

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION
and
DEPARTMENT OF JUSTICE ANTITRUST DIVISION
PUBLIC HEARINGS:

COMPETITION AND INTELLECTUAL PROPERTY LAW
AND POLICY IN THE KNOWLEDGE-BASED ECONOMY
PART II, ASIAN PERSPECTIVES

THURSDAY, MAY 23, 2002
9:30 A.M.

FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
ROOM 432
WASHINGTON, D.C.

Reported by: Susanne Bergling, RMR

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

A T T E N D E E S

1
2
3 William E. Kovacic
4 FTC General Counsel's Office
5
6 William J. Kolasky
7 DOJ Antitrust Division
8
9 Mary Critharis
10 Patent and Trademark Office
11
12 Henry Ergas
13 Network Economics Consulting Group
14
15 H. Stephen Harris
16 Alston & Bird LLP
17
18 Karl F. Jorda
19 Franklin Pierce Law Center
20
21 Byungbae Kim
22 Korean Fair Trade Commission
23
24 Masayuki Koyanagi
25 Institute of Intellectual Property

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 A T T E N D E E S (cont.)
2
3 Abbott "Tad" Lipsky
4 Latham & Watkins
5
6 Len-Yu Liu
7 Taiwan Fair Trade Commission
8
9 Joshua Newberg
10 University of Maryland
11
12 James Rill
13 Howrey, Simon, Arnold & White
14
15 Toshiaki Tada
16 Weil, Gotshal & Manges LLP
17
18
19
20
21
22
23
24
25

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PRESENTATION BY:

PAGE:

H. STEPHEN HARRIS

11

MASAYUKI KOYANAGI

23

HENRY ERGAS

52

BYUNGBAE KIM

61

LEN-YU LIU

71

JAMES RILL

89

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

P R O C E E D I N G S

- - - - -

1
2
3 MR. KOVACIC: My name is Bill Kovacic, and I'm
4 the General Counsel of the Federal Trade Commission,
5 and with me today is Bill Kolasky, who is the Deputy
6 Attorney General for Antitrust, and as you know, Bill's
7 specialty is international affairs.

8 Also with us today is Mary Critharis, who is an
9 Attorney Adviser in the International Section of the
10 Patent and Trademark Office.

11 Today, we are going to continue the wonderful
12 session that we started yesterday by turning our
13 attention to the Pacific and to intellectual property
14 developments and perspectives from a number of
15 countries in that region.

16 I'd like to start by just briefly introducing
17 the members of the panel to you, and happily, I can do
18 this briefly, because for all of you internationalists,
19 you know who these folks are.

20 In alphabetical order and seated to my left is
21 Henry Ergas, who's the Managing Director of the Network
22 Economics Consulting Group. As you heard yesterday if
23 you were over at the session at the Great Hall, Henry
24 recently chaired the Australian Intellectual Property
25 and Competition Review Committee, which was charged

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 with reviewing Australia's intellectual property laws
2 as they relate to competition policy, and we are
3 delighted to have him back for a second round today.

4 To my right and second at the table is Steve
5 Harris, who's a partner with the Alston & Bird law firm
6 in Atlanta. He is the co-chair of the ABA Antitrust
7 Section's International Task Force and the Section's
8 International Antitrust and Foreign Competition Law
9 Committee. You may know him best and I think
10 increasingly scholars and practitioners in this area
11 will know him better as the editor-in-chief of the
12 ABA's wonderful two-volume treatise, Competition Laws
13 Outside the United States.

14 To my left is Karl Jorda, who teaches
15 intellectual property and industrial innovation at the
16 Franklin Pierce Law Center in Concord, New Hampshire,
17 known to this audience as one of the nation's
18 preeminent centers of learning and research in the
19 field of intellectual property. Among other
20 responsibilities, Karl has headed several delegations
21 of U.S. patent counsel at the Japanese Patent Office
22 office meetings.

23 To my left, next to Karl, is Mr. Byungbae Kim,
24 who is the Competition Policy Counselor and Director
25 General of the Korean Fair Trade Commission. He

1 presently serves as the KFTC's spokesman and Director
2 General for their Office of Public Relations, and he
3 has headed the KFTC's Investigation Bureau,
4 Deregulation Task Force and its General Policy
5 Division.

6 To my right, at the end of this segment of the
7 table, is Mr. Masayuki Koyanagi. He is the Director of
8 the Institute for Intellectual Property. Previously he
9 was an Appeal Examiner on the Board of Appeals in
10 Japan's Patent Office, and he's also served in the
11 Ministry of Foreign Affairs of Japan where he handled
12 multilateral international property issues.

13 To my left at the end of the table at the
14 corner is Tad Lipsky, who's currently a partner at the
15 Latham & Watkins firm in Washington, D.C. For ten
16 years, Tad served as the Chief Antitrust Counsel for
17 the Coca-Cola Company and literally circled the globe
18 working on competition policy issues for the company.

19 And as a foreshadowing of an event that will
20 take place at the Antitrust Division next month in

1 enormously influential DOJ 1982 Merger Guidelines.

2 To my right at the end of the table, we are
3 especially delighted to welcome Dr. Len-Yu Liu, who is
4 a Commissioner of the Taiwan Fair Trade Commission, and
5 as one commission to another, we are most delighted to
6 have you with us today. Dr. Liu also teaches at the
7 National Taipei University Law School, and I can't say
8 enough about the importance of having academics in
9 government service -- as you know, that just gives a
10 wonderful cast to what competition agencies can do.
11 And in some ways he is at home as well with his
12 graduate degrees in law from both Stanford and Harvard.

13 To my right, as part of another homecoming,
14 third on the table next to Steve is Josh Newberg, who
15 teaches law at the Robert H. Smith School of Business
16 at the University of Maryland. This is, we're proud to
17 say at the Commission, a homecoming for Josh as well.
18 He served as an attorney in the Bureau of Competition
19 at the Commission and as an attorney-adviser to
20 Commissioner Ross Starek, and as you know, Josh only
21 recently has published one of the most useful articles
22 on intellectual property antitrust issues in Japan.
23 Welcome home.

24 And my final introduction for the moment is for
25 Mr. Toshiaki Tada, who's a senior associate in the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Hibiya Sogo Law Offices and is presently an
2 international legal trainee at the Weil, Gotshal &
3 Manges law firm. His practice in Japan has focused on
4 antitrust, and he's often handled matters at the
5 intersection of antitrust and intellectual property
6 law.

7 And the gentleman to my right, known to all of
8 you quite well, is Jim Rill, currently the co-chair of
9 the Antitrust Practice Group at Howrey, Simon, Arnold &
10 White, former Attorney General for the Antitrust
11 Division, and as I will say later, Jim will be offering
12 some perspectives on this half day segment, and I will
13 give a further introduction to Jim when we turn to that
14 part of the program.

15 Let me simply give you a brief description of
16 the format today. In two and one-half hours, we are
17 going to show you the Pacific, and we will do it in
18 three parts. We will begin with an examination of
19 policy issues in Japan. We will then turn to
20 Australia, Korea and Taiwan, and again, Jim will
21 provide us his observations about the session we have
22 had for the past day and a half as a whole.

23 A couple of logistical notes, simply to
24 encourage our panelists to be sure to speak into the
25 microphones. One of the most useful features of what

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 the Department and the Commission have been doing with
2 these hearings is that we do put transcripts on the
3 web, we put papers on the web, and I'm struck at how
4 our audience at home and abroad find these materials
5 extremely useful. So, to give us the collective
6 benefit of your thoughts for not simply the short term
7 but much longer and for a larger audience, please speak
8 into the microphones.

9 What we'll feature by way of format is
10 principal presentations and then discussions by our
11 colleagues here, and as you're ready to intervene with
12 a comment, simply turn these handsome name tents up so
13 Bill and I can spot you and invite your intervention.

14 I would like to ask Bill, Bill or Mary, if you
15 have any opening comments you would like to make.

16 MR. KOLASKY: Just very briefly, I very much
17 want to thank all of our visitors, especially those who
18 have come here from Asia to share their experiences
19 with us. We feel that we have a great deal to learn
20 from other jurisdictions and from the way they are
21 handling the same problems that we are struggling with.

22 When you look back at the development and
23 evolution of American antitrust law, you see in the
24 early decisions of the Supreme Court, back in the early
25 1900s, the Court frequently looked to the experience of

1 other jurisdictions, particularly the United Kingdom,
2 for guidance on how to apply our antitrust laws.

3 In the last several decades, unfortunately, we
4 in the United States have I think been far too
5 inward-looking and too insular and have not looked
6 often enough to the experience of other countries to
7 see what we can learn from that experience. So, I very
8 much welcome you here and look forward to hearing what
9 you have to say.

10 Thank you.

11 MR. KOVACIC: Mary?

12 MS. CRITHARIS: (No response.)

13 MR. KOVACIC: Let's turn to our first segment.
14 We are going to have two principal presentations, one
15 by Steve Harris and one by Masayuki Koyanagi, to give
16 us perspectives on IP and antitrust views in Japan.

17 Steve, could you start us off?

18 MR. HARRIS: Thank you very much for that kind
19 introduction. I'm very happy to be here. I am also
20 very happy to work with a net. Professor Newberg has
21 written the quintessential and definitive article in
22 this area, so he is here and will tell me if when I go
23 wrong, which I do often, and Director Koyanagi, with
24 whom I've discussed briefly how we're going to divide
25 up the topic, certainly is also more than welcome to

1 jump in if I go astray.

2 The topic of IP and competition law in Japan
3 starts hundreds of years ago, and I did draft a paper
4 that will be posted on the website that discusses a lot
5 of sort of historical context which I think is
6 extremely valuable in order to understand what the
7 Japanese mean when they talk about intellectual
8 property and what they mean when they talk about
9 property generally, because we too often assume that
10 the experiential and cultural baggage that we all bring
11 from our own lives to a word or to a subject applies
12 globally, and that is not true about anything, and it's
13 certainly not true about intellectual property or
14 notions of property.

15 The 1968 guidelines were the first formal
16 guidelines dealing with international licensing
17 agreements. It was the first time that the JFTC put
18 into writing its views of the application of the
19 Antimonopoly Act to technology licensing. The AMA or
20 Antimonopoly Act is the antitrust statute that was
21 passed during the American occupation of Japan in 1947.

22 The '68 guidelines take pains to note the
23 historical movements by 1968 away from overtly favoring
24 licensees, which had been a point of concern, away from

1 and away from summary condemnation of licensing
2 restraints and toward more of a rule of reason
3 approach. While the 1968 guidelines said that, from at
4 least an American perspective, many did not think they
5 did that.

6 The black list of prohibited provisions still
7 was quite long in 1968 and included things that today
8 both the Japanese and others see as much less
9 problematic, including exclusive distribution
10 obligations, charging royalties on goods that don't use
11 the licensed technology, quality obligations regarding
12 the goods, prohibiting the licensee from manufacturing,
13 using or selling competing goods, certain grantbacks,
14 and all of those on the black list were condemned
15 categorically -- we would say per se unlawful -- and
16 were not subjected to an analysis of the effect, if
17 any, on competition.

18 Now, the exception to that is the geographic
19 restraints and restraints on export prices and output
20 had a sort of a footnote that said they were prohibited
21 only if they were of reasonable scope and if the
22 licensor had registered the patent in the foreign
23 market. This was an attempt at comity and at avoiding
24 a fight over whether Japanese law was consistent with
25 or, in fact, interfered with foreign intellectual

1 property rights.

2 Under the '68 guidelines, there was also a
3 white list, it was black and white in those days, and
4 the white list of exempted provisions included limiting
5 the license period, limiting the scope of the license,
6 granting the license for less than the full term of the
7 patent, restricting output of sales or goods, limiting
8 the frequency with which the licensed process may be
9 used, and granting separate licenses to make, use or
10 sell a patented invention.

11 Frequent criticisms often from U.S. companies
12 and less so but to an extent in those days U.S.
13 Government officials were that the guidelines applied
14 only to international licenses, that they did disfavor
15 non-Japanese licensors, despite the notes to the
16 contrary, and that they had a lack of transparency of

1 post-war economy that had been devastated and saw the
2 need to rebuild and approve of some depression cartels
3 but not to use the depression cartel mechanism
4 extensively, had adopted a fairly liberal and
5 pro-business, pro-foreign business set of guidelines
6 compared to what one has seen in some other countries
7 that are closed and that are in a developing situation.

8 Recall that this was roughly contemporaneous
9 with our infamous nine no-no's, and so at least in
10 comparing where Japan was in 1968 with the United
11 States thinking about what is or is not nefarious in
12 technology licensing agreements, they may have been a
13 step or two behind but only.

14 The JFTC enforcement of the guidelines,

142 std adincrst g wlthatebouilityo whimove ofchnology i

1 that as problematic and as part of the hollowing out
2 process of the U.S. electronics and auto industries,
3 for example.

4 The next step, from 1968 to 1989, we lived with
5 the '68 guidelines, and in the interim, the U.S.
6 abandoned the nine no-no's, moving closer to the 21st
7 Century, and in 1989, after a great deal of pressure
8 from Mr. Rill and others, they adopted the 1989
9 guidelines which reflected important policy shifts,
10 including some real, tangible, textural liberalization
11 of their approach to the problem.

12 It sought to address the criticisms of
13 nontransparency and uncertainty through a new optional
14 clearance procedure for the submission of proposed
15 transactions. It kept the structure of the black and
16 white list but added a new gray list, which is
17 essentially a rule of reason analysis of the
18 pro-competitive versus the anti-competitive effects on
19 competition of a particular provision.

20 Many provisions that were on the 1968 black
21 list moved to the gray list. Those include exclusive
22 dealing requirements, in-term prohibitions against
23 dealing in competitive goods or technologies. The
24 black list, however, was still not short. It included
25 resale price maintenance, as it still does. A

1 post-term prohibition against handling of competing
2 goods or technology, though, was still on the black
3 list under the '89 guidelines. Post-term restraints on
4 the use of technology or the requirement of a royalty
5 after the expiration of a patent was verboten, and the
6 restraints on R&D and exclusive grantbacks were still
7 per se unlawful.

8 The new gray list, though, showed some daylight
9 and included many provisions that came from the old
10 1968 black list and some that had not been addressed by
11 the '68 guidelines. The gray list included exclusive
12 dealing, requiring the licensee to distribute through
13 the licensor or its designee, which had been prohibited
14 in the '68 guidelines. The nonexclusive grantbacks, if
15 balanced in substance -- and I certainly never
16 understood what that meant, but I'm sure Mr. Koyanagi
17 will explain it -- but it gave an opportunity to argue
18 that a nonexclusive grantback might not harm
19 competition.

20 The gray list also included requiring the
21 licensee to use the licensor's trademark, restrictions
22 on the quality of inputs or goods embodying the
23 technology, input tying, royalties based on something
24 other than the patented goods, package licensing and so
25 on.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 The white list expanded, so more activities
2 were exempted, per se lawful, if you will, including
3 separate licenses to make, use or sell, time
4 limitations on the license, limitations to part of the
5 technology covered by the patent, field of use
6 restrictions, et cetera, and a long laundry list that I
7 won't read but are in the paper.

8 The JFTC's enforcement of the 1989 guidelines
9 is hard to determine. As Professor Newberg's paper
10 teaches us, there is likely a lot of administrative
11 guidance or "gosai shido" (phonetic) that took place in
12 connection with a lot of these licensing agreements,
13 and there is no public record ever of such
14 administrative guidance decisions.

15 There are a few notable public examples, again,
16 from Professor Newberg's paper. The 1990 cease and
17 desist order for bundling of video game software for
18 sale; the 1995 recommended decision against the
19 restraint in license that continued post-term; a 1997
20 cease and desist order against a trade association that
21 refused to license primary patents to firms seeking to
22 enter the market, which are principally foreign firms;
23 and a 1998 cease and desist order against bundling of
24 two software programs.

25 The enforcement, as I said earlier, appears to

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 have decreased in the 1980s in part due to rule
2 changes, but also because of a stronger pro-technology
3 policy, and because Japan was rapidly becoming a net
4 exporter of technology, something many Americans still
5 don't know, but for well over a decade, Japan has been
6 a net exporter of technology, and thus its own economic
7 interest is very much in favor of protecting
8 intellectual property.

9 In 1999, a new set of guidelines was
10 promulgated by JFTC that replaced the 1989 guidelines.
11 It made small changes, not as dramatic as from the 1968
12 to the 1989 guidelines, but the same direction was
13 maintained. Mr. Koyanagi is going to address the
14 specific provisions of the 1999 guidelines, so there,
15 I've set him up, have hoisted that on him, and the new
16 1999 guidelines maintained the white, gray and black
17 list but added what our friend Professor Newberg aptly
18 named the dark gray category, which is a very useful
19 appellation, which is not quite per se unlawful, but
20 you clearly have an extremely high burden of proof to
21 demonstrate that you can get away with one of these.

22 They include restrictions on licensee R&D,
23 post-term royalties, completely exclusive grantbacks,
24 post-expiration restraints on the use of competing
25 technology or goods. And the 1999 guidelines' most

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 notable change is a great reduction in the black list.
2 The per se category now is resale price maintenance,
3 direct or indirect, basically controlling the sale
4 prices of the licensee or controlling the resale prices
5 of the licensee's buyer.

6 Mr. Koyanagi, again, will address those other
7 specific provisions, except for ones I'm going to
8 discuss briefly dealing with Section 21.

9 The starting point for the discussion of how
10 the antitrust laws in Japan intersect with the IP laws
11 of Japan is what is now Section 21, what was originally
12 Section 23 as AMA was enacted, and that provision
13 reads, "The provisions of this Act shall not apply to
14 such acts recognizable as the exercise of rights under
15 the Copyright Act, the Patent Act, the Utility Model
16 Act, the Design Act or the Trademark Act," and some of
17 those in this room will think that sounds somewhat like
18 35 U.S.C. s.271(d). Again, it is not read as being
19 that comparable.

20 The evolving view of the limited exemption has
21 focused, as good lawyers would, on the word that is the
22 operative word, and that is when an exercise is
23 legitimate and exempt or when it's illegitimate and
24 thus nonexempt. What is called by some commentators
25 the confirmation theory boils down to the notion that

1 patent rights are guaranteed rights like all other
2 property rights but are subject to the Antimonopoly Act
3 like all of the property rights, and to some in this
4 room that will sound like some guidelines promulgated
5 by another agency, the U.S. FTC and the DOJ.

6 The evolving view of the limited exemption also
7 brings into play Section 100 of the AMA that makes it
8 clear that the drafters envisioned the application of
9 the Antimonopoly Act to IP rights at least in some
10 circumstances. It declares and gives power to a court
11 hearing an AMA case to delay that a patent or patent
12 license be revoked and obligates, upon such a
13 direction, the JPO to revoke that patent or the license
14 of that patent.

15 AMA violations that may be the basis for
16 revocation of a patent or license include violations of
17 89, which are private or unreasonable restraints of
18 trade, substantial restraints of competition by a trade
19 association, prohibited international agreements under
20 Section 90, and prohibited acts by trade associations.

21 Conceptually at least, the enforcement of AMA
22 violations against IP rights is also consistent with
23 the Japanese Patent Act's express grant of authority to
24 the JPO to impose compulsory licenses of patents if
25 it's required by the public interest. That's actually

1 Article 93 of the Patent Act.

2 And the grant of authority to impose compulsory
3 licenses under the Patent Act appears consistent with
4 Japan's obligations under TRIPS Article 31. These have
5 been seen as a collection of tools but not as a policy
6 direction as to when they should be implemented.

7 The 1999 guidelines recognize liability for
8 monopolization based on the unilateral refusal to
9 license by a patent owner that is a monopolist in a
10 relevant market, which is one of the first pieces of
11 guidances from JFTC as to when these various tools
12 might be used.

13 Mr. Koyanagi is going to speak to the specific
14 application of that provision to patent pools,
15 cross-licensing, et cetera.

16 It remains unclear how these 1999 guidelines
17 about unilateral refusals to license may affect JFTC's
18 enforcement actions, but it would appear to define
19 certain exclusionary conduct using IP rights as
20 illegitimate exercises under Section 21 and thus not
21 exempt from the AMA.

1 a number of the cases of the Antimonopoly Act relating
2 to intellectual property rights with respect to conduct
3 other than unfair trade practices has been increasing
4 in recent years, there has been increasing demand for
5 the JFTC to clarify its policy with regard to such
6 acts, and the fact that the relationship between
7 patents and competition law has been clarified by the
8 revision of guidelines and rules in the United States
9 and the EU.

10 The new guidelines consist of four parts, and
11 the new guidelines mainly describe these four points.
12 Those are a policy on patent licensing agreements under
13 Section 23 of the Antimonopoly Act; the policy on
14 patent and know-how licensing agreements from the
15 standpoint of the Antimonopoly Act, Section 3; the
16 policy on patent and the know-how licensing agreements
17 from the standpoint of unfair trade practice; and the
18 scope of application and the consultation system.

19 I would like to focus on these two points.
20 This slide shows Section 3 of the Antimonopoly Act. In
21 general, patent licensing agreements include the
22 licensing of patents and the payment of consideration
23 for such licensing. As one of the parties is subject
24 to certain restrictive conditions, such as a
25 restriction of the geographic region, assignment of

1 improved inventions, based on such agreements,
2 unreasonable restraints of trade do not necessarily
3 become a problem.

4 However, if, for example, competition in a
5 specified product market or technology market is
6 substantially restricted by the mutual imposition of
7 restrictions, such as restrictions on the sales price
8 of the patented product, on fields of R&D in patent
9 licensing agreements, such restrictions may constitute
10 a violation of the law as unreasonable restraints of
11 trade.

12 Specifically, in cross-licensing, multiple
13 licensing and patent pools, if by the mutual imposition
14 of restrictions on matters such as the sales price of
15 patent products and on the fields of R&D, there is a
16 substantial restriction of competition in the specified
17 product market or technology market, this constitutes a
18 violation of law as unreasonable restraints of trade.

19 So, as I mentioned, it is generally believed
20 that in Japan, there are no problems in terms of the
21 Antimonopoly Act with respect to actions that are
22 considered as the exercise of rights under the patent
23 law, such as restriction of geographic region or of
24 technology fields in the patent license agreement. But
25 if, for some example, competition in the specific

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 problem under the guidelines, generally interference
2 with fair competition is determined on an individual
3 basis.

4 Therefore, while such provisions have been
5 designated as gray provisions, since no rational
6 grounds for imposing such restrictions are normally
7 recognized and since their effect on competition may be
8 considerable, the following nonprice restrictions are
9 reclassified as restrictive provisions that are highly
10 likely to be illegal dark gray provisions.

11 This slide shows the latest activities of the
12 JFTC relating to IP and competition policy. So,
13 technology standard is infrastructure in competition,
14 and its importance is increasing in the stream of
15 information technologies development, globalization of
16 economies and pro-patent. Technology standard itself
17 is not problematic; however, some acts relating to
18 technology standard would conflict with competition
19 policy.

20 The software transaction importance is
21 increasing in business in the stream of development of

1 system software manufacturer with technical information
 2 relating to the platform functions is necessary for
 3 continuing business activities, if the operating system
 4 software manufacturer in providing such technical
 5 information to hardware manufacturers or application
 6 software manufacturers imposes anti-competitive terms
 7 or is discriminatory, such restrictions can prevent
 8 hardware manufacturers and the software manufacturer
 9 from developing products and the in providing such technical

1 torycasctivwheurmtheurm a risk-that fair s anti-coplication
 12 ting toping pmarket 7g such tecmarketsucf 8 hakebsuch technical
 14 r, spourero unfair tradg tosinece turemay bectlication
 1 viol applioties, law.akebsuch technical
 1 f the operating proviurmthat has bes ae t re moication
 1 sttur 8 bycturer relheoabove-der isbody, such restrikebsuch technical
 2 otiotheuuctTrds and the in proviurmrdware manufa,iikebsuch technical
 24 plis anti-copli ting toping pmarkets 7g such teckebsuch technical

1 license; refusal of license, accumulation of patents
2 for the purpose of stifling R&D; financial patents; and
3 use of patent pools.

4 The research committee will make a report by
5 the end of this June. We will have the report in the
6 near future.

7 Thank you for your attention.

8 MR. KOVACIC: Thank you very much, again, to
9 both of our presenters for an excellent survey of
10 recent developments in Japan.

11 As one way to begin, I was wondering if any of
12 our panelists might have a general comment or
13 observation that they would like to offer about the
14 presentation or specific points that they might want to
15 address to begin, if there was something that you might
16 want to add. And if not, one particular focal point,
17 one thing that stands out I think from the recent
18 Japanese experience is the exceptional amount of effort
19 devoted to rethinking the framework of competition
20 policy controls, both research and guideline revisions,
21 and one key item of interest for the policy-making
22 community in the United States are are there particular
23 approaches given this fresh re-assessment of Japanese
24 policy that we might usefully think about considering
25 as models for analysis or concern in the U.S. as we go

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 through our own re-assessment of the IP antitrust
2 regime in the United States?

3 In short, and maybe I offer this most for our
4 American discussants and panelists, have you seen
5 developments that stand out that you might say, these
6 are things that the U.S. policy-making community might

1 analysis of it. So, I think they are useful.

2 MR. KOVACIC: Mr. Koyanagi, would you like to
3 respond to Josh's question about the stimulus for
4 evaluating the policy direction?

5 MR. KOYANAGI: JFTC's report in the (inaudible)
6 is guideline for (inaudible), so I think JFTC's
7 thinking over -- thinking or observation of the report

1 affect the way the framework that we've just seen is
2 elaborated over time?

3 MR. HARRIS: Well, as I mentioned in my paper,
4 the -- there is a recent amendment that allows
5 injunctive -- an injunctive private right of action.
6 There is so far no decisional -- no case law resulting
7 from that, but there are two cases pending at least of
8 which I'm aware.

9 There is still no private right of action for
10 damages unless the JFTC has already concluded and
11 provided an adverse and final finding of a violation,
12 which is a very large impediment and usually
13 insurmountable impediment to private enforcement.

14 In my own view, private enforcement is a very
15 important tool, probably not surprising coming from a
16 private practitioner, but from my own view, private
17 enforcement is an important adjunct to government
18 enforcement of the antitrust laws, and especially in
19 light of the, you know, limited resources of JFTC or
20 limited resources of any government authority.

21 Again, we get into some discussion of cultural
22 differences, however, and the tendency toward consensus
23 and harmonization and conciliation, which anyone who's
24 litigated in Japan, and I have, has had to account for
25 and deal with and drink a lot of green tea and try to

1 MR. KOVACIC: I was wondering if I could ask
2 our colleagues today who have been involved in the
3 formulation of Japanese policies perhaps to comment a
4 bit upon the relationship between the JFTC and
5 government institutions, policy-makers, who have been
6 involved in what we would call the intellectual
7 property community. That is, one of our aims in the
8 hearings we're holding is, in fact, to teach both
9 communities a bit more about what they do in the sense
10 that at least within our own experience, each community
11 perhaps might benefit from a greater understanding of
12 how they work together, and at least an issue posed is
13 whether or not each regime is sufficiently attentive to
14 distinctive policy concerns that arise within its own
15 province.

16 I was wondering if our specialists from
17 overseas might comment a bit upon the nature of the
18 relationship between the IP and competition policy
19 communities and policy-makers and to what extent, for

1 In Japan, my observation is there are no strong
2 relationships between competition policy-making
3 officials and IP policy-making officials. And so I
4 would say one situation in Japan right now, there are
5 intellectual property strategy, the task force under
6 the Prime Minister in Japan, so, right now, so in
7 Japan, through a strong patent policy to proceed. I
8 think also competition policy-making officials don't
9 have a strong position in the Japanese Government right
10 now, so there are -- I don't think strong competition
11 policy -- strong competition policy is not being taken
12 in Japan for two or three years from now, two or three
13 years.

14 MR. RILL: Just some historic perspective on
15 the last question, I was I'll use the word privileged
16 to serve as one of the core negotiators for the
17 Structural Impediment Initiative talks between the
18 United States and Japan back in what we'll call the
19 first Bush Administration, and I was intrigued that it
20 was one of the rare occasions where the Japanese
21 Government appeared on the other side of the panel
22 representing the multiple agencies of the Japanese
23 Government, including the JFTC, but also the Finance
24 Ministry, the Foreign Ministry and the Ministry for
25 Trade and Industry.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 One of our main issues on structural
2 impediments was improvement in patent review, staffing,
3 facilitation, enhancement of quality of review to
4 improve what we perceived to be not full protection of
5 intellectual property rights. Interestingly, the JFTC
6 did not get particularly involved in those aspects of
7 the discussion, and the discussion was mostly handled
8 for the Government of Japan under the rubric of
9 meeting.

10 Without being particularly pejorative about it,
11 while I think there was some lip service paid to our
12 suggestions, there was not a high priority of the
13 actual involvement of people who were directly involved
14 in intellectual property, nor was there I think any
15 significant result, contrasted I think with some of the
16 results we were able to obtain in strengthening the
17 JFTC as a general matter.

18 Could I ask a question?

19 MR. KOVACIC: Absolutely. I should emphasize
20 for all of our panelists, one of the rules of
21 engagement is that you are free to pose interrogatories
22 to your colleagues, so if you --

23 MR. RILL: I better be careful then for the
24 future.

25 MR. KOVACIC: There is a mutual deterrence

1 element to it, as Jim says, but questions you have, you
2 are most free to pose to colleagues.

3 Please, Jim.

4 MR. RILL: I was particularly interested in the
5 comments both of Mr. Harris and Mr. Koyanagi,
6 particularly in the latter part of the issues that are
7 being raised with respect to licensing restraints in
8 software, they seem somewhat more aggressive areas of
9 inquiry than perhaps would be reflected in the
10 conclusions and suggestions made in our 1995
11 guidelines.

12 I am reminded of the distribution guidelines in
13 Japan, general distribution guidelines in Japan, which
14 are really significantly more aggressive than our
15 enforcement program, quite apart from our defunct
16 guidelines, our enforcement program of vertical
17 restraints, but unfortunately not matched by
18 enforcement policies and enforcement activities in
19 Japan.

20 I come back to something more basic, though, as
21 I see a great convergence between U.S., European and
22 Japanese intellectual property and antitrust interface.
23 Let me ask either Steve or Mr. Koyanagi, is there any
24 case you know of in Japan, since there are cases you
25 both put on the table, in which the JFTC has condemned,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 attacked, a unilateral refusal to license by a
2 patentee, unilateral, not a trade association case, but
3 a unilateral refusal to license by a patentee? I'm not
4 aware of one, and I was just curious whether you might
5 be able to comment on that.

6 MR. KOYANAGI: I think that there are no cases
7 on that refusal policy.

8 MR. RILL: Thank you.

9 MR. HARRIS: Part of the problem, Jim, as you
10 know -- well, not a problem, but part of the problem of
11 you and I understanding this and knowing of it is the
12 administrative guidance system, and many of these
13 issues are handled through that process that is not
14 public, that has served Japan for centuries and
15 resolves most of these issues. So, whether or not JFTC
16 has raised it, I would not be surprised at all if it
17 may have been raised in administrative guidance,
18 especially given the outlook set forth in the
19 guidelines.

20 MR. RILL: But as I understand it, I think it's
21 phrased even at the level of a warning, that there
22 would be some --

23 MR. HARRIS: No. Of course, warnings are very
24 rare, too. Any public expression is very rare through
25 the administrative guidance system, so I don't know the

1 percentage, maybe Professor Newberg does, but a huge
2 percentage of issues raised by JFTC are resolved
3 through either informal consultation, which is even one
4 step below the administrative guidance, or through the
5 administrative guidance, both of which are nonpublic.

6 MR. RILL: My point is simply that there is a
7 convergence here I think between the U.S. and EU and
8 Japanese, basic principles, that one of the basic
9 principles, of course, is that the unilateral holder of
10 a patent has a right to exploit that patent and to
11 refuse to deal, and I don't see Japan deviating from
12 that basic principle.

13 MR. HARRIS: Well, I see them deviating in
14 terms of where they start and what their initial
15 outlook is, and actually EU, from the standpoint of
16 certainly a duty to deal rather than a right to refuse.
17 The analysis progresses both in the EU and the Japan
18 from a somewhat -- well, from a very different starting
19 point. I think they tend to wind up in the same place.

20 They are very strongly protective of IP, and
21 whether you start with a duty to deal that's very
22 narrow and has to have a very high burden of proof as
23 an exception to the -- and can force you to deal, it's
24 almost swallowed up by the exception, or vice versa, as
25 we start out with the right to refuse and have a very

1 narrow category of very unusual circumstances that
2 would present an exception to the right to refuse, I
3 think you get to the same point.

4 MR. RILL: And a very --

5 MR. HARRIS: And very strong protection of IP
6 protection, with an exception for the truly
7 extraordinary case.

8 MR. KOVACIC: Maybe before going to Mr. Kim's
9 question, if I could frame the point of this
10 interchange slightly differently. We spent a lot of
11 time yesterday in talking about the European regime
12 focusing on the obligation to deal and the extent to
13 which, as we put it yesterday, a mere refusal to extend
14 a license might be actionable under the European Union
15 competition regime.

16 If I could pose the question this way, that is,
17 suppose you are advising a business manager in the
18 United States, Europe and Japan, and the question on
19 the table from the manager is, what risk do I face and
20 what complications do I confront if I decide with a
21 position of dominance, let's assume it's somehow
22 defined a dominant enterprise, simply refusing to
23 extend the license to someone who arguably can claim
24 that without the license, they cannot compete with me
25 in a market?

1 Taking those three jurisdictions, where do you
2 feel the most nervous about a refusal to license, where
3 do you feel the greatest comfort, and how would you, as
4 we say in the academic world, how would you explain
5 your answer?

6 MR. NEWBERG: Well, I think in the United
7 States, it's still the law, and it's recently
8 re-affirmed, that a unilateral refusal to license
9 intellectual property is not an antitrust violation.

10 I guess in terms of nervousness, in advising a
11 client, I would say there's not an enormous amount of
12 basis for nervousness on the issue of unilateral
13 refusal to license, even if you have a dominant
14 position in the United States; some basis for
15 nervousness, albeit not enormous because of the lack of
16 private enforcement and the lack of case examples that
17 Jim Rill pointed out; and perhaps slightly more of a
18 basis for nervousness in the EU, because you have both
19 doctrinal basis for going after a unilateral refusal to
20 license as a violation, and you also have the other
21 policy concerns that are built into the EU competition
22 enforcement structure.

23 MR. HARRIS: I would agree with where the
24 Professor comes out. I think the market integration
25 aspect or policy directive undergirding the agency

1 property, which is in essence to incentivise
2 innovation, and competition, and as I call them in my
3 paper, those are the twin engines of progress. When
4 one is way out of balance with the other and when
5 there's an intellectual property right that is blocking
6 a high degree of social good that can be driven by
7 competition in a market, you're going to have, in
8 essence, a decision for the good of public welfare that
9 is in exceptional cases only, as they said in McGill,
10 to require a license.

11 Those cases are very rare and I think will
12 remain very rare, but I think they exist, and the
13 proper policy is to undertake that analysis, not to shy
14 away from it simply because those cases are exceptions.

15 MR. KOVACIC: Jim?

16 MR. RILL: I don't disagree with much of what
17 Steve said. I think that a rigid application of
18 whatever he perceives as the essential facilities
19 doctrine in making a conclusion even as to Europe would
20 be quite conservative, possibly overly conservative. I
21 don't disagree with Josh or Steve -- with Josh in their
22 ranking. I think the question presupposes a level of
23 anxiety, however, on the part of the counselor that may
24 be somewhat unduly given to trepidation.

25 I think that first of all, even Europe wouldn't

1 go so far as to say that the application of the
2 essential facilities doctrine, even the Commission
3 wouldn't go that far, and I was taken yesterday by the
4 debate, the rather extended debate among those who have
5 actually been involved in the cases, particularly Ian
6 Forrester, who represented the Commission in the McGill
7 case, as I recall, emphasizing how narrow the approach
8 at the Commission was in McGill and how little
9 intellectual there was to the intellectual property
10 being claimed in McGill.

11 I'm not suggesting that's a good standard, but
12 what Ian was saying was by looking at those cases, one
13 will over-emphasize differences between Europe and the
14 United States, those cases -- and IMS, of course, is in
15 the courts now. So, I think I'd probably take a
16 tranquilizer and be a little bit less nervous than you
17 are.

18 MR. HARRIS: I agree. I think you should tell
19 the clients to take a tranquilizer. These are
20 exceptionally rare cases. I had the great pleasure of
21 working with Ian Forrester for NDC, and actually he
22 represented NDC on the appeal in the Commission versus
23 Legal Services, and but I did the argument for NDC at
24 the EC level in that case, and they are such
25 exceptionally rare cases.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 One of the points is you have to work very hard
2 to convince the Commission, and you should, that you
3 have a very exceptional case and that this fits that.
4 I mean, they spoke to everyone in the industry. They
5 spoke to everyone in the industries in other countries.
6 They basically had to be persuaded.

7 I also think one point that Ian makes is right.
8 It cannot be discussed in EC decisions, and this is an
9 interesting distinction that drives some of these
10 decisions, and that is the extent to which the
11 intellectual property is valid or valuable. In our
12 court system, of course, the same judge can determine
13 the validity -- and often in a Walker Process or a
14 Handgards circumstance does -- determine the validity
15 or invalidity of a patent at the same time or in the
16 same case that he or she is determining whether or not
17 there's been a violation of antitrust laws.

18 Because the validity of IP rights in the EC is
19 strictly a national concern, both the EC and the EC
20 courts in Luxembourg have to defer to the courts. So,
21 when that case started, the German courts were saying
22 this is a valid right. The German Court of Appeals has
23 now said it is an invalid right in the IMS case. So,
24 the point of departure for both the Commission and the
25 courts in Luxembourg is very different depending on how

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 the national courts view the IP right.

2 MR. KOLASKY: If I can follow up on that, after
3 the discussion yesterday morning, I had occasion to
4 have lunch with Dr. Mehta from the EC, and he had an
5 impressive observation, which is that one needs to look
6 at what happened after the decision in McGill, and what
7 he pointed out is that within a matter of a couple of
8 years, McGill was not in business.

9 MR. HARRIS: It was less than a couple of
10 years.

11 MR. KOLASKY: Yeah, and the point he was
12 making, of course, is that the problem with compulsory
13 licensing under even an essential facilities doctrine
14 approach is that that turns it into a public good, and
15 it's then very hard for anyone to make any money. So,
16 I'm sort of curious, though, we focused on the EU in
17 this discussion, but turning back to Japan, I would be
18 very interested in getting Mr. Koyanagi's comments
19 following up on what Steve Harris was saying about the
20 administrative guidance system in Japan, and that is,
21 if someone were to come to the JFTC and make an
22 argument along these lines that a copyright or a patent
23 was essential, access to that was essential for a
24 company to keep in the market, under what
25 circumstances, if any, would you give administrative

1 guidance requiring the patent or copyright holder to
2 license it?

3 MR. KOYANAGI: Generally speaking, in the case
4 of intellectual property, I think essential facilities
5 is not applicable, because in some -- in some
6 technology, it is a circumvent technology situation.
7 So, however, in the -- operation system software have a
8 function, and it's -- have a very strong network
9 effect. So, in that case, it is -- might be -- it
10 might be applicable to that essential facility, but
11 generally speaking, in the intellectual property case,
12 there are no applications of the essential facilities
13 in Japan.

14 MR. KOVACIC: Mr. Kim, you have patiently
15 waited throughout this sidebar discussion. Please.

16 MR. KIM: Thank you. I'd like to make one
17 comment regarding the categorization between JFTC's
18 1999 guidelines. I think there are very sophisticated
19 categorizations which are white, black, gray or other
20 colors. So, recalling my experiences in KFTC, I found
21 sometimes that some provisions were too sophisticated
22 to be applicable in actual cases.

23 Since the antitrust agencies are facing very
24 different circumstances according to cases, I wonder
25 whether these sophisticated categorizations did

1 actually work when JFTC reviewed the actual cases.

2 Thank you.

3 MR. KOVACIC: Would anyone like to comment on
4 that interesting question? I think an issue for all of
5 us in having guidelines, when you have classification
6 schemes with different criteria, nominal criteria is,
7 of course, how well do they apply in practice and do
8 the nominal classification schemes provide useful
9 guidance in predicting what the institution will do in
10 practice, and, you know, perhaps experience with the
11 guidelines is not rich enough to permit an observation,
12 but do any of our colleagues have thoughts about how
13 the set of presumptions that are built into that
14 scheme -- and, of course, in the academic world, thank
15 God for gray, if not different shades, but always gray,
16 but how do -- do any of the panelists have observations
17 about how the classification scheme and the level of
18 scrutiny associated with each, in fact, is operating in
19 Japan?

20 MR. HARRIS: Just personally, I would hate to
21 go back to the time even before 1968 when there were no
22 guidelines, and I understand Mr. Kim's question, there
23 are often clauses which are hard to pigeonhole, hard to
24 decide whether they are gray or dark gray. It's hard
25 to know whether a gray clause, whether your, you know,

1 back of the envelope -- the effects on competition
2 analysis is the same the JFTC would come down with, but
3 in the usual case of a license that you're looking at,
4 at least in my practice, one is not going to contact
5 JFTC, one is not going to initiate informal
6 consultation except in a major transaction, and so I
7 find them very useful guidelines in terms of sort of
8 the third rail, the truly dangerous clauses that one
9 wants to avoid.

10 Then again, one has to use one's own sense, and
11 it's probably culturally flawed, but one's own sense of
12 how the effect on competition analysis will go forward
13 in terms of the gray categories, and I think also
14 counseling with Japanese practitioners on current
15 outlook of the JFTC, and again, the large transaction
16 informal guidance itself is the proper approach, but I
17 would have a hard time advising my clients without the
18 guidelines.

19 MR. NEWBERG: Yeah, I think that, coming back
20 to points that were made earlier, the '99 guidelines
21 are still very new, so there just hasn't been an
22 enormous amount of experience with them, and also you
23 have this structure where the overwhelming majority of
24 contacts with the agency are informal and undocumented.
25 So, you know, we don't know to what extent these

1 categories are meaningful in those informal
2 interactions, because they're not recorded.

3 I do think, though, that the 1999 guidelines,
4 you know, announced very decisively, continuing and
5 expanding on the 1989 guidelines, that there's a
6 broader and broader area of restraints for which the
7 JFTC is open to argument, to argument about competitive

1 that -- transparent administrative guidance plays a
2 crucial role in transmitting the norms that surround
3 the operation of those standards.

4 We would like to turn now to a Australia, Korea
5 and Taiwan, and for this segment, to give us an
6 overview of Australian experience and licensing
7 arrangements, we're going to turn to a reprise
8 performance by Henry Ergas, who again made a wonderful
9 contribution to yesterday's session and is going to
10 give us an overview of the Australian experience.

11 MR. ERGAS: Thank you very much, and again,
12 it's a pleasure to participate in these hearings.

13 What I want to do is talk briefly about the
14 relationship between competition laws and the
15 intellectual property laws, and in particular focus on
16 some proposed changes to the treatment of intellectual
17 property in our competition law, the main competition
18 law in Australia being the Trade Practices Act of 1974,
19 and I then want to say a few words about the
20 implications of the reforms that are currently proposed
21 to the Trade Practices Act.

22 I should say by way of preface that a written
23 paper, rather lengthy written paper, is available I

1 highlight a few issues that seem of greatest relevance
2 to the subjects being dealt with this morning.

3 Let me start by setting out the relationship
4 between the intellectual property rights established by
5 our intellectual property statutes and the competition
6 laws in Australia. A distinctive feature of our
7 competition act, i.e., the Trade Practices Act, is that
8 it contains a section which has the effect of exempting
9 from certain provisions of the Act conditions imposed
10 in licenses and assignments insofar as those conditions
11 relate to the subject matter of an intellectual
12 property right.

1 the acquisition or transfer of assets, so it's the
2 merger provision of the Act.

3 The sections that are not exempted under
4 Section 51(3) are, importantly, Section 46 of the Act
5 and Section 48 of the Act. The most significant of
6 those in practice is Section 46 of the Act, which is
7 our unilateral exercise of market power provision,
8 roughly equivalent to a monopolization provision.

9 Under Section 46 of the Act, i.e., the
10 unilateral exercise of market power provision, there
11 have been a number of cases which involve material that
12 was covered by intellectual property. In essence, one
13 can say that the mere fact that the conduct at issue in
14 a Section 46 case refers to or arises in relation to
15 material that is the subject of an intellectual
16 property right in no way exempts that conduct from the
17 effect of the section, and in particular, if I go to
18 the question which was raised slightly earlier in this
19 panel, if use is made of intellectual property in one
20 market through, for example, unilateral refusal to
21 license that property, so as to restrict competition in
22 another market, then there is at least a risk that the

1 Section 51(3). This is the Intellectual Property and
2 Competition Review Committee, which was an independent
3 committee established by the Attorney General and by
4 the Minister for Industry, Science and Resources, with
5 the responsibility of reviewing the intellectual
6 property statutes and the Trade Practices Act insofar
7 as those affected the or touched on the interaction
8 between intellectual property and the overall
9 Commonwealth goal of promotion of competition.

10 That was a committee that I chaired, and the
11 Intellectual Property and Competition Review Committee
12 recommended broadly as follows with regards to Section
13 51(3). The committee emphasized that in its view, it
14 was essential that firms be able to enter into
15 efficient contracts regarding intellectual property
16 rights, and as a result, the exercise of intellectual
17 property rights ought not to be subject to unnecessary
18 or onerous obligations except where those obligations
19 had a clear justification in terms of the public
20 interest.

21 At the same time, the committee recognized that
22 intellectual property rights shall not be capable of
23 being used to exceed the market power that they
24 directly conferred. As a result, the committee
25 recommended a substantial reframing of the current

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 provision, i.e., of Section 51(3). In essence, that
2 reframing involves the following, which is that
3 conditions in license and assignments under
4 intellectual property statutes should be fully exposed
5 to the provisions of the Act insofar as those
6 conditions would give rise to a substantial lessening
7 of competition. The Government has since announced
8 that it has accepted that recommendation, and
9 legislation is to be tabled in Parliament amending the
10 Trade Practices Act in the light of that
11 recommendation.

12 What is the effect of that recommendation and
13 of the proposed reform? As I said, the reframing of
14 Section 51(3) will make conditions in licenses and
15 assignments subject to the provisions of the Act
16 insofar as those conditions have the effect or likely
17 effect of substantially lessening competition. What
18 that means in practice is that conditions in licenses
19 and assignments will become subject to the provisions
20 of the Act, except where the breach that they would
21 otherwise cause is merely a per se breach.

22 So, a condition in a license or assignment
23 would not fall foul of the Act if it merely breached a
24 per se prohibition but where that breach did not entail
25 or would not give rise to or be likely to give rise to

1 a substantial lessening of competition.

2 The associated recommendation to that was that
3 the ACCC, the main enforcement agency, which is the
4 Australian Competition and Consumer Commission, be
5 required to issue guidelines as to how it would assess
6 the substantial lessening of competition test in
7 respect of conditions in licenses and assignments, and
8 the effect of issuing those guidelines will be to
9 create a reasonable expectation amongst parties that
10 those guidelines will be adhered to, and hence, to
11 create a basis in administrative law should the ACCC in
12 practice depart from those guidelines in its
13 consideration of conditions in licenses or assignments.

14 The impact of this change will be to -- and
15 here there is contrast to what we were told moments ago
16 about Japan -- to bring a very substantial range of
17 conditions that are ordinarily imposed in licenses and
18 assignments in Australia out of a white box and into a
19 gray box, and so the effect will be that, whereas
20 previously we have had a rather narrow black box and a
21 very large white box, we will converge with Japan and
22 possibly, I would expect, other jurisdictions in having
23 an extremely large gray area.

24 It's worth saying that whilst having gray areas
25 may connote uncertainty among parties, and hence, act

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 as an impediment to efficient commercial operation, our
2 Act is distinctive -- well, New Zealand mirrors this
3 provision -- but our Act has the feature that parties
4 who believe that they are entering into an agreement
5 for interconduct that may be in breach of the Act
6 because of its competition effects can nonetheless seek
7 authorization of that conduct where the authorization
8 then requires the parties to establish that there is a
9 public interest in the conduct that outweighs any
10 competitive detriment that the conduct may give rise
11 to.

12 Put simply, our Act operates through a shifting
13 onus of proof where in assessing whether conduct is in
14 breach of the competition provisions, i.e., gives rise
15 to or is likely to give rise to a substantial lessening
16 of competition, the enforcement agency bears the onus
17 of demonstrating that the conduct will indeed reduce
18 competition.

19 However, our Act recognizes that there may be a
20 trade-off between competition and efficiency, and
21 hence, then allows authorization of that conduct
22 insofar as that conduct would be more generally
23 desirable, so desirable, indeed, as to outweigh the
24 competitive detriment.

25 However, to secure that authorization, it is

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 then the party at issue that bears the onus of
2 demonstrating that the efficiencies that would be
3 obtained, i.e., the gains or benefits to the community,
4 outweigh the detriment.

5 It's worth saying in conclusion that by this
6 change, we are moving towards a situation where the
7 mere fact that conduct involves the intellectual
8 property statutes will not exempt it from any of the
9 Act's provisions insofar as that conduct would have the
10 effect or likely effect of substantially lessening
11 competition.

12 It's worth noting that the committee I chaired
13 made a wide range of other recommendations that are
14 intended to give greater effect to this broad reform,
15 and those other recommendations go importantly to
16 changes in the intellectual property statutes
17 themselves, and the bulk of those recommendations have
18 been accepted by the Commonwealth Government. Some
19 have already given rise to amending legislation; others
20 are expected to do so reasonably soon.

21 The ACCC, for its part, is currently developing
22 or at least beginning the preparatory work for the
23 guidelines that I mentioned a moment ago. Importantly,
24 those guidelines will cover the types of questions
25 which I was very pleased to learn our colleagues in

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Japan as well as elsewhere are now grappling with about
2 software licenses, in particular.

3 We recognize at the same time that

1 contracts.

2 Then finally I will go briefly through some
3 cases that KFTC deals with in the past, the Korea
4 Coca-Cola case and Proctor & Gamble case.

5 Since Korea has several law systems that codify
6 the laws or regulations which are made based on the
7 laws of (inaudible) law, therefore, the fair trade laws
8 and regulations which are made based on the law is a
9 very important source of law with regard to
10 relationship between the competition policy and IPR.

11 There are two types of regulations and laws
12 that can be applied to the case with regard to IPR.
13 The general provisions that can be applied not only to
14 the IPR-related cases but also to non-IPR-related
15 cases. These are Article 3-2 of the Monopoly
16 Regulation in the Fair Trade Act, and Article 7, which
17 is about M&A, Article 19, restrictions on cartel,
18 Article 23, which is about unfair business practices,
19 and finally Article 29, which is about price fixing.
20 These general articles are some very general provisions
21 that we can find in most laws and regulations in most
22 countries.

23 The second type of provisions are directly
24 related to the IPR. The paragraph 1 of Article 32 of
25 the Act forbids companies to enter into international

1 resale price maintenance, and the remaining part,
2 starting from "provided" to the end, should be struck
3 now. It was included by mistake. And paragraph 2 says
4 that the paragraph 1 shall not be applied to

1 licensing of IPR issued by DOJ and the FTC, because
2 it's my understanding there are some clauses in the
3 1995 antitrust guidelines that in some cases a per se
4 rule will be applied, but this guideline of KFTC says
5 that the rule of reason analysis will be applied in
6 most cases.

7 And the guideline illustrates eight types of
8 unfair business practices which are tying arrangements
9 of raw materials, parts, manufacturing equipment,
10 forcing licensee to use the trademarks or designs that
11 are identified by the licensor, restrictions on
12 exporting territories or restrictions on sales
13 territories, restrictions on customers, restrictions on
14 transaction quantities, restrictions on transaction
15 methods and designation of sales and resale prices, and
16 finally restrictions on the use of competing products,
17 restrictions on the use of IPR after its expiration,
18 charging royalties on non-licensed products, tying
19 technology, restrictions on R&D, requiring excessive
20 sales promotion expenses and unfair refusal to license.

21 This final type of unfair business practices is
22 kind of a gathering of various other restraints rather
23 than a single type of restraint.

24 With regard to cross-licensing and pooling
25 arrangement, business competitors, the guideline says

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 that Article 19, restrictions about cartel, will be
2 applied, and if you go to the acquisition of IPR, a
3 merger analysis will be applied when the IPR consists
4 of major parts of businesses or when the license of IPR
5 practically is equivalent to acquisition.

6 And if we talk about other characteristics of
7 the guideline, for each type of unfair business
8 practice, one or two examples of business practices
9 which KFTC does not consider unfair are provided for
10 comparison. Types of unfair business practices are
11 largely similar between the 2000 guidelines and the
12 1997 notifications that I am going to explain later.

13 The general principle (inaudible) is the same
14 as (inaudible) rule of reason analysis. One difference
15 between the two guidelines or notification is that the
16 scope of application for the 1997 notification is far
17 more extensive than the notification is for IPR
18 franchise contract, joint R&D agreement, import
19 distribution contract and joint venture agreements.

20 I will briefly speak about the 1997
21 notification. Before 1997, a request for the review of
22 international contracts was mandatory. From 1981 to
23 1996, there were 2,338 requests were made for the
24 review of international contracts. At the end of 1996,
25 the requests for the review was changed into a

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 voluntary one to lessen the burden on the companies and
2 to promote technology transfer.

3 Now, before closing the explanation about this
4 notification, there are still criticisms about this
5 Article 32 and Article 33 of the Act and this 1997
6 notifications, because many people think that these
7 articles and notifications are discriminatory against
8 international contracts, and some people say that the
9 general provisions in the Act can be applied, so
10 there's no need to maintain these articles or
11 notifications.

12 Considering those criticisms or arguments, KFTC
13 is now reviewing the way to delete the Articles 32 and
14 33 from the Act and revoke the 1997 notification.

15 And then I go talk about the cases that KFTC
16 did in the past. I'm afraid that no specifications
17 will deal after the issuance of the 2000 guidelines, so
18 I talk about the Korea Coca-Cola case of 1997. I think
19 Tad is in better position to explain about this case,
20 but with his permission, I'll go explain about this.

21 The Coca-Cola Corporation signed a merger
22 agreement with Bumyang in 1974. Coca-Cola and Bumyang
23 revised the contract twice and extended the expiration
24 date to June 1st, 1996. In order to reshape the
25 corporation in Korea, Coca-Cola decided to set up the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Serabul Company, which would be in charge of
2 manufacturing in Korea, and Coca-Cola also decided to
3 change the existing bottlers to distributing companies.
4 For that purpose, Coca-Cola proposed that Bumyang
5 accept the changes or else Coca-Cola would terminate
6 the contract on June 1st, 1996.

7 During the negotiation process, Coca-Cola
8 extended Bumyang's right to manufacture and sell
9 Coca-Cola in Korea until April 1st, 1997. Over dispute
10 as to the price of manufacturing assets that Coca-Cola
11 wanted to buy from Bumyang, Coca-Cola stopped supplying
12 raw materials for Coca-Cola to Bumyang as of April 1st,
13 1997.

14 Bumyang filed a complaint with KFTC contesting
15 that Coca-Cola practically promised to extend their
16 contract until the end of 1997. I'll skip the detailed
17 reasons that Bumyang cited.

18 On August 27th, 1997, KFTC made the decision
19 that Coca-Cola unfairly refused to deal with Bumyang.
20 The KFTC decision was mainly based on the assumption
21 that there was a tacit agreement between Coca-Cola and
22 Bumyang to extend the contract until the end of 1997
23 and that it was unfair for Coca-Cola to unilaterally
24 refuse to deal considering the 23 years of transactions
25 between Coca-Cola and Bumyang and Bumyang's huge

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 speed of innovation in the pad market. The life cycle
2 of these products tended to be too short for newcomers
3 to constantly keep up with the leader. The numbers of
4 patents that P&G had was over 300, and that of Kimberly
5 Clark, the parent company of Yoohan Kimberly, was over
6 400.

7 On May 25, 1998, KFTC approved the M&A with a
8 condition that X should sell Y's equipment and
9 intellectual property, which were 24 trademarks, 12
10 patents, six utility models, which were directly
11 related to the production of the sanitary pad to third
12 party within one year of finishing the transaction.

13 These are the presentations that I would make.
14 Before closing my presentation, I'd like to make one
15 additional comment. It is my understanding that DOJ
16 and the FTC have a lot of expertise regarding the
17 relationship between competition policy and IPR, but as
18 you might find out during my presentation, the KFTC
19 does not have so much expertise, while KFTC has not had
20 so much cases regarding these issues, so I hope my
21 presentation won't be seen as kind of trying to teach
22 fish about the sea.

23 Thank you.

24 MR. KOVACIC: Thank you very much.

25 For our final perspective for the 3 n5 pc a t

1 Taiwan, Commissioner Liu, please.

2 MR. LIU: Ladies and gentlemen, it's a great
3 honor for Taiwan Federal Trade Commission to be invited
4 to attend the Asian Perspective Antitrust and
5 Intellectual Property Issues.

6 Article 45 of the Taiwan Fair Trade Law
7 provides that no provision of this law should apply to
8 any proper conduct in connection with the exercise of
9 rights pursuant to the provisions of a copyright law,

1 Japanese corporations, including Sony and Taiyo-Yuden
2 Corporation. And this case is about an information
3 storage media production industry. And the relevant
4 laws of this case is Article 10 and Article 14 of the
5 Taiwan Fair Trade Law.

6 And the effects, a summary. To facilitate a
7 patent licensing to CD-R producers around the world,
8 the respondents adopted a joint licensing arrangement.
9 Sony and Taiyo Yuden first licensed their patent rights
10 to Philips, and Philips bundled the rights together for
11 licensing to other companies.

12 The issues of this case are as follows:
13 Whether the joint licensing practices were in violation
14 of provisions of the Fair Trade Law regarding concerted
15 actions, and secondly, price-setting by monopolistic
16 enterprises, and another issue is about joint licensing
17 caused such important trading information as patent
18 terms and contents to be unclear and was in violation
19 of provisions of the Federal Trade Law regarding abuse
20 of market position by a monopolistic enterprise.

21 During the investigation, we found that there
22 are competition relations among the respondents in
23 terms of patents they owned, and the respondents
24 adopted a joint licensing or so-called patent pool
25 arrangement in which a consensus was reached on

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 royalties and others.

2 Regarding royalty, they divided the royalty
3 into three portions. Philips got 60 percent of the
4 royalties; Sony, 25 percent; Taiyo Yuden, 15 percent.
5 And by this joint agreement, Sony and Taiyo Yuden give
6 up their individual licensing right, which forced
7 potential licensees having no opportunity to choose
8 trading partner, but turning to Philips to obtain the
9 Bongo (phonetic) patents.

10 Furthermore, regarding setting of royalties, we
11 found that respondents possessed overwhelming advantage
12 due to the patent technologies owned by them and the
13 joint licensing practices among them.

1 three above-mentioned companies, granted nearly 200
2 patents to an individual firm, and Philips did not

1 provides that monopolistic enterprises should not abuse
2 their market position by other acts, and while refusing
3 to provide the licensees with important trading
4 information, Philips demanded that the licensees sign
5 the contested licensing agreement and sought payment of
6 royalties.

7 The agreement also demanded that the licensees
8 withdraw any invalidation actions against the patents
9 at issue. And we found out, relying on its dominant
10 position, Philips obviously compelled the licensees to
11 accept the licensing agreement.

12 After considering the unlawful acts' impact as
13 well as the respondents' motives for the violation,
14 benefits obtained thereby, and considerable business
15 scales and prominent market standing, the Taiwan
16 Federal Trade Commission imposed administrative fines
17 of NT \$8 million on Philips and NT \$4 million on Sony
18 and NT \$2 million on Taiyo Yuden, and ordered the
19 companies to immediately cease the illegal practices.

20 In conclusion, I would like to point out that
21 in this case, we did not pay much attention to the
22 question of whether the royalty is too high or not.
23 Instead, we focused on the respondents' abuse of market
24 power.

25 Thank you.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 precomputing -- pretrial discovery, I mean the list is
2 quite extensive is the reason why the American trial
3 lawyers are such a powerful influence on our society.
4 That's part of it. So, these doctrines of per se
5 illegality were liberally applied in cases.

6 For example, a very common pattern is where an
7 intellectual property owner would bring an infringement
8 suit and be greeted with an antitrust counterclaim and
9 also an allegation of misuse, and the successful
10 establishment of an allegation of misuse would
11 completely deprive the intellectual property owner of
12 his opportunity to enforce the intellectual property
13 against anybody, not just the particular licensee or
14 alleged infringer who happened to be a litigant.

15 So, at precisely the moment where this policy
16 of aggressive prosecution under per se rules reached
17 its peak, I can't resist pointing out that the
18 productivity growth curve for the United States economy
19 took a distinct downward kink, which allowed many Ph.D.
20 theses to be written by economics students about why
21 that was. Anyway, it's been alleged that there might
22 have been a connection. I can't resist that.

23 In any event, in the early 1980s, of course,
24 the per se approach, which had been somewhat softening,
25 I might add, during the seventies, but in the early

1 1980s, the per se approach was almost totally
2 abandoned, and in fact, that coincided with a number of
3 other intellectual property reforms; the strengthening
4 of trademark infringement remedies and copyright
5 infringement remedies; the creation of the Federal
6 Circuit and the consolidation of all appellate
7 jurisdictions for patent issues into one court; the
8 Stevenson, Weidler and Bidole Acts (phonetic), which
9 made it much easier for parties who had received
10 government subsidies to exploit intellectual property.

11 There's just a whole list of things that were
12 done in the 1980s, so that I think it's fair to say
13 that the policy presumptions on which the per se
14 approach had been based were totally reversed in the
15 1980s, and I think the, you know, the needle has not
16 really moved back too much from then.

17 There's been a very keen appreciation of the
18 relationship between intellectual property protection,
19 the rate of innovation and the ability of the economy
20 to grow on the one hand and the risk of either vague or
21 overly restrictive antitrust rules, the risk that those
22 rules pose to the process of innovation and indeed the
23 fundamental economic goals of society.

24 Now, believe it or not, this is all coming down
25 to a fairly simple question, which is as follows:

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Federal Trade Commission issues staff advisory

1 essentially responsible for gauging the risks of
2 chilling pro-competitive or innovative behavior? Is it
3 a representative of the agencies that concern
4 themselves primarily with the intellectual property
5 rights, like our PTO? Is it some other -- is it a
6 private party? Is it the parties who are subject to
7 the regulations?

8 So, I've talked long enough. Let me put those
9 two questions on the table.

10 MR. KOVACIC: Do we have any takers for Tad's
11 questions? If you would like to assess the chilling
12 effect of high-powered air conditioning, you are also
13 free to do that, too, but -- Mr. Kim and then Mr. Tada.

14 MR. KIM: I'd like to make some comment with
15 regard to Tad's questions on some issues. As you might
16 find in the KFTC's 2000 guidelines, that guideline
17 obviously reflects a tendency against harsh treatment
18 for IPRs, but when I talked with my colleagues in Korea
19 during the process of preparing for these hearings, my
20 colleagues in Korea are concerned that over-protecting

1 agency and the patent office is not so close as is --
2 as it is in Japan, so the warning does not usually come
3 in Korea. Thank you.

4 MR. KOVACIC: Mr. Tada?

5 MR. TADA: Yes, about the chilling effect, with
6 respect to rule of reason model, I think the -- there
7 had been those kind of effects in Japan, because we are
8 also a civil law country, and the civil laws or
9 statutory laws are relatively detailed, but the
10 competition law is very vague. So, especially at the
11 private sector, say that they can't understand what is
12 the standard. So, that's why JFTC tries to establish
13 guidelines and publish it and try to make the rules
14 very clear.

15 And with respect to a per se rule, actually in
16 Japan, I think the clear per se rule is only about the
17 resale price maintenance. Other than that, even though
18 price fixing and cartels we need to distinguish as
19 well, because we don't adopt a per se rule with respect
20 to cartels, and so I -- as I mentioned before, most of
21 the time, the private business section requires the
22 Government to make the rule clear.

23 MR. KOVACIC: Henry?

24 MR. ERGAS: In respect of the chilling effect,
25 let me turn to something that was emphasized in the

1 report of the IP committee, and in particular, the IP
2 committee's report put great emphasis on the special
3 importance of the role of contracts and assignments of
4 licenses and the efficient use of intellectual
5 property, and the committee stressed that whilst
6 contracts, assignments and licenses were of
7 significance to efficiency in the economy generally,
8 they were probably of greater significant to the
9 efficient allocation of resources in respect to
10 intellectual property rights, and the committee's
11 report contains the fairly detailed discussion of why
12 that might be the case.

13 Without rehearsing that discussion even in
14 part, let me just emphasize one element in it, which is
15 that particularly in Australia, a very significant part
16 of our intellectual property is generated by public or
17 semi-public specialized institutions that in particular
18 are equivalent to your Government labs, which is what
19 we call the CSIRO and its associated system, or the
20 Commonwealth Scientific and Industrial Research
21 Organization, and by their status, these entities which
22 generate a great deal of intellectual property are not
23 in a position to themselves exploit it directly.

24 They therefore have to rely entirely on
25 contracts and licenses to secure efficient use of that

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 intellectual property, and imposing impediments that
2 would be unduly onerous on that process of securing
3 those licenses or assignments would significantly
4 diminish the efficiency of the Commonwealth's quite

1 excuse me, we are not talking about India today, but I
2 was in India recently, and my experience there is
3 perhaps of interest in this very context here and
4 explains why there is such a liberalization with
5 respect to antitrust enforcement, in concordance with
6 the appreciation of the value and importance of
7 intellectual property rights.

8 When I was in India about ten years ago and I
9 made pro-patent statements, I was practically
10 crucified, as you can imagine, you know. It was a
11 small meeting at the -- WIPO meeting, and in India,
12 very few in attendance, and those who were in
13 attendance were just rapidly anti-patent.

14 I was there just recently, and I couldn't

n atta slogj 0dan8 effncordw inrs about tnd oaa2eetiny

1 especially in Taiwan, that's another recent example,
2 and that was mentioned in connection with the
3 developments in India, and there is a relationship
4 between the value of intellectual property in the view
5 of a country and perhaps a liberalization of
6 enforcement and imposition of restrictions on the
7 exercise and exploitation of intellectual property
8 rights.

9 I was very happy to hear the presentations
10 today, I commend the speakers, they confirm my views,
11 and very positive developments indeed. In fact, so
12 positive that perhaps there isn't much cause for
13 concern or much cause on the part of the Federal Trade
14 Commission, Justice Department, to take drastic steps.

15 MR. KOVACIC: With that made, I want to make
16 sure we have time for Jim, but I have one question that
17 I have as a result of this discussion which I found
18 absolutely fascinating and following up on your
19 remarks.

20 Do you think there would be interest on the
21 parts of competition authorities in Asia to have a
22 working group on these intellectual property antitrust
23 issues in the new International Competition Network?
24 Would that be valuable so that there would be a forum
25 for competition authorities to get together to discuss

1 these issues on a regular basis?

2 Please.

3 MR. TADA: I think definitely, I --

4 MR. KOVACIC: Yes, Mr. Tada.

5 MR. TADA: -- I think that would be a very
6 helpful thing to do, because as I think Mr. Koyanagi
7 mentioned in his presentation that Japanese, the JFTC
8 convened a study group for patenting in new areas, and
9 one of the members is from JPO, just an observer, but
10 that's a relatively new thing to do.

11 And also, now I think the intellectual property
12 side also recognizes that competition law is important.
13 For example, recently the Japanese patent bar -- patent
14 attorney examination has changed, and they adopted as a
15 selective subject, which includes antimonopoly law. So
16 now, you know, both sides are getting together. So,
17 it's a very good time to convene those kind of
18 meetings.

19 MR. KOVACIC: Commissioner?

20 MR. LIU: I think it's very valuable to have
21 this kind of discussion, and maybe, as you know, we

1 Jim's role in that, both in the creation of the
2 formulation of the ICPAC Initiative and the preparation
3 and dissemination of its results has had an influence
4 that greatly merits the tremendous effort that was
5 devoted to that undertaking, and we'd like to turn to
6 Jim to provide some concluding thoughts about our day
7 and a half of international perspectives.

8 Jim?

9 MR. RILL: Thank you, Bill and Bill and all of
10 you for the patience for the concluding remarks.

11 During the last couple of days, I think we've
12 all been given clear evidence of the complexity of the
13 interface between antitrust and intellectual property
14 rights in the global scene, which if nothing else
15 certainly justifies the wisdom and foresight of the
16 Federal Trade Commission and the Department of Justice
17 in conducting these hearings.

18 It's also evident to me that complexity exists
19 not only among jurisdictions but within each
20 jurisdiction, and as the debate goes forward -- debate
21 in the European sense meaning polite discussion -- goes
22 forward, those complexities and some uncertainties
23 become more evident under a broad rubric of general
24 convergence, and I don't want to lose sight of the fact
25 that that broad rubric of general convergence has been

1 a theme that has persisted I think throughout all of
2 these hearings and certainly in the past two days, and
3 I think the general convergence comes under a principle
4 that seems to be expressed by speaker after speaker,
5 that antitrust competition policy and intellectual
6 property policy are complementary, can co-exist on
7 reasonably friendly terms and serve a mutual objective
8 of progress and innovation.

9 I'd like to te thet

1 of days of convergence among those jurisdictions which
2 have presented here on that concept of respect for
3 intellectual property rights consistent with respect
4 for properly applied competition law. We've heard it
5 from the United States, we've heard it from the
6 European Union, we've heard it from Japan, we've heard
7 it from Taiwan, we've heard it from Korea, we have
8 heard it throughout. We've heard it from Australia,
9 and just a few moments ago, we heard it from India.

10 But differences do exist -- otherwise, we
11 wouldn't be having these hearings -- and complexities
12 exist which to some extent produce some threat to the
13 stimulus sought by intellectual property rights, some
14 conflicts, some confusion, and some results which could
15 be viewed as hostile to intellectual property rights in
16 the name of antitrust, and in an international setting,
17 these consequences have effects beyond the boundaries
18 of the particular jurisdiction involved, because as we
19 look across global commerce, we see the licensing, for
20 example, of intellectual property rights not being
21 vulcanized jurisdiction by jurisdiction, but
22 efficiently proceeding on a global platform, which can
23 be interrupted, interfered with, sometimes not without
24 justification of course, on different intellectual
25 property right and antitrust interfaces occurring with

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 different standards being applied by different
2 countries, and of course, this particular issue, this
3 particular challenge is exacerbated by the fact that we
4 now have -- everybody has a different count -- but in
5 round figures 100 jurisdictions now with some form of
6 antitrust regulation.

7 Thus, there's I think a widespread call for
8 clarity and convergence expressed yesterday and today
9 of cutting across the lines of private and public
10 sectors, and they evoke, it seems to me, a government
11 response to which the speakers yesterday and today have
12 actually been very sensitive to. For example, even
13 while the U.S. and the EU are so very close, it's not
14 entirely clear based on the debates of yesterday
15 involving Messrs. Forrester, Bennett, John Temple Lange
16 and Director Mehta that there aren't at least
17 differences that are apparent and should be
18 illuminated, discussed and clarified.

19 The equation of patent rights and market power
20 or lack thereof; refusals to deal in compulsory
21 licensing. We had a discussion of that not only
22 yesterday but again this morning. The definitional
23 murkiness between a U.S. standard of what is a vertical
24 and horizontal licensing arrangement and the EU
25 definition of competitive and noncompetitive or

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 competitor and noncompetitor licensing arrangements;
2 the entire scope of vertical restraints, the subject of
3 Dr. Ray's presentation yesterday; and possibly the
4 limits to exploitation of IPR.

5 In other jurisdictions, while the convergence
6 is there, we have at least some of the same dilemmas
7 presented by complexity and lack of clarity. I thought
8 the discussion today of, if you will, the unwritten law
9 of Japan was particularly -- if an unwritten law can be
10 illuminating -- particularly illuminating.

11 In Australia, we heard yesterday and today
12 about some application of the essential facility
13 doctrine and certain special rules applicable in
14 Australia to special industries.

15 We heard excellent discussions today of actual
16 cases from Korea, Coca-Cola and Proctor & Gamble,
17 refusals to deal based on prior dealings in Coca-Cola,
18 the Philips case in Taiwan dealing principally with
19 concerted action. The nuances at the edges of and
20 underlying perhaps even the thrust of these cases
21 create enormous issues of interpretation, enormous
22 issues for counseling, enormous issues for
23 international cooperation as to illuminate the
24 interface across these many jurisdictions.

25 We're talking here about jurisdictions that are

1 property.

2 I would strongly endorse a recent statement by
3 Bill Kolasky, a speech in London, May 17, suggesting
4 that the U.S./EU working group or a U.S./EU working
5 group comparable to the one currently working on
6 mergers be established to work on the intersection
7 between antitrust and intellectual property. Beyond
8 that, there seems to be considerable justification for
9 other working groups, possibly on a regional basis,
10 possibly on a dual national basis, to discuss and work
11 out and clarify the intellectual property/antitrust
12 intersection, multinational efforts.

13 Some of my thoughts were anticipated, and I'm
14 delighted to say they were anticipated earlier in this
15 session, when Bill Kolasky suggested and the
16 representatives from Korea, Taiwan, Japan, and by
17 proxy, India, urged that the next tranche of topics of
18 the up and running International Competition Network
19 put on the agenda the discussion of antitrust and
20 intellectual property. The round tables that the ICN's
21 been conducting in the merger area, the advocacy area,
22 I think have stimulated discussion and progress and
23 work that has been very, very helpful.

24 These round tables have included public sector
25 and private sector in sessions very much like this

1 session where there's a free exchange of views and a
2 learning process that can't be really equalized or
3 patterned, blueprinted, in much of any other existing
4 forum.

5 I'd suggest to those who are involved in
6 steering the ICN that one might want to take it in
7 smaller chunks rather than to walk across the entire
8 landscape of intellectual property and antitrust, and I
9 would suggest opening with rather basic topics, like
10 the equation or not of patent or intellectual property
11 rights and market power, and also the status of
12 unilateral refusals to deal in compulsory licensing. I
13 think getting into license restrictions might be more
14 than ICN is ready for as a first cut.

15 But again, I would endorse the private sector
16 participation as it does in the ICN and point out that
17 the International Chamber of Commerce, the ABA, the
18 U.S. Council for International Business have been very
19 anxious to participate, participation by people who
20 have actually been on these panels.

21 Other organizations should not be ignored. The
22 OECD has produced very thoughtful reports, some you
23 might say at 30,000 feet. I think of one in this
24 particular area prepared by Carl Shapiro that was
25 published by the OECD that gets into the economic

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 intellectual correlation between competition policy and
2 intellectual property policy. That type of work is
3 something that the OECD is I think well suited to
4 perform, and its continued performance of that kind of
5 work seems to be very desirable, less practical, less
6 round table oriented than some of the ICN work.

7 WTO is a little more difficult. There is the
8 TRIPS agreement. It's sort of general. Where WTO
9 goes from there is hard to identify, but WTO does have
10 a lot of members, with a few noticeable absences at the
11 moment, but a lot of members, and I noticed in a recent
12 UNTAD (phonetic) paper, there is a recommendation that
13 WTO's working group on competition and trade undertake
14 a work in this area.

15 My own personal view, and this really hasn't
16 been discussed at these hearings, my own personal view
17 is that's not so desirable as perhaps a broad ICN
18 approach, together with the OECD higher level view.

19 I think the stimulus for further work and
20 creativity generated by these hearings has been
21 absolutely for my purposes illuminating and truly
22 superb, and I want to also express only personal
23 gratitude for the people who have traveled so far to
24 participate in these discussions, because I do think
25 they form the groundwork for truly useful international

1 cooperation and clarity in this area, which is
2 obviously of enormously expanding importance to
3 business and legal and governmental communities.

4 Now, that's what I got out of it today and
5 yesterday. Thank you.

6t's what I gvdHi5KTp yesterday. Thank you.

1 them.

2 Bill, do you have anything?

3 MR. KOLASKY: I would both echo Bill's thanks
4 to our panelists, who I thought were absolutely
5 terrific and made a real contribution, and also to the
6 staffs of both the FTC and the Division, who really
7 have done a wonderful job putting these hearings
8 together. So, thank you.

9 MR. KOVACIC: Thank you all again for coming.

10 (Whereupon, at 12:08 p.m., the hearing was
11 concluded.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T I O N O F R E P O R T E R
2 DOCKET/FILE NUMBER: P022101
3 CASE TITLE: COMPETITION/IP WORKSHOP, PART II
4 DATE: MAY 23, 2002

5
6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 5/28/02

13

14

15

16 SUSANNE BERGLING, RMR

17

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

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025