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2 DEPARTMENT OF JUSTICE ANTITRUST DIVISION

3 and FEDERAL TRADE COMMISSION

4

5 Hearing on:

6

7 COMPETITION AND INTELLECTUAL PROPERTY LAW

8 AND POLICY IN THE KNOWLEDGE BASED ECONOMY

9

10 Session 1: Refusals to License and Compulsory

11 Licensing in the European Union,

12 Canada, and Australia

13

14 Session 2: Licensing in the European Union:

15 The Technology Transfer Block Exemption and

16 Agreements that Fall Outside its Scope

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19 Wednesday, May 22, 2002

20 Great Hall of the U.S. Department of Justice

21 333 Pennsylvania Avenue, N.W.

22 Washington, D.C.

1 MORNING SESSION PARTICIPATING PANELISTS:

2

3 Morning Session: Refusals to License and

4 Compulsory Licensing

5

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8 Branch, Canadian Competition Bureau

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10 Consulting Group, Australia

11 Ian Forrester, Executive Partner, White & Case

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17 Patrick Rey, Professor of Economics, University

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21 James S. Venit, Partner, Skadden, Arps, Slate,

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2

3 Afternoon Session: Licensing in the European

4 Union: The Technology Transfer Block

5 Exemption and Agreements that Fall

6 Outside its Scope

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2

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6 William E. Kovacic, General Counsel, Federal

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1 MORNING SESSION

2 (9:30 a.m.)

3 WILLIAM KOLASKY: Good morning, and

4 welcome to everyone. We are delighted that you

5 have joined us for another session of our joint

17 doctrine in Europe and is present in Canadian and

18 Australian law as well.

19 By contrast those of you familiar with

16 With this brief introduction let me
17 begin by introducing our panelists. Joining us
18 in representing the agencies at this morning's
19 session is Mary Critharis, an assistant solicitor
20 at the U.S. Patent and Trademark Office.

21 Time constraints require that our
22 introductions of the members of our distinguished

9

1 panel be brief. More complete versions of their
2 biographies are available in the prepared
3 materials.

4 Gwilym Allen is the senior economist
5 and strategic policy advisor in economic policy
6 and enforcement in the competition policy branch
7 at the Canadian Competition Bureau. He has
8 drafted a number of Competition Bureau guidelines
9 including the intellectual property enforcement
10 guidelines.

11 Henry Ergas is the managing director
12 of the Network Economics Consulting Group in
13 Australia. He recently chaired the Australian
14 intellectual property and competition review

15 committee set up by the federal government in
16 1999 to review Australia's intellectual property
17 laws as they relate to competition policy.

18 Ian Forrester is an executive partner
19 at White & Case LLP in Brussels where he
20 practices European law. He represents the
21 European Commission before the European courts in
22 the well known Magill case about refusal to deal.

10

1 David Hull at the end of the table is
2 a partner in the Brussels office of Covington &
3 Burling. His practice concentrates on EU
4 competition law, representing clients before the
5 European Commission, and advising them on all
6 aspects of competition law.

14 as research director of the Institut d'Economie

15 Industrielle.

16 He has researched many aspects of

17 competition policy including the social benefits

18 and private incentives for exclusive dealing,

19 vertical integration, and refusals to deal.

20 Jim Venit is currently a partner in

13 certain security concerns.

14 If you are not a DOJ employee, you
15 must be escorted around the building. Antitrust
16 Division paralegals who are wearing name tags
17 highlighted in green escorted you into the
18 Great Hall.

19 They were available at the back of the
20 room to escort you out of the building should you
21 need to leave the session, to the restroom or
22 upstairs to the seventh floor should you need to

12

1 make a phone call. Think of them as hall
2 monitors.

3 Cell phones do not work very well
4 in this part of the building again because of
5 security concerns. Because leaving the building
6 is difficult, refreshments are available in the
7 back of the room.

8 This morning's session will be a
9 combination of presentations and discussions.
10 Around 11:00 we will take a fifteen-minute break
11 and then come back for another hour, finishing up

12 around 12:30.

13 The hearings will resume at 2:00 this
14 afternoon for a three-hour discussion focusing on
15 the EU's technology transfer block exemption
16 regulation as well as agreements that fall
17 outside the scope.

18 As you are undoubtedly aware and have
19 already observed, the acoustics in the Great Hall
20 are less than perfect. For those of you in the
21 audience, if you have trouble hearing you might
22 try moving to a different seat closer to the

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1 podium.

2 Our audio-visual specialist in the
3 back of the room also has a limited number of
4 amplification devices available. Panelists, I

11 large number of speakers and we want to hear
12 everyone's views.
13 During the discussion periods if you
14 would like to raise a comment, make a comment, or
15 ask a question, please turn your name tents up on
16 end like this to signal that you would like to
17 do so.

18 For those of you in the audience with
19 questions for our panel, please come and talk
20 to either Bill or me during the break. Time
21 permitting we will try to pose your questions
22 to the panelists. Let me now turn the microphone

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1 over to Bill Kovacic who I think has a few
2 remarks to add.
3 WILLIAM KOVACIC: I simply want to
4 express my appreciation to our colleagues at
5 the Department of Justice and the Patent and
6 Trademark Office for hosting this wonderful
7 event. I think all of us realize that even
8 several decades ago it was incomprehensible that
9 this type of hearing could take place.

10 And it's been the extraordinary
11 development of competition law globally and
12 the development of a remarkable infrastructure in
13 many countries that permits us to take advantage
14 of a rich collection of international and
15 comparative perspectives.

16 And I simply want to thank this truly
17 hall of fame panel for committing their time and
18 in the spirit of these hearings bringing a great
19 deal of fresh and imaginative thinking to this
20 set of issues. And again to express my
21 appreciation to Bill and his colleagues for being
22 such wonderful hosts. Thanks, Bill.

15

1 WILLIAM KOLASKY: Thank you, Bill.

9 property rights.

10 But I think it's very important to

11 realize from the start that these cases both

8 involved body parts for side panels on

7 might be deemed as an abuse of the patent or
8 might trigger -- if not deemed as an abuse might
9 trigger the granting of a license.

10 And I think it's always interesting
11 when you look at the European court judgments on
12 these issues to ask yourselves to what extent is
13 the court requiring a license in a situation that
14 would seem to come within the scope of a monopoly
15 and to what extent is it maybe doing something
16 that would happen under the monopoly legislation
17 itself if the right owner did that.

18 And I think in Volvo v. Veng two of
19 the things clearly come within the scope of the
20 monopoly. The last one might arguably involve a
21 non-exploitation that could trigger a license.

22 The second case is the famous Magill

18

1 case which involved a very valuable listing of
2 television programs. And the plaintiff in that
3 case wanted to put the television listings of
4 three stations together into a weekly listing.

5 And the television stations that owned

6 the copyrights refused to grant that right. And
7 a license was required by the Commission. The
8 case was appealed. And the Court of Justice
9 upheld the Commission's decision and set forth
10 four criteria which if they applied the court
11 said could result in the granting of a license.

12 The big debate about Magill is whether
13 these criteria are cumulative or not. But the
14 four criteria were that the broadcasting
15 companies were the only source of the
16 information, that the refusal to grant a license
17 prevented the appearance of a new product, that

5 or grant a license to an essential input could be
6 an abuse or the attempt to monopolize the
7 secondary market could be an abuse.

8 But that's only the Court of First
9 Instance and not the Court of Justice. Again if
10 you look at the Magill case one could rationalize
11 here forgetting the nature of the right and
12 saying, well, this really involved a form of
13 non-exploitation of a property right.

14 And so one could make an exception in
15 granting the license or requiring the license to
16 be granted there. These are basically the two
17 leading cases.

18 There's now a third case that the
19 Commission has brought and which is now on appeal
20 where the Commission basically threw out the
21 window the secondary market characteristic and is
22 applying or seeking to apply the Magill reasoning

1 to a situation where a right holder has refused
2 to grant a right so it can continue to monopolize
3 the same market that the right exists on.

4 And some of the members of our panel

5 are involved in that case, and I will leave it to

3 it's very useful to focus on the nature of the
4 right and the fact that these rights are
5 statutory monopolies.

6 Essential facilities doctrine has
7 a very, very rich tradition and its place in
8 analysis, but I think only when there's an
9 essential facility. I think when we're dealing
10 with property rights it's much more useful to
11 focus on statutory monopoly. Thank you.

12 WILLIAM KOLASKY: Thank you, Jim.

13 Before we turn to other speakers, are there any
14 questions from the other panelists for Jim? I
15 have one if I can start off with that.

16 In putting up the criteria in the
17 Volvo case, one of the ones you mentioned was
18 that the copyright holder was charging quote,
19 unquote, excessive prices for the spare parts.

20 I know under Article 82, as written,
21 exploitative pricing would appear itself to be an
22 abuse of dominance. How widely is that actually

1 enforced in the European Union and its member

2 countries, especially with respect to

3 intellectual property rights?

4 JAMES VENIT: I think the answer is

5 not at all in my experience. The Commission has

6 recently been complaining about termination

7 charges for roving fees amongst cellular phone

8 operators and has I think initiated a case

9 against the Dutch PTT in that regard.

10 I was once involved in a case where

11 the Commission was considering the problem of

12 excessive pricing by a pharmaceutical company.

13 We convinced them to abandon that I think wisely

14 on their part. So this is not an area where

15 there's been very much vigorous enforcement at

16 all and I think for obvious reasons.

17 WILLIAM KOLASKY: And then the other

18 question I had which was obviously provoked by

19 your very opening is whether you have any

20 speculation as to why these cases tended to

21 involve copyrights rather than patents.

22 JAMES VENIT: Because they came up I

1 guess. No. There is a case where the Commission
2 rejected a complaint that would involved
3 licensing of patents, the Lederle case.

4 You know, I think they came up because
5 people wanted to have access to the rights. I
6 think the results came about because we had
7 copyrights and not patents. Beyond that it's
8 hard to speculate as to why.

9 WILLIAM KOLASKY: Yes, John?

10 JOHN TEMPLE LANG: Jim, it's perfectly
11 correct to say that there hasn't been a formal
12 decision concerned with patents. But there is a
13 case which is referred to in my paper where the
14 Commission took action and by consent a license
15 of patents was given.

16 It's the Solara case in which there
17 was a complaint by a small Finnish television set
18 manufacturer. It involved a patent pool of
19 German television transmission and receiving
20 equipment manufacturers.

21 The Commission took the view that
22 the patent pool had a duty to license the new

1 technology for stereo transmission and reception.
2 And the companies got the message and agreed to
3 grant the license. So there was no formal
4 decision. But there is no doubt there were
5 patents involved.

6 WILLIAM KOLASKY: Ian?

7 IAN FORRESTER: I might offer
8 necessarily a partial answer to your question
9 about why the cases have touched copyright.
10 Copyright is particularly unharmonized in the
11 European Union.

12 And the fifteen member states are
13 obliged by the Berne Convention to extend
14 copyright protection to certain things.
15 Community legislation obliges them to extend
16 copyright protection in the field of databases
17 and software.

18 But they have the right to extend
19 copyright protection in other directions. And I
20 think that it's no coincidence that the Magill
21 and IMS cases both related to copyright being
22 involved in what would seem a surprising set of

1 circumstances.

2 WILLIAM KOLASKY: Thank you. Jim?

3 JAMES VENIT: Just very briefly, on

4 the Solara cases, one of the very, very early

5 cases, I think one has to understand that is a

1 MARY CRITHARIS: Yes. I have a
2 question for any one of the panelists. We're
3 talking about refusal to license. And I wanted
4 to know if there were any cases in Europe where
5 there was a patent involving a patent that has
6 not been worked.

7 WILLIAM KOLASKY: John?

8 JOHN TEMPLE LANG: There have been a
9 number of cases that I know of under European
10 Community law. But there were a number of cases
11 under national patent law.

12 And most, but I think not all, of
13 the national patent legislation provides for
14 compulsory licensing for essentially public
15 health grounds for pharmaceutical products.

16 WILLIAM KOLASKY: With that, a sort of
17 introduction and overview of the European law
18 with respect to the application of essential
19 facilities to intellectual property, let me turn
20 the mike over to Patrick Rey who has written a
21 very interesting and provocative paper on
22 vertical integration which is in the materials,

- 1 which frankly I think it would be fair to say
- 2 challenges the conventional thinking with respect
- 3 to vertical integration in a way perhaps that it
- 4 hasn't been challenged for 15 years. Patrick?

5 PATRICK REY: Thank you, Mr. Chairman.

6 The economics of commrcs9ato hairman.

1 There are some variants of this basic
2 scenario. In some cases the bottleneck can be an
3 input, can be a raw material, as in commercial
4 cell phones. In other cases it can be a
5 infrastructure such as a stadium, an airport,
6 a harbor, and so forth.

7 In other instances other than being an
8 input it can be sold on a stand alone basis. It
9 can be hardware as opposed to software. It can

1 expressed is that for this concern the bottleneck
2 owner may try to seek to leverage its market
3 power in the upstream segment into the downstream
4 market. Depending on the context this
5 monopolization could be achieved through various
6 practices.

7 When the bottleneck holder is itself
8 present in the downstream market, then it can
9 refuse to deal with other competitors, or it can
10 choose to make its product -- its bottleneck
11 incompatible with the good or service that is
12 being provided by the downstream competitors.

13 Or it may decide to charge high
14 wholesale prices which being present doesn't --
15 even if it charged the same price, its purely
16 internal price, that makes a difference.

17 Or alternatively it can engage in
18 tying and therefore force its customers to buy
19 its own version of the complementary good in
20 order to have access to its bottleneck good.

21 In the absence of vertical integration
22 the upstream monopolist can alternatively seek

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1 to favor one or a few of downstream competitors
2 either through exclusive dealing or through
3 price discrimination or through other types
4 of discrimination such as not releasing the
5 appropriate information, delaying supply,
6 delaying the delivery of new and important
7 versions of the product and so forth.

8 This monopoly leverage concern has
9 been criticized by the so-called Chicago school
10 which pointed out that while the bottleneck owner
11 clearly has some market power in the upstream
12 segment and was therefore expected to exploit
13 that market power, it could also act directly in
14 the upstream segment and therefore did not need
15 to distort downstream competition.

16 And there were two variants of this
17 critique which reflect the two types of models,
18 the input model versus the stand alone model.
19 The bottleneck as an input, used as an input,

20 then the monopolist can simply charge a high
21 price for this input.

22 And to be sure, the demand for the

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1 final good eventually is a source of profit. But
2 you cannot expect the monopolist to be able to
3 have this profit twice. There is only one profit
4 to be made basically. And charging a high price
5 for the input will suffice.

6 And therefore if the monopolist
7 chose to not deal with some of the downstream
8 competitors or otherwise affect competition it
9 cannot be because it wants to leverage its
10 upstream market power.

11 It has to be for alternative and
12 efficiency enhancing reasons: protecting
13 reputation, providing good services, and the
14 like. When the input is sold as a stand alone
15 product, maybe the argument is even clearer.

16 If the consumer needs the monopolized
17 good or service in order to be used in
18 combination with other goods or services, then

19 the monopolist can simply charge the monopoly
20 price for the good.
21 And actually if there is more
22 competition in the complementary segment, then

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1 this increases the value of the monopolized good.
2 And therefore the monopolist should welcome such
3 competition in the complementary segment.

4 This Chicago view has had the
5 beneficial effect of forcing industrial
6 economists to reconsider the foreclosure argument
7 and to put it in what I believe is on firmer
8 ground.

9 In the last ten to fifteen years we
10 indeed have seen developments in the economic
11 culture that account for the Chicago critique and
12 yet provide a rationale for vertical foreclosure
13 concerns. There again one needs to distinguish
14 the input mode and the stand alone mode.

15 When the bottleneck is used as an
16 input, then the clear idea that was first
17 expressed by Hart & Tirole in a 1990 paper and

18 has been followed by others since then, was that
19 the upstream -- or is that the upstream
20 monopolist in practice will find it difficult to
21 fully exploit its market power without some form
22 of exclusion.

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1 And therefore the concern is not about
2 extending or leveraging the monopoly power from
3 the upstream segment into the downstream segment.
4 The concern is simply that the monopolist will
5 seek to distort or reduce downstream competition
6 in order to better exploit its upstream monopoly
7 power.

8 I'll come back to this very shortly.
9 If the bottleneck is used and sold directly to
10 consumers on a stand alone basis, then there have
11 been a couple of papers that have also pointed
12 out the possible anticompetitive points.

13 There is a well known paper by
14 Whinston that shows that committing to tying
15 might be a good way to deter entries or it could
16 be used as an entry deterrence strategy provided

17 that there is not too much complementarity
18 between one good and the other good.
19 And more recently there was a paper
20 by Carlton & Waldman that expressed that the
21 upstream -- monopolist in the home market, in
22 order to prevent entry in the home market it

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1 might be a good idea to prevent entry in a
2 related market in some sense.
3 The entry in the related market,
4 potentially a more competitive segment, may be

16 into a final good on a one-on-one basis.
17 And suppose that the way the industry
18 works is that first each downstream competitor
19 must order a different quantity from the
20 monopolist which determines the level of
21 capacity of the downstream firm in its market.

22 And then second given those

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1 capacities, given how much they have, the
2 downstream firms compete on price. Now, from an
3 industry perspective it would be a good idea for
4 the monopolist to make sure that overall the
5 capacity remains at the monopoly level and
6 therefore is restricted.

7 But when its downstream firm
8 negotiates and deals with the monopolist, the
9 downstream firm will have an incentive to order,
10 and the upstream monopolist will have an
11 incentive to indeed supply quantity that is the
12 best reaction to the overall quantity that will
13 be put forward in the market by the others.

14 In other words, this type of situation

15 gives rise to a situation that really looks like
16 what we call a Cournot situation, firms attempt
17 to compete in a market.
18 And we know that this will lead to a
19 more competitive outcome than the monopoly
20 outcome. And if there are more competitors in
21 the downstream market, then the outcome will be
22 even more competitive. And eventually all

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1 profits may be dissipated in this way.
2 The same problem arises in the context
3 of franchising or licensing agreements. A patent
4 holder, for example, is unlikely to make much
5 money if it cannot commit itself not to flood the
6 market with licenses.

7 And indeed if everyone holds a
8 license, then downstream competition will
9 dissipate the profits that could have been
10 generated by the patent.

11 There again the patent holder would
12 like the promise that the number of licenses
13 would be limited or that future licenses will

14 include provisions to limit downstream

13 It may still choose to deal with
14 other downstream firms, particularly if they
15 have a specific advantage in developing practical
16 applications or in introducing particular
17 customer groups. But it will have a natural
18 incentive to preserve and exploit any overall
19 market power.

20 Short of entering the market, the
21 upstream bottleneck owner can choose to deal
22 exclusively with some of the downstream firms,

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1 alternately to favor some of the downstream firms
2 over other competitors.

3 In the context of IP rights this would
4 amount to giving an exclusive right to one
5 particular firm and a refusal to grant any
6 additional licenses.

7 Let me stress that in this context the
8 outcome and the exclusive dealing arrangements
9 may well be worse than vertical integration and
10 worse I mean both from the point of view of the
11 firm but also from the point of view of social

12 welfare.

13 If, for example, the upstream

14 monopolist has a specific advantage in developing

10 relevant.

11 The second quick point on the new
12 product, what is meant by new product here for
13 the analysis or for competing product is really
14 the fact that it's not you have a competitor that
15 could produce a new version or improved version
16 of the product.

17 What matters and what is potentially
18 beneficial, what prevents the exploitation of
19 market power is really the fact that there is
20 a competitor.

21 And if a competitor simply offers the
22 same good or competes with the same good, that's

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1 fine. If in actuality it's competing with an
2 inferior good, it may still exert some
3 competitive pressure on the upstream monopolist
4 and therefore we will have a more competitive
5 outcome.

6 I have so far focused on identifying
7 and possibly, hopefully clarifying the
8 foreclosure concern. I do not mean of course to

9 give the impression that vertical integration or
10 exclusionary practices are necessarily bad.

11 And while they may serve
12 anticompetitive purposes, they may also serve
13 legitimate and efficiency enhancing purposes.

14 For the sake of time I will not spend much time
15 on this, and there is a lot of discussion in the
16 written paper that has been submitted.

17 But let me just mention that in the
18 context of IP rights probably the most relevant
19 line of efficiency defense lies in the need to
20 protect new investments in R & D and innovation.

21 And one may indeed wish to tolerate some
22 foreclosure activity and static inefficiency as a

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1 means to promote dynamic efficiency.

2 This provides a good reason, for
3 example, for being more tolerant when the
4 bottleneck is the result of innovation as opposed
5 to the result of increasing in terms of scale or
6 as a result of historical accident.

7 It is first in this context that in

8 fact we fine tune the amount of tolerance or
9 regulate the rate of return on that bottleneck
10 itself. And we know that such regulation is not
11 an easy task even in industries where regulators
12 have been supervising the bottleneck for years
13 or decades.

14 So at the very least one should be
15 very cautious when it comes to striking the right
16 balance between static and dynamic
17 considerations.

18 This brings me to the second topic I
19 would like to briefly touch upon which is about
20 the respective roles that IP rights and
21 competition policy can play in achieving the

innov such een mnspost 21 .olerance or

7 competition authority could or should play the
8 roles of advocates for respectively the
9 protection of innovation on the one hand and the
10 promotion of competition, product market
11 competition on the other hand.

12 As my rephrasing in terms of
13 competition in innovation versus competition in
14 product market suggests, I'm not sure that this
15 approach is a desirable one.

16 In addition at the moment it's not
17 clear to see who could play the role of the judge
18 in front of those two advocates. Another
19 approach consists of identifying the competitive
20 advantages of patent offices and competition
21 agencies.

22 For instance, the Patent Office will

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1 be typically in a better position to assess the
2 importance of the investment and also the social
3 value of the innovation, the novelty, for
4 instance, of the innovation.

5 Still the Patent Office will typically

6 have to rely on uniform rules that are best
7 designed to fit the average case but may make it
8 difficult to fine tune the level of the rents
9 that an innovator should get.

10 In practice all sorts of problems call
11 for some case-by-case analysis. For example,
12 lock-in problems may give an excessive reward to
13 the first innovator and prevent the reward of
14 other innovators that later provide alternative
15 ways to service a need.

16 Competition authorities are typically
17 better suited to operate such a case-by-case
18 analysis. But on the other hand they are often
19 subject to a natural tendency to place a legal
20 weight on ex post product competition.

21 Even sticking to the design of average
22 standards, patent offices and competition

1 agencies can play complementary roles. For
2 example, the breadth of the patent affects both
3 the profit of the innovator, of the patent
4 holder, and it also affects this call for

5 imitation.

6 And therefore in order to both prevent

7 inefficient imitation and at the same time

8 avoiding giving excessive rewards to the

9 innovator, it might be useful to complement the

10 IP protection with antitrust enforcement.

11 Beyond the potential risk of excessive

12 rent expropriation by competition agencies,

13 striking the appropriate balance between ex ante

14 competition in innovation and ex post competition

15 in the product market is clearly not an

16 easy task.

17 But I would like to mention that there

4 competition for future innovation.

5 And therefore I think that this is
6 really a key issue on which agencies should put
7 a large emphasis when determining under which
8 conditions technology transfers can be made.

9 Let me conclude by stressing that
10 from an economic perspective IP rights should be
11 treated according to the same principle as for
12 any other property right. In particular IP and
13 particularly property patents should not be
14 confused with market power.

15 There was the 1989 OECD report on
16 competition policy and IP rights. There was a
17 survey of licenses that shows that in 27 percent
18 of the cases the patent holder did not -- was not
19 exposed to competition. So there was a real
20 market power there.

21 But in 29 percent of the cases the

47e was a

oron. So Sokasisubso cutthe ent 20 invasion.

3 doesn't mean that there was significant market

4 power.

1 Patrick, let me ask you as a first
2 question and we can try to get some discussion
3 going, on page 5, your statement that an upstream
4 monopolist cannot exercise market power without
5 exclusion, to what extent if at all does that
6 depend on the monopolist being able to price
7 discriminate?

8 Would that be true if you are in a
9 market in which price discrimination is not
10 possible?

11 PATRICK REY: We actually make in the
12 paper the funny remark that nondiscrimination
13 laws do facilitate a lot of exercise of market
14 power.

15 I mean in a good way -- what the
16 monopolist would ideally want is to ensure that
17 prices will remain high, quantity will remain
18 low, and fight requests by individual downstream
19 competitors for more quantity, better conditions,
20 and so forth.

21 And nondiscrimination laws are a very
22 good and effective way for the monopolist to

- 1 commit itself not to favor one competitor against
- 2 the other and resist the temptation or the
- 3 pressure to provide more output or better access
- 4 or better conditions.

1 even though those monopolists have not engaged in
2 exclusion. So the question is: Have you tried
3 to test this proposition empirically?

4 PATRICK REY: To be sure there are
5 many ways in which this can be done. One way
6 would simply be to develop a reputation not to
7 discriminate and not to give in to terms and so
8 on. So the question is to what extent this
9 commitment problem exists and is severe in
10 practice.

11 That's a very good question, and I
12 don't think it has been on purpose. That is,
13 looking at this particularly there has been an
14 interesting experience that has been made.

15 So this remains -- I'm here referring
16 to experimentally other than actual business case
17 studies. This experiment was conducted by Steve
18 Martin and he has published a paper on this which
19 suggests that when you do this experiment that
20 you put players in this type of situation. Then
21 the commitment issue may be a problem.

22 WILLIAM KOLASKY: And a final

1 question, not seeing any flags raised, is whether
2 you have thought about or tried to develop what
3 if any legal rules you think should flow from the
4 insights contained in your paper.

5 PATRICK REY: Well, there were some
6 dividing lines that are suggested. So, for
7 example, one is when you have a bottleneck, one
8 question you may want to start with is what is
9 the origin of the bottleneck.

10 Is it just there because historically
11 there was a monopoly that was counted without --
12 and is the conditions of the technology or the
13 market such that it's no longer wanted but you
14 have given -- you have to start from this
15 situation.

16 Is it because of economies of scale
17 and scope? In those cases intervention may be
18 more warranted than cases where the battle in the
19 case is simply the result of innovation. So
20 these are some ideas like this that are
21 developed.

22 WILLIAM KOLASKY: Bill?

1 WILLIAM KOVACIC: As the presentations
2 have mentioned, in using an essential facilities
3 framework there are basically three issues that
4 a court or a tribunal has to address.

5 It has to define what it means
6 to be essential. It has to identify what
7 justifications for limits or refusing access
8 are acceptable.

9 And if it decides that access must be
10 provided as Patrick has identified, it has to
11 decide the terms on which access might be
12 provided.

13 And I was wondering -- if the
14 panelists in looking at their own
15 jurisdictions -- if there is a sense that in
16 setting the last of these conditions, that is the
17 price for access, are tribunals comfortable with
18 undertaking the role of setting the access price.

19 And are they doing it in a way, as
20 Patrick suggested they might, taking account of
21 incentive consequences of setting a price for
22 access to, say, an intellectual property right?

1 WILLIAM KOLASKY: Provocative
2 question. And hearing no immediate response --
3 Jim?

4 JAMES VENIT: I'm going to duck the
5 question a little bit. But there's been a very
6 interesting Commission decision in granting
7 access to I believe involving Deutsch Post to
8 its delivery system where the Commission used
9 the notion of recoverable costs as one of the
10 benchmarks in formulating the access price,
11 which I think shows a certain amount of greater
12 sophistication in the analysis than one might
13 have been concerned one would get.

14 But it's obviously a very, very
15 difficult issue. And particularly I think
16 Patrick's distinction between whether you have
17 an historical monopoly as opposed to an earned
18 monopoly I think is very critical in determining
19 that access price because you want to reward the
20 earned monopoly more than you will conceivably
21 the historical monopoly.

1 formative essential facilities cases come out of
2 an environment that might be called a regulated
3 industries environment.

4 And perhaps postal services fits into
5 that model. Do you have an intuition about the
6 capacity of a tribunal to account for the element
7 of risk in undertaking the innovation that
8 generates the intellectual property right?

9 That is, is this a dimension that
10 is captured in the essential facilities
11 jurisprudence, or is this something new that
12 tribunals are going to have to confront in the
13 future if they walk down a path that mandates
14 access to the intellectual property right?

15 JAMES VENIT: I think it's going to be
16 the latter. They're going to have to confront it
17 again. I mean the Deutsch Post case involved
18 what I would regard as a classic essential
19 facility case. It didn't involve IP.

20 And so you can deal with cost elements

20 This is a very important and valuable
21 exercise in the knowledge that these and past
22 hearings generate, informing certainly the

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1 Canadian antitrust agencies and other
2 practitioners throughout the world. And the
3 information and knowledge here has always proved
4 and I'm certain will prove to be invaluable.

5 I have been asked today to talk about
6 and describe the Canadian approach to
7 intellectual property and particularly a refusal
8 to deal. And this is dealt with within our
9 intellectual property guidelines, or as we refer
10 to them in Canada as the IPEGs.

11 And the IPEGs are available on our
12 website which is at competition.ic.gc.ca. And
13 I'll put that website up at the end. I'll try to
14 keep my comments short, and I won't go through my
15 whole presentation. The presentation is
16 available at the back. And I'm just going to
17 concentrate on a few things.

18 First of all, the intellectual

19 property guidelines start out by the usual
20 compulsory requirement that we acknowledge that
21 intellectual property regimes and competition
22 laws are complementary and they share the same

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1 goal and that they are there to promote -- both
2 are there to promote innovation and technological
3 change.

4 In developing the guidelines, there
5 are two main points that you have to understand
6 in Canada. The development of the guidelines was
7 driven primarily by the structure to the law and
8 to some -- a lesser extent by the jurisprudence.

9 The point to understand is that the
10 structure of the Canadian law can be thought of
11 as being divided into two general sections.

12 There's what we refer to as the general
13 provisions. The general provisions are divided
14 into civil provisions and criminal provisions.

15 And as the names apply, we have
16 criminal law and civil law. And they deal with
17 the traditional antitrust offenses or issues of

17 Basically section 32, the special
18 remedies, provides the Federal Court the power to
19 make remedial orders when it finds that the use
20 of an intellectual property right results in an
21 undue lessening of competition or restraint of
22 trade.

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1 And it has some very broad -- it has
2 broad remedies that it can invoke including
3 declaring any agreement or license relating to
4 the use of the IP void, compulsory licensing,
5 revoking a right, and any other direct action it
6 considers.

7 Now, with regard to the jurisprudence,
8 Canada has very little jurisprudence with regard
9 to the interface between intellectual property
10 and the Competition Act. However, we have one
11 case which is Tele-Direct and another case in
12 Warner. Warner basically just quoted
13 Tele-Direct.

14 And basically what the jurisprudence
15 says is what 79(5) says, which is that there has

16 to be something more than the mere exercise of
17 the statute -- of the intellectual property right
18 in order for there to be found a misuse of
19 trademark. This was a trademark case.

20 And basically what we did in the
21 intellectual property guidelines is we took that
22 concept and applied it to all the general

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1 provisions.

2 And what that basically meant is

14 joint or coordinated behavior because it is not
15 unilateral, licensing because it is not a
16 refusal, and then situations where you may have
17 a refusal but you have something more.

18 And with regard to section 32 then
19 section 32 would apply to situations in which
20 there was the competitive harm flowing directly
21 from the exercise of the right.

22 The only way that you could challenge

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1 or correct the anticompetitive consequence was to
2 challenge or address the exercise of the
3 intellectual property right directly.

4 So here's my diagram. So basically we
5 had these two situations. There's more than the
6 unilateral exclusion. Then we dealt with it
7 under the general provisions because, as I said
8 before, it will require either joint behavior,
9 licensing, or something more than a simple
10 refusal.

11 And then under section 32 it's the
12 mere exercise or the unilateral exercise of the

13 IP right to exclude and nothing more. And that's
14 when section 32 would be applied.

15 The guidelines outlined when we would
16 and how we would deal with section 32. And we
17 describe a two-step approach. What I should
18 mention is that we have no actual jurisprudence
19 on section 32.

20 But we were compelled to provide
21 guidance on when section 32 would or would not
22 apply. And this is the adoption of a two-stage

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1 approach to first try to identify when the
2 "unduly" aspect or component of section 32
3 would apply.

4 And then we added a second step which
5 we looked at 32 and asked the question that in
6 order to ensure that 32 maintained the integrity
7 of the complementarity between competition law --
8 the Competition Act and competitive laws in
9 general and the IP laws. We added a second step.

10 We asked this question: whether or
11 not invoking a remedy, i.e. forcing compulsory

12 licensing would adversely alter incentives to
13 invest in research and development. And the
14 guidelines sort of point out some of the things
15 that we look at in trying to determine each
16 of them.

17 In the first case with the idea of
18 undueness, two of the factors that we point out
19 that we would look at and deal with would be to
20 try to identify whether the mere exercise of the
21 right indeed resulted in an undue lessening of
22 competition or restraint of trade.

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1 If the holder of the IP is dominant in
2 the market and the IP is an essential input for
3 firms to participate in the market. Here is a
4 diagram I included in the handout which tries to
5 describe the general approach of the IPEGs.

6 On the left-hand side is the general
7 provisions, what will put you into the general
8 provisions, and what particular sections. And a
9 traditional antitrust type of analysis would
10 apply for each of the three categories in which

11 the harm stems from something more than the
12 unilateral exclusion.

13 And the right-hand side is our
14 description of how we would apply section 32.

15 And I think my time is up.

16 But because we have no jurisprudence
17 we did provide in the guidelines a hypothetical
18 case which is example Nine which dealt with a
19 situation which I'm sure the Americans will find
20 very familiar in which we describe how the Bureau
21 would deal with this situation in which we
22 decided that this would be a case in which we

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1 would apply section 32.

2 There is the website at the bottom,
3 competition.ic.gc.ca where you can access the
4 guidelines. And if you have any questions, I'll
5 be happy to answer them.

6 WILLIAM KOVACIC: I think all of us
7 who are lawyers realize that one of the great
8 inventions by lawyers in the field of the English
9 language is the use of the word mere. That is,

10 the mere exercise is not unacceptable, but
11 anything -- the interesting question is when do
12 you tread beyond mere exercise.

13 And I was wondering if I could just
14 pose a couple of quick questions to Gwilym
15 before we go on to Henry's survey of approaches
16 in Australia.

17 One is, Gwilym, if we think of the
18 problem we were talking about when Jim spoke
19 before about the issue of excessive pricing,
20 would you say that it was contemplated in writing
21 the guidelines that a decision by the holder of
22 an IPR to set a price at any level it wished,

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1 that is, assume a price of infinity, as high as
2 it wanted, was it contemplated that there would
3 be any notion of excessive pricing under the
4 guidelines?

5 GWILLYM ALLEN: I guess the short
6 answer is no. We thought the majority of the
7 cases that we are going to see are going to fall
8 into general provisions. They are going to be

9 under abuse of dominance.

10 And we do not have an exploitative
11 or excessive pricing. It has to engage -- the
12 dominant firm has to engage in an anticompetitive
13 act which does not include pricing.

14 WILLIAM KOVACIC: And maybe just one
15 other quick question. Could you maybe say a bit
16 more about how -- if we go to the special remedy
17 provision in the last box on the diagram you
18 showed toward the end of the presentation, is
19 there a thought about how the tribunal would
20 perform the trade-off between competitive harm
21 and possible harm to innovation incentives?

22 GWILLYM ALLEN: Well, we gave it a lot

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1 of thought. First of all I should point out that
2 under the special remedies not only is it special
3 in terms of what it says within the law, it's
4 special in how it's treated by the courts.

5 The civil provisions are referred to
6 the competition tribunal which is a specialized
7 court made up of judges and industry experts.

7 Gwilym. Our next speaker is Henry Ergas, who's
8 going to talk about Australian approaches to
9 compulsory licensing. While they are setting up
10 Henry's slides, Henry will be the last speaker
11 before the break. But we have also allocated
12 twenty minutes after his presentation for
13 discussion.

14 So I'm going to invite the other
15 panelists to think about questions they may have
16 for each other or comments they may want to make
17 on one another's presentations so we might be

6 available to you and in the other papers.

7 And I won't go into them in any detail
8 other than simply to say that there are obviously
9 complex trade-offs involved. The situation in
10 Australia is in some respects complicated but in
11 others perhaps relatively simple.

12 We have provisions in the main
13 intellectual property statutes that are relevant
14 here. And then there are also provisions in our
15 competition law which is the Trade Practices Act.

16 And probably the distinction between
17 those is that the provisions in the intellectual
18 property statutes construct obligations to
19 license or define situations in which there is an
20 obligation to license, whereas the provisions in
21 the Trade Practices Act define circumstances in
22 which the refusal to license may be in breach of

1 the law.

2 Looking first at the intellectual
3 property statutes which as I said construct some
4 obligations to license, there is a relatively

5 sharp contrast between the Copyright Act and the
6 Patents Act.

7 Of course consistent with our
8 obligations under TRIPS we do not have any
9 obligations to license in respect of trademarks.

10 So the main obligations to license that are
11 relevant -- there are others in minor IP
12 statutes -- are under the Copyright Act and under
13 the Patents Act.

14 The difference is that the Copyright
15 Act defines obligations to license in a very wide
16 range of circumstances though those circumstances
17 are then narrowly identified in the statute.

18 So they are narrowly defined in
19 the statute. And there is a relatively sharp
20 contrast here between the approach to copyright
21 legislation in Australia and that in the
22 United States.

1 So we have in the Copyright Act these
2 circumstances in which either there are absolute
3 defenses against claims of infringement or

4 obligations to license that are statutorily
5 administered.

6 In contrast in the Patents Act we
7 don't specify the circumstances in which an
8 obligation to license may arise in any great
9 detail. But we do define a test and then subject
10 individual instances to that case by case test.

11 It's fair to say -- and I think this
12 comes to a point that was raised earlier in the
13 discussion -- that it is mainly in respect of the
14 copyright legislation that the issue of the
15 extent and implementation of the obligations to
16 license has arisen.

17 In my view there is a substantial
18 economic or underlying difference between what we
19 attempt to do in the Copyright Act and what we
20 attempt to do in the patents situation, the
21 Patents Act.

22 In the Copyright Act the main

1 justification for the fairly extensive provisions
2 that we have that construct an obligation to

3 license lies in the transactions cost
4 difficulties that would be involved in attempting
5 to secure efficient access to copyrighted
6 material.

7 In other words, the provisions in the
8 Copyright Act broadly deal with situations where
9 the transactions costs involved would be so great
10 in securing negotiation on an efficient basis
11 between the owners of the right and potential
12 users that it is more efficient to in those
13 circumstances convert the property rule into a
14 liability rule and construct a statutory
15 administrator for that liability rule.

16 In contrast in the Patents Act we're
17 basically dealing with situations which involve
18 market power. And though those two go to
19 transactions costs considerations at a quite
20 fundamental level, they obviously are much more
21 case by case in their nature.

22 The Patents Act provision dates

1 back many years though it was reinstated in the

2 Patents Act of 1990. And it can be broadly seen
3 but not exclusively seen as the ability to secure
4 an order compelling a license in circumstances
5 where a patent is not being worked to the
6 interests of the Australian community.

7 The provision itself, its precise
8 effect is somewhat unclear as it has not been
9 frequently tested in court.

10 However, in the proceedings of the
11 committee I chaired for the Commonwealth's
12 government on the act, it was put to us with
13 great strength by particularly the patent
14 attorneys that the provision has a significant
15 impact in their negotiations with rights owners.

16 The committee recommended changes to
17 the provision. And in particular we recommended
18 that the criterion be changed into a competition
19 test that would be broadly similar to the
20 section 32 provisions that are available in
21 Canada.

22 The government has recently announced

1 that it has accepted that recommendation insofar
2 as it will retain the existing test it will add
3 to it a new competition test which is currently
4 being drafted and is expected to be tabled as an
5 exposure draft in the course of the coming
6 months.

7 Moving from the IP statutes to our
8 competition laws, as I said, the competition laws
9 define circumstances in which a refusal to
10 license may be a breach of the law.

11 We are first noting at the outset that

1 subsidiary part of a broader service to which
2 application is being sought.

3 And some use has been made of a
4 similar provision in the telecommunications
5 access regime. And that has actually been
6 implemented. Our committee was asked to review
7 whether the exclusion of intellectual property
8 rights from the general essential facilities
9 regime should continue.

10 And we concluded that there was a case
11 for maintaining the current exclusion essentially
12 for the reason that first the decision of the
13 essential facilities regime was poorly suited to
14 handle intellectual property rights.

15 Second, we felt that to the extent to
16 which one wanted to construct circumstances in
17 which there were obligations to license, that was
18 more efficiently done in the intellectual
19 property statutes themselves.

20 And it was in the light of that that
21 we recommended the reform of the Patents Act and
22 also a number of reforms which have since been

1 implemented to the Copyright Act.

2 And, third, we felt that insofar as
3 refusals are anticompetitive, then the remedies
4 should come in the general provisions of the act
5 rather than in the essential facilities regime.

6 In terms of those general provisions
7 which broadly define the circumstances in which a
8 refusal to license may be a breach of the laws,
9 the most relevant provision is our section 46
10 which is loosely equivalent to your
11 monopolization provisions in the United States or
12 to the misuse of power provisions in the EU.

13 And section 46 defines as a breach
14 circumstances in which a firm that has a
15 substantial degree of power takes advantage of
16 that market power for a set of proscribed
17 purposes which basically go to harming either
18 competitors or the competitive process.

19 The important words in respect of the
20 section and its interpretation are the words
21 shall not take advantage of that power.

22 And the key issue that has arisen in

1 the case law is whether the mere -- and I use
2 that term ill-advisedly I'm sure -- but the mere
3 exercise of an IP right can be a taking advantage
4 of market power given that the firm that lacked
5 that power might still be in a position to
6 exercise that right.

7 The case law is fairly uneven in this
8 respect. But I think it's fair to say that since
9 the Queensland Wire decision in our High Court it
10 has been clear that -- at least this has been
11 absolutely clear -- that the mere fact that the
12 refusal or the conduct involved intellectual
13 property in no way immunizes that conduct from
14 the reach of the section.

15 So the mere fact that what is at issue
16 here is intellectual property as against other
17 forms of property is a matter of indifference to
18 the court in determining whether or not a breach
19 of section 46 has arisen.

20 And that is then apparent if you look
21 at the decisions that are discussed in the paper
22 that I've set out and in particular in a decision

1 that involves the supply by the Australian Stock
2 Exchange of information that it generated where
3 in that decision as in the other relevant
4 decisions the Federal Court both at first
5 instance and on appeal has broadly indicated that
6 there should be no difference between the
7 analysis of the exercise of an intellectual
8 property right relative to the exercise of any
9 other kind of property right in respect of
10 liability under that section.

11 In conclusion, we have a number of
12 bases in the current Australian legislation that
13 construct situations where either a license is
14 compulsory or where the refusal to supply a

1 Australia are the provisions that are made under
2 our intellectual property statutes themselves.
3 And here we are seeing very significant reform
4 both in the Copyright Act and in the Patents Act.

5 And if I may just say one word in
6 conclusion, it seems to me that part of the
7 impetus for reform of the provision in the
8 Patents Act is that the change in the nature of
9 patentable subject matter and of patented subject
10 matter and in particular the growth of patenting
11 related to software and to business methods has
12 created at least in Australia concern that the
13 types of provisions that we had in the Copyright
14 Act may be rendered ineffective to the extent
15 to which they are not paralleled by similar
16 provisions in our patent legislation. Thank
17 you very much, Mr. Chairman.

18 WILLIAM KOLASKY: Thank you, Henry.
19 Because we're running a little bit late, I'm
20 not going to direct any questions to Henry
21 specifically. I would like to have a little

1 issues that have been raised.

2 And I would throw out three
3 suggestions for things we might focus on. The
4 first is that a number of speakers in describing
5 the approach in their jurisdiction talked about
6 the need to balance the adverse effect on
7 competition of a refusal to license against the
8 potential adverse impact on incentives to invest
9 and innovate if compulsory licensing were to be
10 required.

11 And I think that that invites
12 consideration of what the best approach is given
13 the institutional limitations of competition
14 agencies and courts. That is, should that
15 balancing be done on a case-by-case basis?

16 Should we have strong presumptions in
17 place going in one direction or the other? Or
18 should we have more akin to flat per se rules
19 that unless a very clear set of criteria are met
20 we will not require compulsory licensing of

21 intellectual property rights?

22 A second sort of broad theme that came

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1 through is that in all of the jurisdictions one
2 of the factors considered is whether there is a
3 quote, unquote, legitimate business justification
4 for the refusal to license.

5 And again I think that invites an
6 inquiry as to whether that is something that
7 should be reviewed on a case-by-case basis,
8 or whether we can deal with that through
9 presumptions and general rules.

10 I think in the United States decisions

20 and agencies actually engaged in a case-by-case
21 review of the business reasons for the refusal to
22 license? And then the third question really for

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1 the entire panel is the one that I asked Patrick.

2 And that is given his challenge to us,
3 if you will, to the conventional wisdom with
4 respect to vertical integration, does that argue
5 in favor of broader competition rules in terms of
6 granting access to bottleneck facilities
7 including intellectual property? And if so, what
8 should those rules be? Comments? Questions?
9 Henry?

10 HENRY ERGAS: I have a question with
11 respect to per se rules versus case-by-case
12 treatment.

13 It's worth noting that at least in
14 Australia we do have particularly in respect to
15 copyright a broad number of situations in which
16 there is a per se obligation to make third-party
17 access available and absolute defenses against
18 infringement.

19 And the one that I think is most
20 interesting that's recently enacted are the
21 provisions that go to issues of computer or
22 software interoperability where we have

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1 provisions now in the copyright act that make it
2 an absolute defense against infringement if the
3 infringement or what would otherwise be
4 infringement occurs only to the extent necessary
5 to ensure that one can design programs that are
6 interoperable.

7 And the question that was grappled
8 with there -- and my committee recommended in
9 favor of this provision -- was whether you should
10 subject interoperability issues to a case-by-case
11 treatment where you would say in this specific
12 case is competition materially promoted or

18 that it would be preferable to go with some

19 per se type of rule.

20 And we came to the view that an

21 important factor making for per se requirement

22 was first the simplicity of specifying the

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1 circumstances in that case. I don't believe that

2 that's always true.

3 And secondly if you had a

4 case-by-case treatment and you had some type of

5 process whereby an individual had to seek access,

6 there would be an externality that would arise

7 whereby one party would bear the costs of seeking

8 that access.

9 But the benefits of that access would

10 flow very widely. And so because of that we went

11 for a per se approach which is now in the

12 copyright act. Thank you.

13 WILLIAM KOLASKY: Thank you. That's

14 very interesting to hear how that was dealt with

15 in Australia. Ian?

16 IAN FORRESTER: I could mention that

17 the approach followed in Australia with respect
18 to computer programs I think followed the
19 European example where Article 6 I think it is
20 of the software directive creates a legislative
21 obligation to tolerate technical infringements
22 of the copyright in order to pursue

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1 interoperability.

2 And in European legislation on other
3 fields database protection, the patenting of
4 biotechnological inventions, other areas, the
5 black letter law obliging the member states to
6 implement national legislation executing the
7 instructions conveyed by the directive also
8 obliges them to insert provisions guaranteeing or
9 confirming that the rights are always exercised
10 subject to the competition rules.

11 So I think it may be that in Europe
12 we see more in the form of legislative guidance
13 lacking the richness of American jurisprudence in
14 the form of many, many decided cases.

15 WILLIAM KOLASKY: Thank you. Jim?

15 If you look at our case law over the
16 last seven years, you will not find a single case
17 in which the court imposed a duty of access that
18 did not involve either a regulated utility or a
19 joint venture.

20 And that I think leads to the question
21 of whether there is support at least on this
22 panel and if so what you think the likelihood

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1 is that the courts and commissions in your
2 jurisdictions would likewise move in this
3 direction to limit the application of the
4 essential facilities doctrine as someone
5 suggested to situations where the bottleneck is
6 the result of in effect a natural monopoly, that
7 is substantially economies of scale and scope, as
8 opposed to the result of invention and
9 innovation.

10 And I would add in circumstances where
11 the industry is regulated so that there is an
12 expert agency that can regulate the terms of
13 access rather than having the competition,

14 authorities have to undertake that task.

15 GWILLYM ALLEN: I'm sorry. I'm not
16 sure. I wasn't about to answer that question,
17 but I was going to just return to your idea about
18 the presumption and the balance between the
19 adverse effect on competition versus the adverse
20 effect on innovation.

21 And certainly we gave that a lot of
22 thought with regard to section 32. And I guess

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1 if you look at the way that we've approached it,
2 it is that -- I guess our presumption is that we
3 would find it very rare that we would use 32.

4 And basically what we did was we said
5 that we would only apply 32 in situations where
6 it was very clear to us that the effect on
7 innovation or the effect of issuing a remedy or
8 issuing an order would unlikely have any real
9 adverse effect on innovation.

10 Now, how do you deal with that? What
11 we did is we said we would only do this in those
12 very rare situations where it is very clear that

13 there was virtually very little time, effort, or
14 resources devoted toward something that resulted
15 in intellectual property protection.

16 And therefore if you took that
17 protection away, would that adversely effect the
18 incentives to have put time, effort, and
19 resources?

20 And the answer was clearly no, because
21 although they knew when they did that that they
22 could have gotten protection in the future or

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1 that protection was a possibility, they didn't
2 bother putting anything in there.

3 So taking away the protection should
4 indicate that there is not going to be a real
5 adverse effect. But how often those situations
6 arise is probably very, very seldom.

7 Therefore, there is this presumption
8 that you would always -- if you were going to
9 err, you were going to err on the side of
10 allowing protection to stimulate innovation as
11 opposed to on the other side.

12 WILLIAM KOLASKY: John?

13 JOHN TEMPLE LANG: Two comments.

14 First it seems to me that there is an extremely

15 strong argument against a case-by-case approach

16 which is it just takes too long. And if you're

17 trying to encourage innovation, the last thing

18 you want is litigation between two interested

19 parties lasting for several years.

11 price of a compulsory license.
12 They may be able to do it easily by
13 saying it has to be done on a non-discriminatory
14 basis. But that will only deal with the simplest
15 cases.

16 And I suspect that a competition
17 authority that is serious about imposing
18 compulsory license -- compulsory access
19 obligations whether or not it concerns
20 intellectual property will find itself trying to
21 do the job of a regulator whether it particularly
22 wishes to do so or not and whether it has the

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1 power to do so or not.

2 WILLIAM KOLASKY: I think we're almost
3 out of time. So let me just let David Hull who
4 hasn't spoken yet have the final word, and then
5 we'll resume after the break.

6 DAVID HULL: I just wanted to say that
7 I agree very much with what John said, that there
8 is a need for general principles. I think in the

10 then that has been limited by various exceptional
11 circumstances and developed on a case-by-case
12 basis.

13 And the problem with that is that that
14 list seems to keep getting longer, and it's
15 difficult to predict what will be next. So it
16 would be useful to have some principles of more
17 general application.

18 WILLIAM KOVACIC: If I could just
19 leave one thought with our panelists perhaps for
20 the rest of the discussion this morning and going
21 into the afternoon.

22 I was wondering if you detect any

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1 degree to which competition authorities
2 implicitly or explicitly make judgments about the
3 appropriate breadth of the intellectual property
4 right as granted or as defined in deciding
5 whether there has been an abuse of that right, or
6 in deciding what kind of remedy should be
7 provided for access.

8 That is, do you see in any instance

9 the tribunals in effect second-guessing statutory
10 definitions of rights, not directly challenging
11 them, but silently in effect saying "I think
12 that's a terribly broad right and I know how to
13 fix it; I'll define abuse broadly, or I'll
14 mandate access widely?"

15 Do you see that phenomenon at all work
16 in the way in which tribunals are addressing
17 cases? Just a thought for the future discussion.

18 WILLIAM KOLASKY: And with that
19 provocative question we're going to take a short
20 fifteen-minute break. We will resume between
21 11:25 and 11:30.

22 And after the break we're going to

1 hear a discussion of the IMS case in order to
2 see how these principles are applied in the
3 context of a particular case. We're not going
4 to relitigate the IMS case, but rather talk

8 WILLIAM KOVACIC: We're going
9 to resume with a segment featuring three
10 presentations that will focus to a large extent
11 on the IMS Health case in the European Union.
12 And to start us off will be John Temple Lang.
13 John?

14 JOHN TEMPLE LANG: I have been asked
15 to comment on the issues raised by the IMS case
16 and to make as clear as I can which of these
17 issues, however it may be resolved, will give
18 rise to a principle limiting the power of the
19 Commission to order compulsory licensing.

20 Two introductory points: First, I
21 have a fairly strong impression that the
22 Commission has not really got a policy on

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1 compulsory licensing of intellectual property
2 rights. It has reacted opportunistically to the
3 Magill case and the IMS Health case.

4 Secondly, the main fundamental
5 limiting principle is of course the principle
6 stated very clearly by the Court of Justice in

7 the Veng, Volvo, and Renault cases that in
8 general even a dominant company has no duty to
9 license intellectual property rights unless there
10 is something extra, something additional to the
11 mere refusal to license.

12 And the question of course is what
13 kind of additional behavior or additional effects
14 of the behavior will qualify for compulsory
15 licensing.

16 The first set of issues -- I'm going
17 to distinguish between the issues that had arisen
18 before the IMS case and haven't been completely
19 resolved and those which are raised for the first
20 time by IMS.

21 The first couple of issues concern the
22 downstream market. Does the company which is

1 dominant in the upstream market also have to be
2 dominant in the downstream market? Or does some
3 lesser degree of lack of competition suffice for
4 compulsory licensing, at least for compulsory
5 access to an essential facility?

6 My view is that the company must be
7 dominant in both markets. But the point hasn't
8 been settled. Secondly, it seems to me that
9 there is an issue again giving rise I believe to
10 a limiting principle.

11 There must in my view be scope for
12 added value competition in the downstream market.
13 Otherwise the transaction costs of imposing a
14 compulsory license are not justified.

15 This sounds unfamiliar, but everybody
16 in Europe accepts without thinking about it very
17 much that you can't have an essential facility
18 situation in a downstream market which is merely
19 retailing or reselling a product.

20 The explanation for that is in the
21 absence of a possibility of providing added
22 value. Then there is the question what is meant

1 by what was said by the Court of Justice in the
2 Magill case about a new product.

3 Must the competitor which is seeking
4 the license be offering a new kind of product

5 which is not offered in the market and for which
6 there is an unsatisfied demand? Or is it enough
7 to be merely one more competitor providing one
8 more example of more or less the same kind of
9 product that is already available?

10 Once again the issue hasn't been
11 resolved. The Magill case concerned clearly a
12 new kind of product, a comprehensive television
13 program magazine, for which there was a clearly
14 unsatisfied demand.

15 Then there is an issue mentioned
16 by Jim Venit this morning: Are the Magill
17 requirements monopolizing a second market and
18 depriving consumers of a new kind of product
19 in some sense or another? Are these separate
20 alternative requirements or are they cumulative?

21 I've given some reasons in my paper
22 to suggest that they are in fact cumulative

1 requirements. But clearly the question has not
2 yet been answered and may have to be answered or
3 may be answered by the Community Courts in the

4 IMS case.

5 I think there are very important
6 issues not yet faced and certainly not yet
7 resolved about pricing of intellectual property
8 licenses.

9 I think that competition authorities
10 in Europe at least underestimate the difficulties
11 of determining the right level of remuneration
12 on competition law grounds if you haven't got a
13 basis for comparison in the particular case.

14 In other words, if you can't simply
15 say you gave a license already to those people;
16 you must give another license to this plaintiff
17 on substantially the same terms.

18 There are very considerable
19 difficulties about risk. In doing this the
20 Commission has frankly not faced these issues.
21 It hasn't faced them -- it didn't face them in
22 the Magill case, and it hasn't yet had to face

1 them in the IMS case.

2 any stage.

3 So in my view it is not a particularly
4 important argument unless somebody is better at
5 doing long distance psychoanalysis of the judges
6 and the Commission than I am. But there may be
7 an element of it there.

8 Well, I said that I would point to
9 several of the issues that have been raised for
10 the first time in the IMS case. I think there
11 are basically three.

12 The first one is can a facility become
13 essential not because the competitors are unable
14 to produce a rival facility of their own, but
15 because the customers prefer the dominant
16 company's facility and are not interested in
17 alternatives.

18 This is the first time as far as I am
19 aware that it has been suggested that consumer
20 preferences can make an essential facility when
21 competitors can produce alternatives.

22 And I don't think it matters for

1 and Australia and in other countries that the
2 mere refusal -- I don't think I can avoid using
3 the word -- the refusal to license by itself
4 cannot be an abuse.

5 There must be something else that
6 makes the situation special and particularly bad
7 in some way.

8 If the IMS decision is right, then it
9 seems to me that what it implies is that in some

1 we can be.

2 First of all, we are not talking about
3 defining markets. We are not talking about
4 market definition for the purposes of assessing
5 market power.

6 We're talking only about the question
7 whether the intellectual property right can be
8 used for two different purposes and whether you
9 could have a license for one of those purposes
10 which left untouched the value of the
11 intellectual property right for the other
12 purpose.

13 I think we're obliged in Europe to
14 accept that the Court of Justice thinks that you
15 have to have two markets. In most at least of
16 these cases the court has often referred to the
17 use of market power in one market to limit
18 competition in another market.

19 However, I think it's important to
20 make a couple of other points. First, I don't
21 think it's important whether this particular
22 dominant company has ever granted a license of

1 the IP right or not.

2 The question whether there are two
3 separate uses for the intellectual property right
4 is an objective one and one that doesn't depend
5 on what the dominant company has actually done.

6 It would be relevant however if no
7 company in a similar position had ever granted a
8 license and if there were good reasons for not
9 doing so because in particular if there's only
10 one market it normally doesn't make sense for you
11 to grant a license of your principal competitive
12 advantage to a competitor or a potential
13 competitor if you're planning to stay in the

1 an obligation to license.

2 Suppose that the process is cheaper,
3 produces a purer product and does so more quickly
4 and more efficiently.

5 If you say that only one market is
6 necessary and you can have a compulsory license
7 in these circumstances, it seems to me that you
8 are saying that a dominant company if the
9 competitive advantage is great enough to give
10 rise in due course to a monopoly -- that's what
11 the Commission says -- a competitive advantage
12 which is valuable must be shared.

13 And that is once again an extremely
14 surprising proposition and one with enormous
15 implications if the decision is ultimately upheld
16 in this particular respect.

17 I don't know whether the courts are
18 going to uphold the IMS decision. But if they
19 do, it seems to me they can strike it down on one
20 or more of these grounds and we won't know the
21 answers to the other questions.

22 However, it seems to me that the

1 courts will probably have to face all of these
2 issues and answer them appropriately if they are
3 going to uphold the decision in due course.

4 WILLIAM KOVACIC: Thank you, John.
5 What we thought we would do because each of our
6 three presentations in many ways are closely
7 related here would be to hear from all of our
8 panelists for this segment first and then go to
9 the discussion. So if we could, please turn to
10 Ian's talk now.

11 IAN FORRESTER: About twelve, thirteen

22 been terribly kind and encouraging.

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1 And I said, well, very nice. I've got
2 a case for the Commission before the court. He
3 said, really, well, very good; what's the case?
4 And I said Magill. And his face changed utterly
5 and he said that's a disgrace; I'm shocked; I
6 very much hope you lose.

7 And such passion is characteristic of
8 the field of IP rights, especially when they come
9 in contact with competition law. The episode
10 illustrates also that Magill at the time was
11 regarded by many as an extremely bad and even
12 reckless case.

13 And now I think it is regarded perhaps
14 as an interesting one, but not a terribly
15 surprising one in the light of hindsight. The
16 next thing I'd like to say is that there have
17 been enormous encroachments on the rights of IP
18 holders due to the application of community law,
19 enormous encroachments.

20 But those encroachments have been far

21 more significant by the application of the rules
22 of free movement than the very small number of

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1 decisions on compulsory licensing.

2 And indeed the vocabulary that's used
3 to discuss the free movement cases has almost
4 tainted and distorted analysis in the case of
5 competition matters.

6 Now, the early cases related to the
7 use of IP rights to hinder cross border trade.
8 Classically the patentee or the trademark holder
9 in The Netherlands could prevent the unwelcome
10 importation of genuine goods which its affiliate
11 had put on the market in, let's say, Germany.

12 It could prevent their importation and
13 sale in The Netherlands. Now, it was clear to
14 the European Court for whom market integration
15 was a kind of civil religion that the use of
16 national IP rights to prevent such importations
17 had to be blocked. It wasn't acceptable.

18 The court created a theory
19 distinguishing between certain kinds of rights,

20 core rights and less core rights, existence and
21 exercise. And it said that you would retain
22 always the core ones, but you could lose the

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1 non-core ones.

2 Now, that vocabulary was the technique
3 used by the court to reach an acceptable result
4 in the free movement of goods cases. It has
5 been argued and is still argued that the
6 existence/exercise doctrine is relevant also
7 for competition cases.

8 I've never really believed that that
9 was correct. But there is still debate. But in
10 my view we're probably moving now to a situation
11 where existence and exercise as a way of deciding
12 whether or not an IP right can be removed, that
13 that -- the use of that vocabulary is rather
14 passing.

19 However, in the field of compulsory
20 licensing it is a very, very small basis. There
21 is Volvo v. Veng. There is Ladbroke and Bronner
22 which have to do with refusals to deal.

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1 There is Magill of course. And now
2 there's IMS. So I think that that is too small,
3 too fragile, too narrow a basis of authority to
4 make confident predictions for the future.

5 Putting it differently, you can find
6 better guidance about the constraints placed by
7 community competition principles in community
8 legislation. And then you can glean guidance
9 from Magill and IMS.

10 So there have been two big cases which
11 have aroused immense attention. And before I say
12 anything about them procedurally I state my
13 thesis which is that both cases are to be
14 understood more easily as reactions by
15 competition enforcers to the non-harmonized state
16 of EC copyright law.

17 And I believe that if we were talking

18 about mainstream, orthodox, common, whatever word
19 you like, IP rights, it is unimaginable that the
20 decisions taken in Magill and IMS would have been
21 taken.

22 Now, each of the Magill and the IMS

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1 cases involved serious arguments as to -- and
2 ongoing arguments as to whether the national IP
3 rights did indeed exist.

4 The Commission acted before there had
5 been a final decision on the merits before the
6 national court. That was the case in Magill and
7 also in IMS.

8 In Magill the Irish High Court gave
9 its judgment only long after the Commission
10 decision. And in the IMS case the Commission
11 decision was taken in the summer of last year,
12 and the German courts -- there have been many,
13 many decisions, but there is no final decision on
14 the merits.

15 So the Commission says we are acting
16 in order to keep the complainant alive pending --

17 during the progress of the national litigation.
18 Now, another procedural interesting
19 phenomenon is in both cases the European court
20 suspended the Commission decision as having been
21 too bold.
22 So we have in both cases

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1 Europe-specific procedural context with a
2 strange, I assert, national IP right being
3 invoked successfully by the dominant enterprise
4 in the national courts driving the complainant
5 out of business or preventing him entering the
6 business, and the Commission intervening to try
7 to keep things alive while matters get
8 sorted out.

9 And in each case the European court
10 has overruled the Commission's procedural
11 intervention.

12 Now, that seems to me intriguing and
13 also relevant for the future because it would
14 suggest that intrameasures cases involving
15 licensing will be extremely difficult,

15 But what is more surprising is the
16 proposition that the presentation of information,
17 commercial information about what's going on in
18 each of these regions on that map should also be
19 copyrighted.

20 That seems a surprising and bold
21 assertion. German courts have said it right.
22 They said it is correct. The battle goes on in

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1 Germany.

2 So I think that in each case we can
3 see a cluster of unusual circumstances which
4 together justify the use of Article 82. Article
5 82 applies to dominant enterprises the higher
6 burdens that are required, especially high
7 burdens imposed by the Treaty.

8 However, we may also note that by
9 far the great majority of cases where dominant
10 enterprises are the subject of a complaint where
11 the complainant requests that they be ordered to
12 deal, by far the great majority of those
13 complaints are rejected and deserve to be

14 rejected.

15 I note that a recent OFT report says
16 answering the questions from our chairman or some
17 of the questions from our chairman -- I found
18 this interesting this morning. I heard it by
19 phone -- that an authority confronted with the
20 request to order trading, and notably in the
21 context of licensing, should ask itself a number
22 of questions:

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1 What was the investment made by the

- 13 right in this case? Again I think that properly
- 14 viewed both the IMS and the Magill cases can be
- 15 regarded as specific reactions to very, very
- 16 particular problems arising under national law.

12 And then it looked at two refusal to
13 deal cases in each of which the complainant had
14 been unsuccessful but where the Court of Justice
15 gave some guidance as to what the principles --
16 what relevant principles would apply.

17 Those are described in my paper.

18 That's Ladbroke where a bettor shop wanted to
19 show horse race pictures. The European Court

11 particular circumstances of the IMS case.
12 Now, conclusions to be drawn from all
13 this: I believe that in the mainstream European
14 companies and American companies and competition
15 law enforcers are really very little different in
16 their interest in respect for R & D and the
17 exploitation of technological innovation.

18 Europeans expect patent and copyright
19 protection to be given and to be enforced. The
20 great majority I repeat of requests for
21 compulsory licenses have been unsuccessful
22 and deservedly so.

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1 Next conclusion, the vocabulary of
2 the European Court in analyzing competition law
3 problems involving IP rights have been distorted
4 by older judgments of the European Court
5 concerning free movement of goods. I think that
6 that distortion is gradually being corrected.

7 Next, there have been only two cases
8 in which a compulsory license has been granted
9 for a genuine -- for a refusal to license a

10 copyright right upheld genuinely provisionally by
11 a national court. That's to say Magill and IMS.

12 In neither case was the finding of an
13 abuse based merely on refusal. In both cases
14 there were extra additional elements. And I
15 think it's very, very important that both cases
16 involved curious, aberrant as I have called them
17 national IP rights.

18 Now, predictions of the end of alarm
19 for holders for high technology companies due to
20 the Magill and IMS cases, there were immense
21 discussions at the time of Magill about the
22 long-term implications. It did not materialize.

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1 There have been grave murmurings about
2 the implications of IMS judgment. I submit that
3 those grave tidings may also not emerge. The
4 substantial result I think with the current
5 situation is not alarming.

6 So other than those two exceptional
7 cases which I've mentioned, I think that the
8 European law is not disturbing, shouldn't be

9 disturbing even in the Great Hall of the

8 general discussion. David?

9 DAVID HULL: I want to just briefly
10 look at the IMS case from a comparative
11 perspective. I should start with a caveat that
12 despite what you might infer from my southern
13 drawl I'm an EU competition lawyer, not an
14 American antitrust lawyer.

15 And I don't profess to have any
16 expertise in American antitrust. So most of you
17 know the American cases much better than I, and I
18 apologize for any misstatements I may make.

19 Just a general comment on looking at
20 what's going on on the two sides of the Atlantic,
21 it's interesting over here the debate on
22 compulsory licensing in the IP field in the wake

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1 of the Federal Circuit's decision in Xerox seems
2 to be -- the debate seems to be have we gone too
3 far in protecting IP rights in this context.

4 Whereas in Europe in the wake of the
5 IMS case the debate seems to be have we not gone
6 far enough.

7 In the wake of IMS there was concern
8 I think that in the general context of this
9 discussion going on in the wake of GE/Honeywell
10 of the need for greater convergence among
11 antitrust jurisdictions on how they treat various
12 competition law problems.

13 I think in putting the IMS case
14 in that context there was a concern that IMS
15 represents greater divergence, a move away from
16 the approach to this issue in the U.S.

17 I think that's certainly true if you
18 look at the theory that the Commission used. I
19 think that it would be -- as Bill said, it would
20 be very rare in the U.S. to use an essential
21 facilities doctrine in this context.

22 So in that sense IMS -- the approach

1 used by the Commission in IMS is much different
2 from the approach in the U.S. What I'd like to
3 do briefly is look and see how the U.S. courts
4 might come out on IMS to see if in fact the gap
5 is as wide as it appears to be at first blush.

6 There are three U.S. cases I'll
7 discuss very briefly. First there is a split in
8 the U.S. it appears on how you deal with this
9 issue.

10 The Federal Circuit in the Xerox case
11 adopted a very strict test of saying that the
12 refusal to license would not be a violation of
13 the antitrust rules except there were certain
14 exceptional circumstances: sham litigation,
15 illegal tying, or fraud on the Patent Office, all
16 three of which would be very difficult to show.

17 So essentially the Federal Circuit set
18 a very high bar to compulsory licensing. I think
19 if the Federal Circuit were presented with IMS,
20 it's very likely it would not compel IMS to
21 license its IP rights.

22 The Ninth Circuit in the Kodak case

1 took a different view. The Ninth Circuit
2 essentially said that there's a presumption that
3 it's okay not to license your IP rights, but it's
4 a rebuttable presumption, and it can be rebutted

5 by showing that the refusal to license is but a
6 pretext for anticompetitive conduct.

7 In that case Kodak refused to supply
8 spare parts to independent service organizations.

9 And the court suggested that in fact that refusal
10 was not legitimate -- out of a legitimate concern
11 to protect the IP rights, but was rather to
12 exclude competition in an anticompetitive way.

4 the facts of IMS it could find that IMS's refusal
5 to license was a pretext.

6 Reading between the lines when you
7 read the Commission's decision, there seems to be
8 a notion that IMS asserted its rights late in the
9 game for the sole purpose of excluding a new
10 entrant to the market.

11 And in those circumstances I'd wonder
12 whether the Ninth Circuit might find that that
13 was simply a pretext for anticompetitive conduct.

14 Finally I would mention the Dell
15 Computer case decided by the FTC. In that case
16 in the context of standard setting Maurits
17 Dolmans will talk more about this this afternoon.
18 So I won't really go into it.

19 But I'll simply say in this case the
20 idea is that in the standard setting process if
21 one of the participants doesn't disclose it has
22 IP rights and then comes along very late in the

1 game and asserts its IP rights, that is
2 considered to be anticompetitive.

3 It's relevant to the IMS case because
4 there is a lot -- in the Commission's decision
5 and in the commentary on the case there's a
6 notion that the brick structure involved in IMS
7 is at least akin to a standard -- some sort of
8 open standard.

9 And IMS should be perhaps estopped
10 from asserting its rights so late in the game.
11 It comes along after this structure has been
12 widely used in the industry, has been developed
13 with the participation of customers.

14 And it comes along and asserts its
15 rights at the last minute. I think the
16 difficulty with applying this notion of estoppel
17 in IMS in the standard setting process is IMS
18 didn't set the standards with competitors. It
19 set it with its customers.

20 So it's really different from I think
21 a normal standards process. But still there's
22 this notion that perhaps this estoppel argument

1 would be an interesting one.

2 My conclusions are first that I wonder
3 if the gap between the U.S. and the EU is as
4 great as it might appear at first blush. I think
5 the U.S. courts -- I don't know if they would
6 reach the same result in IMS, but they might
7 reach a similar result if presented with the
8 IMS facts.

9 I also think when I read the IMS case
10 I come away with the impression that this is not
11 simply -- although the theory used by the
12 Commission makes it appear that this is simply a

1 That seemed to be troubling for the
2 Commission, but it had a hard time articulating
3 that when it used the essential facilities
4 doctrine.

5 So perhaps some of the reasoning in
6 the U.S. cases if the Commission had taken maybe
7 the estoppel approach or some of the other the
8 reasoning you find in the U.S. cases, it might
9 have done a better job articulating what was
10 truly -- what's considered to be truly the
11 problem in this case.

12 I'll stop there.

13 WILLIAM KOVACIC: Thank you, David.

14 We have just about fifteen minutes before we
15 break for lunch for discussion among our
16 panelists.

17 And we certainly have a considerable
18 collection of topics that we could address, both
19 the panelists' views about the underlying
20 rationale for the IMS decision, its consistency
21 with other national approaches for evaluating
22 demands for access and for evaluating refusals

1 to deal.

2 So again I'd simply like to invite our
3 panelists to respond to what they have heard and
4 perhaps for our speakers in this segment to
5 respond to the interpretations they have heard
6 from their colleagues. Henry?

7 HENRY ERGAS: Thank you very much.
8 I wanted to comment really on two points. The
9 first relates to John Temple Lang's presentation,
10 the second in respect of a number of issues that
11 were raised by Ian Forrester.

12 With respect to Dr. Lang's
13 presentation, Dr. Lang emphasized the
14 difficulties he saw arising involved in
15 determining appropriate prices for access to
16 intellectual property when that access had been
17 mandated.

18 And I of course agree with him that
19 the difficulties are substantial. What I would
20 say though is this, that we have had in Australia
21 as in many other countries schemes or statutory
22 licenses in respect of copyright for many years

1 now.

2 And within those schemes and as part
3 of the implementation and administration of those
4 schemes the bodies administering them have had to
5 determine appropriate remuneration.

6 And indeed we now have -- for
7 example, in respect to the copyright tribunal in

- 1 Forrester in his very comprehensive discussion of
- 2 the background to IMS.

1 Act, and as is being reflected in copyright

2 legislation virtually throughout the world.

3 The second trend I would point to in

4 that respect is the de facto extension of the

5 patent right to areas where either it previously

6 did not exist or if it did exist it existed in

7 very minor form.

8 And this is especially the case with

- 1 competition authorities? Well, what it means
- 2 is that the type of dilemma that Ian viewed as
- 3 aberrant far from being aberrant is occurring

22 important things in this area as in any area is

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1 the need to develop limiting principles.

2 And I thought that Ian's talk and
3 David's talk were very useful in terms of
4 suggesting a possible limiting principle in the
5 IMS case, namely the notion that the brick
6 structure had become an industry standard and
7 that there may have been some reliance on the
8 part of customers to the notion that it might be
9 treated as though, if you will, open source and
10 that therefore there might be an estoppel
11 element.

12 It seems to me that -- I don't know
13 whether factually that is the case in IMS. But
14 that certainly would seem to be a useful limiting
15 principle. I'm more troubled by the limiting
16 principle suggested in the Magill case, namely
17 that it was a new product for which there was a
18 customer demand.

19 And I'd like to try to put to the
20 speakers a hypothetical. As you know, here in

21 the United States, and I think this was common

22 throughout the world, we had something called

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1 Napster where teenagers were able to listen to

2 recorded music off of all labels for free.

3 In the wake of Napster's demise there

4 are proposed joint ventures among the various

5 record label companies to aggregate their

6 libraries in order to be able to provide a

7 Napster like service for a monthly subscription

8 fee.

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20 IAN FORRESTER: I can offer an answer
21 on the last one. I think again one has to look
22 at Magill, all the circumstances which were

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1 present.

2 The material in question was indeed
3 copyrighted, but it was promotional material that
4 was given by the broadcasting companies to
5 hundreds, indeed thousands of periodicals which
6 were encouraged to reproduce it on a daily basis.

7 And the controversy related to whether
8 it could be reproduced by Magill on a weekly
9 basis in competition with the weekly magazines
10 of the broadcast companies.

11 I think that just that set of
12 circumstances, those elements, would justify the
13 confident rejection by the European record
14 industry to Mr. Napster Europe who wanted to have
15 a compulsory license with respect to information.

16 Yes, there would indeed be a new
17 product being offered. But I don't think the
18 circumstances would be exceptional enough to come

19 within the Magill principle.

20 WILLIAM KOVACIC: Jim?

21 JAMES VENIT: The easy way out of

22 Magill is that it's the record companies

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1 themselves who are going to pool to be able to
2 offer the product, and they wouldn't run into the
3 horn of dilemma that there couldn't be the new
4 product because the owners hadn't put it out and
5 they were preventing someone else from doing it,
6 which is a facile answer to the question, but I
7 think it's relevant.

8 The issue on the standard to me is a
9 very different thing if one develops something
10 that is accepted by customers as a standard as
11 opposed to coordinating with other rivals to
12 develop a standard which then becomes industry
13 standard and shutting people out.

14 One could make the argument that the
15 IMS thing is even more disturbing because you are
16 punishing them because they were successful.

17 WILLIAM KOVACIC: Patrick?

18 PATRICK REY: I have remarks on this
19 and on the questions you raised before. As you
20 can infer from my presentation and the paper,
21 I believe that it's fair to say that there can
22 exist particular circumstances where vertical

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1 foreclosure can raise legitimate antitrust
2 concerns.

3 And I think that this should be
4 recognized particularly in the U.S. where the
5 vertical foreclosure is essentially perceived as
6 a non-issue.

7 That being said, I'm not sure that IP
8 rights would be the first rights, the first
9 property rights that a competition authority
10 should try to focus on.

11 And indeed when the bottleneck results
12 from innovation, then I would tend to agree with
13 the suggestion that there should be a presumption
14 in favor of the right holder.

15 And clearly the dilemmas that John
16 Temple Lang has mentioned regarding the

17 difficulty to regulate access particularly for
18 competition authorities and for courts -- of
19 course the courts will have to be involved at
20 some point. And as the time arises the issues
21 that are considered we do advocate for being very
22 cautious.

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1 I'd like to react first to the
2 interpretation of the Magill and IMS case. I
3 think it is quite a realistic interpretation.

4 But I really found it quite dangerous
5 to try to second guess national Patent Offices
6 and to use competition policy cases which
7 establish generally applicable standards in
8 order to resolve without being able to say so
9 explicitly to try to resolve possible errors
10 in national IP statutes.

11 I'm not sure that this line of
12 reasoning provides a very good approach to
13 possible limitations or limiting principle.

14 WILLIAM KOVACIC: And John?

15 JOHN TEMPLE LANG: I just want to

16 repeat the fact that all this theory about rights
17 does not appear anywhere in anything that the
18 Commission has written about the IMS case. It's
19 not part of the Commission's case. Maybe they
20 might have made it into their case, but they
21 didn't do so.

22 They argued the case very clearly on

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1 the basis that an IP right may not give rise to
2 a monopoly and that if it does give rise to a
3 monopoly even if the monopoly is due to customer
4 preferences and not the inability to have
5 competitors to produce an alternative facility,
6 then it must be licensed.

7 That is the Commission's proposition,
8 whether you like it or not or whether you think
9 that another proposition might have been made.
10 That's what the Commission is saying very clearly
11 to the court.

12 WILLIAM KOVACIC: Ian, did you have a
13 response to Patrick's comment?

14 IAN FORRESTER: A brief one. I think

14 tuning so that when you think that the breadth of
15 an intellectual property right was too wide you
16 have very vigorous antitrust enforcement, and
17 when you think it's too narrow then you change
18 your antitrust approach to the particular
19 intellectual property law.

20 We had long debates about this, and
21 we decided that it was inappropriate to use
22 enforcement mechanisms to try to fine tune the

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1 existing intellectual property law. We put in a
2 section in our guidelines saying that that would
3 not deter us from engaging in advocacy, and
4 encourage either legislative change or when the
5 IP laws were being reviewed to use our advocacy
6 role to step in to provide our opinion on the

13 about how the sort of natural development of
14 reality has changed the appropriateness of
15 intellectual property and maybe it has extended
16 it to some degree.

17 And indeed that was the idea that
18 we had in our application of section 32, to try
19 to deal with that particular problem, that the
20 situation -- and these were based on some ideas
21 that we basically stole or borrowed from a number
22 of academics on the idea that the architecture of

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1 the law can change such that the objectives in
2 the intellectual property are actually being
3 undermined by their very use.

4 And as a marker that that may be
5 happening would be the effects on competition.
6 And that may be that competition law or authority
7 should step in and try to readjust the balance or
8 at least put it before a court -- and in our case
9 it's the Federal Court -- to consider the
10 readjustment of that balance.

11 WILLIAM KOLASKY: Thank you very much,

12 Gwilym. I think that will have to be the last
13 remark. This is obviously a fascinating subject
14 and we could stay here all day debating it. But
15 we have another session this afternoon.

16 I want to on behalf of the Justice
17 Department -- and I'm sure Bill would echo this
18 on behalf of the FTC -- thank all of our speakers
19 enormously for coming here. They all obviously
20 came from other countries, other continents. I
21 think Henry gets the prize for coming the longest
22 distance.

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1 But we do very much appreciate your
2 sharing with us your perspectives on how your
3 jurisdictions are dealing with these very
4 difficult issues and it will very much help to
5 inform our consideration of the issues here in
6 the United States. So thank you.

7 (Applause.)

8 WILLIAM KOLASKY: We will resume at
9 2:00, and as I mentioned before, I gather you
10 need to be escorted out of the building and then

11 find your way back here. Thank you.

12 (Lunch recess.)

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1 AFTERNOON SESSION

2 (2:00 p.m.)

3 WILLIAM KOLASKY: Good afternoon.

4 I want to welcome everyone back as we continue

5 our discussion of international comparative

6 issues in this next session of our joint hearings

7 on competition and intellectual property law and

10 International Deputy Assistant Attorney General
11 for antitrust. I'm happy to have with me as my
12 co-moderator Bill Kovacic, General Counsel of
13 the FTC, who served also as co-moderator this
14 morning.

15 This morning we heard from a
16 distinguished panel about refusals to license
17 intellectual property and compulsory licensing
18 in the EU, Canada, and Australia. This afternoon
19 we will focus on the European Union's technology
20 transfer block exemption regulation, referred to
21 as the TTBE, as well as agreements that fall
22 outside of its scope.

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1 In the European Union, bilateral
2 licensing of some types of intellectual property
3 is covered by the technology block exemption
4 which was adopted in 1996 and will expire in
5 2006.

6 Last year responding to criticism that
7 the block exemption was both overly formalistic
8 and complex and too narrow in scope, and noting

9 that there was a need to harmonize treatment
10 of intellectual property with other recently
11 re-enacted regulations on vertical agreements,
12 R & D agreements, and the like, the European
13 Commission commenced a mid-term review of the
14 TTBE.

15 We're most fortunate to have with us
16 today Dr. Kirti Mehta, a director in DG Comp,
17 who will discuss that review process. As part
18 of that process, the EU solicited public comments
19 about its proposed changes, some of which will
20 be discussed by the panel today.

21 We will then expand the discussion
22 of licensing practices to address licensing

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1 agreements that do not currently fall within
2 the block exemption.

3 Such agreements include multiparty
4 licenses of intellectual property such as patent
5 pools and cross-licenses, some of which are
6 affected by the activities of non-governmental
7 standard setting organizations. With that

8 introduction let me move on and introduce our
9 panelists. But before I do, Bill, do you want
10 to add anything?

11 WILLIAM KOVACIC: No, Bill.

12 WILLIAM KOLASKY: Bill and I will be
13 representing the Justice Department and the FTC
14 this afternoon. We have with us Mary Critharis,
15 an assistant solicitor at the U.S. Patent and
16 Trademark Office.

17 Unfortunately I do not have time for
18 lengthy introductions of our panelists, but more
19 complete versions of their biographies appear in
20 the prepared materials.

21 As I mentioned, Dr. Mehta is a
22 Director in DG Comp. He is responsible for

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1 competition policy, coordination, international
2 affairs, and relations with other institutions.
3 His main areas of responsibility are policy and
4 legislative initiatives, trade and competition,
5 and international cooperation.

6 Fiona Carlin, to Dr. Mehta's left,

- 7 is a partner with Baker & McKenzie at their
- 8 European law center in Brussels where she
- 9 specializes in antitrust and trade practices,

6 His practice includes advising clients on
7 competition and regulatory law issues including
8 IP.

9 Next to him is Will Tom, a partner at
10 Morgan, Lewis & Bockius here in Washington. In
11 the 1990s Will served as deputy director at the
12 Bureau of Competition at the FTC.

13 Prior to joining the FTC he worked
14 here in this building as a counselor to the
15 Assistant Attorney General in the Antitrust
16 Division, and was a member of our intellectual

5 College of Law in Iowa City. He teaches and
6 writes in the fields of intellectual property
7 and antitrust.

8 Professor Janis is coauthor of a
9 two-volume treatise, IP and Antitrust, with
10 Professors Herbert Hovenkamp and Mark Lemley.

11 Before we turn to the substance of
12 this afternoon's session, I need to go over a
13 few administrative details, many of which are
14 probably familiar to you. Because we are in
15 the Great Hall of the main Justice Department
16 building, we are required to observe certain
17 security procedures.

18 If you are not a DOJ employee, you
19 must be escorted around the building. Antitrust
20 paralegals who are wearing name tags highlighted
21 in green escorted you into the Great Hall.

22 They are available at the back of the

1 room to escort you out should you need to leave
2 the session or to take you to the restroom or
3 upstairs to the seventh floor should you need to

4 make a phone call. Cell phones do not work well
5 here in the Great Hall.

6 Because leaving the building is
7 difficult, we have refreshments at the back of
8 the room. Hopefully the coffee will hold out.
9 But if not, you might want to get up and get
10 some now. Like this morning's session, this
11 afternoon's session will be a combination of
12 presentations and discussion.

13 Around 3:20 we will take a
14 fifteen-minute break and then come back for
15 another hour and a half, finishing this session
16 around 5:00 p.m. These hearings will resume
17 tomorrow morning at 9:30 at the FTC, just one
18 block down Pennsylvania Avenue with a discussion
19 of many of these same issues from an Asian
20 perspective.

21 As you are no doubt already aware from
22 this morning's session, the acoustics here in the

1 Great Hall are less than perfect. Those of you
2 in the audience, if you have trouble hearing you

3 may want to move to a different seat. Our
4 audio-visual specialist in the back of the room
5 has a limited number of amplification devices
6 available if you would like to try one.

7 Panelists, I would ask that you
8 speak directly into the microphones and try to
9 enunciate even more clearly than I'm sure you
10 always do. And speak perhaps a little more
11 slowly. Also for some reason the microphones
12 take a second or two to activate.

13 So after you first start it may be a
14 second before people can hear you. I'm going to
15 ask the speakers to stick as closely to their
16 presentation time as possible so that everyone
17 has a fair opportunity to present their views
18 and so that we have time for discussion.

19 If there are people in the audience
20 who have questions that you would like us to put
21 to the panelists, please come up at the end of
22 the session or during the break and we'd be happy

1 to put those questions.

2 For the speakers if you want to
3 offer an intervention, please raise your flag
4 OECD-style and I will call on you. With that
5 introduction, let me now turn to our first
6 presentation by Dr. Mehta from the European
7 Commission.

8 KIRTIKUMAR MEHTA: Good afternoon,
9 ladies and gentlemen. And my special thanks
10 to Bill Kolasky and Bill Kovacic first for the
11 invitation to come and also the opportunity to
12 present to you our current legislation and how
13 we see it being reviewed.

14 Let me first start with what the block
15 exemption -- what it means in our situation. As
16 most of you are aware, Article 81(1) of the EC
17 treaty prohibits agreements that prevent,
18 restrict, or distort competition, and 81(3)
19 allows for exemption for those agreements which
20 confer sufficient benefit to outweigh the
21 anticompetitive effects.

22 And the Commission currently has

1 the exclusive power to write those exemptions
2 and also it can provide those exemptions for
3 categories of agreements. And in fact the block
4 exemption is the regulatory way we do that. If
5 you look at the block exemption regulation today,
6 a number of restrictions are permitted both on
7 licensor and on licensee.

8 Many of these are indeed often the
9 common situation when the licensor wants to
10 territorially assign the license, and quite often
11 will also have some other restrictions that are
12 enumerated in the block exemption. The block
13 exemption has the advantage that it provides
14 legal security.

15 It means that in national courts our
16 national competition authorities will not
17 challenge agreements that are in line with the
18 block exemption. And in a way we have a
19 situation where much of the litigations that
20 result from those are agreements that fall
21 outside of this block exemption.

22 The current block exemption as was

1 pointed out came into force in '96. And midway
2 through we had put in the regulation that there
3 would be a review. This review has been preceded
4 by a fact finding.

5 And in the report on the block
6 exemption you see that a lot of detail is given
7 on how the block exemptions worked because we
8 addressed this question as to people who we are
9 told are using the block exemptions or those in
10 the licensing field to find out whether they do
11 use them.

12 As you see from the report, the number
13 of the agreements that are notified to us are
14 actually not so many. So the bulk of it either
15 falls under the block exemption or the bulk of it
16 is simply not notified to anybody.

17 So I think that is an experience we
18 also have, and we have looked. In the process
19 of our reform of Regulation 17 something like
20 80 percent of agreements are simply not notified
21 either to Commission or to any other competition
22 authority.

1 The review process that we have
2 started we hope will lead towards the end of
3 this year to a draft proposal for certain
4 modifications based on the consultation we've
5 had up to now. And we hope that we will continue
6 to get detailed comments from those who are
7 familiar with the block exemption. And that
8 will help us draft these suggestions.

9 Let me say I think the report is quite
10 frank on what we found in this fact finding. And
11 many of the comments were largely that the block
12 exemption as it stands today is rather
13 proscriptive. It forces agreements into certain
14 rather narrow straitjackets.

15 Secondly, the scope is limited to
16 bilateral licensing agreements and doesn't cover
17 those between several parties. Presumably people
18 can do a sequence of bilateral agreements, but
19 this is from a transaction cost point of view
20 quite expensive and may not lead to the same
21 results.

22 Thirdly I think many people have

1 found that there is no distinction in the block
2 exemption between licensing between competitors
3 and licensing between non-competitors. This is a
4 notion which is not very well developed in the
5 block exemption.

6 You have certain situations where
7 licensing between what is often competitors may
8 be block exempted, and there is no market power
9 threshold there at all. The only major concern
10 of the block exemption is precisely these
11 territorial restrictions. So long as they are
12 not territorial restrictions, much is allowed.

13 A further point that comes out is
14 that often the block exemption is not so clear
15 as to how the territorial restrictions, customer
16 allocation restrictions, the field of use, side
17 license, et cetera, are going to be treated in
18 the block exemption. And there is a need to make
19 this more clear.

20 So I think that gives you a brief
21 overview of the main points that come out of the
22 fact finding and which are then detailed in the

1 report which also gives an economic assessment
2 of how the different articles of that -- of the
3 block exemption are supposed to work in practice.

4 I think that if you were to look at --
5 and this audience perhaps is probably most
6 interested in looking at where are the major
7 differences in policy. And I think in the little
8 paper I presented you see already that I have
9 highlighted some of these aspects.

10 Firstly, as I say, these territorial
11 restrictions, because these are taken in
12 Europe -- you must remember Europe is a community
13 that is a single market which has evolved over
14 time. It has been from national economies that
15 were separated perhaps by important barriers.

16 And hence one of the most important
17 roles for competition policy has been to ensure
18 that those barriers which are removed by our

19 5 Tw (3fare the major) Tyou were to 35elveg9- th367ish3089 0.3892 Tw (71 9 7 restrictions, 2tl

- 1 reason why we have duration limits on territorial
- 2 exclusivity and the focus that is there on active
- 3 and passive sales. I think that is perhaps
- 4 something which is very important.
- 5 And you find it in several other areas
- 6 of our competition policy. A similar issue which

22 block exemption currently covers patents, pure

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1 patents, or know-how and only covers trademarks
2 and other rights if they are ancillary to the
3 main transaction. Should we broaden this scope?

4 I think the issue here is that if we
5 wanted to do that we would have to change the
6 Council Regulation which is the one we call
7 a negative regulation.

8 Our legislative architecture is
9 that the Council Regulation indicates the areas
10 in which the Commission may make a block
11 exemption.

12 And the existing Council Regulation
13 limits it to essentially patents and to the
14 know-how. And if you were to change that, that
15 would take a period of two to three years before
16 we could do that.

17 It may well be that in our proposal
18 for Regulation 17 which currently is being
19 discussed by Council we have put rather a broad
20 article which says that the Commission would have

21 the power to bring in block exemptions where they

19 Thirdly, the question of license
20 agreement between non-competitors, and here
21 without excluding other options the report
22 proposes a framework where you will see that we

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1 are thinking of making this distinction and to
2 have a much more lenient regime with a shorter
3 list of hard core articles or restrictions as
4 regards licensing between non-competitors and a
5 longer list of hard core and the market share
6 threshold for licensing between competitors.
7 This is an idea that of course has
8 interested several people who have commented on
9 our report. Of course people are not happy with
10 having a market share threshold. Andwtpn ideaas

18 important potential competitor.

19 But this is not an area where you can

20 say very clearly in black and white what are the

21 situations in an exhaustive way that you are

17 consultations with our Member States have more or
18 less shown that the enthusiasm for extending the
19 scope to software, to other IP rights is not I
20 would say so important.

21 I think that too many complications
22 come with that vis-a-vis the national laws in

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1 those areas. And so it's not something that we
2 would be able to undertake in this exercise.

3 I think I wanted to basically stop
4 there because I think these are the main
5 elements. You can read the report and also the
6 written submission of comments that I have made
7 which goes into a bit more detail on the issues
8 that I touched upon. Thank you very much.

9 WILLIAM KOLASKY: Thank you, Kirti.
10 Because most of the other speakers will be
11 commenting on the block exemption report, I'm not
12 going to ask them at this point to comment on
13 Kirti's presentation.

14 But if any of you have any clarifying
15 questions that you would like to ask Kirti, we

16 have time for you to do that before we move on to
17 the next speaker. In that case let's move on to
18 Fiona Carlin who is going to give us her comments
19 on the block exemption report.

20 FIONA CARLIN: Good afternoon. I'd
21 like to start by thanking our hosts for inviting
22 me to speak this afternoon. It is my pleasure to

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1 be here. And I'm going to probably repeat to
2 some extent some of the points that have already
3 been expressed by Dr. Mehta. And I apologize for
4 doing that from the outset.

5 But what I thought I would do is focus
6 primarily on how industry sees the current rules
7 and how difficult they are to apply in practice
8 and then give you some reaction from an industry
9 and private practitioner side on the Commission's
10 proposals to change.

11 It's already been mentioned that the
12 current block exemption entered into force on the
13 1st of April, 1996. That happened one year after
14 the U.S. licensing guidelines were published.

15 And yet there is very little policy from the U.S.
16 guidelines that finds its way into the block
17 exemption regulations.

18 And if you compare the new proposals
19 for a revised technology transfer block exemption
20 with the American guidelines, you see how far
21 the EU/U.S. dialogue has advanced. And I think
22 that's generally welcomed in Europe.

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1 The word straitjacket has often
2 been applied to the existing block exemption
3 regulation. And I will go a little bit further
4 than that because I believe that the current
5 rules are a minefield of quirky drafting and
6 pitfalls for the uninitiated.

7 So I think all in all the Commission's
8 evaluation reports and the proposals to change
9 the current rules have been very widely welcomed
10 by industry and private practitioners in Europe.
11 I'd like to say a few words about why the date
12 2004 is important. Two things will happen in
13 2004, one of which Dr. Mehta has already

13 if their license agreement is challenged they
14 can go to the Commission and seek an individual
15 exemption which offers them some degree of
16 protection.

17 Currently an individual exemption
18 would not apply retroactively, but it would be
19 certainly influential in a court's discussion
20 as to the acceptability or not of particular
21 restraints.

22 What's being proposed is that

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1 individual exemption procedure will be abolished
2 and that national courts and national competition
3 authorities will be able for the first time to
4 apply Article 81 in its entirety. So the current
5 monopoly that the Commission has in granting
6 exemption will be abolished which will mean much
7 more enforcement I think at the national level.

8 So coupled with the fact that we're
9 going to have a lot more enforcement at the
10 national level and a lot of new authorities
11 enforcing the new regime, industry is very

12 concerned that any revised block exemption
13 regulation be as clear and consistent as
14 possible so that the enforcement environment
15 is predictable.

16 Whereas the current block exemption,
17 in the Commission's own words, is so proscriptive
18 that it tends to discourage efficient
19 transactions and hamper the dissemination
20 of new technologies. The drawbacks of the
21 current regulation are many.

22 First of all, it applies only to

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1 patent licenses, know-how licenses, or mixed
2 patent and know-how licenses. It's already
3 been said that it only applies to bilateral
4 agreements. It does contain rather old rules
5 limiting the duration of any territorial
6 exclusivity that is conferred on licensees.

7 And just a few words on that. Under
8 the current system in a pure patent license
9 territorial exclusivity is accepted for as long
10 as there are parallel patents in force in the

11 territory of the licensor and the territory of

12 the licensee.

13 For pure know-how licenses territorial

14 exclusivity is accepted for a period of ten years

15 starting on the date on which the products are

16 first put on the market anywhere in the European

17 Union.

18 And with regard to mixed patent and

19 know-how licenses, territorial exclusivity is

20 accepted for as long as there are necessary

21 patents in force in the territories concerned

22 or for the period of ten years or whichever of

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1 those periods is the longest. So that's already

2 a complicated system to apply.

3 One of the major drawbacks of the

4 regulation as well is that it expressly prohibits

5 any extension of the duration of the territorial

6 restraints by the inclusion of any improvements.

7 And that's a serious drawback, a disincentive to

8 license if you like.

9 Dr. Mehta has already outlined the

9 generally to the new proposals has been broadly
10 in favor of a more liberal system that's on the
11 table.

12 The Commission, we're glad to see, is
13 proposing to abandon this arbitrary ten-year
14 duration limit on territorial restraints in
15 know-how licenses. We're opposed to the per se
16 exclusion of licenses involving dominant firms.
17 And we welcome the proposal to extend the block
18 exemption regulation to cover a wider range of
19 intellectual property rights.

20 In particular at least the American
21 Chamber of Commerce welcomes the notion of
22 expanding the block exemption to cover software

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1 copyright and design rights, although we don't
2 particularly see any need to have a regulation
3 covering pure trademark licenses or copyright
4 contents licenses.

5 I've mentioned that industry is
6 broadly positive to the suggestions to narrow
7 the definition of competitors which means that a

8 greater range of agreements will fall within the
9 more generous system envisaged for agreements
10 between non-competitors.

11 We urge a more nuanced approach to
12 the blacklist of prohibited restraints that the
13 Commission is proposing to insert in relation to
14 agreements between competitors. The Commission
15 is proposing to prohibit as such all territorial
16 and output restraints.

17 And we would argue that where the
18 licensor is below a 25 percent market share
19 threshold and for as long as an agreement is
20 non-reciprocal and for as long as a licensee is
21 not restricted in the use of its own technology,
22 perhaps in those situations the Commission could

1 be a little more generous or a little less
2 suspicious of agreements between competitors.

3 I suppose the main concern that
4 industry has is the proliferation of market share

7 when in the future they try to determine whether
8 or not they fall within the new block exemption
9 safe harbor.

10 I think industry has been
11 very vociferous in the past in opposing the
12 introduction of market share thresholds in
13 licensing block exemptions. I think this time
14 around there's resignation to the fact that we're
15 going to have to live with market share
16 thresholds.

17 However, we are asking the Commission
18 to produce guidelines which will make our life as
19 easy as possible in trying to apply some of these
20 thresholds, particularly, when you are talking
21 about tension in multiple markets, not only the

6 and national courts applying these rules, I think
7 the need for clarity on market definition issues
8 and market threshold issues becomes really
9 paramount.

10 I'd like to turn briefly and consider
11 a couple of particular restrictions and look
12 at how the current rules deal with those
13 restrictions and what the Commission is proposing
14 in terms of their treatment in the future.

15 First of all, non-compete clauses, the
16 current regulation prohibits non-compete clauses
17 all together. However, it does say that if the
18 licensee chooses to compete with the licensor's
19 technology the licensor can terminate any
20 territorial exclusivity conferred and may stop
21 licensing future improvements to the technology.

22 The new rules would appear to be

1 much more rational in that they would permit
2 non-compete clauses in agreements between
3 non-competitors but continue to prohibit
4 non-compete clauses where a license is entered

5 into between competitors. And we would welcome
6 this more liberal approach.

7 The provisions currently dealing with
8 assignment and grantbacks of improvements are
9 complicated to say the least. The current
10 regulation prohibits any obligation on the
11 licensee to sign its improvements back to the
12 licensor.

13 And it does permit reciprocal license
14 back obligations provided that such obligations
15 are non-exclusive for as long as the improvements
16 are not severable.

17 And that means that if a licensee
18 comes up with an improvement which can be
19 exploited independently of the licensed
20 technology, it must be free to exploit that
21 improvement independently.

22 And therefore it may grant the

1 licensor a non-exclusive license to use those
2 improvements, but it must remain free to exploit
3 the improvement on the market itself.

4 This is a complicated regime. The new
5 rules we're told will be more generous in terms
6 of grant back clauses. But we're not very clear
7 on just how generous they will be.

8 But I will say since we have the
9 benefit of Dr. Mehta's presence here today that
10 when you consider in particular a licensor that
11 has technology that maybe he licenses out to
12 multiple licensees in different fields of use,
13 these grant back provisions and the prohibition
14 of assignment makes his life very difficult in
15 terms of managing the relations with multiple
16 licensees and making sure that the technology is
17 exploited to its maximum.

18 So I think there is certainly room for
19 a more generous approach to assignment and grant
20 back clauses. The block exemption regulation
21 today contains some very odd drafting on no
22 challenge clauses. Basically the licensor may

1 not prohibit the licensee from challenging the
2 validity of the patents or know-how it has

3 licensed.

4 However, the licensor may terminate an
5 agreement if the licensee disputes the validity
6 of the underlying know-how or patents or may
7 terminate the license of a patent if the licensee
8 challenges that such a patent is not a necessary
9 patent. I'm not going to go into this in more
10 detail.

11 But just even comparing those two
12 indents, the difference in language, it is not
13 clear why in one case you can terminate the
14 agreement and in another case you can terminate
15 the patent license. Drafting problems I think
16 prevail throughout the current block exemption
17 regulation.

18 The Commission in its evaluation
19 report says in any future regime they may take
20 a slightly less restrictive approach to no
21 challenge clauses.

22 And they are aware of the fact that if

1 the licensor is a weaker party perhaps in that

2 kind of situation a no challenge clause would be
3 acceptable in order for the licensor to ensure
4 that the licensee is not going to run away with
5 its confidential know-how. I think that's also
6 very welcome.

7 I think I'll just say a few words in
8 conclusion. Given the complexity and the narrow
9 scope of the current regulation, industry is very
10 generally positive towards the Commission's
11 proposals to change.

12 There are nonetheless pitfalls that
13 we would urge the Commission to consider very
14 carefully, some of the main ones being: a very
15 strict approach that they seem to be taking
16 towards license agreements involving dominant
17 companies;

18 A very strict approach they want
19 to take concerning all agreements between
20 competitors; the dangers inherent in multiple
21 market share thresholds in a decentralized
22 enforcement system.

1 And therefore we would urge the
2 Commission when it produces its draft block
3 exemption regulation for consultation later this
4 year to present at the same time draft guidelines
5 which as much as possible clarify some of these
6 issues so that we get a whole package to comment
7 on in the hope that the new system moving forward
8 will be more coherent and more generous to
9 technology transfer. Thank you very much.

10 WILLIAM KOLASKY: Thank you very
11 much, Fiona. Kirti, is there any part of Fiona's
12 comments that you would like to respond to or any
13 questions you may have for her?

14 KIRTIKUMAR MEHTA: No. I think
15 overall the comments are very useful. And I
16 think as regards the conclusions I would agree
17 that what we are foreseeing is generally regarded
18 as in the right direction. This is the comments
19 that we have had. We realize the issue with both
20 is defining potential competitors.

21 Secondly, because after all you know,
22 technology, almost everybody in that field or

1 related fields you could say can be on that very
2 similar technology trajectory. So how do you
3 define who is the potential competitor?
4 I think the case of very drastic
5 innovation is a very distinct case and people
6 can recognize that very easily. But that is not
7 a very common situation. The common situations
8 we are talking about are really incremental
9 improvements in technology. And hence that is
10 an issue that we are looking at.

11 Market definition, certainly I agree.
12 And I think if we look at our guidelines and
13 horizontals and R & D you see we have the market
14 for the product. Then there is a technology.
15 Then there's what you might call the R & D or
16 innovation market. And the innovation market I
17 must say is rather difficult to define.

18 And very often you end up by saying,
19 well, if there are three or four pools, well,
20 then we will take this into account. But why
21 four? Why not two? Why not five? I mean it is
22 absolutely arbitrary how you go about doing it.

1 Nevertheless we have certainly followed this line
2 for the R & D pools.

3 But that is an issue that we are
4 looking at very much. And certainly we take to
5 heart the comments that people have made. I also
6 think Fiona's comments bring out many of the
7 elements that are already there.

8 For example, the reason why people
9 don't notify is because there is this possibility

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1 In the modernization, the draft
2 regulation, you also talked about business review
3 letter which is an instrument we have not had up
4 to now. So you should look in the perspective
5 that you have block exemption, certainly also
6 guidelines. We are thinking here too to develop
7 guidelines. What happens when the block
8 exemption safe harbor doesn't cover you?

9 And these business review letters I
10 personally see as a way of dynamically keeping
11 the guidelines up-to-date because issues in which
12 we will do the business review type of thing are
13 those which are not covered in block exemption,
14 which are not covered in guidelines, and there is
15 a specific issue that comes up for which we will
16 make a response rather than -- a response because
17 we think it's not covered at that point.

18 And so I think in that respect there
19 will be uniform application of the EU rules which
20 of course will be another major advantage of the
21 modernization, that you have a common set of
22 substantive rules being applied. And we would

1 The comments compared the EU and U.S.
2 approaches in the IP area. We endorse the basic
3 thrust of the TTBE report. And we certainly urge
4 the Commission to apply additional flexibility
5 and incorporate a broader scope in any future
6 block exemptions in the IP area.

7 Since the focus of these two days of
8 the hearings is an international comparative law
9 perspective, I'm going to focus on those parts of
10 the ABA comments that are comparing the EU and
11 the U.S.

12 My PowerPoint actually covers all the
13 comments, and I understand that the PowerPoint
14 will be posted on the FTC website so that if
15 anyone is interested they can see all of my
16 PowerPoints which I don't expect to go through
17 today.

18 And in any event, the ABA comments
19 themselves are posted on the ABA website on both
20 the web pages of the antitrust law section and
21 the international law section. And I believe

22 they will also be posted on the FTC website. So

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1 you can't miss them if you went looking for them.

2 The joint comments are comments of
3 the three ABA sections only. They are not ABA
4 policy, and they are not approved by the house of
5 delegates or the board of governors of the ABA.

6 I think I now have gotten all the categories
7 covered.

8 In comparing the EU and the U.S.
9 we had six areas that particularly struck us
10 where our differences in approach can lead to
11 significantly different results. First and
12 most fundamentally is the view of the role of
13 competition law with respect to intellectual
14 property rights.

15 Second is the view of market power
16 that's in intellectual property, approaches to
17 dominant positions and to monopolization, our
18 characterizations of licenses, our view of
19 vertical restraints, and certainly our very
20 different procedural contexts that we act in.

21 The role of competition law in the IP
22 area, the EC report discusses the potential role

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1 of competition law in intervening and trying to
2 improve the balance that's provided by IPR law,
3 the balance that is provided in the IPR law for
4 incentives to innovate and not to overprotect or
5 underprotect the innovator's work.

6 As a result of this sort of urge to
7 intervene in this way, an IPR holder might not
8 be able to obtain maximum royalties in the EU
9 without offending the competition law. There
10 is this concept there of excessive prices. And
11 it might be more likely that a dominant IPR
12 holder might be subject to compulsory licenses.

13 In comparison in the U.S. the balance
14 of incentives to innovate is determined by
15 Congress in the patent laws. We don't see the
16 antitrust law as seeking to improve in particular
17 cases the balance that was reached by Congress in
18 the patent law. The IPR holder is entitled to
19 get what royalties the market will bear.

20 And it is very rare that we might find

21 that somebody has an essential faculty that may

19 there is some difference there.

20 In terms of the market power of
21 intellectual property rights, there's still some
22 indication that in the EU there is an inference

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1 that there is a legal monopoly from IPR. And
2 that term is used several times in the TTBE
3 report so that there is sort of a presumption
4 that you have a substantial market power that
5 can exist simply by holding some intellectual
6 property rights.

7 In the U.S. we now have a feeling that
8 IPR is really just another property right. And
9 it is a property right -- of an exclusive right
10 over certain technology. So we apply the same
11 general antitrust principles to IPR as to any
12 other property right. So therefore there is
13 really no presumption of market power from merely
14 holding certain IPR.

15 For example, take paper clips which
16 now are quite mundane. There have been many
17 patents issued over the years on paper clip

18 designs. And maybe the first patent on paper
19 clips which embodied the concept of trying to
20 clip together items with a twisted wire has a
21 certain amount of market power.

22 But I tend to think that the

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1 one hundredth patent on paper clip design doesn't
2 give you much except exclusive rights over the
3 particular way you're twisting your wire to make
4 that paper clip. So you can also analogize it to
5 having ownership of a factory.

6 The market power that you have from
7 ownership of a factory really turns on how many
8 other factories are nearby that produce a similar
9 product. You may not have any market power at
10 all, or you may have a lot if you are the only
11 one in town with that factory. Our view towards
12 monopoly or dominant position is also very
13 different.

14 Article 82 prohibits the exploitation
15 of market power by a dominant firm. And again
16 you have this concept of excessive pricing, so

17 therefore monopoly pricing may generally be
18 frowned upon. Whereas in the U.S. we prohibit
19 monopoly only if it is obtained or maintained by
20 improper means.

21 So therefore simply having high prices
22 generally is not enough if you were to get those

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1 high prices as a result of a monopoly that was
2 gained by having a superior product on the
3 marketplace.

4 The combination of these differences
5 in terms of the inferences that we draw from the
6 mere holding of intellectual property rights and
7 the differences in how we treat the holding of
8 market power leads to significant differences in
9 the treatment of IP licenses.

10 In the EU therefore you might find
11 more frequently that IP licenses are unacceptable
12 for competition law reasons than in the U.S. The
13 characterizations of licenses is a major area
14 that we thought was a difference. In the EU you
15 focus on the competitive relationship of the

16 parties to the license.
17 So depending on whether you are
18 characterized as competitors or non-competitors
19 different rules apply to you in terms of the IP
20 license types and terms that you enter into.
21 As we see it under the existing TTBE, you're a
22 competitor if you manufacture competing products

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1 or you are competing manufacturers.
2 The proposal in the TTBE report
3 proposes to limit the definition of competitor
4 so that you would be a non-competitor even if you
5 produce competing products if, one, the license
6 involves a sweeping breakthrough so that no
7 longer would you be competing unless you both
8 have that breakthrough or if the licensor or
9 licensee are in a blocking position with respect
10 to the licensed IPR.

11 But the focus is still primarily in
12 terms of the characterization of the parties to
13 the license. The focus in the U.S. is much less
14 on the competitive relationship of the parties,

15 although that is not to say that if Coca-Cola and
16 Pepsi were to enter into a license between the
17 two of them for some IP that our agencies would
18 not start scrutinizing it very closely indeed.

19 But the rules that would be applied
20 to that license would not be dictated by that
21 competitive relationship between Coke and Pepsi
22 per se. I think we consider much more the nature

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1 of the competition absent the license. We
2 consider the relationship of the parties
3 relative to the subject matter of the license.

4 So suppose again you take paper clips.

5 If one of the paper clip manufacturers
6 developed some new machine to make paper clips
7 that really does a great job whatever design
8 paper clip you've got, and a competing
9 manufacturer of paper clips has basically been
10 just buying paper clip making machines from other
11 folks to make the design that they've got,
12 suppose the two enter into a license where one of
13 them gets the license to use that new machine.

14 Well, under the EU concept if
15 I understand correctly those two would be
16 competitors and therefore the license would
17 be subject to tougher rules than between
18 non-competitors. Whereas in the U.S. they would
19 be considered as having a vertical license and
20 would be subject to the more rule of reason
21 general approach of vertical restraints analysis.
22 Or suppose you have both paper clip

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1 makers developing new machines on their own.
2 Unfortunately neither of them can use their own
3 machine without infringing on the patents of the
4 other.

5 In that case under the proposals in
6 the TTBE report these two entities would not be
7 considered competitors. But in the U.S. a
8 cross-license between those two in order to clear
9 their blocking positions might be considered more
10 of a horizontal relationship. And it might be
11 viewed a little more skeptically.

12 Or suppose that you've got one paper

13 clip maker that has found a new way to make paper
14 clip wire very efficiently and another paper clip
15 maker has found a new way of twisting the wire in
16 any way you would like. And it's best of course
17 if you have those two in a combination and they
18 could really make super paper clips.

19 Well, in that case it does seem that
20 under both EU and the U.S. approaches, under EU
21 they would be considered non-competitors and in
22 the U.S. it would be considered more of a

12 cover are things like exclusivity, field of use,
13 customer groups, and territories. The EU has
14 much more concern on intrabrand competition.
15 They are concerned about the possibility of
16 coordination among licensees to a licensor.
17 And they have special concerns about
18 territorial restrictions perhaps in light of its
19 market integration objective. I guess you could
20 characterize the EU approach perhaps more like
21 what we had in Schwinn bicycles plus the market
22 integration imperative. Whereas in the U.S. we

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1 may have an approach that's guided very much by
2 GTE/Sylvania.

3 We focus much more on interbrand
4 competition. And in the vertical context we
5 do have concerns about foreclosure of access to
6 input, the possibility of raising rivals' costs,
7 and certainly of course the possibility of
8 coordination among competitors, especially if
9 you have a network of vertical arrangements.

10 The procedural context in which IP

10 points out. There are areas where the various
11 exemptions that are out there now may not be
12 fully consistent so that it might be a challenge
13 to see where a particular arrangement actually
14 fits within which exemption.

15 And with modernization indeed there
16 is a prospect of review by various member states.
17 And in each case you've got the deal right now
18 with the whole process of possibly individual
19 notification and opposition possibility and
20 possibility of withdrawal of exemption.

21 In the U.S. our general concept
22 is that everything is permitted unless it is

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1 specifically prohibited. And the IP guidelines
2 provide safety zones outside of which rule of
3 reason applies. And the guidelines do provide
4 a strong road map as to the approach that the
5 agencies will take where there are scenarios that
6 fall outside the safety zone.

7 And the guidelines cover patents,
8 copyright, and know-how. But basically again we

9 focus on a functional analysis and not so much of
10 categorization of the licenses as such. So this
11 is a quick tour over the comparisons between the
12 EU and the U.S. that we discuss in the ABA
13 comments on the TTBE report. Thank you very
14 much.

15 WILLIAM KOLASKY: I don't want to
16 get us too far behind schedule. I do have one
17 question for Kirti though. I thought that one of
18 the most provocative comments of Yee Wah was the
19 suggestion that the EU presumes market power from
20 the existence of IP rights, whereas in the
21 United States we do not.

22 And, Kirti, I wonder if you could

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1 respond to that. Is that true? And if not,
2 maybe you can give us some reassurance.

3 KIRTIKUMAR MEHTA: I think in the
4 report itself -- I believe it's in point 28
5 where certainly I think the words used are legal
6 monopoly. But whether it was market power or
7 not it is a method of what are the substitutes

8 available. It says so in that report.

9 So I think -- personally I think this
10 is perhaps not such a big difference as these
11 comments may lead you to believe. I think some
12 of the other comments certainly and myself I said
13 that we have difference as regards vertical
14 restraints.

15 And I explained the reason for
16 vertical restraints essentially from a
17 competition point of view to prevent foreclosure.
18 That is certainly something recognized here, what
19 you call exclusive dealing.

20 Or a second issue is of price
21 discrimination. This is for -- in the European
22 context you are to look upon it as segmenting

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1 the market. That is quite an important issue
2 for reasons of market integration. And there
3 certainly the emphasis I would say is different.

7 very much for inviting me here. I've come a long
8 way. It's my second day here. It's 9:10 p.m.,
9 and I'm getting a bit tired. So we have three
10 preliminary issues we have to get through before
11 we actually reach the presentation.

12 One is can I stay awake for the next
13 ten minutes to make the presentation. The second
14 is can you stay awake for ten minutes to listen
15 to my presentation. And the third is in the
16 absence of my seven-year-old son who is in bed
17 in Paris, can I make my PowerPoint presentation
18 work.

19 My comments are based on the report
20 that the Licensing Executives Society made in
21 connection with the block exemption regulation
22 although I'm not speaking on behalf of LES.

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1 I'm speaking on my own behalf.

2 Our comments on the block
3 exemption regulation are perhaps a little bit
4 more controversial than the comments of the
5 American Chamber of Commerce or the American Bar

6 Association. And I'd like to explain to you why
7 they are a bit more controversial and to try to
8 justify why we've made those comments in the way
9 we have.

5 There's very little economics.

6 Once you have passed that formalistic

7 stage -- and that's fairly easy to get past --

8 the burden then shifts to business to obtain an

9 exemption under Article 81(3). And if you can't

10 obtain the exemption, you have a problem.

11 And in principle under Regulation 1762

12 you cannot get an exemption without going to the

4 your agreement is -- even if you do manage to
5 get an exemption after you have notified it, the
6 legal effect of that exemption is back dated only
7 to the time when you notified.

8 What happened before that is sort of
9 a legal limbo. So it's not a nice thing if you
10 haven't notified and you should have. The block
11 exemption regulations, they provide a means of
12 benefiting from this magic exemption you have
13 to have if your agreement is restrictive of
14 competition under the formalistic test.

15 The block exemption gives you the
16 benefit of the exemption without having to
17 notify your agreements. That's where the block
18 exemption system arises from. That's where it
19 comes from. That's what we're talking about.

20 And block exemptions have been adopted
21 in the past in those circumstances where the
22 Commission feels that it has sufficient knowledge

1 about the types of agreements that are subject
2 to the exemptions that it can say in which

3 circumstances an agreement or a practice can
4 benefit from the block exemption.

5 And although it is not the official
6 purpose of the block exemption system, the block
7 exemption regulations in practice have become a
8 kind of code of conduct that provides legal
9 security for business. If you follow the rules
10 of the block exemption you are okay. You don't
11 have to notify. Nobody will bother you.

12 The 1996 regulation covered patent
13 licenses, know-how licenses, and mixed licenses.
14 Now, at the time the Commission wished to
15 introduce a market share threshold test for
16 extending the benefit of the block exemption
17 to certain types of territorial and other
18 restrictions.

19 There was a big debate about this.
20 It went on for several months. It went all the
21 way up to the Commission itself. It became a
22 political matter. It was decided and discussed

1 at a full meeting of the Commission.

2 It wasn't just a technical decision.
3 And the Commission backed down. They backed down
4 under pressure from various business interest
5 groups including LES and other professional
6 groups.

7 And therefore in its present form
8 the block exemption regulation provides legal
9 security to business which is based essentially
10 on the terms of the contract.

11 You draw up your contract. You look
12 at the contract. Do we have white clauses? Yes.
13 Do we have black clauses? No. We're okay. We
14 don't need to go any further. We don't need to
15 notify. We have security.

16 Two things, the Commission is now
17 evaluating the block exemption system for patents
18 and know-how licenses. But at the same time
19 there is a proposal to abolish the notification
20 system all together. And as I say right from
21 the beginning, the block exemption system arises
22 because of the requirement of notifying in order

1 to obtain the famous exemption under 81(3).

2 So there's some question as to
3 what the block exemption system would do in a
4 community competition law where there was no
5 longer any requirement or any possibility of
6 notifying to obtain an individual exemption.

7 But we are interested in the fact
8 that the competition director in general is
9 increasingly aware of and influenced by the U.S.
10 approach to the antitrust aspects of licensing.

11 And this is shown in some of the
12 comments in the Commission's evaluation report:
13 the fact that they do make the point that IP
14 rights are an important factor in economic
15 development; the fact that they do say that
16 licensing is in principle a pro-competitive
17 activity;

18 And the fact that they also make
19 the point that in order to assess the likely
20 competitive impact of a license you do have to
21 look at things like the structure of the relevant
22 market and the role that the companies to the

1 license play in that market;
2 And the fact that, yes, it is the
3 case that provisions in license agreements can
4 have a different impact according to whether
5 the agreement is made between competitors or
6 non-competitors, at what stage they are in the
7 market. And so that's the Commission's suggested
8 solution in summary.

9 There are, in the case of licenses
10 between non-competitors, restraints which are not
11 related to the exploitation of the licensed IP
12 subject to a 30 percent market share, but not
13 including certain hard core restrictions which
14 are always prohibited, and a dominance threshold
15 for restraints related to the exploitation of the
16 licensed IP, and in the case of licenses between
17 competitors, an overall market share threshold
18 of 25 percent and again with a hard core list of
19 restrictions, certain things that you can not do
20 in any case regardless of what your market share
21 is.

22 I'm being very quick going over this

- 1 because I think we are going to have discussion
- 2 on the actual terms itself. Now, all of this
- 3 sounds very realistic in the same way that the
- 4 U.S. licensing guidelines are meant to be and
- 5 probably are in general terms realistic in their

1 essentially on business to justify a license and
 2 not on those attacking the license to justify
 3 their position.

4 In the U.S. it's up to those attacking
 5 the license, whether it's the authorities or
 6 anybody else. The license is prima facie okay
 7 under the antitrust laws unless you can show the
 8 contrary based on showing the impact of the
 9 license or the likelihood of showing the
 rust both on the antitrust context.

14 In the Europe context we're rather

2 different positions. The burden is on the pro-competitor.

20 5 exemptions at the very least -- say -- of the

1 business.

2 You are not saying that the
3 competition authorities no longer have any
4 control simply because a block exemption applies
5 to a particular contract.

6 And it's at that stage when the
7 Commission moves to withdraw the benefit of the
8 block exemption, it's at that stage that a set of
9 realistic guidelines to explain the Commission's
10 policy would be very useful and could well be
11 appropriate because when the Commission decides
12 to withdraw the benefit of the block exemption
13 in effect the burden of proof passes to the
14 Commission to show why the benefit of the block
15 exemption should be withdrawn.

16 So what if the centralized
17 notification system is abolished? It gets rid
18 of one of the arguments, in fact the initial
19 argument for having a block exemption in the
20 first place because you no longer have to notify
21 to be exempted, so why do you have the block
22 exemption.

1 But the burden of proof resolution --
2 reason for granting a straightforward and
3 presumed exemption will continue to exist because
4 the structure of Article 81 will not have changed
5 even though the centralized notification will no
6 longer exist.

7 And that second reason, the burden of
8 proof reason, will become even more valid, if you
9 like, since the granting of the exemption which
10 would still be necessary would be in the hands of
11 what I'd call a myriad of national authorities
12 rather than a single entity being the Commission.

13 And remember again that the block
14 exemption would not be a carte blanche, would
15 not be an absolute benediction to a particular
16 agreement. The presumed exemption could always
17 be overturned. The Commission could withdraw it
18 or national authorities could move to withdraw
19 it.

20 So our view is as long as Article 81
21 retains its present structure and approach,

22 that's a formalistic approach to deciding whether

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1 an agreement is restrictive of competition, plus
2 the necessity to justify obtaining an exemption,
3 then we think there should be a system of
4 presumed exemption.

5 And they are not absolute
6 presumptions. They are rebuttal presumptions
7 based on what we've called the contract, the
8 whole contract, and nothing but the contract, and
9 then a set of guidelines that will tell us as to
10 the basis on which the authorities would seek to
11 overturn a presumed exemption.

12 And that would indicate to us what
13 sort of things we would have to avoid in order
14 to have the benefit of the exemption threatened.

15 And if we can therefore make the
16 distinction between the role of the block
17 exemption system or the presumed exemption system
18 and a set of guidelines as to the policy of
19 the authorities, then I think we can have a
20 discussion, a realistic discussion based on

21 many of the proposals which the Commission has
22 discussed in its evaluation report and taking

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1 into account the United States' approach in the
2 licensing guidelines as to what we could put in
3 the block exemption or the presumed exemption
4 regulation on the one hand and the guidelines
5 on the other.

6 But those would be guidelines not
7 for enterprises to justify why they should get
8 the exemption, but as in the United States,
9 guidelines as to what the policy of the
10 authorities would be where they seek to withdraw
11 the benefit of an exemption given on the basis of
12 an exemption regulation which is based in turn on
13 the contract, the whole contract, and nothing but
14 the contract. Thank you.

15 WILLIAM KOLASKY: We're into our break
16 period, but I want to ask James one question if
17 he can give me a brief answer perhaps so we don't
18 intrude too much on the break.

19 With respect to what you described

20 as the formalistic approach to Article 81 in
21 determining whether or not an agreement is,
22 quote, unquote, restrictive, is that inherent in

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1 the language of Article 81(1) or is that a matter
2 of interpretation by the courts which could be
3 changed to move closer to the U.S. position where
4 the plaintiff has the initial burden of showing

19 why would you need Article 81(3)?
20 I think that the presence of
21 the structure of the article itself almost
22 inevitably gave rise to the type of formalistic

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1 interpretation of Article 81(1) and then the
2 emphasis being placed on what you had to do in
3 order to obtain the exemption under Article
4 81(3).

5 If the initial text had just stopped
6 at 81(2), a lot of things might have been
7 different and we might be talking about something

18 provocative question right before the break,
19 but I really do want to make sure we get through
20 all of our speakers. So I'm going to turn
21 immediately to Peter Alexiadis.

22 And any of the panelists do have

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1 further comments on the question I put to James,
2 perhaps we could discuss that at the end of the
3 session. And I'm now going to turn the chair
4 over to my co-moderator, Bill Kovacic.

5 WILLIAM KOVACIC: Thank you, Peter.
6 Whenever you are ready. Thank you.

7 PETER ALEXIADIS: Ladies and
8 gentlemen, I'm pleased to be here. And I thank
9 the Department of Justice and the FTC for the
10 invitation. I'm not going to speak on behalf
11 of humanity at large, but on behalf of myself.

12 I have a fairly narrow topic which
13 follows fairly naturally in the sequence of what
14 we've heard today in the sense that it's really
15 only realistically viable to assess what the
16 community's response to multilateral licensing

17 agreements is having heard all of the previous

18 speakers.

19 And they raise a number of interesting

20 issues which will mean now that as I broach some

21 of those areas they will not be new to you.

22 I've decided to look at the fairly

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1 vexing question of should a revised block

2 exemption regulation have broader coverage so

15 nullity should you breach Article 81(1).
16 And then it is followed by an express
17 power of the Commission to exempt and only the
18 Commission to exempt should you breach Article
19 81 (1).

20 So consequently it leads to the
21 difficulty that the last speaker was alluding to
22 and particularly in the licensing field where the

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1 hub of everything that we're talking about is
2 enforceability because we are not talking about,
3 as we do in a lot of other contexts, whether or
4 not an antitrust regulator is going to be
5 somewhat aggrieved by the anticompetitive
6 conduct going on in the marketplace.
7 Quite the contrary, in most licensing
8 contexts we are concerned about whether or not
9 the parties can enforce their agreements given
10 what is on the record and given that those
11 agreements will inevitably be challenged in
12 national courts. Again it's important to
13 remember the way the European Union operates.

14 And why those concerns are less
15 appropriate for multilicensing agreements is
16 because the level of cooperation through parts of
17 an industry or among competitors is such that the
18 enforceability issue becomes less important.

19 It becomes less important because
20 if you're going to engage in that level of
21 cooperation once you lose trust among one
22 the whole deal is off. Therefore, enforceability

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1 becomes more or less an all or nothing exercise.

2 Whereas in a licensing context it's
3 key that the licensee not run away with the
4 fruits of your labor on the back of an
5 unenforceability obligation. So I think there
6 we have a chance to move together as two systems.
7 But we probably need to do it incrementally.

8 Now, I'm just going to quickly run
9 through some of the problem areas that we have
10 and some of the drivers from a substantive point
11 of view and from a procedural point of view again
12 to give you a better context of how we should

13 look at these issues.

14 First and foremost as I said earlier,
15 the intrabrand competition issues are much more
16 important in Europe than they are in the U.S.,
17 and they do not necessarily produce rational
18 competition results all the time.

19 Dr. Mehta did allude to two instances
20 however where they can produce anticompetitive
21 issues which even in a U.S. context would be
22 taken into consideration even not at the height

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1 level of concern.

2 We do as a result of a legacy of
3 administrative practice I believe -- and this is
4 where I agree with the ABA commentator who wasn't
5 speaking on behalf of the ABA, but was speaking
6 on behalf of someone. I do agree with her that
7 we have probably had an overfascination with
8 classifying competitors in terms of actual or
9 potential or non-competitors.

10 And that essentially, again if you
11 look back historically, was the result of a

12 desire by the Commission to try to overcome
13 the difficulties of the absolute prohibition
14 under Article 81(1).

15 And by classifying or characterizing
16 market actors as not direct competitors, they
17 were able to sidestep the Article 81(1)
18 prohibition and therefore de facto create a
19 type of rule of reason analysis.

20 The courts in Europe have done their
21 job as well by trying to skate past the issue of
22 Article 81(1) relative to Article 81(3) and

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1 talking about the effect on competition in
2 general of certain types of agreements.

3 And a body of jurisprudence has
4 developed over the course of time however in
5 practice -- I'm speaking as a practitioner now --
6 largely ignored except by the bravest of counsel
7 on the continent when one is looking about legal
8 certainty and this vexed issue of enforceability.

9 Market definition has also proven to
10 be a highly controversial issue as we have moved

11 to gradually historically attempting to impose
12 more a market based analysis on this rather than
13 the straitjacket approach.

14 And the difficulty has been the rather
15 obvious one. Namely it's difficult enough trying
16 to configure your marketplace and your market
17 definition at the start of the licensing
18 agreement. But how do you do that two, three,
19 four, five years later, particularly when it's
20 innovative technology?

21 So again you're running through the
22 bogey of this unenforceability issue right smack

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1 dab in the middle of a licensing arrangement
2 which was perfectly legal a few years ago.

3 The other issue that has arisen that I
4 find interesting from a practical point of view
5 is the mantra of effective competition, the
6 ability to withdraw the benefits of a block
7 exemption should there be not effective
8 competition in the relevant market covered by the
9 license.

10 And that is an interesting one as well
11 because the doctrine of effective competition
12 most recently is developing a standard which is
13 no different than dominance.

14 Therefore you should ask yourself if
15 effective competition means dominance, why don't
16 we say dominance, and why aren't we just
17 concerned about market power in a licensing
18 context and forgetting about a lot of the rest.
19 I just believe that's food for thought.

20 Another point that Fiona Carlin
21 mentioned earlier was the plethora of competing
22 market share benchmarks which are very, very

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1 confusing to clients. I dare not say that they
2 are confusing to lawyers because we wouldn't have
3 a job unless there was a degree of confusion.

4 But they are very confusing to
5 clients. And it's difficult for them to
6 tiptoe between the tulips of ten percent,
7 twenty percent, twenty-five percent, and
8 thirty percent at any given point of time

9 and knowing precisely where they stand.
10 Another point that's worth adding is
11 that in innovative markets and particularly when
12 we are talking about the information society type
13 of products, it's very difficult to get comfort
14 from a block exemption when the marketplace is
15 changing so rapidly. This alludes to the point I
16 was raising earlier about the way things change.

17 The other point that you should note
18 is that EC competition rules outside the context
19 of Article 81(3) are totally incapable of dealing
20 with the evaluation of efficiencies in the way
21 you would deal with efficiencies under your
22 antitrust rules.

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1 And I think that's borne out by the
2 explicit language of Article 81(3) which is all
3 about evaluating efficiencies. And if it is
4 that explicitly stated there, it doesn't exist
5 anywhere else.

6 And the fact that we're having a
7 series of ongoing debates now about efficiencies

8 in the context of the merger regulation suggests
9 that we don't have an efficiencies doctrine. We
10 never have had, and we'd like to pretend that we
11 have had.

12 The other point to note is that people
13 tend to forget a case called Delimitis decided
14 quite a while ago now in the context of EC
15 jurisprudence which made it quite clear that
16 block exemptions are straitjackets. That's
17 precisely what they are, and they're nothing else
18 but that. And I advocate the words of Mr. Leavy
19 in that respect.

20 So from substance to procedure, there
21 is a difficulty with broadening the scope of the
22 TTBE block exemption for the simple reason that

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1 if we were to seriously contemplate bringing
2 multiparty licensing within its scope we would
3 have to change the enabling regulation under
4 which it is adopted itself.

5 That is not an insignificant task. I
6 think Fiona Carlin alluded to that as well, that

5 case with the DOJ, for example.

6 The other point to remember as well
7 is the power of exemption lies only with the
8 European Commission, not with the national
9 courts, not with national competition bodies.

10 We have had difficulties and we
11 will continue to have difficulties with the
12 modernization which is occurring now within the
13 community as more power is devolved from the
14 center to the periphery with the accession
15 nations.

16 As it becomes quite clear that all
17 these new competition authorities and all these
18 issues which will arise do not have the power of
19 exemption. We have a doctrine in the community
20 which has developed separately called the
21 doctrine of severance.

22 And namely you're able to rip out

1 an offending prohibition which is prima facie
2 anticompetitive in order that the remainder of
3 the transaction or the agreement be held on foot.

4 The difficulty with that has been the
5 difficulty recognized for a number of decades
6 now, that by doing that a national court de facto
7 is kind of giving an exemption in many respects
8 because Article 81(3) refers to agreements.

3 that we've been looking at in the past and
4 focusing more on the effects of the licenses as
5 to whether or not fundamentally they are vertical
6 or horizontal in nature.

7 And I propose that we adopt a
8 tripartite test which essentially looks at
9 structure, conduct, and performance in evaluating
10 those. The structural issues will be those that
11 will be underlying the industry in which the
12 licensing arrangement is taking place and an
13 evaluation of market power.

14 Secondly, we should look at the
15 modalities of the licenses. And I use the word
16 modalities because it is one of the most popular
17 words in European Community jargon and probably
18 means absolutely nothing to anyone here. But we
19 should look at the modalities of the way the
20 licenses work.

21 And that will help us to understand
22 the relationship between licensor and licensee,

1 the relationship between the licensor and other

2 suppliers, and the relationship between other
3 licensees so that when we are making -- drawing
4 conclusions about foreclosure and lack of access
5 and so forth that they can be more or less
6 informed by those key drivers.

7 And thirdly, we should be quite
8 explicit as to what are anticompetitive practices
9 which we foresee that might stem in a worst case
10 scenario from multilateral licensing agreements.
11 So structure of the market.

12 We should be looking at the underlying
13 products that are developed, and we should be
14 looking at the technology. We do not as yet in
15 Europe have your tripartite breakdown of IP
16 markets in terms of product, technology, and
17 innovation. We do have products and technology
18 however.

19 I tend to agree with Dr. Mehta that
20 the innovation markets approach doesn't quite sit
21 comfortably with our administrative practice and
22 jurisprudence today. It's probably more relevant

1 in an evaluation of market power at the end of a
2 process. But currently it's a very unruly horse
3 for us to ride.

4 And I find I probably in general
5 believe that innovation markets are very, very
6 difficult to assess from a licensing point of
7 view. In terms of market power, ultimately the
8 key issue here is whether or not the joint use of
9 IP rights aggrandizes market power and therefore
10 also raises barriers to entry.

11 And quickly, evolving markets,
12 identifying market power is arguably possibly
13 better addressed by first identifying the likely
14 abuses which are likely to occur.

15 We've had a lot of historical
16 experience under Article 81 where we have a
17 history of abuse of configuring the market
18 around the abuse rather than going through the
19 analytical step of first identifying the market
20 and then the market power. So we work backwards
21 as a shorthand.

22 In terms of the modalities of the

- 1 multilateral licensing arrangements, we should
- 2 be trying to determine whether in net they act
- 3 as an entry facilitator, promote open standards,

- 1 a whole, and so on.
- 2 Last but not least we should be
- 3 clear about what anticompetitive practices we

1 competitors.

2 And last but not least, we have the
3 reduction of incentives to engage in R & D which
4 has the result of delaying innovation. And again
5 we can draw on the horizontal guidelines and
6 Article 82 jurisprudence. And in that sense
7 there are a lot of standardization issues which
8 I'm sure Maurits will cover later.

9 So what should the desired approach
10 be in Europe which over time would start to look
11 very much like a U.S. approach? I will propose
12 that we adopt guidelines for multilateral
13 licensing. I would propose that we exclude
14 it from the block exemption all together.

15 I would propose that we look at it in
16 terms of clear, vertical, and horizontal issues
17 and market power issues. I propose that we
18 identify clearly the negative effects that we
19 might suppose could result in a worst case
20 scenario so parties know precisely what they
21 are getting into.

22 And I propose as the previous speaker

1 said that there be no presumption of illegality
2 at all but we talk about how the competition
3 regulators would like to see these issues on
4 balance so that again it becomes an issue of
5 the parties not having to be concerned about
6 regulation.

7 Again because enforcement is not an
8 issue that is unlikely to prove burdensome in
9 this situation. Thank you.

10 WILLIAM KOVACIC: Thank you, Peter.

11 I was wondering if Will perhaps could give his
12 presentation now since Will like Peter will be
13 addressing in many ways multiparty licensing
14 issues. And following Will's presentation, we
15 can take a few minutes to discuss the points that
16 both have raised.

17 WILLARD TOM: Thank you, Bill, and
18 thank you to both the Antitrust Division and the
19 FTC for having me here today. Like the previous
20 speaker, I am not speaking on behalf of any
21 particular organization or group.

22 What I would like to do before I get

1 into the multiparty licensing issues is just make
2 a few comments about the TTBE report itself.
3 I think -- and it may just be my capacity
4 for several self-delusion and my general
5 Pollyanna-ish attitude.

6 But I really think that it is
7 remarkable the degree of convergence between the
8 Commission and the U.S. authorities in just over
9 five years since the TTBE went into effect. And
10 here I'm not referring simply to the TTBE report
11 itself, but also to the wealth of material that
12 the Commission has produced in the last few
13 years:

14 The 1999 amendment of Regulation 17
15 which dispensed with the need for prior
16 notification in the case of vertical agreements,
17 the vertical block exemption that same year,
18 the block exemptions for R & D agreements and
19 specialization agreements, and the guidelines on
20 vertical restraints in the year 2000, and the
21 guidelines on horizontal cooperation agreements

1 If you look at these documents, you
2 will see really I think something of a sea change
3 in approach. And I am much less pessimistic
4 than I think some of the previous speakers like
5 Mr. Leavy as to the ultimate effect and the
6 ability of businesses to function under the
7 European approach.

8 I think together these documents
9 represent a huge movement away from the black,
10 white, and grayness of prohibited, permitted, and
11 exemptible practices and toward a regime in which
12 the market conditions in which the practices
13 occur play a much more important role.

14 And in the report itself one also sees
15 indications that Commission staff would like to
16 see a wider scope for intellectual property
17 owners to exploit their intellectual property
18 including licensing exclusive rights not just to
19 particular territories but also to particular
20 fields of use and customer groups and so on.

21 One also sees a trend toward applying
22 the same basic principles to all forms of

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1 intellectual property, not just patents and
2 know-how but also copyrights and the like. And
3 chief among those principles that they would
4 apply is a distinction between competitors and
5 non-competitors which as we know is a key
6 distinction in the 1995 U.S. guidelines.

7 And finally I think the block
8 exemption report makes clear that the distinction
9 between competitors and non-competitors is
10 largely defined by what would have occurred in
11 the absence of a license which I think itself
12 was a step forward on the U.S. side in terms of
13 analyzing these issues.

14 And we ought I think to step back now
15 and again on the U.S. side and recognize that
16 some of the problems that we may see in European
17 approaches are not so far from issues that we
18 have dealt with on this side of the Atlantic and
19 continue to grapple with today.

19 something of a progression here and something of
20 a struggle with some difficult issues. So what
21 do we make of this for what U.S. enforcers should
22 take away from the European experience which

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1 I gather is the principal purpose of these
2 hearings?

3 And I think in part you should just be
4 very encouraged by the wide degree of acceptance
5 of the approach that U.S. enforcement policy has
6 gained in Europe over the last few years.

7 And perhaps one can only hope that the
8 U.S. courts and other U.S. agencies will be as

18 mentioned before and also in mergers where the
19 key question is whether there would have been
20 competition absent a license.

21 And the answer is that we just don't
22 know. And if you look at the track record over

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1 the last several years you'll see a wide variety
2 of approaches to that very issue.

3 I mentioned the district courts
4 basically take a don't ask, don't tell approach
5 and simply skip right past the issue of whether
6 this is a horizontal relationship and simply
7 assume that it is.

8 You see in some of the government
9 cases the approach of what I call the Russian
10 dolls. You open up the antitrust case and inside
11 it there is a patent case. And you've got to dig
12 to the bottom of the patent issues in order to
13 know what the right antitrust answer is.

14 And there are a number of other
15 approaches as well which we don't have time to go
16 into here. I think the European counterpart in

17 the TTBE report is the reliance on the concept of
18 a sweeping breakthrough to identify a situation
19 in which parties that may look like competitors
20 are not really competitors.

21 And there I think we're again likely
22 to run into the problem of simply not knowing

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1 until well after the fact. And several of the
2 previous speakers have mentioned to me for
3 certainty when you're trying to put together a
4 license, when you're trying to make investments
5 in ct. And investments

16 against it where Intel basically almost came out
17 and said that patents were a positive hindrance
18 not only to innovation in the semiconductor
19 market but even to having a functioning market
20 at all, and that the reason they flexed their
21 muscles, if you will, was in order to cut through
22 the patent thicket and prevent other players from

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1 holding them up because you had hundreds if not
2 thousands of patents reading on any product you
3 could possibly commercialize in this market.
4 And what did you do in that area?
5 I think there do seem to be some different
6 approaches in Europe. And you've probably heard
7 some of those approaches this morning. I wasn't
8 here, but I know that some of the essential
9 facility kinds of issues were discussed.
10 But it's not clear to me that either
11 the U.S. authorities or the Commission would find
12 it a satisfactory approach simply to deem the
13 patents of Intergraph or Digital or Compaq to
14 be essential facilities that had to be licensed

15 royalty free to Intel.

16 And so the puzzle that this whole
17 patent thicket area presents -- and it still
18 remains -- is going to be an issue that neither
19 side is going to find terribly easy to deal with.

20 And finally there do seem to be some
21 key points of difference between the U.S. and EC
22 approaches in which some of the previous speakers

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1 have alluded to.

2 Two in particular may be the role of
3 market thresholds which has already been touched
4 on, and the treatment of competition among
5 licensees. On market share thresholds I think
6 there's been mention of the huge furor that
7 erupted when the market share idea first appeared
8 in the initial draft of the TTBE.

9 And Caldwell -- I don't know if
10 Caldwell is still here in the audience. Caldwell
11 Harrop and I went over to Brussels to appear at a
12 public hearing while the issue was being debated.
13 And it was during the period when the DOJ task

14 force of which I was a member was writing our own
15 guidelines.

16 And I was invited to speak about the
17 differences between the safe harbor market share
18 provision in the U.S. guidelines and the market
19 share provisions in the proposed block exemption.

20 And one of the points I made was that
21 under the kind of regime you've described today
22 where you have a prohibition and then an

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1 exemption, the market share plays a very
2 different role from what it does under the
3 safe harbor.

4 And I think in the event the European
5 Commission solved the problem rather neatly, that
6 is, by taking the market share threshold out of
7 the exemption part of the document and putting in
8 a new withdrawal mechanism where the market share
9 test would play a role.

10 I think many of these problems are
11 going to be if not disappearing entirely at least
12 being greatly reduced in significance under

13 modernization.

14 I think we saw some harbingers of
15 that in the treatment of vertical restraints and
16 the abolition of the requirement for prior
17 notification and the statement that the typical
18 course would be to seek retroactive exemptions
19 where necessary in that vertical area.

20 And I think similar kinds of
21 mechanisms will evolve that really make some of
22 the more nightmarish scenarios that have been

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1 alluded to this afternoon perhaps overblown.

2 Just briefly on competition among
3 licensees, I would hope that the U.S. authorities
4 in considering the European experience would
5 decide not to imitate the concern expressed in
6 the TTBE report for preserving competition among
7 licensees as an independent value.

8 I think the U.S. guidelines took very
9 special pains to giving the licensor freedom to
10 create the kind of licensing arrangement that it
11 chose to best exploit its intellectual property,

12 just as a manufacturer has a lot of freedom to
13 create an appropriate distribution system.

14 And whether one chooses -- whether one
15 as a licensor chooses multiple licensees or a
16 single licensee, whether one chooses licensees
17 that compete with each other versus licensees
18 that have exclusive territories and exclusive
19 customers or fields of use, really should be of
20 no concern to the antitrust authorities.

21 Let me turn for just a minute to the
22 multiparty licensing issue. I don't think there

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1 is any question that multiparty licensing is
2 becoming more important than ever in industries,
3 particularly the kind I mentioned,
4 semiconductors, now biotech.

5 I mean in pharmaceuticals you used to
6 have this model of one patent, one product, in
7 effect the notion that the patent covered the new
8 chemical entity, and that was what was important
9 and would allow the innovator to earn a return on
10 its pioneer product.

11 Now you have in biotech situations
12 what is very reminiscent of the patent thicket
13 issues in electronics. And you will probably
14 see, I would not be surprised, biotech patent
15 pools emerging in the near future.

16 There are a number of complications
17 that maybe make that less suitable than in a case
18 of MPEG and DVD. But I think you'll see them
19 nonetheless. The approach there has been
20 actually not too dissimilar, business review
21 letters in the U.S., individual exemptions in
22 Europe.

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1 Both approaches have involved
2 comparable delays. There is obviously a
3 difference, and that is the business review
4 letter is purely optional and the individual
5 exemption is not unless you set things up so
6 that retroactive exemptions are available.

7 But the issue going forward as we
8 get more experience with these kinds of pooling
9 arrangements is how do you set up a system in

10 which these delays will not occur, especially in
11 fast moving industries, point one.

12 And point two is that the issues
13 are not limited to pooling in the context of
14 standard setting but also situations in which
15 more than two firms contribute both patents and
16 complementary capabilities to a venture. And
17 you see partial solutions I think in the block
18 exemptions for joint R & D and for specialization
19 agreements.

20 But there again you have some of these
21 market share ceilings of 20 and 25 percent that
22 really limit the usefulness of that approach. So

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1 I think there remains an issue in this multiparty
2 licensing area that will require some work.

3 I'm not necessarily advocating that it
4 be part of this proposed block exemption because
5 I recognize some of the drawbacks of delay and
6 the need to change the underlying regulation.

7 But it is an issue I think that ultimately will
8 need to be addressed. Thank you.

9 WILLIAM KOVACIC: Thank you, Will.

10 Because we do want to make sure to give both
11 Maurits and Mark a full opportunity to give their
12 presentations and to perhaps shortchange the
13 discussion rather than give each of them three
14 minutes at the end to go through their talks,
15 we're going to have both of those first.

16 And then we'll have an extraordinarily
17 efficient and insightful interchange at the end
18 followed by these presentations. So Maurits if
19 you would, please.

20 MAURITS DOLMANS: Thank you very
21 much, Will. Thank you for inviting me.
22 I'll be talking about the exciting world of

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1 standardization, and in fact this is a world that
2 can excite some people and people get very
3 emotional about this as was remarked this
4 morning.

5 I'll be talking briefly about how
6 standards organizations can deal with submarine
7 patents. I'll give the example of the ETSI IPR

8 policy which is a case that happened about eight
9 years ago.

10 And I note that the W3C IPR policy
11 seems to go the same way as the ETSI IPR policy.

12 So that raises some interesting antitrust issues.

13 I'll then discuss questions relating
14 to non-disclosure or late disclosure or
15 incomplete disclosure of IPRs in the context
16 of standardization. And there are some cases
17 pending in Europe that might be of interest.

18 And then finally I'll deal with
19 licensing conditions and in what situation --
20 how can you effectively or efficiently solve a
21 dispute about reasonable and non-discriminatory
22 royalties.

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1 And if we have time maybe we'll touch
2 on compulsory licensing in the standards context
3 because I heard twice a question about that. So
4 I guess it is of interest. So I'll touch on it.

5 Right. What happened in 1993 with the
6 ETSI IPR policy? ETSI, as some of you may know,

7 is the formal European Telecommunications
8 Standards Institute. It is somewhat of an
9 equivalent of ANSI, but geared towards
10 telecommunications.

11 And it has both governments as well
12 as customers, users, and competitors in the
13 telecommunications area as its members. What
14 happened was they were very worried about
15 submarine patents.

6 license; I'm going to be the only player in the
7 standardized market.

8 So what did ETSI do? They imposed a
9 requirement on all its members to license all of
10 their essential IPRs necessary for a standard,
11 right, unless they were withheld within 180 days
12 from the start of standards work.

13 This is called a license by default
14 because what happens is standards work usually
15 takes three years in Europe, maybe a little less
16 long here, but it takes a long time.

17 So if you have half a year to withhold
18 your patents, you don't even know what the
19 standard looks like. You might not even know
20 what patents you have. You might not even be
21 able to declare your patents because there may be
22 pending applications.

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1 And if you then declare what they are,
2 what the content is of the patent application,
3 you may actually lose your patent rights. So
4 this created some problems. But it became a

5 requirement for membership. At least that was
6 the proposal.

7 And so a number of IT companies
8 complained on Article 81 and Article 82. They
9 said, well, you, ETSI, you consist of a number of
10 competitors and users; you are teaming up; you
11 are concentrating demand under Article 81, and
12 in fact you are dominant in the market for
13 telecommunications standardization, and what
14 are you doing.

15 As a result of imposing this condition
16 upon us, patentees, or potential patentees, you
17 are either forcing us to accept that we have
18 excluded and that affects our competitive
19 position because we lose the right to influence
20 the standards work.

21 We lose the right, for instance, to
22 propose technology as a standard. We lose the

1 right to block a particular standard if we think
2 that standard isn't good for industry. And,
3 secondly, we will not have a chance if we can't

4 participate in the standardization work to gain
5 experience and lead time or timely market entry.
6 And that can be quite -- because if
7 you know about a standard that is being
8 developed, you can already start research and
9 development in the implementations. You get to
10 market a year or two before the others. You take
11 the cream out of the revenues. So it's quite
12 important to be a member of these organizations.

13 The Commission solved it by sending a
14 letter to ETSI saying, well, a mandatory license
15 default, mandatory because it was enforced by
16 exclusion from membership, and license by default
17 because everything is licensed unless you
18 withhold it, reduces the incentive to compete
19 through innovation because companies would
20 normally want to differentiate their products.

21 And if you can't do that because you
22 are compelled to contribute your patents to

1 standards, it reduces innovation. In addition
2 the Commission took into account the defection

3 of important companies that may have important
4 technologies could affect the quality of European
5 standardization and therefore the quality of
6 standard compliant products.

7 So there was a settlement reached.
8 And this might be of interest to the W3C as well.
9 The settlement says an IPR policy must call for
10 essential IPR before the standard is agreed, not
11 immediately after the start, but just before it
12 is agreed.

13 Each member must inform the standards
14 body timely of any essential IPR of which it is
15 aware, whether it is its own or a third party's.
16 The ETSI director will then ask will you please
17 license on fair, reasonable, and
18 non-discriminatory terms.

19 And if, yes, fine, no problem although
20 we'll come later to the question of what happens
21 if then these terms are a little higher than what
22 the parties originally expected.

1 But if the license is refused, then

2 the ETSI director will ask for an explanation, a
3 reasoning. If the reasoning isn't good enough,
4 they may refer it to the European Commission for
5 compulsory licensing.

6 And if the Commission doesn't want to
7 deal with that or if ETSI doesn't want to deal
8 with the licensing request, they will withdraw
9 the standard. So that's the ETSI IPR policy.

10 What we see in the W3C is there is a big debate

1 requirements document.

2 So it is a little later in the
3 standardization process. But if you don't do
4 that, you get kicked out of the standardization
5 work.

6 So this seems to raise the same
7 competitive concerns in the U.S. as the ETSI IPR
8 policy did in Europe, excluding from membership
9 impacts to competitive position.

10 Mandatory license by default reduces
11 the incentive to innovate because if you can't
12 withhold the patent then you may be less
13 interested particularly in the internet area
14 which can be quite important, less interested in
15 innovation.

16 Defection of IT firms could affect
17 because a number of IT firms may decide to get
18 out of the W3C. That could affect the quality of
19 those standards. And my conclusion would be that
20 the open source community should compete and not
21 expropriate.

22 So what do we do with submarine

1 patents? Is there an alternative? One
2 alternative is to say we're going to boycott IPR
3 based technology all together. Under EC law a
4 collective boycott raises concerns but could be
5 justified by objective, relevant, and verifiable
6 criteria.

7 And I think one of the important
8 criteria when you know that there is potentially
9 a patent for a particular technology that's being
10 proposed as an internet standard is not only the
11 quality and the functionality of the technology
12 and the cost of the license that you are involved
13 in, but also the inherent cost in introducing
14 IPRs in open source development work.

15 And it is a fact that the W3C has
16 been based on open source development work. And
17 there is some very interesting work done by

1 competitive advantage that open source
2 development has.
3 So it's perfectly legitimate as long
4 as they do it clearly and they reason it for the
5 W3C to say we don't want to have to deal with any
6 patents; we are going to collectively boycott any
7 intellectual property based technology.

8 Now, what could be a possible solution
9 is to say, well, you have to -- if you propose
10 a technology, if you actively propose your own
11 technology you will be stopped from then later
12 asserting the technology to block a patent, to
13 block it or to charge royalties.

14 But if a third-party technology is
15 being proposed, or somebody who is not even a
16 member, there should be no requirement to
17 license. There should be IPR searches. And
18 those who do not wish to contribute their
19 technology should not be excluded from the
20 standards work and perhaps a referral in
21 exception -Ords work 1 in

1 over the head of the open source community and
2 uses that in order to reduce the incentive of the
3 open source community to innovate.

4 Then that might be a concern that the
5 antitrust authorities might be interested in.

6 Now, what do we do with non-disclosure or late
7 disclosure, the Dell case or the Rambus case?

8 Well, actually there is a case pending
9 in Europe on these types of matters. There is a
10 case. First of all, not all non-disclosures are
11 in bad faith. People can legitimately forget
12 that they have patents.

13 In a large, multinational company
14 there may not be perfect communication. There
15 may be legitimate doubt about the scope of a
16 particular patent claim or about the scope of a
17 particular standards technology.

18 And you may not figure out that your
19 patent applies to a standard until much later
20 after the time that you were supposed to have
21 disclosed. But there is a patent case like this
22 pending in the EU. I can't mention the party I

1 think because it's not public yet.

2 And I don't have the full information

3 because I only have my client's side of this

4 thing obviously. But this is very interesting

5 because the firm at the time of concealment was

6 before the standard is set. When the standard

7 is not set, right, the technology provider can't

8 define dominant except perhaps in exceptional

9 situations.

10 So we in Europe have a problem that

11 you wouldn't have over here in the U.S., namely

12 that when the abuse takes place the alleged

13 concealment unless it is in good faith, right,

14 there is no dominance. So Article 82 doesn't

15 apply. And suppose that the technology is

16 particular to the standard, and suppose that

17 higher royalties are charged.

18 Then by the time that the technology

19 provider is dominant, perhaps to consumers it is

20 no longer relevant. Apparently the Commission

21 then has been thinking about saying we can't say;

22 we can't apply Article 82 or 81 to this. So

1 today.

2 What do you do if a patent pool
3 charges excessive royalties? Can you regulate
4 that situation? Now, in Europe I would submit we
5 can, and perhaps in the U.S. you might want to.

6 First of all, in the standards
7 environment when a patent pool controls the
8 intellectual property development that's
9 essential for a standard, there's no more
10 competition for the market. It's only
11 competition in the market.

12 There are in fact barriers to
13 innovation. The very existence of a standard is
14 a barrier to innovation because it takes three
15 years to get rid of the standard and replace it
16 by something else.

17 So in this exceptional situation there
18 might be a need for a degree of price regulation
19 or control. Now, the best regulation is of
20 course provided by the market. So how do you

21 do that, to allow standards organizations to

22 compare technologies, not only the quality and

20 confronted with very high demands for royalties

21 by patent pools.

22 And they were saying, well, it's one

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1 thing for the patent pool to ask a high royalty

2 of a device which is specifically designed to do

3 the thing to which the patents apply.

4 But we are a PC manufacturer. A PC

5 can be used for many, many different purposes.

6 There is only one little component in a PC. PC

7 margins are very, very thin. We can't support

8 much royalties.

9 We think that the six-and-a-half

10 dollars you are asking for for the device is too

11 much. Now, how do you solve that? Do you solve

12 that through regulation?

13 A better way and what we did in that

14 particular case is the patent holders stepped out

15 of the pool for a moment and started to sue one

16 of the PC manufacturers and asked for injunctive

17 relief in order to force them to the negotiating

18 table or force the debate of six-and-a-half

19 dollars per device.

20 So the argument we developed is that
21 in a patent pool situation where the patent pool
22 has promised to license on fair, reasonable, and

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1 non-discriminatory terms, where the exemption or
2 business review letter has said that they have to
3 license on fair, reasonable, and
4 non-discriminatory terms, where they are in fact
5 dominant because they are a dominant monopoly --
6 they are in fact a monopolist technology provider
7 for this particular standard, right, and where
8 the injunction would kick out -- would mean that
9 in the downstream market for PC manufacturing
10 there would be an impact on competition.

11 In these situations a patent pool
12 shouldn't be allowed to ask for injunctive
13 relief. They are estopped from doing that
14 because they have promised to license on fair,
15 reasonable, and non-discriminatory terms.

16 And the antitrust authority and the
17 rest of the community has relied on that to their

18 detriment. And for these reasons it would be
19 a violation of Article 82 and possibly the
20 condition of Article 81(3) that was applied to
21 get an exemption.

22 It would be a violation of competition

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1 law to ask for injunctive relief. What you would
2 ask for is damages. And what are the damages?
3 Well, damages are what you would have earned had
4 you had fair, reasonable, and non-discriminatory
5 terms.

6 What does this mean? This means the
7 court is going to look at what the damages are,
8 what the royalty should be. And of course as
9 soon as they realized that they ran to the
10 negotiating table and settled because you don't
11 normally want a court to settle the royalty --
12 to set the royalties for you.

13 So I think this is an important
14 means for antitrust authorities to ensure
15 that royalties are fair, reasonable, and
16 non-discriminatory and to ensure that in

17 situations where a patent hasn't been properly
18 declared, where somebody simply says like Sun
19 has done in a number of environments: We have
20 a patent, we're not telling you what it is, but
21 we have a patent.
22 You can't check the validity. You

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1 can't check whether it's essential. You can't
2 even check whether the patent really exists. In
3 a situation like that the patent owner shouldn't
4 be allowed to ask for injunctive relief.
5 Compulsory licensing for standards, is
6 there still time for that or do you want to wait
7 for questions? Compulsory licensing, do you want
8 to discuss that or do you want to wait for
9 questions? I have probably exceeded my time.

10 WILLIAM KOVACIC: Maurits, maybe we
11 could take Mark's presentation and then use the
12 discussion to come back. Thank you.

13 MAURITS DOLMANS: Thank you very much.

14 MARK JANIS: Thank you. I'm still
15 sitting here wondering about compulsory licenses

16 and standards. I have to retool very quickly
17 here. Thank you. I'm glad to be here. I
18 feel it necessary to give a disclaimer because
19 everyone else did, and I would feel left out
20 if I didn't.
21 So I really am just speaking on behalf
22 of myself, as if I would be speaking on anyone

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1 else's behalf. It is relevant to a point that I
2 want to make though. I come here as a patent law
3 expert and an antitrust law novice.
4 So if I do say anything untoward about

15 about here. And to me this takes us back I guess
16 to the starting point of a lot of the antitrust
17 analyses that have been talked about here and
18 then back beyond or ahead of the starting point.
19 And here's simply what I want to claim or what
20 I want to plead for.

21 And that is that antitrust regulators
22 on both sides of the Atlantic really should take

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1 care lest they assume away serious patent law
2 issues that really precede antitrust analysis in
3 certain of these areas. And the one that comes
4 most clearly to mind to me is the area of patent
5 pooling and cross-licensing.

6 So let me -- if you will indulge me
7 for just a couple of minutes here, let me give
8 you a little patent law talk here to explain what
9 I mean.

10 A simple, simple scenario where I've
11 got a patent that has a claim to a pioneering
12 invention, you have a patent that has a claim to
13 an improvement invention, and we both wish to

14 manufacture the improved product, all those are
15 variables that are important to the story. We
16 think we know what may well happen.
17 You and I will enter into a
18 cross-licensing arrangement. It will be a
19 bilateral, simple cross-licensing arrangement.
20 And we know -- and it seems very straightforward
21 superficially at least -- we know where the
22 antitrust analysis of that simple cross-licensing

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1 arrangement will start.
2 If we look at the DOJ, the U.S.
3 guidelines, they tell us as I see them anyway to
4 start out by asking whether the patents that are
5 being cross-licensed are blocking or non-blocking
6 and then go on from there.
7 What about the European analysis?
8 Where is the starting point there? I'm a little
9 less clear I would say. It gets us into Article
10 5.1 of the TTBE and confusion there I would say.
11 But if you look at the evaluation
12 report on the TTBE, it includes a lot of language

13 that begins to look like it is very similar to
14 U.S. standards, and other speakers have mentioned
15 that.

16 So there is abundant language in the
17 evaluation report suggesting that we should pay
18 attention to the notion, the concept of blocking
19 positions. It's part of the proposed definition
20 of competitor and so forth.

21 It seems to be the same starting
22 point. And it seems to be very straightforward

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1 except to a patent lawyer I would maintain. So I
2 want to ask a little bit about how did we get to
3 this starting point? And how we get to this
4 starting point of calling a patent blocking or
5 non-blocking requires a very complicated patent
6 law analysis.

7 At least two conclusions are embodied
8 in that label, blocking versus non-blocking,
9 one conclusion about patent scope, and a
10 second conclusion about patent validity and
11 enforceability. Ordinarily I think it would

12 necessarily be included in the notion of
13 blocking.
14 And so let me just develop that just a
15 little bit for you starting with this conclusion
16 about patent scope. What does that entail?
17 Well, of course it entails interpreting the claim
18 language of the patent. That is simply the most
19 controversial issue in the last five years of
20 U.S. patent law with many variant approaches.
21 That's the starting point.
22 Secondly, this analysis of claim scope

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1 might well entail an analysis of infringement at
2 least -- and I don't really know how this
3 purports to be done.
4 But at least if we I guess hypothesize
5 the product that both parties think that they
6 want to make and then conduct an infringement
7 analysis to see if both patents would be
8 infringed by that product, that would be a way
9 to ask whether these claims block or whether they
10 overlap.

11 But the infringement analysis
12 is itself complicated. It is a fact laden
13 analysis. It may entail inquiry into the patent
14 law doctrine of equivalents, especially if there
15 is a question about design-arounds which as I
16 understand it often arises in this context.

17 And the doctrine of equivalents I
18 suppose is the second most volatile issue, maybe
19 the most volatile issue. We'll find out soon in
20 U.S. patent law because there is a major case
21 pending right now in front of the Supreme Court
22 dealing with that issue.

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1 So what do I conclude from this little
2 bit of ranting here on the claim scope issue?
3 First of all purely as a matter of U.S. law
4 certainly in many of these cases reasonable minds
5 could differ as to this conclusion of blocking,
6 the conclusion about claim interpretation and
7 infringement.

8 So the idea of blocking versus
9 non-blocking, as I see it anyway as a patent

10 lawyer, is not a simple concept. Secondly, again
11 purely as a matter of U.S. law without even
12 making any comparative analysis this distinction
13 between blocking and non-blocking depends on
14 application of legal standards that themselves
15 are volatile, that change over time.

16 So it seems to me at least in theory
17 that one could undertake a purely proper analysis
18 in year one and conclude that there are blocking
19 patents involved in an arrangement, and by year
20 five conclude that under the proper application
21 of the then existing standards there is no
22 blocking, particularly depending on variations

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1 in the doctrine of equivalents there.

2 So that's just another thing to keep
3 in mind. Finally a comparative observation, and

8 complicated than that because the situation that
9 I've given you is the simplest type of situation:
10 two parties, one claim of one patent, and one
11 claim of another patent.

12 And you do have to talk in terms
13 of claims of patent, not in terms of blocking
14 patents. That's really a misnomer. It is really
15 a matter of blocking claims. Most patents, most
16 all patents include multiple claims of varying
17 scope.

18 And so again at least in theory when
19 you talk about claim one of one patent lying in
20 a blocking relationship, a mutually blocking
21 relationship with claim one of another patent,
22 what about claim two of the first patent and its

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1 relationship to claim one of the other patent?

2 What about claim two of the other
3 patent and its relationship with claim one of
4 the first patent, and so forth and so on?

5 And you can see that if you step
6 through this analysis you could have not really a

7 bunch of patents in a patent pool all of which or

6 We might not want to discard it all
7 together if we can't come up with anything
8 better. But if it's embodied as sort of a weak
9 presumption in a document that is a set of
10 guidelines that's rather general, maybe that's
11 appropriate. Maybe that's the best we can do.

12 And perhaps that is the correct way
13 to characterize current U.S. law. What about
14 European law though? I think there may be an
15 insight here for European law. And that is
16 that it might be a mistake to vest this blocking
17 versus non-blocking distinction with sort of a
18 talismanic significance in a very elaborate
19 formalistic legislative document.

20 And where does that lead me? It
21 probably leads me to a point of agreement with
22 several of the other speakers who said we should

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1 have some kind of guidance, European competition
2 law regulation of patent pools.

3 But it should be in the form of
4 guidelines, not in the form of a block exemption

5 that looks like the old style, formalistic type
6 of block exemption. So maybe that's an insight
7 that flows from some patent law considerations
8 here.

9 I think I perhaps should stop there.
10 I mentioned that there is another conclusion
11 bound up in this analysis of blocking versus
12 non-blocking. It is the conclusion about
13 validity and enforceability of patent rights.

14 That bleeds over I think into other
15 types of competition law standards as well,
16 whether a patent is necessary, whether a patent
17 is essential for purposes of a patent pool.
18 I think only a valid patent would be essential,
19 I think. So you could see the same kind of
20 considerations.

21 And I think this reinforces my point
22 that I just made earlier. There is lots of room

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1 for judgment and lots of room for differentiation
2 on matters of patent validity and enforceability.

3 Indeed the standards between U.S. and

4 Europe are not harmonized, definitions of prior
5 art, different approaches to eligible subject
6 matter for business methods and maybe for
7 software as one of the other speakers mentioned
8 earlier.

9 So the antitrust analysis that flows
10 from this is not likely to be the same either
11 even if antitrust standards themselves are the
12 same. So I will stop there. I think there are
13 other issues that are touched by this same sort
14 of phenomenon.

15 And compulsory licensing is one. No
16 challenge clauses are another. These are issues
17 that have to be informed by an understanding of
18 patent law as well as competition law. And I
19 thank you for your attention.

20 WILLIAM KOVACIC: Thank you, Mark.
21 In the few minutes we have remaining I'd like to
22 just start by perhaps giving Kirti a couple of

1 minutes if he wishes to react to some of the
2 comments that he's heard in this second segment.

3 Much of the discussion has focused
4 directly or indirectly on specific features of
5 the EU regime as well as efforts to assess the
6 wisdom of existing approaches. So, Kirti, if you
7 wanted to take a few minutes to comment on other
8 presentations, please do.

9 KIRTIKUMAR MEHTA: Thank you
10 very much. Just briefly I think one comment
11 on Mr. Leavy's presentation. I think our
12 legislation, our Article 81(1) I think the rather

2 clear would be a problem.

3 I will say if you want to make a block

4 exemption, meet the requirements of the deeds

5 that have been put forward. And to counteract

6 the criticism of its primitive nature now, then

7 I think we can only move forward by bringing it

1 lead to lower price for consumers. But if on the
2 other hand you are pooling substitute patents,
3 it's not clear what will happen.

4 Probably the prices to consumers may
5 rise. So these are issues that we are going to
6 be going into in looking at what are the benefits
7 of patent pools or multiparty arrangements.

8 There again we will then -- today now
9 don't say much about royalties, but whereas we
10 will have to look upon it because then you are
11 looking at the incentives to innovate and so on.

12 Similarly with the standards, very
13 interesting paper that was made whereas we didn't
14 get to the end of it. But I think our policy on
15 standards agreements, standardizing agreement is

16 very often we ask the qu.297ck4no the partiesBo813T* -0.385p8 inno r--0.3039lss73ort, sh v, sh v, sh T*

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1 approach is that standard competition is also --
2 can be good for the consumer.

3 So where that thrives, why not in but
4 to take a policy which enables not to have a very
5 wide interpretation of restrictive agreements.

6 Thank you.

7 WILLIAM KOVACIC: Perhaps one other
8 question, and our panelists don't necessarily
9 have to have well formulated views on this now.
10 But it's certainly something that we'd be glad to
11 accept your thoughts on for the record as they
12 occur to you.

13 And this is a point that Will raised
14 earlier, that is Will raised the very useful
15 question of what should U.S. policy makers take
16 away from the European experience, especially
17 recent efforts to engage in a continuing
18 assessment of the EU antitrust IP regime.

19 I was wondering if our panelists might
20 have other thoughts about approaches both in
21 process or in content that U.S. policy makers
22 given your reflection on the two regimes might

1 consider emulating.

2 Any thoughts about that? And again if
3 that's too much to formulate at the moment, it's
4 not your last chance to contribute. But if you
5 do have an immediate reflection, I'd welcome
6 that.

7 MAURITS DOLMANS: Mine would be too
8 controversial.

9 WILLIAM KOVACIC: We are tough enough.
10 Please.

11 MAURITS DOLMANS: Don't discard all
12 leveraging claims because I think leveraging
13 claims can -- there are situations where
14 leveraging is efficient. But there are also
15 situations where leveraging is inefficient.

16 And the European Community is looking
17 at the Microsoft case right now. And I must say
18 of course I have an ax to grind there. But I
19 think if you look at tying law in Europe and so
20 forth it does make some sense in spite of what's
21 been suggested.

22 PETER ALEXIADIS: I would second that.

1 I don't have an ax to grind yet in Microsoft, and
2 I won't mention any particular clients, but it's
3 my experience that leveraging is real. It can be
4 pro-competitive and it can be totally defensive
5 and foreclosing.

6 It needs to be looked at in a very
7 skeptical fashion however because it is a very
8 easy claim to make. And that's the only warning
9 I'd give. But I think it is real whether we
10 want to call it leveraging or some other word,
11 Maurits. But I still think it's real.

1 So I want to express my thanks to
2 you for giving us the benefit of this wonderful
3 thought and simply to mention that tomorrow we
4 go to the Pacific Rim at 9:30 at the FTC. Bill?

5 WILLIAM KOLASKY: I would echo what
6 Bill has just said. We really do thank you
7 enormously for coming here and sharing your
8 experiences and your thoughts with us. It's

1 over these types of issues because we do think
2 that convergence is important. And so I hope
3 that this is not the end of our discussion, but
4 only the beginning.

5 WILLIAM KOVACIC: I can only
6 underscore as strongly as possible Bill's
7 last comment. One of the most exciting and
8 encouraging developments I think has been simply
9 the process of competition authorities and the
10 scholarly and practicing community in a process
11 that has not involved any binding compulsion to
12 devote effort to advancing the electric debate.

13 And that discourse has been
14 extraordinarily fruitful as our panelists have
15 observed today. And a major reason as Bill said
16 for these proceedings is to see that that remains
17 front and center a key element of what the policy
18 making community does not future.

19 WILLIAM KOLASKY: With that, can we
20 give our panelists a hand? Thank you.

21 (Applause.)

