
10 happens in copyright as well.

11 MR. WEINSTEIN: Yes.

12 MS. GREENE: Okay. Actually, Professor
13 Shapiro.

14 PROFESSOR SHAPIRO: I think some of this
15 discussion about the big guys versus the little guys and
16 how threatening it is if you're on the wrong side of the
17 suit actually should highlight exactly where the FTC and
18 the DOJ should not go in taking sides on those sort of
19 disputes. It seems to me that that's always going to be
20 the case. We heard it on biotech earlier, you know,
21 there's people saying you've got all these patents,
22 particularly when large numbers of patents are asserted
23 and they're suspect about the quality.

24 As I understand the law here, it seems to me
25 just right, so long as somebody's asserting their patent

1 they're simply the normal process of people asserting
2 patents, which of course can be exclusionary.

3 MR. WEINSTEIN: Carl, would you get in the
4 middle if you learned that the letter accusing the party
5 of infringing five patents was sent out without an
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1 not the big guys frequently, it's the little guys. In
2 fact, Mr. Nydegger just pointed out that in many cases
3 small firms, new entrants, use their patents to establish
4 that they're qualified players in an industry, and those
5 of you that heard Bronwyn Hall yesterday will remember
6 that she surveyed the semiconductor industry and found
7 that the folks that really especially appreciate patents
8 are the new entrants.

9 So the sort of traditional, old-fashioned view
10 that the incumbent firms have the patents and the poor
11 little new entrant's getting hit on the head and this is
12 retarding competition, while it undoubtedly occurs from
13 time to time, the reality is that doesn't fit anymore
14 from what I'm hearing based on the field research that's
15 been done around here and from what people are giving in
16 the way of general comments.

17 So we have to be very, very careful not to
18 craft policy based on the individual anecdotes. I mean,
19 I've been in many circumstances where the venture
20 capitalist says, well, I'm throwing in an extra million
21 dollars for a patent litigation because I expect it.
22 This is not the end of the world. The odd patent case,
23 there's a hundred of them a year, is not the end of the
24 world. You know, every industry when it emerges there
25 are difficult problems around patents, but we shouldn't

1 throw the baby out with the bath water. We should
2 certainly always work to try and improve policy, but you
3 know, to craft policy based on individual sad cases will
4 surely give us bad policy.

5 MS. GREENE: Greg.

6 MR. AHARONIAN: You know, there's another
7 agency we haven't really mentioned here today, at least
8 in this session, I'm not sure of the others, but that's
9 the Securities and Exchange Commission.

10 None of these lawsuits and activities before
11 the lawsuits happen in a vacuum, especially during the
12 Internet bubble era. Oftentimes we'd see one startup
13 after another, as soon as they got their patent issued,
14 go straight to the press and announce that they got this
15 great patent that's going to let them block out all their
16 competitors that was broad as hell. You would see the
17 stock price rise immediately and significantly, and then
18 over time as everyone started checking it out and
19 realized these guys are bullshitting, the price dropped.

20 In fact, I commented on this in my newsletter
21 and an economist actually checked it out and he figured
22 that you could actually make money by shorting the stock
23 of a startup or a big company that announced a bogus
24 patent the day after they announced it.

25 To me, one of the reasons I'm so insistent on

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1 problem in this society. If people take a while to
2 learn, so be it. But if we run in and try to regulate
3 our way to perfection, we're certainly not going to get
4 perfection.

5 MS. GREENE: John.

6 MR. LOVE: I just want to comment. I've heard
7 a lot of concerns raised about what to me is patent
8 misuse and I certainly understand that there are problems
9 there, but I think that's a different issue than looking
10 at the patent system in general. If there are concerns
11 about patent misuse I think the FTC and Department of
12 Justice, certainly there's a concern there in some policy
13 issues, but I guess I'll reiterate don't throw the baby
14 out with the water. The problem may not be with the
15 patent system. It may be in the use and the practices
16 that people make of it, of the patents themselves.

17 And one other thing. The last 20 years there
18 have been other industries that have gone through
19 similar, I guess, patent awareness and increases in
20 patent activity, and I just want people to keep in mind
21 that the patent system has served industries very well
22 the last 20 years. You know, our economy has certainly
23 flourished and we've been one of the best economies in
24 the world and the envy of many companies. In the
25 sporting goods area, those of you that play golf and

1 tennis, I'm sure you're aware of the number of patents
2 and the increased development of the technologies of
3 those companies, and they seem to be surviving very well.

4 Also, I used to have jurisdiction over the
5 medical and health care industries, and I think people
6 who are familiar with those industries, 20 years ago they
7 were very, very -- I guess, in the patent infancy stage
8 about using and filing for patent applications -- but
9 over the past 20 years the activity in that area has
10 increased drastically, because I know I had to oversee
11 the increase. There used to be about six examiners
12 handled all the applications in the surgical area, now
13 there are over 150.

14 So other technologies have dealt with the
15 problem. They've survived, competition has flourished,
16 and software may have some different characteristics, but
17 I think let's not overreact about the value of the patent
18 system if in fact there are some misuses of the patent
19 itself, which seems to be a different issue.

20 MS. GREENE: Okay. Bob.

21 MR. TAYLOR: I would very much not want to see
22 the agencies getting into the business of trying to
23 police what somebody thinks might be bad or weak patents.
24 First of all, I think you may even be proceeding from an
25 incorrect premise that there are more patents today than

1 there were at other times in history. The size of the
2 American economy is vastly different today than it was 20
3 years ago or 40 years ago, and if you make an assumption
4 that there might be some correlation between the number
5 of patent applications and the gross national product,
6 then you at least ought to examine that question, which
7 I'm not sure anybody has done.

8 Furthermore, on that point, the nature of the
9 American economy. We are increasingly finding our growth
10 in the economy in new technology, and while new
11 technology has been a driving force for this economy for
12 200 years, it is today the primary driving engine, and
13 that will in and of itself lead to a large number of
14 patents.

15 The further point, though, is even if you
16 accept the idea that there are in the patent system a lot
17 of weak patents, and I'm not sure I agree with the way
18 Carl looks on a weak patent. He said he thought that a
19 weak patent was one that might not be enforceable. I
20 think the system itself, by and large, takes care of the
21 unenforceable or the invalid patents. I think there
22 probably are some patents that make very marginal
23 contributions in terms of the advance of human knowledge,
24 and if I were thinking about patents that would support
25 anti-competitive types of arrangements between companies,

1 it would seem to me that that would at least be a
2 relevant inquiry.

3 Indeed, I think that if you contrast the old
4 General Electric case dealing with tungsten filament
5 light bulbs with the U.S. Gypsum case which dealt with a
6 machine that depressed the edge of a wall board, of a
7 piece of wall board so that when they build a house they
8 can put tape in the joint, cover it over with mud and can
9 seal the crack, the way the Supreme Court handled the
10 price fixing arrangements or the price restrictive
11 licensing arrangements in those two cases, you will at
12 least find some historical precedent for treating
13 differently technology that really adds something of
14 great importance to the economy.

15 But for the agencies to get in and try to bring
16 enforcement actions and try to identify those strikes me
17 as an almost impossible task. There's precedent for it.
18 U.S. v. Glaxo, and there's at least another case brought
19 by the Department of Justice back in the '40's and '50's
20 where they challenged restrictive licensing based on the
21 grounds that the patent was invalid and they went after a
22 validity attack on the patent. I thought we had laid
23 those to rest by the time we got to about 1970.

24 MS. GREENE: Right. Unfortunately, our time is
25 starting to come to an end, so just to restate one of our

1 negotiation and there wouldn't be litigation.

2 Even if the agencies can improve things in
3 theory, if you inject another element -- namely, I've got
4 a patent, not only do I have to work through the
5 probability that it's valid and the probability if it's
6 valid that it's infringed, but I've also got to take into
7 account what the agencies will do -- unless there's
8 absolute clarity with respect to the way the agencies are
9 going to act, that's an additional element of uncertainty
10 that can create distance between the parties to the
11 litigation and reduce the likelihood of settlement. So
12 you end up pushing things out of the marketplace and into
13 the courtroom unless whatever you craft is so clear that
14 it doesn't add another element of uncertainty. So that's
15 kind of just raising the bar really on terms of how you
16 get good public policy here.

17 I'm willing to admit that I think that there is
18 some policy improvement that can come through the
19 agencies working together at a policy level. But when
20 you get into the enforcement action, unless the policy
21 guiding the enforcement is crystal clear, you're going to
22 take a step backwards rather than forward because you're
23 going to create additional uncertainty which will lead to
24 more disputes, not less.

25 MS. GREENE: Carl.

1 PROFESSOR SHAPIRO: I think the agencies have
2 of course long realized that there are various licensing
3 arrangements and deals between competitors that can act
4 against the public interest. That's equally true of
5 various settlements. So while I agree with various sort
6 of hands off sentiments that have been expressed, I would
7 leave you with the notion that you should not presume
8 that settlements or other arrangements involving patents
9 that are reached between competitors are in the public
10 interest. There is just no such inference, and that's
11 why it's an entirely legitimate area for the agencies to
12 keep an eye on such settlements, particularly between
13 direct competitors.

14 MS. GREENE: Right. Les.

15 MR. WEINSTEIN: Picking up on this point and
16 also responding to Professor Teece, it's important to
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1 get adjudicated.

2 MS. GREENE: Now, even though it's five, I want
3 to give everybody the opportunity to have a last comment,
4 so we're going to just keep going. Rick.

5 MR. NYDEGGER: Yeah. I think one thing is
6 worth noting here in terms of this whole issue with
7 respect to patent quality. I think that in a sense in
8 fairness to the PTO, if there is a question here, an
9 issue -- and I again, I don't think we ought to
10 necessarily jump to that conclusion too quickly -- a lot
11 of the evidence seems to be anecdotal in nature. But I
12 think it's worth noting that the PTO deserves an
13 opportunity to probably have access to the resources it
14 needs to do its job properly and then to see if that
15 results in improved quality at the outset. It's no
16 secret that over the last five years Congress has
17 diverted a half-billion dollars of user fees paid to the
18 PTO for other purposes that Congress deemed to be more
19 important than patent examination.

20 What's worse, uncertainty and increasing
21 pendency that results from that uncertainty, or trying to
22 decrease that pendency, those both can have implications
23 in terms of potential anti-competitive effects. I
24 personally think that the uncertainty that comes from
25 increasing pendency can perhaps be a larger problem.

1 The PTO has struggled mightily to keep that
2 down. In that same five-year period, for example, the
3 pendency has gone from 20.8 months to 24.7 months.
4 They're doing a good job of staying paced but that's
5 putting pressure obviously on the PTO in terms of its
6 resources. The number of filings in that same period
7 rose by 71 percent. Their staffing, on the other hand,
8 rose something like 34 percent, or half the pace. How
9 many corporations do we know of that could handle those
10 kinds of increases in demands on their output or
11 production with essentially staying level or at half the
12 pace? That's a tremendous burden for any agency to bear,
13 so perhaps if there is an issue that's the starting point
14 for solving the issue it is to give them a fair chance to
15 fight with both hands instead of one hand tied behind
16 their back.

17 MS. GREENE: Greg.

18 MR. AHARONIAN: I'll agree to some extent with
19 Robert and David that, as much as possible, keeping up
20 government agencies is always a good thing. I firmly
21 believe that a very effective and reasonable, and
22 sometimes undue, burden of costs affects that industry
23 itself, but working with the PTO can solve a lot of these
24 problems.

25 At the same time, as John kind of jokingly

1 pointed out, every industry for the last hundred years
2 has had this problem, and he said that eventually we
3 resolved it and moved on. At the same time, that means
4 for the last hundred years this country has been unable
5 to anticipate how to deal with the next thing. We keep
6 on screwing it up every generation. You'd figure at
7 least one time we'd say, "Hey look, ten years from now
8 we're going to get another headache. Why don't we get
9 ready for it now." So in a sense we've been kind of
10 screwing this up repeatedly for the last hundred years;
11 and I say screw up because, in the engineering sense,
12 this is something that can be fixed.

13 And as the data I like to toss out all the time
14 shows, industry really isn't doing enough, I don't think.
15 In that case, where industry refuses to take these
16 problems seriously over a long period of time, good or
17 bad, let's bring in someone else. I mean, they might not
18 make it any better or worse, but we've blown our
19 opportunity and it's time to shake it up a bit.

20 MS. GREENE: Thank you. Luis.

21 MR. MEJIA: Yeah, I'll make it very quick
22 here. I just wanted to follow up on Professor Shapiro's
23 comment about settlements most likely being between
24 competitors.

25 The university is rarely a competitor with a

1 company in which we find ourselves in litigation. Just
2 for illustrative purposes, the university has only sued
3 three companies in thirty years. So we do this very
4 rarely and most of the time hesitantly when we do do it,
5 because that's really not what we're about.

6 The point I wanted to make was that in my
7 experience with the process, and having only very limited
8 experience in this realm, there is oftentimes great
9 pressure to settle, and the pressure seems to come from,
10 again from my limited experience, from judges that don't
11 want to handle patent cases. And then we have to take a
12 look at the possibility of, you know, being overturned
13 and all of the down sides of not settling.

14 So the point is that I think from the
15 university standpoint I think our avenues are somewhat
16 limited because we don't find ourselves in direct
17 competition with companies in which we can cross-license
18 and have a standard type of a settlement. So I would
19 just throw that out as something to think about. I know
20 it's beyond my experience really to go into any great
21 detail on that, but I do know that from my limited
22 experience that there are some issues there that do tend
23 to be problematic.

24 MS. GREENE: Thank you. John.

25 MR. LOVE: I thought I was through but I have

1 one more comment in response to Greg.

2 MS. GREENE: We'll end on a note of Love --
3 what can I say.

4 MR. LOVE: What I meant by saying we've been
5 through this before is the cycle of what we call emerging
6 technologies where the patent activity due to the nature
7 of the technology the grants are very broad in nature,
8 and I think that's part of what the system is all about.
9 You have emerging technologies, you have pioneer
10 inventions, the inventors are entitled to broad claims.
11 But then the developments come along, patents are issued
12 to improvements, and you know, at the end of the cycle
13 you have several companies that are competing and seem to
14 be doing very well. And again I'll say there are many
15 examples of that over the last 20 years and to me that's
16 one of the benefits of the patent system.

17 MS. GREENE: Okay.

18 MR. LOVE: Thanks.

19 MS. GREENE: I lied because I did say everyone
20 could have their last comment, so Bob.

21 MR. TAYLOR: I just wanted to say that it's
22 been a great privilege to be part of this group, it's a
23 very distinguished and thought provoking discussion and
24 I've enjoyed it immensely.

1 Thank you all so much.

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C E R T I F I C A T I O N O F R E P O R T E R

CASE TITLE: COMPETITION AND INTELLECTUAL PROPERTY LAW
 AND POLICY IN THE KNOWLEDGE-BASED ECONOMY
HEARING DATE: FEBRUARY 27, 2002

I HEREBY CERTIFY that the transcript contained
herein is a full and accurate transcript of the notes
taken by me at the hearing on the above cause before the
FEDERAL TRADE COMMISSION to the best of my knowledge and
belief.

DATED: MARCH 8, 2002

KENT ANDREWS

C E R T I F I C A T I O N O F P R O O F R E A D E R

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