

>>FEMALE SPEAKER

We'll go ahead and get started now. We are doing the afternoon panel on the FTC series on the Evolving IP Marketplace where we will have our industry round table. Before that we will have Judge Robinson talk. It is now my distinct pleasure to introduce the Honorable Sue L. Robinson, District Court Judge of the United States District Court for the District of Delaware. Judge Robinson has been a member of that court for 20 years now. She served as Chief Judge of the court from 2000-2007 and also served on the Judicial Conference of the United States from 2000-2003. The District of Delaware is noted for hearing a large number of patent cases and other complex commercial cases. Judge Robinson has presided over many patent cases and has been at the forefront of patent jurisprudence. She has developed thoughtful and engaging opinions and demanded high standards from those practicing before her. If you will indulge a shameless plug for tomorrows topics, among her opinions include several post eBay opinions that demonstrate this level of both theoretical and practical rigor and have taken great strides in developing standards in the wake of the Supreme Court's opinion in eBay v. MercExchange. These opinions have required proof from evidence on the record and they have helped extend the analysis and boundaries of the post eBay injunction cases. Further demonstrating her commitment to the practice of law, Judge Robinson organized a group of lawyers in 2004 to form a panel to draft the first default standard for electronic discovery.

In addition to her onerous career on the Court, she served as an Assistant United States Attorney for the District of Delaware, which demonstrates her continuing commitment to the public service. She was an Associate with the firm of Potter, Anderson and Cooper. She earned her J.D. from the University of Pennsylvania School of Law and her BA from the University of Delaware. So with that, I will let her -- . (applause).

>>THE HONORABLE SUE L. ROBINSON

Thank you very much for that very gracious introduction. It is a privilege as well as a challenge to be speaking to such a knowledgeable audience today. When I was first asked to participate in this proceeding, I was not sure what I could contribute to a discussion on the standards for assessing patent damages and their implementation by courts. Although I have been on the bench since 1991, I was a magistrate judge before that. During my tenure I have marshaled hundreds of patent cases and tried 65 at last count. Nevertheless my experience with damages is limited. Let me explain why. Starting in the mid-1990s, the number of patent filings in the District of Delaware began to grow exponentially. At about the same time, judges had been directed by Congress through the guise of the Civil Justice Reform Act to set firm trial dates at the outset of each civil case. As a result, it became apparent that the traditional ways of scheduling and trying cases would not accommodate our docket of no fewer than 20 multiple

week patent trials per year. In order to maintain a firm trial date for all of our cases, patent as well as our other civil and criminal cases, we could not allow patent trials to last indefinitely. We had to impose limits on lawyers so that trials would start and end predictably. My colleague, Judge Farnam began the experiment of time trials in 1991 and we have never looked back. In this regard however, it stood to reason that if we're going to limit the trial time given to lawyers, we should limit the issues to be tried during the limited number of hours allotted for trials. The question then became how to separate issues for trial in a fair and efficient way. Although this is not true in every patent case, for every judge in my district, for the most part, issues related to damages, with the attendant issue of willfulness are separated, to be tried if at all once liability has been finally established by the Federal Circuit. The decision to postpone trial of all damages issues is based on several fundamental principles. First, because injury is presumed, if a valid patent is infringed, liability can be tried without reference to damages. Second, trying damages to a jury who already has the responsibility of determining infringement and validity may be unduly burdensome especially if the case involves complex technology or multiple patents, parties, or prior art references. Third, and I believe most importantly, both the court and the market are better served if the parties with their superior knowledge of the market in which they are operating, determine the practical consequences of the court's legal determinations. Now because I am supposed

to talk to you for more than three minutes, I will elaborate on my three principles.

As you all know, proof of infringement is a two-step process. The court has to construe the asserted claims, then the jury has to compare the elements of the accused product and, of course, we could be talking about the steps of an accused method. With the asserted claim limitations as construed by the court.

If the jury finds by a preponderance of the evidence that the elements of the accused products are literally the same or equivalent to the asserted claim limitations, the patentee has proven infringement. So long as the patent is not invalidated, the patentee is entitled to no less than a reasonable royalty as damages. In other areas of the law, a very different analytical framework applies.

For instance, a plaintiff suing under a negligence theory has to prove not only that the defendant violated a standard of conduct but further that plaintiff was injured and that his injuries were proximately caused by the defendant's negligent conduct. Similarly, a plaintiff pursuing antitrust claims must prove injury in fact that the injury was proximately caused by the defendant's violations of the antitrust laws, that the defendant's illegal conduct was a material cause of plaintiff's injury, and that plaintiff's injury was an injury of the type that the antitrust laws were intended to prevent. Because the fact of injury is not an essential element of the cause of action of patent infringement, but is presumed once infringement is proven, a jury in a patent case can determine all issues related to liability, infringement and validity without ever hearing a word about injury or the

resulting damages. This fundamental substantive difference between patent and other civil cases lends itself well to making patent trials procedurally unique. Patent cases are also amenable to a difference in process because of their complexity. Juries in a patent trial are expected to understand to a minimal degree technical evidence about difficult subjects over which very bright scientists might reasonably differ. Layered over this pure science are the litigation tactics of the lawyers in the courtroom. Which are just as likely to obscure as clarify the issues to be tried. The temptation to inappropriately use evidence of damages to sway a jury's view of liabilities is certainly not unheard of and I think it was referred to today in this morning's panel. Indeed, like the claim construction exercise, I have a feeling some of you have heard me say this before, a patent trial involves science, distorted by the limitations of language, further distorted by the trial tactics of aggressive members of the patent bar fighting over their client's market share. Bottom line, whenever you mix science with business and legal issues, all seen through the prism of litigation, the end product is bound to be complex. Then think about the hypothetical negotiations and whether that artificial legal construct really resonates to a typical juror who has no information about the parties or the markets in which they're operating except which they have learned in trial. Jurors are a precious resource, members of the public taking their time to resolve the disputes of businesses when businesses have failed to do so. One of my jobs as a trial judge is to

respect and protect the jury's time by making the process efficient and understandable. If liability can be determined without the added complexity of damages within the context of a time trial, it follows that damages should be bifurcated and the judgment on liability entered for purposes of appeal pursuant to Federal Rules of Civil procedure 54 b. The question might be posed at this juncture, only because I need to fill some time, whether Discovery and damages should also be bifurcated. I suggest that there are two different, but both reasonable approaches to this question. On the one hand, damages discovery tends to generate discovery disputes because so much of this material relates to the most confidential information a business has. Damages figures have to be updated after appeal anyway so why not take 60 - 90 days of focused discovered after liability has been finally established by the Federal circuit. On the other hand, I understand from Judge Thine (ph) our magistrate judge who has probably settled more patent cases than any other settlement officer in the country, or at least judicial officer in the country, that settlement of a patent case is virtually impossible without some damages discovery. A patentee has to know not only how and allegedly infringing widget works but how many are being sold in order to discuss settlement intelligently. Moreover, if the patentee is seeking a preliminary injunction, damages discovery is required at the outset. Regardless of when damages discovery proceeds, it is beyond dispute that discovery in a patent case imposes a tremendous burden on the parties. Document production

especially electronic discovery and depositions of employees can cost businesses millions of dollars in terms of lost hours of productivity and professional fees. As a trial judge, I am cognizant of these costs and at least try to take into consideration when I make decisions that impact the litigation. -- and at least try to take these costs into consideration when I make decisions that impact the litigation and trial processes. For example, I have imposed limits on when document production can proceed and on when motions for summary judgment can be filed so that clients stop pursuing unreasonable expectations and lawyers stop turning hourly fees. The tension between cost and reasonable litigation goals is reflected best in what I call the Daughbert epidemic. Relating to the Supreme Court's opinion of that same name issued in 1993. I have to say that I had some prepared remarks but after the remarks this morning at lunch, I wrote down some more on my tablecloth. I might not be as polished here. In my view, Daughbert was supposed to protect the litigation process against bad science, not to determine which expert's analysis fits the economic realities of any particular case best. I have had cases where the parties have exchanged Daughbert motions on every single expert witness. Witnesses who have impeccable credentials and whose analysis reflects fairly unremarkable principles. Nevertheless because the experts disagree substantively, motions are filed to have the judge preclude the experts from testifying at all as opposed to testing the merits of the expert's opinions through the rigors of

cross-examination. This is especially true with damages experts generally economists who build their expert opinions on a series of assumptions based on the evidence of record. Arguably if one assumption is incorrect, their theory falls apart like a veritable house of cards. In this regard however, and my apologies to any economists who are still here (laughing) But my view is that economic theory is basically all relative. There are very few absolutes that can be applied. The economic landscape, in my view, looks very different from the perspective of a patentee verses the perspective of the infringer. To have a judge shape that landscape based on lawyer arguments without hearing any of the evidence from the people who have the evidence to me undermines the right to a jury trial. And I truly believe -- and I also find it interesting that the lawyers expect the court to make these determinations. They don't say anything about their clients who actually know the economic realities putting any self-restraint on the experts that they have hired. In my view, with due respect to the litigators who spoke about -- and I know -- I have heard -- it has never happened in my court -- I have heard that judges -- I take it at the urging of litigators spend days on Daughbert motions. I believe that is contrary to both the case itself and to the true economic realities that the parties have a right to present to a jury. But enough about Daughbert. Back to my three principles here. Having shared my view that the fact of damages is irrelevant to the issue of liability and therefore adds an unnecessary layer of complexity to an already complex jury trial, it follows that

damages should never become the tail that wags the dog in the trial. Again let me explain. Although the owner of a valid patent has substantive legal rights, it generally takes a business dispute to generate patent litigation. I respect the fact that patent cases are really business cases and that litigation is but one weapon in a company's arsenal of competitive armaments. Nevertheless, when business decisions are driving a party's litigation strategy, a case can spin out of control for the simple reason that the courts is rarely informed of the business parameters in which it is operating. Both aspects of a patent dispute, the legal and the business need to be resolved. In reality however, the court is better equipped to resolve the former. It follows that the court should use its limited resources to do just that. After all, businesses generally have the means to resolve their disputes. However they need the motivation a court decision affords to focus their means on an amicable solution. Of course having judicial officers available for mediation, both before and after the trial on liability leads to the best results. In the settlement arena, unlike the courtroom, the issue of damages is and should be the engine that drives the exercise. Unless a patent owner is seeking only injunctive relief, a good settlement officer can generally fashion creative ways to honor the patent owner substantive rights while accommodating the party's business needs, depending on the dynamics of the market and of their business relationship. A jury can't do that. And indeed neither can the trial judge who does not have access in the normal course to the type of business

information made available to a settlement officer. And that is how it should be. If parties to a business dispute cannot resolve their business problems without resorting to litigation, let the courts do what they do best, Finally determine substantive legal rights. On the other hand, once the Federal Circuit has made its final legal determination, let the parties have the first opportunity to do what they do best, understand and quantify the market consequences of the court's decision. I suggest that the logic of my reasoning is supported by the fact that very few of my cases come back for trial on damages. A quick look at the Federal Circuit's presidential opinions issued last year Likewise indicates that the subject of damages is generally not the focus of most of these opinions. Before I close, let me say a few words about injunctions. Since the Supreme Court's 2003 decision in eBay it is much more difficult in my view to justify granting an injunction at all let alone prior to the federal circuit's final say on liability. Starting with the premise that injunctive relief is not meant to be Penal in nature, I have come to conclude that injunctions are really about market share and are best suited to protect those patentees in two party markets, most often emerging markets where they compete head-to-head with the infringer. I find the imposition of injunctive relief more problematic when a patentee does not compete in the market at all or when the infringer is one among many competitors in the market. The point being that if the patentees market share will not be substantially affected by enjoining the infringer, then surely the patentee is

not suffering irreparable harm by allowing the infringer to continue its business pursuits. Under those circumstances, money damages may well constitute an adequate and appropriate form of compensation for the infringement. My final thoughts for today, I recognize that I have talked more about process than about substance. I suggest that there is good reason for my doing so. As a trial judge I write on water. My legal analysis is not correct unless and until the Federal Circuit says it is. The Federal circuit's decision is only as good as the record upon which it is based. That is my primary job as a trial judge. To make sure that the litigation record reflects a fair, efficient and predictable process so as to engender confidence in the outcome by the business community. This is especially challenging in times like the present when market forces are driving business disputes to litigation. The third branch is receiving neither the resources it needs more they respect it deserves for its role in maintaining a healthy, competitive business environment. I suggest that the separation of issues, especially of damages is an effective way to use the court's expertise without undue burden on its limited resources. I thank you for your time and attention. (applause).

>>FEMALE SPEAKER

Thank you Judge Robinson for those thought-provoking comments. I hope that -- we will ask the panel to come up now. We would love to hear their

reaction. We will get some of that during the panel.

>>MALE SPEAKER

Thank you very much. We are reassembled now with a great panel. We have an industry round table to discuss patent damages in particular reasonable royalty awards. The concerns that were raised in this morning's panel from the practical perspectives of these particular industries. The representatives that we have assembled will talk about how patent damages affect licensing, business strategy and innovation in various sectors of the economy. In particular, they will discuss from the perspectives of their own industries whether damage awards in patent cases promote innovation and promotes R&D. They will also examine various proposals to revise standards for damage determinations. We have a great panel and limited time. I will just give the name, rank and serial number. Their impressive bios are on the Web and the nature of their work will be evident from the discussion that ensues. I do want to express our gratitude for them all coming here during these times. They are arranged alphabetically starting just to my left here. Keith Agisim works for Bank of America as Associate General Counsel for Global Intellectual Property. Phil Johnson is chief patent counsel at Johnson and Johnson. Jack Lasersohn is a partner at The Vertical Group. Jerry Loeb is Genentech's Vice President for Intellectual Property. Bryan Lord is Vice President, Finance and Licensing and General Counsel at Amberwave. Taraneh

Maghame' -- is that close? Please correct me to the record now. Taraneh serves as Vice President Patent Policy and Government Relations Counsel at Tessera. Kevin Rhodes is Chief Intellectual Property Counsel and 3M Innovative Properties. David Simon works as Intel's Chief Patent Counsel. Marion Underweiser works at IBM where she is the Intellectual Property Law Counsel. Thank you very much. We look forward to the panel.

>>FEMALE SPEAKER

Let's dig in. I know this group has a lot to say on this topic. They were invited because they have all been very involved in the issue over the last couple of years. Let's start with the big picture. Why is this issue of patent damages important to your company, and as we -- you can turn up your table tents and I will call on you. But this might be something that most people would like to comment on. I will just remind panelist to speak into the mic and we will pick it up on our transcript. Would anyone like to go first? Marian I am looking over there.

>>FEMALE SPEAKER

Thank you, first of all, for having the panel and having me here.

>>FEMALE SPEAKER

And if it works as part of this issue, you can address why over compensation and under compensation might be a problem.

>>FEMALE SPEAKER

IBM's perspective on this is a balanced one. We look at reasonable royalty damages both from the perspective of patent holder who has a significant IP licensing business. We make \$100 billion a year licensing our IP and we also make \$100 billion a year selling products and services so we are subject to a lot of adverse assertions of patents. So for us, it is really more a question of the IP market, the licensing market. We don't want to have to litigate. We would like to be able to have an efficiently running licensing market. What does that mean? The court awarded damages are effectively providing a benchmark for licensing and settlement negotiations. Collectively they are making up this marketplace. For the marketplace to work, there has to be efficiency there. There can't be friction. A whole lot of transaction costs or what you end up having is a problem getting -- your products will end up costing more than they should costing, collaborations' will not occur. You won't have the innovations working their way into products. In the case where parties decide to go forward but they can't agree, they end up litigating. That is very costly and diverts funds away from where they can be productively used. We see a problem in our industry where there is a sustained high level of patent litigation. There is the opportunity for

inflated awards. This, to us, means that there is too much diversion away from where things should be operating efficiently in the licensing market into litigation. At the same time, the parallel conclusion you can draw from that is that the standard in reasonable royalty damages is not providing the kind of certainty that parties need in order to negotiate those deals up front. What we think would be a good way to approach this is to focus the damages analysis in a way that is somewhat more objective. That would be -- and a number of the panelists touched on it this morning, but that would be to focus on the economic value of the invention. What did the inventor really contribute? What is that economic value? That fair to the patentee. It compensates the patentee for what was contributed. It does not overcompensate the patentee for what was not contributed. The way we think would be -- we had some guidance from a recent case on the issue of patent exhaustion, but we have some guidance from the Quanta case with the standard of the essential features. I can talk about that more as we go on. But that was a case where the court was also focused on what is the value of a certain product that is being sold. I think that gives us an objective standard so that it is fair. That provides participants in the licensing market the ability to make decisions up front so that innovations can make it into products before parties end up with a dispute they can't resolve.

>>FEMALE SPEAKER

Okay. David do you want to comment on why damages is important to Intel?

>>MALE SPEAKER

Yes. Fortunately Marian went first and we tend to agree. I will augment a little bit.

>>FEMALE SPEAKER

You are in alphabetical order by the way.

>>MALE SPEAKER

Actually -- we will go there (laughing). From our perspective is important to compensate the right way. It is clear if you under compensate you set bad examples for innovation. If you overcompensate, you set bad incentives for innovation also. Similarly there was a speaker earlier who kept talking about you have to punish people because there may be infringement under the radar. If you start putting deterrence into this, you start setting all sorts of problems by adding that. I think the one thing that particularly with non-practicing entities that you have to also put into the system is the costs in the system are very much -- when you have a non-practicing entity verses a practicing entity, the cost systems are slanted. When you are a defendant your counsel refuses generally to work for contingency fee for some strange reason. We haven't been able to

get anybody to do that. Similarly when we have to produce documents, we are talking about literally electronic document production for us is millions of dollars, in every single case. Frequently the same documents, but in every single case. Huge cost. Many of the entities show up, here are my documents, it is the file wrapper, it's the patent and that's about it. They are on contingency fee. There has been a whole phenomenon of capitalizing on this shown by looking at the statistics we saw this morning and you sort them by industry, it is clear from one of a lack of a better term, I'll use the term tech industry because that's the one people use. The damages are significantly higher, between 4-6 times higher. In addition to which what we are seeing is that is where the non-practicing entity litigation tends to be. We are very much viewing it as this is the way -- if I am lucky, I strike it rich. That creates a whole bunch of incentives and disincentives in the system that aren't frankly benefiting innovation. It is even getting to the point that getting \$30 or \$40 million out of one company can be rather hard in litigation. But what we now have is the number of defendants has gone up dramatically in the last few years where you now have 5, 10, 15, 30 or even 40 defendants in a patent case. In some districts you are getting 40 hours of trial time in a one or two-week period trying to try a case with that many defendants is unmanageable. The thinking is not that they will take that many defendants to trial but the thinking is they will get a couple of million dollars from each of the defendants until they get down to a manageable number and then those last two

or three or four unlucky souls will be the ones that go to trial. It becomes a very economical situation to do this from a plaintiff standpoint. As a result, we see patents that are supposed to be used for innovation are actually being used for lots of other purposes. It's because in our industry the system tends to over compensate the patentee.

>>FEMALE SPEAKER

Thank you. Kevin.

>>MALE SPEAKER

First of all, thank you for inviting me to participate this afternoon. A little bit different perspective. First of all, 3M is balanced on this issue as well. On the patent owner side, we currently own about 6,000 U.S. patents used to protect our investments in research and development which totaled nearly \$1.4 billion last year. We have a longstanding commitment to the patent system. Why do we disclose our inventions in order to get a patent? Or I should try to get a patent. We do that because we think it will provide meaningful protection for the investment in R&D that leads to those inventions. For the following investments and commercialization that we commercialized and to protect the commercial products that we put on the market from infringement. In my view, the damages award is part and parcel of that protection. Typically when we go into a patent

infringement litigation and we have a steady diet of plaintiff side cases. More cases on the patent owner side than the defense side, we don't get preliminary injunctions. They are rare. You have a situation where you have two, three years of infringement before hopefully you can get that permanent injunction. In the post eBay world, I think on Professor Janicke's website, 69% are cases where the permanent injunction is asked for, it is entered. Hopefully we will get that permanent injunction but even if that doesn't come for two-three years into the litigation we want to have some type of meaningful compensation. Let's not lose sight of the fact that damages are compensatory in nature, some type of compensation for that infringement whether that be reasonable royalty or lost profits or most commonly a combination of the two. I do believe that there is a compensatory aspect. I also believe from firsthand experience that damages too low eliminate the deterrent function of meaningful remedy for patent infringement litigation. Over 60% of our sales outside the U.S., we have litigated patents all over Europe and Asia, and we see what happens in legal systems where there isn't an effective remedy for a patent infringement. Essentially infringement becomes a cost of doing business. It's cheaper to free ride on someone else's R & D and pay this slap on the wrist penalty than it is to do your own R & D. There is a deterrent feature to damages that would not like to see undermined if we start taking away remedies one by one, permanent injunctions and then lowering damages. On the other hand, we market over 50,000 products and services

despite our efforts to clear those products and our corporate IP policies that say we won't infringe the valid, enforceable IP rights of others, we have a steady diet of defendant cases. We know what it's like to receive allegations of infringement of one component -- products with hundreds of components. We try to remain balanced on the question of damages, but we have found through our experience -- and I will disagree with most of the panelists this morning -- what we have found is that the 15 Georgia-Pacific factors really do replicate what real world licensing negotiations outside of the litigation context, the types of issues that are discussed in those negotiations and they provided much-needed flexibility for the industry's we are in -- the fact patterns those cases generate, the different business models to monetize IP. And without that flexibility, I don't think damages can be boiled down to a single test or factor. I think it is unrealistic to think that if we move to a standard like economic value, we would ever have any agreement. I think what Judge Robinson just said is apt and that is that we have experts on either side arguing what the proper economic value is. I think it is Puric (ph) to think by changing from a flexible test to a less factored test if you will that we get added certainty. I was also struck by some of the statistics this morning. We heard this morning that the median damages awards that have remained remarkably consistent over the last 13 years and declined in 2008 to what looks to me at the graph was maybe the lowest level since 1998. It strikes me, I wonder if when we are talking about changing damages laws, if we are

talking about a solution in search of a problem here. But the awards are very erratic. Erratic is another way of saying there are some big numbers on the slides right, but we don't know anything about those cases. What were the inventions? What were the accused products? What were the sales of the accused products? You look at any body of law and you will see a disparity in awards of damages. I don't think patent law is unique. I don't think any alternative system will give us added certainty and I don't think the case has been made by data that damages awards are out of control or that juries aren't looking at the proper economic factors in making damages awards.

>>FEMALE SPEAKER

Thank you.

>>MALE SPEAKER

So in my view there is no need to abandon the body of law that has been developed over decades in favor of new rules especially in this time that those new rules have unsupported justification and unknown economic ramifications. I think this is not the time to be making those kind of new rules.

>>FEMALE SPEAKER

Thank you. Taraneh would you like to --

>>FEMALE SPEAKER

Tessera, which I'm sure many of you have not heard about is -- does not have a name recognition as my three other panelists here, but we are a technology company in the Silicon Valley. We -- our core technology relates to the packaging of semiconductor chips. Initially when we developed this technology, we did manufacture it. We did actually do packaging of the chips. Being a small company and having a small manufacturing plant in Singapore, there was not enough capacity for us to meet the demand for our innovative technology because basically what we're able to do is create the ability to miniaturize these chips with the packaging in order to put them in our very small handhelds and other consumer electronics. So our customers were really one of the main reasons why we turned our business into a licensing model. They needed additional sources for this technology. They needed us to license it to others who could more efficiently manufacture and who had more capacity to manufacture. Basically there was a shift in our business. We took our homegrown technology, we sold off our manufacturing plants and we turned our business into a licensing business. Since that time, we have signed up over 50 companies, major companies as licensees. That accounts for a certain percentage of the market. Now our technology is widely adopted. There are still companies out there that are not willing to pay our standard royalties. Our

royalties -- it's not a situation where we have to establish a value. We don't establish economic value. We don't establish what is the inventive feature here. There are over 50 licensees already. We have built over a billion dollar company, a \$1.2 billion company using this licensing model. We are forced into litigation. If we cannot negotiate licenses with people that are holding out on us, if we can't take our repeatedly tested patents that have been tested in the courts, tested in the ITC, and say you are infringing because you use the same technology all of our other licensees do and you need to pay us, there is not another choice other than to litigate. We keep hearing about these outrageous costs of litigation for companies, we call them mega tech companies who are pushing for this kind of reform, \$50 million in one year, \$60 million in one year. I can tell you that last year we spent more than that on our litigation. Our little company spent more than that and we are still in litigation. The costs are not one way. One thing that strikes me is that in all of this discussion, first of all, we don't talk about what that amount of money for the mega techs means in terms of their revenues and their profits. I can tell you, we are a \$2 billion-dollar company, \$1 billion-dollar company spending \$60-\$70-\$80 million in litigation in one year is a heck of a lot higher percentage than the \$50 million that a company spends defending itself on a number of patents litigations they may have in any given year. The other thing I don't hear about is for example, IBM, a big licensing company. A lot of cross licenses. Do we have to put a value on those cross

licenses because if you have two what people call practicing entities going at it and they end up settling, what do they do? They take cross licenses. What is the value of that? Has anyone sat down and said -- (overlapping speakers).

>>FEMALE SPEAKER

And how do these issues play into why the damages issue is important to your company?

>>FEMALE SPEAKER

Because when we talk about damages and people talk about over compensation they say -- first of all I agree with Kevin that we don't have the data to show this. They talk about these outrageous damages, which the data this morning did not show that, in my opinion. And we look at numbers. If the same lawsuit was between practicing entities and there was a cross license, I think there should be an attempt to assign some value to that cross license and compare that to the amount of money that exchanges hands in a situation where a company and their product is their IP. That IP is being asserted against someone who is willfully infringing it. The other aspect of this is we talk about a deterrent effect and David was saying how that just creates all sorts of other problems. I don't really know what those other problems are, but when we're talking about deterrent effects, we are talking about willfulness, when someone has been

found to infringe and the patent has been found valid, that's when we are talking about enhanced damages. We need to keep in mind at what stage we are talking about this. It is necessary to deter willful infringement. If that is being done and we saw from the numbers this morning that that is not occurring on a regular basis, I think the average was that there was maybe 12% of cases where enhanced damages were given and that was one and a half times perhaps even though they are allowed to be troubled. I keep coming back to this question of where do we see the over compensation and where is the data that shows that we need to do something about this "problem?" From our perspective we need to have the ability to obtain appropriate royalties for our technology that we spend hundreds of millions of dollars developing. The only way we can do that is through litigation if we cannot come to an agreement with folks that are using that technology. Having the flexibility to determine the amount of damages is absolutely necessary. The other thing that struck me this morning --

>>FEMALE SPEAKER

Actually why don't we move on and we will come back. We will have an interactive discussion on a number of topics. Bryan could you tell us why from your company Amberwave, the issue of damages is important?

>>MALE SPEAKER

Sure. First a little bit of background on Amberwave. It is probably the case that most people's at this table legal department is larger than the size of my entire company. We are a 25 person company research and development company in Salem, New Hampshire. We were spun out of MIT back in 1999. We have raised \$91 million in venture capital to bring to market a suite of technologies that are in the domain of hetero (ph) integration of advanced materials. That is a mouthful but essentially what that means is you take different elements that are on the periodic table, all of which have different semiconductor properties and you put them together in special ways. Those special ways can help semiconductor chips run faster and use less power. They can make solar cells more efficient. They can make LEDs that will someday replace light bulbs above us and be more efficient and brighter and more pleasing to the eye. What we did, in contrast to Tessera, is raise this venture capital dollars really was the classic University Professor and a frat brother turned venture capitalist who got together over coffee and decided to found the company based on this material science technology. Unlike Tessera, we decided from the outset that the flexibility of the licensing business model made a lot of sense for the company. Being a venture backed company, it made no sense to raise the \$500 million or \$5 billion to go into production and manufacturing. Instead as our world is becoming increasingly desegregated, not aggregating, we are actually desegregating in our economy, it made sense for us to stick to our knitting and

focus on being a research and development shop. For us, damages really is the fall back that the venture capitalist ask about when they decided whether to make an investment in Amberwave. We get technology has some promise, we get that you have some Ph.D.s, and we get that we've got money. What happens if you have bring a product to market and the sales guys do their job and somebody on the other side of the table says in a licensing business model says, thank you for teaching us about your technology. We will go ahead and use it. Don't call us, we will call you. That's what damages relates to. It is what is the -- as some people in the field call the BATNA, what is the best alternative to a negotiated agreement. If you think about the Amberwave story, it really matters to everything from that entrepreneur, that scientists at MIT deciding whether this was a risky enough or safe enough pursuit for him to go forward. Whether those venture capitalists really had enough of a confidence in intellectual property that was going to be generated to put the capital to work. And frankly whether those employees, me being one of which said is this going to be a place where I will give 100% of my human capital to this enterprise. Patents really matter. They protect that joint investment. I think we ought to see more of the Amberwaves at the table and talking about how patents are important to them. That complements the very important issues that some of these large and well-known companies also talk about. I also will make one additional point. Beyond just the IBMs and the Amberwaves as well, it is worthwhile for us to take note of where

we stand as a society. This debate started back a couple of Congresses ago, 2005, it has been portrayed as tech versus pharma, tech versus trolls, good guys versus bad guys. And what not. There is a very, very serious economic debate going on that is trying to pour billions if not trillions of dollars into the economy to get people back to work, to get people to take risks and to bring new technologies to the marketplace. It seems crazy to me that we are also having a conversation about how to reduce the negotiated value of intellectual property in today's day and age. I would encourage all of us to think about the counter incentives and disincentives that we might be perpetrating by really continuing the debate that happened and it started a long time ago and quite frankly ought to take place in different context today.

>>FEMALE SPEAKER

Thank you. Gary, why are damages important?

>>MALE SPEAKER

They're important on both sides of the equation for Genentech. We're the target of IP lawsuits 60% of the time and the enforcer of IP about 40% of the time. Like some of the panelists, we feel like we are sort of a little in between the two camps that Bryan talked about a little bit that have sort of dictated the patent reform debate. We are sympathetic to the concept of patent holdups because

there are a variety of cases that have bubbled through the system on things like research tools or such where the -- either the patentee is trying to claim a reach through royalty on a product that doesn't actually practice the patent or somehow the patentee has gotten claims to a reach through claim where they have covered the entire product by expanding the scope of their claim but in focusing on the inventive step in their invention. One of the key biotech cases that went to the Supreme Court dealt a little with the issue where you ultimately had what was deemed by the Federal Circuit's opinion that was ultimately -- that is a no longer enforced -- what was deemed as a reasonable royalty, \$15 million that was approved in the Judge Newman dissent against Merck which had never gotten a product to the market and never made a sale, just had the investment in development of tens of hundreds of millions of dollars in the product. You had a debate ultimately that damages award of \$15 million was reduced to \$6 million. That's a hefty sum where even today, four years after the fact, there is still no product from them out on the market. Who knows if there will ever be a product out on the market from them by the time the patent expires. We are sympathetic to the concept of patent holdups but at the same time, we are very invigorated about the concept that we need to be able to enforce our patents and get the proper remedies for our patents. That is driven in large part by the long product life cycles in bio technologies. We have 8-10 years before we ever get a product to market once it has actually left the lab. The whole clinical trial process is such

that if we can't rely on our patents to protect against competition and to provide a reasonable return on our investment, then the hundreds of millions of dollars that we invest in development are at risk during the whole time. Often because of the decision at the Supreme Court level, you can't test your IP against a potential competitor until they have launched because the whole process of clinical trials is insulated from infringement. You have a period where you know someone has a similar product that is practicing your IP and you are both sort of in development. Maybe you launch, but you can find out until they launch if they infringe on your IP because you don't have a rights case or controversy because there's no actual infringement. We definitely think once you have a case of somebody who has not taken a license, you need to be able to enforce your patents and get appropriate damages with respect to them. So therefore we are very concerned about some of the proposals on the patent reform front with respect to the inventive contribution or essential features or predominant feature. Particularly predominant feature because you look at a biotechnology product, we have a product, it is not a computer that is pre loaded with software. We have a product and it is often very difficult to say that a very important contribution that maybe the main reason you got FDA approval is the predominant feature of the product. It is not a meaningful analysis with respect to a lot of Pharma and biotech products. We worry about a tailoring of the economic value rule or the reasonable royalty analysis that excludes a whole area of technology. And then

the other thing we worry about just in general is trying to over tailor the whole approach to damages. I largely agree with Kevin that the Georgia-Pacific factors are working reasonably well and maybe with apologies to Judge Robinson I think sometimes it does involve a lot more oversight by a judge to make sure that they continue to work well. Before I close I just want to bring up one case where we actually faced a theory that was going to the jury where a very reputable economics damages expert was willing to say that every time you have a negotiation, the parties will always meet in the middle. You should always get 50% of the profits of the party based on the total number of licenses taken at the time. That almost made it to the jury and it was based on an obscure theory of the mathematician from a Beautiful Mind and coincidentally a Beautiful Mind had just won the Academy Award. It was on all the jurors' minds. We brought that Daughbert motion to try and get that theory stricken. Ultimately we did not have to go there because we invalidated the patent. I do think that damages experts, may be more than some other types of experts, are willing to go out on pretty extreme lines. A lot of money is wasted in the whole damages expert battle and often they have very little or not very recent real world negotiating experience. You would think that that would be a key component of a true damages expert, not economics degrees from Oxford, but I have actually negotiated these licenses. You don't find a lot of those people because they don't want to take sides. With all that said, I think we continue to feel that flexibility is crucial and

we worry about over tailoring how these statutory remedies for damages. But yet I think that we do see that there needs to be some oversight and whether that takes place at the judicial level or with some statutory fixes I think remains to be seen.

>>FEMALE SPEAKER

And Jack you work with start-ups. Why is getting damages correct important to start ups? I think related to this question in this context is something I'll come back to some of the other panelists about, why damages as opposed to injunctions -- not more important -- how does the role of damages and how you value your patent relate to how you value injunctions in your patent especially, and Bryan, I will come back to you on this, in a business model that might depend on exclusivity.

>>MALE SPEAKER

Thank you for inviting us first of all. I am in a slightly different position than many of the panelists because I'm not a patent lawyer, I am a venture capitalist and really a business person. I am also here not representing a single company but representing the National Venture Capitalist Association and all the venture capital community in this. The simple answer to your question is that damages are absolutely critical to the process of venture capital funding the innovation

economy. There is no other way to say it. It is one of the most important components of why we have the innovation economy that we have in the United States compared to other parts of the world. There are other reasons but the patent law of the United States and in particular the way damages work historically and the way injunctive relief has worked has been a key component. I am sure we will talk about this a lot more, so I won't go into a lot of detail but damages, the way you determine royalties, lost profits in appropriate cases, the ability historically to have injunctive relief in most cases, all of those together permit inventors and have permitted inventors to capture the full economic value of their inventions. In turn, that has allowed us as venture-capitalist to provide capital to those inventors to develop the inventions. If you do not allow inventors to capture the full economic value of their invention but some hypothetical, arbitrary amount less than that, which nobody has been able to adequately describe, the amount of things that will qualify for venture capital financing will decrease. Somebody said on the first panel, there are very few actual laws of economics. I agree with that. There are almost no good laws of economics as we have learned recently. One of the laws of economics is that if you decrease returns, you will decrease investments. That I can guarantee. The reason that damages are so critical as one of the elements of the innovation system is that it does, together with other components, injunctive relief I can tell you is arguably even more important in many cases. The fact that injunctive relief is less

available is a huge issue for us. It's a major factor for us now in the way we think about funding companies as compared to how we thought before eBay.

Damages, injunctive relief and other things are absolutely critical. Bryan made the point before about his frat brother meeting with the scientists. I always tell the story -- my experience is that when I leave an entrepreneur there are usually three people at the table, the entrepreneur, the scientist or engineer, and there's a venture capitalist. There is Bob Swanson (ph), (inaudible), there is Bob Noyce (ph) and Arthur Rock (ph). The entire semiconductor industry was created by venture capitalists. The entire biotechnology industry was funded by venture capitalists. Then there are the venture capitalists. There are two pieces of paper. There is a business plan that talks about the transistor and integrated circuit or splicing genetic engineering or something else and there is the market and all that. And we go through all of that. And inevitably the next question is is there another piece of paper on the table? The other piece of paper is a patent. If you don't have a patent or some other way to enforce your IP, IP broadly defined trade secrets for IP, patents, as much as I love the idea, my answer is 99% of the time is going to be I can't finance that. There is no way to protect me from the enormous asymmetric power that other competitors have in the market versus my little pipsqueak start up. I'm sorry. That is why it matters to us.

>>FEMALE SPEAKER

Thank you. Why are damages important to Johnson and Johnson?

>>MALE SPEAKER

First, by way of introduction, and maybe you know this, hopefully you're all wearing Band-Aid brand adhesive strips or use baby shampoo, Johnson and Johnson baby shampoo or Brach or Neutrogena or some of those other consumer products of ours, but actually we are more than a consumer products company, collectively our 200 companies are the largest medical device manufacturer in the world. We are the largest health-care company in the world. Our companies collectively are the third or fourth largest biotechnology company in the world and the fourth or fifth largest pharmaceutical company in the world. We are plaintiffs and we are defendants. More or less in equal numbers. But unlike many companies that you hear in this debate, if you pick up our 10-K and you look, we have material patent litigations that are listed both as plaintiffs and as defendants. We have litigated and do litigate against people at this table. Some of them, Kevin, we paid damages many times the sales of our product to. Thank God that has dropped off the top ten list unfortunately. But I find myself thinking about our business as being very much like Jack's discussion of venture capitalists. We have more products to develop through out our businesses and our different industries then we can afford to fund. Right now, this is a time, and we are not immune from the economic realities of what is going on. This is a

time when there are a lot of reasons not to take risk. There are always a lot of reasons not to take risk, but there are especially now a lot of reasons not to take risk. The patent system is the reason that we invest \$7.7 billion per year in R & D. When we sit down, we are very much like what Jack says, we listen and we hear about the technology too and it happens to be an internal team. Sometimes it is not. Sometimes it is like Julio Palmaz (ph) who came to us with the idea for the first coronary stent. Or sometimes it's a venture capitalist or sometimes it is a pipsqueak company who is now substantial. But in any event, we are looking at a number of things. We are looking at technical feasibility and technical risk. And some of our areas, especially pharmaceuticals, but not just pharmaceuticals, they are huge risks. Then we are looking at, of course, the ability if we go out into the market to have exclusivity. In some areas like pharmaceuticals, if we come out with a new drug, we might have five years of data exclusivity. You can't begin to finance a billion dollar drug development project over 12 or 14 years on five years of exclusivity. It is all about the patents. And then we look at what has happened in the marketplace over the last -- or in the legal community. It is harder to get patents, much harder to get patents. Much harder to enforce patents. Much harder to get injunctions if you are successful. Finally, you come down to whether, if you do when are you going to collect damages. And then let's assume that you are wildly successful and after six, or eight or ten years of litigation you do get a judgment, there are unending appeals but not to worry, you

are collecting 2.33% in post judgment interest. Or for the ten or 12 years before hand, you are getting prejudgment interest. We have never once collected prejudgment interest that equals the average cost of our capital. Which is probably what you look at and we look at. It is always lower. I will tell you that there isn't -- we have had some good wins, thank God. That's why I'm here otherwise someone else would be here. (laughing). But there is not a single one of my business leaders, if we get a good win who would say you know what, I am in the same place I would have been if the infringement had not taken place. Not a single one. Now, we have Seagate. Regardless of what might have happened about enhanced damages a few years ago, there are no willful infringement damages now after Seagate. You heard it hear first but what we heard this morning is right. These cases are being dismissed on summary judgment in the face of deliberate copying and in the face of negative opinions and other things that used to be slam dunks on willfulness. So what is the concern? My concern is that a patent on like what you might think of just as an investment, to me a patent is jobs. We spent \$5-\$10 million in R & D in order to produce a patent on average. Where does that go? We are not building Taj Mahal research labs. It is necessary to have research labs but R&D money is mostly jobs. Good jobs. Jobs of PhDs and highly trained people and ancillary people. They are jobs. There are a lot of jobs. When you get a patent and if it is enforceable and worthy of having more capital invested in it, it is more jobs. And if it produces a

business, it is more jobs than that. And eventually one day you growth to be Intel, like David's company did or like Gary's company did. You have a real growing economy. We are talking in patent damages whether we are going to put the brakes on people who might take risks. I think this is exactly the wrong time to be talking about putting on the brakes. I think we ought to be hitting the gas.

>>FEMALE SPEAKER

Keith, why patent damages are important to your company?

>>MALE SPEAKER

I'm with Bank of America. A very popular company these days. (laughing). I think we also take a very balanced approach to patents and damages in general. We do a substantial amounts of research internally. We are \$100 million per year. Most people don't realize but the bank employs tens of thousands of engineers to develop the technology internal to the bank. Not only do we have our own IP, the bank has relationships with 99% of the S&P 500. One in two consumers has some sort of a banking relationship with the bank. For us the patent system has to both work for us in our industry and also work for our clients, the people that we bank and have financial relationships with. If you look at the damages issue, it is an important issue, but I think it is important to put in

context that it lot of the things we saw this morning in terms of forum shopping and venue and some of the quality issues with the PTO and some of these damages numbers that we have seen that it is a holistic problem with the patent system in that damages is an important and essential feature, something we will talk more about today. It is not the entire issue. It's one piece of the larger puzzle of overall patent reform that is needed. Turning to damages itself, I think we have heard a lot here about the need for proper incentives and investments and it is important to keep in mind that the damages as relates to reasonable royalties and lost profits are supposed to be compensatory. It will compensate for your harm, no more, no less. There are other mechanisms in the law to deal with punitive damages, to try to create and modify and incentivize people to certain behavior. Maybe injunctions need to be looked at. Attorneys' fees, costs, other mechanisms in the law to deal with that. The damages themselves are supposed to be compensatory. When you look what is happening there, from the bank's perspective, we see a system that is broken. We saw this morning that non-practicing entities on average get more money in damages than competitors do. That does not seem to make a lot of economic sense. We also see, which is a big issue for us is we often get sued as an end user. Something someone else makes we incorporate in online banking, so people can log on, not have their identity stolen, we get sued on that feature. The damages against the end user are substantially more. That's what non-practicing entities go after than the

manufacturers of these products. It's the exact same technology. I don't think that makes a lot of economic sense. What is the affect of -- what are large and excess damages awards. We heard this morning that the panel this morning had a census that you will see a substantial increase in litigation. If people are overcompensated that will drive more litigation. That's what we see that the financial services world. Professor Lerner (ph) is a Harvard Business School professor and did some studies and he found that financial patents are 27 times more likely to be asserted the nonfinancial patents. Those numbers are orders of magnitude more than some of the most litigious areas of patent laws such as pharma and biotechnology. We far exceed the number of lawsuits. If you look at compound annual growth rates for our cases in the financial services world were two times the growth rate in technology and four times the growth of overall patent litigation in the United States. Again is there overcompensation happening? Again if you go with what the experts and economists said this morning, they've seen an increase in lawsuits. We're seeing that. Look at the proliferation of non-practicing entities. If it wasn't a viable business model or you didn't get an outside return for it, you'd do something else. From our perspective I think damages law as relates to the financial-services it's broken. It needs to be fixed. People have talked about jobs and the role innovation plays in that. It's important to keep in mind to it that with increased costs and innovation, that is less products that we can introduce or any company can introduce (inaudible).

That does not only affect the bank but again we are in aggregator of technology. We are an end user of technology and develop our own. It has a cascade effect on the economy. Thousands of suppliers. If we don't bring a product to market that affects thousands of suppliers and thousands of jobs. The other closing remark, the last thing I would point out is that speaking about banks in general, not Bank of America per say but banks in certain capital ratios have again fun for everyone to learn about, that's the banking industry lately. Just as a ballpark industry average, for every dollar that gets paid to non-practicing entities, that is \$10 that the bank can't lend to businesses and consumers to up the economy grow.

>>FEMALE SPEAKER

Thank you all very much for giving us those perspectives to understand the importance of patents in your companies. We will now go through the system where I will ask you to turn up your name cards if you would like to answer. We talked a lot this morning about the role of damages as being compensatory. To put the patentee in the position he would have been in had there been no infringement. Any comments on whether that is the goal of the damages system? Whether the goal stretches beyond that? And if so, depending on what you think the goal is, how should law approach that?

>>MALE SPEAKER

It is absolutely the goal of the damages statute to simply be compensatory in the absence of enhanced damages for willfulness. No question about that. The debate revolves around whether or not in fact it is compensatory and I don't think that any of the debates that I have heard from anyone at the table, as much as we have disagreed on other things, question that that is the goal of damages. I even see Dave nodding.

>>FEMALE SPEAKER

I wanted to start with something I thought there would be agreement on.
(laughing). Jack.

>>MALE SPEAKER

I generally agree with that, but I would add that if you go a layer below that and you say it's compensatory to put the patent holder in the position he would have been in had the infringement not occurred. That is another way to look at the question of economic value. What has been that cost the patent holder from an economic value point of view? Ultimately, those are two sides of the exact same coin. I think the answer to one is in fact the answer to the other. They are the same answer effectively when you call it compensatory or some other word, that is in fact what you are attempting to seek and find in both of those cases.

>>FEMALE SPEAKER

Keith. Kevin. I'm sorry.

>>MALE SPEAKER

I do believe generally that the goal of damages law should be compensatory. I don't think it is. I don't think whether it's lost profits as determined under panduit or a reasonable royalty under Georgia-Pacific that by the time there's a remedy for reasonable infringement even in the best case, even in the case where the patent holder gets a permanent injunction and gets lost profits or market based analysis of lost profits plus a reasonable royalty, you are ever put back into the position as if the infringement had never occurred. By the time of a final judgment and a damages award and an injunction, the infringement has changed the marketplace whether it is reputational for the patent holder, customer relationships, pricing structure, you are never put in a fully compensatory position as if the infringement had never occurred. When people talk about overcompensating or under compensating the patent holder, I come back to compared to what and based on what facts. It is factually specific. I think the goal ought to be compensatory with one additional layer on that. I think that we do run the risk if we take away too many remedies from patent holders, so permanent injunctions decrease damages. You do lose part of the deterrent

effect against infringement. Something Professor Cotter was talking about this morning especially in the context of undetected infringement is there going to be more incidents of undetected infringement if the remedies available to patent holders are too low?

>>FEMALE SPEAKER

Bryan.

>>MALE SPEAKER

I just want to touch a little bit on the over compensation issue. It has been put forth that if there is over compensation, we will see an increase in litigation. The logical conclusion that we are supposed to make is that therefore if there is an increase in litigation, then there must be over compensation. The two don't -- as all of us as litigians might know that that is not a truism. In fact there are other explanations for that phenomenon that may be the case. One might be the fact that there is more infringement. If there is more infringement, there might be more litigation. As fact as we know in some industries, there is a famous situation where a Microsoft attorney was found to have been instructing his internal clients to say do not look at patents. Do not read patents. Ignorance is bliss. That was the quote I recall. If that's the case, that is likely to be the case that infringement will increase in situations where you are training your people to

ignore and be blissful about your ignorance of patents. That is a possibility. The other possibility is we could have an increase in patents, which might call for an increase in litigation. We know that has been the case. Quite frankly for all of us who believe in innovation, we ought to celebrate the fact that we have more patents in our system rather than less. We would be having a very different panel discussion if we were trying to figure out how to resurrect an innovation economy where there was not a lot of patents being filed. That is a good thing. We might expect some litigation to flow to proportionally increase in that. That is the last point, on a proportionality case, when we can look at all kinds of numbers, statistics can be manipulated as you like, but if you actually look at the number of lawsuits per patent, it has roughly been the same amount, 1.5% of all patents that have been issued over the last 20 years have been the amount of litigation that has ensued. We have seen a very flat amount of litigation per patents that have been issued over the course of the last 20 years. That suggests, as Kevin said, that we might be looking for a solution in search of a problem here.

>>FEMALE SPEAKER

Marian.

>>FEMALE SPEAKER

Thank you. What I've heard from a lot of people on the panel are issues surrounding speculation generally speaking. That what people are concerned about is the ability -- to answer your question -- reasonable royalty and lost profits, trying to compensate the patentee and that's what they should do. They should be compensatory. I think that we're all recognizing that in patent litigation there is risk, there is risk and cost. You don't want to end up having to litigate because there is uncertainty associated with what you end up with, from either side of the equation. Part of the problem here is to push the disputes to be resolved before you get there. In order to do that I think we want to avoid issues within the context of litigation that are speculative, that are hypothetical, and unknown. That's why it's helpful to have something that's more objective standard. What I am hearing from panelists, if we could all agree somehow up front, licensor or licensee of what the value is and could come to an agreement to where both sides at the table know that if they do end up in court this is where the evaluation is going to go, they have an idea about that, they are more likely to agree up front and that would be better. You don't worry about how will I get my interest and how do I make sure how I'm compensated and how do I figure out all these other contingencies to make sure I really am compensated. The point of having more objectivity is avoiding that.

>>FEMALE SPEAKER

Dave.

>>MALE SPEAKER

That is precisely the issue. I don't think anybody disagrees that this is about adequate compensation. Sometimes disagreement is about what is adequate compensation. We have a really serious issue of you have a test that is in essence a grab bag for whatever the jury comes back can be supported under because you can choose all, some, or none of those 15 factors. The Federal Circuit has told us they won't overturn a jury verdict unless it's monstrous. That creates an additional problem for the District Court judges who I know they want to do justice on the other hand I know the last thing they want to do is to retry a patent case. I could be wrong on that, but -- (off mic comment). (laughing). I won't say his name, but I once had a District Court judge threaten to whip out a gun if we brought the case back to him. And I know he kept one under the bench. Going back, the real problem is the current legal system is a standard that permits just about any argument in many instances and, for example, everybody that was talking today about a running royalty. I can tell you that the least likely way to get Intel to agree to a license is to come in and talk about a running royalty. We by example, it takes us ten years to develop a semiconductor process, four years to develop the product for our leading edge processors. Each of those represents about \$4 billion in investment. Then we

have to build plants that are about a \$3 billion investment. We are very aware of that. We know where the patent damage awards are and where they aren't. They are in the United States. It is a factor that we do consider about plant exercise where we build plants. Notwithstanding that we just announced yesterday we're putting up \$7 billion of new plants in the United States in the next two or three years. The point that I want to make is that this is really about we make an incredibly complex products, as many people do. When we looked at it, we said and we stopped counting at 1500 of our own patents in our products. Yet when you go to trial with this grab bag of factors, the trial as Ed Raines said this morning is about the patent suit. You get at best, depending on the district, 40-80 hours to try the case. You will be talking about the validity, infringement, damages, and maybe will get to spend a little bit about the atmospherics of your business. The result is you have a huge over emphasis on that patent in many instances. What you have done is created a huge amount of uncertainty. Whether you are looking at the threat of the injunction or not, when you are looking at huge potential damages theories, we have had people come in with five or \$10 billion in damages theories, you have to take a step back and say what's the rational act. A rational act is that you will try to settle them and you will try to settle them at if you really had to bargain between the parties of what we would have paid at the time if we would have a choice to pay this much to use as patent and we almost invariably have another option at the time of our design

decision, we would have made the other options. We would not pay that kind of money.

>>FEMALE SPEAKER

Taraneh.

>>FEMALE SPEAKER

I want to go back to the point of compensating the patentee for damages to be compensatory. One of the things that the patentee does not get back is the attorneys' fees, for example. It has now spent millions of dollars enforcing its patents and may get a damages awards that some may say is too high and some may say is too low. In almost all cases, it does not recoup the millions of dollars that it had to spend to get to that point. If you assume that that royalty that is established at the end of this trial is the same as it would have gotten absent the trial than it is out of pocket by quite a large amount of money. There is not fair compensation in that instance. Going to the point that was being discussed with respect to the value, obviously no two patents are created equal. If there are a number of patents covering the product, each patent will have its own contribution to that product and will have its own value. Depending on who you are, that patent will be valued differently, not just in terms of a patentee verses and accused infringer, but it seems like there is a lot of discussion around who

owns that patent. If it is an NPE, does that make that patent less valuable. Does less work go into that patent because it is now being held by an NPE? I'm not sure that's the way we should be looking at it. Patents should be looked at with respect to whether they are good patents or bad patents. Valid or not valid. Infringed or not infringed. The owner of that patent is not part of that equation. We talk about the increased litigation by NPEs and the fact they're getting these larger damages awards. It is pretty much well accepted that there has been a large number of entities that have been created recently that are able to assist individual inventors, who by the way based on statistics I discussed them last year 60% of the patents are given to individual inventors. They are able to help them monetize those patents. They don't have and we don't have the billions of dollars to establish those types of clients they're talking about. Because you have more avenues for the NPEs to be able to monetize those patents, you are seeing more of those patents out there and you are seeing more litigation around those patents. The numbers go up. To the extent that the patents are in industries where there are large volumes of products, you will see larger numbers. There is really nothing surprising about the trend now, if our goal is to say we want to reduce the amount of litigation so we will not want the NPEs to enforce those patents rather than determine whether they are actually good patents that read on these products, that's not the right way to go. There is no consideration there of over compensation or under compensation or

compensation at all. We are just basically valuing the patent based on who the holder is.

>>FEMALE SPEAKER

Okay. Jack.

>>MALE SPEAKER

With respect to the point about how risky litigation is. Again the risks in litigation are widely asymmetric. The risk to a small company is not only that it loses the actual litigation, but that it never makes it through the litigation. It does not have the money. It cannot raise money while its litigating very often. Innovator companies will do almost anything to avoid litigation. The obvious thing that all of our companies, venture backed companies do and every venture capitalists will tell you this, is we desperately try to negotiate deals with larger companies to acquire our companies or to pay us a royalty. The problem is that the answer is simply no. The larger companies recognize the asymmetry of market power and economic power and see litigation as a competitive tool in business. They can afford the litigation, we can't. I think it is not fair to assume that innovators and patent holders seek litigation and don't see the risks. We see it very, very clearly.

>>FEMALE SPEAKER

What does that mean for damages law?

>>MALE SPEAKER

The point of damages is that you only go to litigation if you think you can recover enough damages to justify it. When we have discussion about should we litigate something, the question always becomes is it worth it, the litigation could cost \$5 million. If you will get \$1 million worth of damages or a tiny, tiny royalty stream for example at the end of a very long and risky litigation, in many cases our answer is it is not worth it, don't bother. Damages controls the circumstances in which we actually litigate. Again to the extent that we believe -- to the extent that damages are reduced, which is what we're talking about here, there's a lot of obfuscation about what should be -- its really a question of let's reduced damages. The proposal is about different standards and let's reduce damages awards. The effect of that will be asserted to reduce the amount of investment, which by the way create jobs, 12% of the current employment in the United States and 19% of the GDP are venture backed companies. Most of the new jobs being created in the United States come from small companies, not from large companies with notable exceptions. That will ultimately absolutely -- damages will ultimately affect job creation and investment and innovation.

>>FEMALE SPEAKER

Is anyone arguing that damages should have a kicker? Some sort of going beyond making the patentee whole for these reasons? Okay. I will take that as a no. Phil your comment. (overlapping speakers). (laughing).

>>MALE SPEAKER

In seriousness, unfortunately that is not the context of this overall debate. You could have a debate -- this is part of my opening comments about saying which we should be moved the lever? Increase awards for damages, decrease awards for damages and there would be very rational economic justification for increasing the awards for damages as well. I'll pipe up. I understand unfortunately that this agenda has been set in a context that says take it as stipulated, the damages are too high, but let's figure out what to do to reduce it, as Jack just talked about. I think that is too narrow a description of the economic realities we're in in an innovative economy.

>>FEMALE SPEAKER

Phil.

>>MALE SPEAKER

Ed mentioned this this morning, but didn't really go into it. It is very hard to figure out what is happening by looking by looking at the cases that are selected to go

to trial. There are thousands of cases, over 20,000 cases in the example we saw this morning. We have very few that ended up in high damage awards either way. What we did see is if you are a patent owner and you go to trial or you press your case, you have a two-thirds chance of getting zero and if you do win, it is a little less likely than average that you won't get enough to cover your attorneys' fees. That is not all that exciting. There are so many cases out there, and so few go to trial that what is happening is that defendants and plaintiffs are collectively deciding which ones to try. What is surprising to me is that the damages numbers have stayed relatively flat. Over that same period of time, that was 15 years, I think back, everybody thinks about their own company, our company's revenues are more than twice what they were ten years ago. You would be expecting if they had grown simply with the growth of business and business has grown in the last 10-15 years, you would be expecting the amounts of the awards to go up in proportion to the inflation or the GDP or what ever. That to me suggest that something is at work that is actually diminishing the relative value of the awards rather than enhancing them.

>>FEMALE SPEAKER

Keith.

>>MALE SPEAKER

Thank you. I want to respond to a couple of points that have been raised in this discussion. The first one relates to I think there are some comments that the patent holder is not relative to the damages discussion. I think that really illustrates part of the problem that damages are not based on economic realities, but this mythical negotiation. Defendants and defendant's economic condition, the size of the company, their profits, those are sort of favorite tactics that you see from patent holders explaining why one penny per unit or one penny per transaction is reasonable. I think if you look at the economics of the defendants, you also have to look at the economic position of the patent holder. I think, some of the start ups you were talking about are different than for that true non practicing entity. Their whole business is the business of infringement. They don't want people to not infringe their patents, as a startup company may. A startup company doesn't want the infringements, they want to build their own market and create their company and create jobs. The typical non-practicing entity wants you to infringe. If you're not infringing, they got out of business. It is a completely different dynamic that really needs to be addressed looking at what are appropriate measures of damages are.

>>FEMALE SPEAKER

Perhaps we should distinguish between non-practicing entities who are innovators and seeking to license out their technologies versus patent holding

companies that seek to license broadly. I take it your comments pertain more to patent licensing companies that seek to license broadly.

>>MALE SPEAKER

Obviously it is very context specific but there is a whole -- scores and scores of companies that go out and buy a patent from bankrupt companies or individuals and try and find people to assert against. That's largely what I'm talking about.

>>FEMALE SPEAKER

Okay. I want to move into a more substantive discussion -- I didn't mean that. (laughing). A discussion of the substantive legal rules. Please don't take the tents down. And work in any comments you want to make there. Trying to understand how important lost profits damages verses reasonable royalty damages are to your company and let's start with lost profits. Do you think that lost profits, if it's important in your industry, being done appropriately? Is it working? Are the right kinds of damages being awarded? Philip. Thank you.

>>MALE SPEAKER

When I am collecting, absolutely. (laughing). The fact of the matter is that you are talking about competitor lawsuits with lost profits damages. They are always extremely important on both sides whether you are the defendant or the plaintiff.

Actually, as we heard this morning, although they are complicated and sometimes hard to prove which means that sometimes people will default over to the reasonable royalty, where you can prove them, they usually are amongst the most accurate of the damages. Frequently you have good data from both sides of the equation because the infringer will have one thing that every business does is they will keep track of how much money they are making, how much profit they are making with what they are doing. You frequently get a look at both sides of the equation as a result of the discovery. It isn't -- there is not a wild disparity, margins are what they, sales are what they are. There can be disputes over the contribution but frequently, I think generally -- actually generally we settle quite a few as Judge Robinson indicated against competitors where liability is clear and where the market share information is clear. I think there are very important but let me go on to say that it is a rare case where you have a two supplier market and where you don't also have reasonable royalties in because where there is a three supplier market and you are suing one of your competitors, or four or five or six supplier market, then reasonable royalties are always a component of your case. It is always a component of your case as a back up because you can never be sure that your lost profits case is actually going to be sustained. You give it to the jury and if they decide you are not entitled to lost profits then it defaults to reasonable royalties.

>>FEMALE SPEAKER

Gary.

>>MALE SPEAKER

I agree with Phil wholeheartedly that in competitor situations, the lost profits analysis is working well. We are starting to see the lost profits analysis abused a little bit in sort of non-practicing entity situations where the lost profit analysis becomes one move of if you had entered into license agreement back then that would have given us more legitimacy and we would have gotten more profits as a company and could have got more investment. It is this causal change of lost profits in a non-competitor setting. That is a little troublesome and should have been avoided. We are starting to see allegations like that. Just in the general realm where you have a competitor, I think everyone agrees that is the heart and soul of a lot of the patent disputes that we have and that you need to be fully compensated whether or not it's a reasonable royalty, lost profit, or some combination of both especially in sort of a post eBay rule.

>>FEMALE SPEAKER

And is lost profits available in a three or four supplier market? Phil what is your experience with that?

>>MALE SPEAKER

Yes, it's available but to a lesser extent because you have to show that you've actually lost the sales and therefore lost the profits. When there is another or several other suppliers in the market, you have to deal with the issue that first of all you probably won't collect more than your market share because the defendant will say if we hadn't infringed these sales would have gone to the other suppliers and they would have purchased the other technology. You have to fight it out. It becomes an even harder case. The more suppliers there are, the more substitutes there are, the more interchangeability there is and the less likely it is that you end up with a good lost profits case.

>>FEMALE SPEAKER

Jack.

>>MALE SPEAKER

I would add to that that I think lost profits works up to a point. For many of our companies, they are always making the transition, often during the litigation or in their history of being a "non operating" company to being an operating company. There is often this question -- and they are very tiny and there is always this argument of you couldn't be in the business anyway for the list of 15 different reasons or as Phil just said, nobody -- the other competitor took your share

because nobody wants to buy from a pipsqueak company etc. So actually in our part of the world, it is difficult in many cases to make the lost profits case stick.

>>FEMALE SPEAKER

In your world do many of the parties you are dealing with have products? Isn't that the reason that there is no lost profits? Do they have a product? You need have a product to have a lost profit. (overlapping speakers).

>>MALE SPEAKER

Yes. But you don't need just a product. You have to prove but for the infringement you would have sold something. An example would be if you are a medical products company, you might have a product but the defendant would say it does not matter, the doctor won't buy from you anyway because you are a pipsqueak. There are things other than having the product that you actually have to prove.

>>FEMALE SPEAKER

My surprise was that in these early stages that the company had a product at all. And that lost profits did come in, but it sounds like that you are talking about slightly later stage companies there. Kevin.

>>MALE SPEAKER

I would add briefly on the question of recovery of lost profits in a multi player marketplace that as Phil said it is possible to get lost profits with the market based analysis with the morpho (ph) analysis breaking down the competitive situation in the marketplace. If there are three or four competitors in can be done. What we found is that sometimes markets get so fragmented that you couple together the chances of getting lost profits, the amount of proof, and expert discovery that will entail, the detailed disclosures that will require us to make on our own product lines and their profitability that at some point you reach diminishing or no returns and it is not worth going forward in that situation.

>>FEMALE SPEAKER

So the issue of whether to pursue lost profits is also a litigation strategy issue.

>>MALE SPEAKER

Indeed. We have had cases where we had a product and there was direct competition and for some of those reasons that I just mentioned, we decided not to go for lost profits but rather for an injunction and reasonable royalty damages.

>>FEMALE SPEAKER

Philip.

>>MALE SPEAKER

The strategy of going for damages at all is frequently a litigation decision or how much time to spend more often on damages especially for defendants. If you think you have a good case on the merits, many trial attorneys think you don't want to spend time standing up and putting on an elaborate damages cases for fear the jury will get the idea that you think you ought to be paying something because in order to put on a damages case you have to assume that you are going to lose and talk about how much you are going to pay. So many times, especially for defendants and I think Jack mentioned that this morning. He said he didn't put on damages cases. Really what you are seeing is you are seeing situations where that was a strategic decision to emphasize liability. Some of the case that produce abhorrent results are explainable when you go back and look at it because they did not put on damages experts, they really didn't put on a damages case or they didn't put on a credible damages case, very abbreviated because they may a strategic decision that they were going to win on liability and then were surprised that they didn't.

>>FEMALE SPEAKER

For those of you who are sometimes defendants, what are your reactions to the thought -- Judge Robinson's comments of bifurcating? Phil, do you think that's a

good idea, bad idea, and also what is your experience in how often that happens?

>>MALE SPEAKER

I think it happens more and more and I think the experience is generally good. I really don't think that the plaintiffs gain all that much by making a lot out of damages in a complex case. I don't care what your invention is, it is very complicated for the jury. What they really don't want to give up -- the plaintiffs don't want to give up any willfulness attributes or evidence if they can avoid it. Now after Seagate that is frequently dismissed and not allowed during the liability portion of the trial anyway. So, I think that the biggest downside is it prolongs the proceedings. If someone is a small company and/or someone is hoping to collect money and doesn't want to give a below market grade loan to their competitor, it puts off the day of reckoning and the day of collection probably by another 2-4 years because there will be another trial, there will be at least one more appeal and it will take that much more time for you to get your paycheck if you are the plaintiff. But other than that, if you are talking strictly on the merits, it is probably a purer way to address the issue.

>>FEMALE SPEAKER

Reasonable royalties, how should they be calculated? They are out there. Is the

hypothetical negotiation the best of all terrible alternatives or is it actually a good idea? Marian.

>>FEMALE SPEAKER

I think that the hypothetical negotiation model is as some of the panelists discussed this morning, I think it is a useful tool in certain contexts, but I think fundamentally the problem with the model is that it's used as this base line, this hypothetical negotiation. And it's inherently a construct, it's inherently speculative, so part of the advantages of looking for a focus, which was also discussed a lot this morning, if something -- again as a starting point, but looking for a focus to the invention, to what is really the economic value of the invention and to focus on that first instead of trying to reconstruct this kind of hypothetical environment is that you're really more focused on the substance of what was contributed just to start with. So the inquiry gets lost in the context. And it doesn't mean that the contextual issues are not important or they won't affect the royalty calculation, but if you can look at the invention to start with, you can use that to help you with these other tools. So if you had, for example, a question about non-infringing alternatives, something that was discussed this morning, won't it help guide the fact finder to understand in the first instance what that invention is? What am I focused on here? What am I supposed to be focused on? If I know what the invention is, then I ought to be able to value this compared

to what that closest non-infringing alternative is. I could give a mechanical example. If you have a device that I would call a separable device, let's say you have an invention where you have an invention for use in any kind of vending device, right, so it could be soda machines or washing machines or anything where someone puts money in and something happens. If your invention is separable to that component, you have created a new device that takes bills rather than just coins, then you can compare that to other purely coin operated devices that could be used in lots of other machines. If you have instead an invention that actually makes the washing machine run differently, actually makes one of these tools run in a different way, now I can pay by the minute or I can pay for an hour or something like that. You've changed the operation of this machine, and now you may want to consider -- well, okay, maybe if I'm looking for a non-infringing alternative, I have to look at a different product. But by starting with something substantive like that, you can use some of these other tools to figure out how to calculate a royalty.

>>FEMALE SPEAKER

Dave.

>>MALE SPEAKER

So from my view, the hypothetical royalty negotiation frequently is used as a tool for somebody to get in economics that they otherwise couldn't get in because they literally make it up saying this is the way we would negotiate it. For

example, there are some -- I'll try to dignify it as much as possible, pseudo academic publications for damages experts where they've tried to go out and collect industry data and say here are the typical royalty rates in these industries. Now, first of all, it's very hard to figure out what the industries are because there's a big difference between Bose headphones or loud speakers, and Intel microprocessors but nonetheless they get lumped in the same place in addition to which when you read the articles carefully, they say a lot of these things, it's a little hard to say what the real number is because there are floors and ceilings. A 5% royalty where you have a ceiling of a \$1 million per year is a big difference from a 5% royalty where there's no ceiling. So as a result a lot of this is used as a vehicle in my view to get stuff in that really has very little bearing in the industry. We keep hearing about the royalty base and the running -- and what percentage to apply to the damages. That's not the way we negotiate licenses at Intel. Our view is it's an inappropriate way to deal with it in our business. So as a result, it's a very different model yet everybody uses this as a vehicle to try to say it would have been a running royalty rate.

>>FEMALE SPEAKER

The alternative being a lump sum?

>>MALE SPEAKER

The alternative presumably would be a lump sum. What was the value of this at the time we made the decision and balancing the risks of using that approach to

the other approaches that were available to us? It's rare in our industry that there's only one way to do something.

>>FEMALE SPEAKER

How successful is that as a litigation tactic to say in a hypothetical world we would have only ever paid lump sums. So let's talk about that.

>>MALE SPEAKER

We've yet to figure that out. (laughing).

>>FEMALE SPEAKER

That means it hasn't worked yet.

>>MALE SPEAKER

It hasn't worked, and it hasn't not worked.

>>FEMALE SPEAKER

Okay, got it. Keith.

>>MALE SPEAKER

Thanks. I think the hypothetical negotiation can work. Obviously I don't think it's a one size fits all solution. It's very contact specific. I guess one aspect of it that I wanted to comment on is hypothetical negotiations is supposed to occur the day before infringement begins or this artificial construct, so I think most companies marketing people have grandiose visions of the world, otherwise they wouldn't launch these products. One place where the -- where it falls down is I don't think there's enough clear rules around what really happened. It's not just this artificial

day before infringement but real world, what happened. There should be more analysis, more reliance on actual economics of what occurred during infringement. As we heard this morning, there's enough assumptions and hypotheticals and theoreticals built into these damages models from the experts as it is that to the extent real data does exist, that's something important to factor into these analyses.

>>MALE SPEAKER

I wanted to go back to a few comments I've heard on the reasonable royalty analysis and the hypothetical negotiation. It is inherently speculative, but I haven't heard an alternative that's any better, and I think this concept of what is an invention -- what is the invention really or the inherent contribution or what are the essential features of the invention or the product creates sort of a mini Patent Office review procedure in the middle of a trial or court proceeding that is largely going to be how well does the invention translate or inspire a layperson or a judge to think oh, that was a really cool idea, and it's not going to be any less -- or any fairer to sort of go down that approach to -- it essentially created a mini grading system of oh, this is a grade A patent, this is a grade B patent, this is a grade C patent, and if we wanted to do that by saying this invention has two essential features or this invention has three essential features all of which are embodied in the product, I think that's a dangerous path to start going down. I think the reasonable royalty in the Georgia-Pacific analysis allows you to take in

the entire range of factors and doesn't try and distill the invention in a way that might -- that I think doesn't necessarily give it the force that it deserves. And I guess I want to make one point about the aberrant awards where you have an invention that's a very small piece of a larger product and the fear that that's going to create a huge reward because defendants aren't allowed to spend much time talking about their product. And I think that's a very real concern. I think that sometimes the defendants end up talking a lot about their product in the context of secondary considerations of nonobviousness and the commercial success of their product with respect to their own patents or to be able to sort of talk about those types of things if they are a practicing entity of their own patents, and sometimes they're then able to present a lot of evidence on their own infringing product, but it's the rare case that that happens, and so then you can end up with these situations where you have aberrant awards, but it's just the ability to make sure that that issue is properly vetted to make sure the reasonable royalty analysis works. I guess I want to raise a question with respect to a company like Intel that has enough money that you could always do a net present value analysis where if the reasonable royalty is low enough, it's going to be exactly identical to you from a cash basis as a lump sum. Maybe it's a low reasonable royalty, maybe it's one that you're embarrassed to say before a jury which is .0015% or something like that and maybe that's the problem with why you're saying it's nonstarter, but you always have both royalty base and rate, and

so it doesn't seem to make sense that all a lump sum is doing is saying the royalty rate here is so low is it worth the transactional effort of keeping track? It always seems like there's some rate that could approximate whatever that lump sum is going to be.

>>FEMALE SPEAKER

Do you want to respond, Dave?

>>MALE SPEAKER

Okay. So by the way, as part of my response I disagree with the statement you made that there aren't grade A, B, and C patents in terms of economic value. I think absolutely there are clearly patents that are more valuable, and patents that are less valuable. The reason why I say it doesn't make sense to take a running royalty is we look at it is there are a couple of different -- in many instances we have lots of options of how we're going to do something. Okay. There are benefits for using a technique, and there are disadvantages of using a technique, in almost every single case, and they're going to get relative performance for certain things and not for other things, and we're hoping we're going to project four years out when we do these design decisions that we're going to guess for the right place for the market, and we haven't always guessed right, but that's the way we're looking at it, and if somebody comes up and says I want -- let's take the example of the Microsoft versus AT&T, that \$1.52 billion judgment and let's not forget that .02 there because it's \$20 million bucks was a .5% royalty rate,

okay, for the -- a decoder, one of several decoders, there were actually two decoders, one of which didn't work, and if Microsoft had been presented a choice of you can use this decoder and pay a .5% running royalty on PC sales, which is what that was or not use it, it's really simple. We won't use it, we don't need it, there were other ways to do that decoding. From our standpoint, we look at these things, and if you tell us it's going to cost us .5% running royalty or .1% running royalty, almost invariably there's a cheaper choice. That's why running royalties don't make sense typically in our business because there's almost always another choice of what we could do. They may not be quite as good, they may have certain other -- they may have certain disadvantages, they may have certain advantages, but the idea that we would say we are going to take a revenue stream on a product that literally has, as the Supreme Court has said, thousands of patents in it, to any one patent doesn't just make sense to the business.

>>MALE SPEAKER

Right. Another thing we have sort of stipulated to in this discussion and sort of overlook when we talk just about damages is the fact that if we're at damages, we have concluded that infringement has occurred. And we ought not just simply overlook that fact. Infringement's not supposed to occur. We're supposed to have a system that actually disincentivizes infringement from occurring, and when it does have certain circumstances that we have spent a lot of time talking

about here to address that situation, but I think we have a public policy arena, I think we're all in agreement on this that we're supposed to be driving towards, first of all, compliance with the intellectual property laws and working toward non-infringement and dealing with cases after the fact when that happens. I thought about this -- I thought about today's presentation -- actually I was getting a cup of coffee this morning, and if you think of the preposterousness of this objective standard and the outcome of that, I would love it if I'd walked into Starbucks today and I'd taken a sip of coffee, and they said to me excuse me, sir, but that's \$3.95 for your cup of coffee, and I said well, it's just water and beans. There's really nothing in it. That's all you've done is really put water and beans into this cup, I think it's worth about a nickel, and they'd say no, it's \$3.95, and I'd say how about if we find somebody else to come up with an objective standard for what this thing is worth? Somewhere I guess in between perhaps is the answer, but at the end of the day Starbucks should have the right to be able to say you don't get that cup of coffee. It's up to you whether you want to walk into my store, drink the cup of coffee or not, and I think it's the same argument about infringement. We ought to start with public policy regime that says don't infringe, and if you do, we'll figure out a way to reconcile the differences between the parties.

>>MALE SPEAKER

Jack.

>>MALE SPEAKER

I think in the final analysis, the search in all of these conversations for damages is ultimately to find the economic value. I think that is really what's going on. My impression of the function of the hypothetical negotiation is to put a process in place for the jury to actually find that economic value. That's what the -- that's what the hypothetical negotiation is all about. It says okay. We want to find the economic value, and the jury says how? And you say well, imagine that you were negotiating at the time. What would you have agreed on? That is the economic value. And the answer then is well, what should I consider, and then they pull out Georgia Pacific, and there are 15 different things you should consider. Well, as a famous physicist once said, you should simplify things as much as possible, but no more. Unfortunately, this is complicated. Every single company in our portfolio has a different situation, every single competitor is different, every environment is different, we heard this morning in the WalMart case where they cut the price by 75%, and so the actual royalties were greater than the selling price, their business models now where people give away software for nothing in order to collect a service fee. So every single -- and Intel doesn't want to pay a running royalty. Okay. That would have been part of that hypothetical negotiation. We will under no circumstances pay a running royalty. If everybody else pays a running royalty, you know, that may or may not have been persuasive as an argument. I just don't see how if the ultimate search is to find the economic value, that you can simplify that to some formulistic

approach. It is complicated, and the hypothetical negotiation at least to me when I -- again as a non-lawyer think about from a common sense approach, how would I do that, I'd say imagine you were negotiating, and that's, in fact, as I understand it what the law is.

>>FEMALE SPEAKER

I think Jack probably said 80% of what I was going to say. The whole hypothetical negotiation needs some parameters. After all it is what one side is willing to pay and one side is willing to take, so David's point about what he is willing to pay comes into play in the hypothetical negotiation situation, and all these other factors, the Georgia Pacific factors, also come into play because the ultimate goal is to determine economic value, and there's no reason why that economic value can't be put into a lump sum royalty context. It doesn't have to be a running royalty. The parties could agree that this could be a lump sum royalty. So saying that we're not going to pay running royalties so we can't use these factors I guess if that's what I heard is -- they don't go together because you could really come up with an economic value, that's a lump sum royalty that fits into this hypothetical negotiation context.

>>FEMALE SPEAKER

If the overwhelming consideration of a company in the hypothetical negotiation is the cost of alternatives, that should be taken into account, though.

>>FEMALE SPEAKER

Yeah, I mean that would be one factor that's taken into account. The alternative -
- the commercial success of that alternative versus what you actually ended up
using, but we can't lose sight of the fact that this company has been infringing
these patents as Brian was saying for a number of years, and we can't just turn
the clock back and say okay, well, I would have chosen something else, so I'm
going to set the value on this. They did choose to infringe whether knowingly or
unknowingly is not the issue, but there is that fact that we need to take care of,
and then we need to take care of the going forward part of it at that point, and the
fact that injunctions may no longer be available in a lot of instances complicates
that part of it even more because now we're talking about possibility of
compulsory licensing, what kind of rates do you set for a compulsory licensing
scenario. Courts have not decided that yet. We've seen one or two instances
where they've tried to do it, but it's even more difficult to set a reasonable royalty
going forward now because of things that we discussed this morning in terms of
changes in the economics, but at least in that respect you can -- you know what's
happened in the past, and if you need the flexibility to do a market-based
evaluation. And the Georgia Pacific factors with possibly further guidance from
the courts allow you that flexibility.

>>MALE SPEAKER

Marian.

>>FEMALE SPEAKER

Thank you. I'm going to respond to some extent of what was said before about looking at an objective standard like the one that IBM is proposing to use the standard, in quantative, the economic value of the essential features of an invention. The first thing that I want to say is that -- I don't think we can give up on some level of objectivity, some level of public notice because we don't promote licensors and licensees to be able to efficiently agree. And a licensing negotiation. But more importantly I think I should explain a little bit better why the analysis in Quanta was relevant because the Court was looking at a situation where a product was sold, and asking the question of whether that product exhausted the patentees rights. What does that mean? That means once the product's exhausted, the patentee can't assert the patent anymore against that product, so against downstream buyers or users of the product. So the Court's making a decision about the scope of the patent right with respect to the product that's being sold. And it has a complicated problem. It's a product that had certain characteristics that were -- a microchip is sold, does it exhaust a patent system that included -- and it's a component system, but it includes standard and common items. And so the question the Court was answering was whether or not this sold product embodies the essential features of the invention, and it's a value question. Was the patentee fully compensated for that patent when that product was sold? That's the question. So if the patentee was fully compensated, that's a good way to see where the economic value of the

invention is. And the other thing I should point out is that the Court recognized in response to an argument by the patentee that this is a standard that is substantive, it's based on the type of invention, it's not a -- it's not just a one-dimensional analysis when faced with an invention, the patentee raised the issue of the Arrow case where the Court was evaluating at a combination invention where all the elements of the invention may have been in the prior art and the inventiveness was in the combination, and the Court said that's not going to be subject to the same analysis. There the inventions and combination, I can't break that up. And for the Court's recognizing that there are these different situations that can be encompassed by this, the Court can make a substantive analysis of the invention, that the Court's going to have to do that if it's faced with this issue, and that the Court expects the marketplace to be able to cope with this and to be able to read the characteristics of a product and understand how it relates to what this invention is.

>>FEMALE SPEAKER

Is your Quanta argument even where the claim is to the whole computer, if the inventive feature of the patent, the reason the Patent Office issue it is encompassed within the chip, we just have to worry about compensating -- coming up with damages based the chip?

>>FEMALE SPEAKER

Yes, sure, that's part of it. That's part of the concept here, how do I focus on

what's going on, and part of it is absolutely to make a substantive evaluation of a claim. So if an inventor has come up with a significant invention, then regardless of whether they claim it very precisely or expansively to include standard or unrelated components, that patentee should still be compensated with significant royalties where as if an inventor comes up with a minor improvement, that inventor should -- would more appropriately be rewarded with limited royalties regardless of whether the invention is claimed precisely or expansively.

>>MALE SPEAKER

Jack captured my first point, better than I ever could have hoped to the idea that there's this objective standard of economic value and this entirely subjective set of Georgia Pacific factors, and they aren't both trying to get to the same result is not accurate. The Georgia Pacific factors are trying to replicate what type of dynamic there would be between the patent holder and wanting to use the patented invention, presuming willingness on each side, and it does mirror a lot of the considerations that take place in actual licensing negotiations, so I think it is -- does provide the flexibility and the grounding in economic reality that one needs to do a proper damages analysis. Further to that, the idea that then the economic value is more objective I don't think is realistic. We're still talking here about an inherently adversarial process by the time we get to litigation. We're not going to get the plaintiff and defendant sitting down agreeing on what the

economic value is. They're each going to hire experts, they're both going to come up with different evaluations of what the economic value is, and then it's going to be up to the judge or the jury to decide. So which type of framework do we want that adversarial process to proceed under, one that has a host of factors that replicate real world licensing negotiations, including perhaps if the defendant or the plaintiff, whichever side you're on does not believe in running royalties, or do we have one that's been boiled down to a single factor, and I point out that economic value is embodied in a number of the Georgia Pacific factors, number 9 off the top of my head is the patented invention as compared to earlier or prior products and what the added benefit is. So it's flexible enough to deal with that, but it doesn't constrain the analysis. I said at the outset that I was balanced, and I did find a point of agreement with my neighboring table here I do think there is room for improvement on these industry comparables that David was talking about or the rules of thumb that we talked about this morning. I think to the extent we're divorcing the damages analysis from the facts of a particular case and trying to rely on these rules of thumb or comparables or the like, I do think the Courts could help judges and juries -- the courts could help juries in that analysis. I do, however, think the tools are there. I think rule 702 of the Federal rules of evidence, I think Daughbert and Coumotire (ph) gives the Courts the tools to do that, there's been legislative proposals on gate keeper I think legislation could help on the gate keeping function, although the point was made

this morning with which I agree legislation is a blunt instrument. Look at section 284 of the damages laws right now. It's very general. Intentionally we have decades of case law, decades of fact patterns that we need to tailor decisions, common law development toward and I think that's the preferable way to do it, I don't think legislation can encompass all of the different fact patterns you get with different industries, different business models of monetizing IP.

>>MALE SPEAKER

Let me press you and Jack on one item here. This morning there was pretty broad agreement in the panel that the Georgia Pacific factors were relevant considerations even for negotiation, but that throwing them before a jury was the problem, that they just enabled a jury to support any decision a jury would get to, so in the right hands, they could be useful tools, but are they good litigation tools for jury trials?

>>MALE SPEAKER

Well, with all due respect to Judge Robinson, I do think there's a role for the Court as a gatekeeper. I think by way of careful analysis of motions eliminate, really working through the factors, perhaps at the charge conference, the Georgia Pacific factors that go to the jury should mirror what the evidence was that was presented at trial. So I do recognize there could be a problem if 15 factors are presented to the jury, not clear which are really supported by the evidence which aren't -- and I think that judges can help juries in that regard.

>>MALE SPEAKER

Jack.

>>MALE SPEAKER

I completely agree with that, and NBCA has supported the -- expanding and defining some of the gatekeeper functions as well. But the question is what's the alternative? And it isn't at all obvious to me that an even more obscure alternative would actually help the jury more. I mean the -- I have to be careful how I say this, but the problem in, for example, a case as I see it of Lucent, for example, is that juries are mathematically challenged. In granting a half a percent royalty they thought they were granting an incredibly tiny little royalty. In other words they got the principle right. Which is this is a title of component, there were lots of alternatives, etc. To them .5% was a little tiny royalty, when it should have been 10th to the minus 18th. That's just beyond -- that's a fundamental problem I think with the jury system. But what the alternative is which is to say economic value of the essential future? I mean I think the results would be even worse.

You need to have more control on the juries which is what Georgia Pacific attempts to do and say look, here is a checklist of things you should consider as opposed to one very broad, and I think completely obscure formulistic approach.

>>MALE SPEAKER

This morning we had the question that a decimal point can mean the difference between a \$10 million award and a \$100 million award.

>>MALE SPEAKER

Good luck explaining that.

>>MALE SPEAKER

Marian.

>>FEMALE SPEAKER

Well, I just --

>> I'm sorry. I actually --

>>MALE SPEAKER

There are a couple of things that people tend to forget about. Judge Ron White from the northern district of California was on a panel with me a few years back.

I forget, whether it was the ABA or AIPLA and he said look, this is one case.

Georgia Pacific. And it's dealing with a very specific product, yet this is

something that for whatever reason has come to be used, and I, frankly, don't

find it very helpful. I'm paraphrasing, and apologizing but that was in essence

what the judge said in addition to which everybody loves to talk about how

Georgia Pacific has all these factors. Everybody forgets the second circuit

actually reversed and vacated the district court decision because it was a judge

decision. In reaching that decision the district court forgot to allow the fact that

the plaintiff -- the defendant, the accused infringer would in fact in any

reasonable negotiation have ended up with a profit, and the district court had

allocated all the profit to the plaintiff, and the second circuit said that's wrong.

The Federal circuit glances over at that point. They've repeatedly said that's not the guidepost for us. So as a result, we've moved away from what originally had some economic underpinning to something that now is in my view, has slanted the table very much in the compensation -- and we must compensate factor.

And I think we need to really look at -- this is a business toward, it's about value, it's about economics. We heard all the economists say these don't really help us very much. We can use them to reach almost any result. That's a fundamental problem and I think we need to rethink what we're doing.

>>MALE SPEAKER

Phil, how about you?

>>MALE SPEAKER

We negotiate hundreds of licenses a year, and when we sit down to negotiate, we use methodologies that are very much like the Georgia Pacific factors. We don't call them Georgia Pacific factors. Our business people are looking to what it would cost to pay. We both pay, we pay hundreds of millions of dollars in licenses -- license fees to others, and we collect quite a bit as well. But when we sit down, we are looking at those factors that are mentioned in Georgia Pacific. To us the hypothetical negotiation is a good proxy for what business people do when they sit down and negotiate. I agree with Kevin in this situation. And I think that the situations are so varied that it would be impossible for anybody to come up with a single rule that would specify what the appropriate royalty would

be in a given context because of variations in technology, risk, marketplace, marketplace variation, regulation, a whole bunch of issues, many of which were mentioned this morning. To me, the biggest concern about the people who are proposed a simplified rule is that as part of that, they would wish to preclude the other side, whichever side they're on, from presenting what they think fair damages are from their standpoint. And there isn't just one view of it. Yes, I agree, David should be able to go in this his cases and explain why a lump sum royalty for a given feature is the appropriate approach and why he had alternatives at the time and the benchmark time period and in the hypothetical negotiation when presented with the feature which is the subject of the dispute, he should be able to say had we had a negotiation at that time rather than pay you X as a lump sum, I would have done something else. I think that's entirely appropriate. But if the other side wants to come in and say no, you wouldn't because here is what your chairman said at an analyst meeting about how they would being, borrow, or steal in order to get this feature into your chip, they ought to be allowed to do that.

>>MALE SPEAKER

And if it's a question of putting in what they view as comparable patents, should there be any restrictions on that?

>>MALE SPEAKER

To me every invention is unique and every situation is unique, so I have a lot of

sympathy for people who are objecting to industry standard rates or rules of thumb or the like without an awful lot of foundation, and I do think here's where the judges can be of assistance because they can hear the motions to exclude during the trial and make either excluded from evidence or give cautionary instructions or work on the jury instructions because they may have little or no weight in many situations, but in some situations, where there's a regular and established royalty perhaps they do have weight, so it's a touchy area, but I have sympathy for that.

>>MALE SPEAKER

Marian.

>>FEMALE SPEAKER

Thank you. One thing I want to clarify is that when I talk about using a standard like the economic value of the essential features, it's not meant to be the only factor that a Court would consider. It informs the analysis of damages, it doesn't dictate its complete evaluation. That said, I think we could all agree that what the inventor -- what the patentee should really be compensated for is the value that's added by the patent. That's really substantively the fair and correct answer. And in looking at a substantive test using that to focus the initial context of the inquiry rather than saying that the most important thing about my damages inquiry is the hypothetical negotiation, by trying to refocus the Court on what was invented, you're looking at a substantive question that should not be obscured to the Court.

What could be less obscured or more relevant than asking what was the value here? What did the inventor really do? What is the substance of what was contributed by the inventor? So I think that while a lot of these other considerations that exist in the case law are absolutely still relevant to the analysis, it doesn't mean that you lose focus on the invention. Now, that said because there are other relevant factors, and I think a little while ago you started talking about -- I guess what I would call judicial management. Damages is a complex question, so while we would like the standard to provide guidance and licensing, it's also recognize that as you go through the process, there's a lot of relevant evidence, there's a lot of evidence that both parties are going to want to present, and there was a recent case, a recent Cornell versus HP where judge Radar was ruling on a motion in limine, so a lot of really good judicial management, and in this case he was excluding evidence relating to EMVR because it hadn't been -- it wasn't sufficient. It didn't meet the right threshold, and I think it is important with all of the possible factual evidence that comes in for the judges -- for a judge to be disciplined in that regard for a couple of reasons, one of which is it helps the jury, it helps the fact finder, but the other reason is that it provides a certain level of public notice. If the judge actually rules on the record regarding what works or what doesn't work in terms of admissibility of evidence, then, again, this is another piece of guidance for patentees and licensees. You can say okay, I understand what works and what

doesn't work in this context, so I think that's a very helpful -- that would be a very helpful thing to encourage.

>>MALE SPEAKER

Gary.

>>MALE SPEAKER

I have three quick points. One, I agree with Dave on one thing, that there are lots of instances where (inaudible) doesn't want to take running royalties either, one of the key ones of those is research tools where our actual product doesn't practice the patent, and that's the thing I mentioned in my opening comments about reach-through royalties and reach-through claims, the ability to get reach-through royalties is just sort of bubbling up through the system with respect to biotech and pharma. Reach-through claims are an issues of what is patentable and I think that's -- I think that a little bit of what I hear from Marian and Dave is the tail wagging the dog with respect to maybe there's bad or less significant patents, and so let's change the amounts that people can get for all patents because there's some bad seeds out there, and I think if you're really going to go down that math, the way to deal with it is to look at what claims are being allowed and issued, and maybe you shouldn't get a claim covering the entire computer if all you did was make a single change to a decoder, and maybe the problem -- so my second point -- maybe the problem with the \$1.502 billion damages award isn't maybe the royalty rate, but the royalty base. Maybe you should have looked

at hypothetically what would the decoder have sold for, not what the computer or the software program or whatever else would have sold for. So it involves more involvement of the judge to be flexible on what the appropriate royalty base is, but it's much more feasible than asking a judge to look at whether an invention was minor, significant, or essential. I mean some of our most important inventions involved four nucleotide changes to the variable chamber of a immunoglobulin, and for inventions that aren't accessible to -- judges thankfully are using computers these days, so they largely get that, they have to come up to seem on biotech, but patents are presumed to be valid, and they're looking at very specific issues of enablement and description and obviousness in light of what was done previously, but they're not in a position to say oh, this is really a big leap over what was there before. That's the reason why most patent examiners have Ph.D.s in the area, and they're flawed, the patent service on flawed, but to ask a judge or a jury to go down that path in addition to all the other things they have to do in evaluating a patent I think is really inviting mischief.

>>MALE SPEAKER

When you asked about the -- what do you suggest -- trying to figure out the value of the decoder, is that similar to what you're talking about in terms of trying to figure out the value of the specific invention?

>>MALE SPEAKER

I was trying to -- it was the decoder -- I'm not familiar with the patent in the Lucent case, but it was a patent involving a decoder?

>>MALE SPEAKER

It was a patent involving a decoder of audio information.

>>MALE SPEAKER

Right. So you would -- I mean you would look at a royalty base, what does the decoder sell for, and maybe you get .5 % of the value of the decoder, and maybe the jury should never see the bigger sales, and unfortunately that's maybe a Daughbert issue that judge Robinson didn't necessarily want to deal with or maybe it's a 702 issue or whatever it is. I don't think that putting the judges in this position of trying to reevaluate how much of a leap this invention is, is a good use of judicial resources.

>>FEMALE SPEAKER

Wait. How do you -- identify the economic value of the invention without thinking about how significant the invention was?

>>MALE SPEAKER

You don't have to.

>>FEMALE SPEAKER

Gary, do you understand my question? If part of the goal here is to decide what the economic value of the invention is and to compensate, doesn't it matter whether this is a minor advance with several alternatives or a major advance with

no alternatives? No? Why? Phil. Let Gary. I went to Gary. (Laughter).

>>MALE SPEAKER

Because some of the greatest technical advances are commercially valueless, and some of the most valuable from an economic standpoint advances may not rise to -- they obviously to be patentable they have to meet the patentability standards, but they may not be valuable in comparison to the technical advance that they represent. Because think about -- I don't know, gene splicing. When it happened, it was scientifically fabulous and commercially valueless for a long, long time. Other things are very small advances that put a technology or a product over the top to make them fabulously valuable.

>>FEMALE SPEAKER

And that would be economically valuable patent then?

>>MALE SPEAKER

Yes.

>>FEMALE SPEAKER

The gene splicing, an example would be helpful to understand how you could have a very economically valuable patent that did not make a significant contribution as compared to the prior art. The gene splicing example -- why is that -- why is that not commercially valuable? Is it because there's not infringement? Is it because there's not a product?

>>MALE SPEAKER

At the time it was invented, it wasn't commercially valuable. It took years before other things happened to further development, and then it did -- at that time become commercially valuable, but it was not at the time it was invented. As opposed to -- think of my favorite, which is -- I don't know if it's patented or not, but in hotels I spend a lot of times in hotels -- is the curved shower curtain rod. It's great, and it's in every shower apparently in every hotel in America.

(Laughter).

>>MALE SPEAKER

You must go to different hotels than I do.

>>MALE SPEAKER

That's not the biggest leap, but commercially, I'm assuming very commercially successful. Now, every invention to be patentable has to still at some level meet the inventive standards.

>>FEMALE SPEAKER

Let's go back to the shower curtain idea there. Are you suggesting because it's commercially successful, there should be very high damages then even though it's not technically much of an advance?

>>MALE SPEAKER

Well, whether they're high damages or not would depend on all the Georgia Pacific factors (laughter) among them and whether the infringer was selling a lot of them and when they decided to do it, and once every hotel room in the

country already has one --

>>FEMALE SPEAKER

Not costs.

>>MALE SPEAKER

People may not pay that much for it now that every hotel has one. From are all kinds of factors, and so it would depend on the circumstances of the case. It's not -- you can't just say well, because it's popular. And the other thing, inventions change in value a huge amount during their lifetime. Like in the gene splicing. A classic area is in aids drugs. You get a new inhibitor that works for highly experienced patients who are running out of treatments, it becomes very valuable, but then after a while, after it's used and aids develops a resistance to it, it becomes less and less valuable, and then the next new thing comes along, and that's what's valuable. So you have to value the invention, and we generally value the invention at the time the infringement begins. And eclipsing technology is one way that most patents and most inventions lose value because the next generation of technology comes in, and then nobody wants the last one.

>>MALE SPEAKER

Keith. You've been very patient. In this field you have to be.

>>MALE SPEAKER

This is about our 25th panel together. (Laughter).

>>MALE SPEAKER

Listening to everything the people are talking about, it does -- and Georgia Pacific may play a role in figuring this out, but ultimately it comes back to you need to create an objective standard. Peoples have talked about wanting enhanced gate keeping, gate keeping against what? It has to be some sort of objective standard, and we all agreed earlier in this conversation that damages are compensatory. So what are you compensating for? The economic value of the invention. That value can change. People's houses, their value has changed a lot. The beauty of the house hasn't changed, but the value has. The economic value of the house has changed over time. You need to provide an objective standard which would be the economic value, and the question is of what? And I think we talked about Quanta and the essential features like you raised with the computer comprising, so the objective standard, you're able to implement a lot of the gate keeping that people talked about, and from a gate keeping perspective, there's so much they can do pretrial, and that's important, but I think there's also sort of a post trial component. We saw this morning on some of the statistics where the awards from judges were substantially lower than the awards from juries. We assume that the judges are the ones generally getting it right. That tells us that there's some discrepancy -- they're hearing the same evidence. There is a discrepancy. There's no mechanisms or standards -- the standards are too high so judges can't correct those issues when they do come up, so some of the gate keeping functions need to address that. A

potential solution is to create more sort of a -- more of a record to help the district court judge on appeal, we're all back in school, show your work. It would be great if you had the jury show their work, how did they figure it out.

>>MALE SPEAKER

Thanks, Keith. (inaudible). First of all -- many people here know this I think it's worth pointing out that this huge judgment we keep talking about, the \$1.5 billion was actually the one that was set aside, so I hate harping on something that the judge himself found was not supported by the evidence and immediately set the judgment aside. So with that said, we -- there was also a suggestion that possibly because that was -- the judgment was in error and it was based on a -- a royalty base was too high because it was the whole price of the computer, maybe we should consider perhaps the selling price of the decoder. That reminded me of something that was said this morning about the invoice price, and I think that's a totally wrong direction to be headed in as well. There is no correlation between an invoice price or a selling price of an item and what that economic value would be. The value of something that is sold at the time of sale could be very different from the value that the seller -- that the buyer gets from it by combining it with a product.

>>FEMALE SPEAKER

Just -- I want to clarify that. They were talking about what the base ought to be, not what the whole economic value ought to be, and why can't you extract -- get

the economic value you want out of the base by adjusting your royalty rate? Is it fair to just point to, say, that's not the economic value there in the decoder if what they're really talking about is the base and not the whole economic value?

>>FEMALE SPEAKER

You could do it that way but you're artificially building a value here. Because the sale price of the decoder could bear -- it's possible that it bears no relation to what the economic value ultimately should be, so that could be a factor that's taken into account, but there needs to be the ability to adjust the royalty rates to appropriately reflect the economic value at that point. The other point about economic value is we keep several people keep saying this is an objective standard. I'm having -- I'm sitting here trying to think how is this an objective standard? Why are we saying determining economic value is objective?

Because how do we do that? In order to determine the economic value, you still need to go back and rely on those other subjective factors whether you want to call them the Georgia Pacific factors or whatever it is, you need to look at evidence in order to determine that economic value, so it is not an objective standard. It's the ultimate end result where you want to get. And the objective standard for gate keeping. Well, you can have objective standards for gate keeping. We've talked about that I know at length in the path and reform debate and made a lot of proposals as to how judges can determine what evidence has been presented and what factors maybe supported by that evidence, and send

those factors to the jury. That's a possibility, but I don't see that any of this can be labeled objective per se because you still have to have the flexibility and the flexibility is part of the subjectivity of this determination to start with.

>>MALE SPEAKER

Gary.

>>MALE SPEAKER

Actually I think I'll agree with Dave on the point of the decoder, and maybe he wouldn't go as far as I would go, but on the issue of not looking at the entire value of the product all the time, I think that there is some middle line with respect to the royalty base, and I'll go back to the curved shower curtain example because maybe that's one that we can all understand. Do you get a royalty on the cost of renting out the hotel room for having the curved shower because you claim -- because some clever patent attorney claims a hotel room that includes a curved shower rod in their hotel, and in that type of problem, should the judge have the ability even if the claim ultimately says the hotel room that includes this curved shower rod, should the judge have the ability to say well, really the invention here related to the curved shower rod, and your royalty base that should go to the jury is the cost of the rod, not the cost of the hotel room? And I think that the judges should potentially have flexibility on that standard. I don't know that there's a lot of situations where that applies, but there's certainly some situations where that applies, and you can see that, but it's much more effective

to come at it from that way instead of trying to grade the economic value of particular inventions and to say that some are class A or class B from an economic value perspective.

>>MALE SPEAKER

Two points. The question was asked how do you know if there is value? The very simple answer is was there infringement? If the technology has been used, it's I think a rational assumption to conclude that there has been value derived. Most rational organizations do not add elements to their technology offerings because they add no value. Most add them because there is some value, so I think we can sort of stipulate to the fact as my comments were earlier, if in fact we found infringement, we should be able to conclude that there was value that was derived from that no matter how -- we can argue about significance, insignificance, rate, base, and the like, but we should be able to assume that by implementing a user of the technology has concluded there's been value there. Second point, going to this objective standard item a little bit, I'm a young guy, and yet I'm going to say I can remember when kind of comment, and this whole debate if you all recall started back -- I think it was 2005. The most important issue that was being raised by the proponents of the patent reform legislation now was injunctions. Do you remember we had the whole issue about blackberries and the like, and that issue went away as we all know, eBay was passed by the Supreme Court, and that fell off the legislative radar screen, and

yet that was far and away the most important sky is falling type scenario.

Blackberries might have been taken away from legislators that was really driving the legislation. After that case occurred most people would assume it's pretty difficult to get an injunction if not impossible these days. We could comment on the tragedies of that from a negotiating perspective, but let's assume that it's pretty difficult to get. Then we moved into this era of apportionment.

Apportionment was the buzzword of the day for a long, long time, and suddenly apportionment was sort of a dead-end. That didn't carry favor. That was certainly as Jack described an effort to simply reduce the damages amount. After we got past the injunction issue to say how do we reduce the damages amount?

Apportionment was advanced, and obviously that didn't advance. Here we are doing exactly the same thing with a different name. This objective standard, the economic value of the feature is an entirely subjective just by a different standard that basically changes the negotiating dynamic once again, and this is a marketplace, this is a marketplace where there are buyers and sellers, and we ought to drive towards willing buyers and willing sellers as our standard. And that is subjective. It's in the eye of the seller and the eye of the buyer, and a negotiation that comes to drive that value. To suggest that we're going to have some sort of an objective standard I think is faulty, and I'll point out a situation in the apportionment debate, if you recall, some folks talked about imagine if there was a situation if somebody had like a delay switch on a windshield wiper? We

would really consider you should get end value on the car? We talked about apportionment. Low and behold, whatever it was, 18 or 24 months later a movie comes out about the delay wiper on windshield wipers, fire of genius, right, and it talked about this inventor, and how all the car companies were ignoring the inventor and clamoring for a way to put this in their car to drive the sales of their next year's features on the automobile. And they said we've got the delay, buy our Buick instead of that crummy Ford because you don't have the delay feature on your windshield wiper. So we have cases that Hollywood has taught us about cases where incremental improvement actually drive sales of end products, and it's another example of how today we would think it would be preposterous that there be an objective standard around the value, of a delay feature on a windshield wiper, but there was certainly a day where that inventor should have been entitled to have a negotiation with Ford, Chrysler, or GM and say here's my invention, would you like to have the competitive advantage of adding it to your product? And that's what we can't lose sight of.

>>MALE SPEAKER

I'd like to really agree strongly with what Brian just said and expand because that is in fact how innovation occurs. It occurs in this very incremental way, tiny little improvements where the goal isn't to get paid sort of some abstract value for how many hours it took to make the invention, but rather to get the economic value. And it's interesting that every single case that we've just talked about here can be

looked at both ways. Let's go back to the shower curtain example, and the point was well what's the value of that? I could buy it from somebody for X price here if somebody offers it cheaper. It is possible that people actually changed which hotel they would stay at on the basis of did it have the shower curtain in it or not? I have no idea if that's true, but this is one of the ways to think about economic value, which is actually the way that most innovators think about it. They're not looking to get paid a tenth of a billionth of a percent royalty on compensating them for their time, they're looking to capture the economic value that the invention has on an entire marketplace. Phil is probably too modest to use this as an example because it's a Johnson & Johnson example, but in the case of coronary stents, the addition of a molecule to the drug coating the stent, the additional of a molecule, a change of a molecule to the drug coating the stent could affect and did affect the likelihood of that stent becoming thrombotic or not thrombotic. And that complication was only 1%. So you're talking about effecting something in the market that only had a 1% change. But basically it was commoditized market. All the other stents were roughly the same. The introduction of an invention like that could shift where the drug codeine or change itself cost virtually nothing in terms of cost, could shift \$1 billion of profit to the company who licensed it. So it only becomes a question of who is entitled to that profit? A company that chose to do it and infringed and made the extra billion or the inventor? I mean that's really what it comes down to, and in that

case I would argue the inventor's entitled, not the infringer. If it shifted the entire market, the inventor is entitled to that because his invention caused that to happen. It gets vastly more complicated because you'd say well, you could never -- you had to have a stent business and licenses for stents and all sorts of other things which gets into this hypothetical negotiation which is well, you're right I couldn't have gotten the whole billion dollars, but look how much this one little tiny change meant in terms of economic value. Let's negotiate. I don't think you can simplify it beyond that. Every example that you can come up with including the MP3 player in Microsoft Windows has the potential to have that kind of effect. Would people buy an operating system without an MP3 player? The answer today is no. You would actually not buy such an operating system. So these -- talking about sort of the hypothetical how big is the invention or how important, how many hours it took, how smart, was it a genius who did it is not the point, it's the economic impact that it has.

>>MALE SPEAKER

Marian, how does that sit with what you were saying before?

>>FEMALE SPEAKER

I think we have to distinguish here that it is not a one to one linear relationship between how inventive is the invention versus how much economic value it has.

I think it's clearly true that an invention will have value that depends on its context, how it's used, how it's implemented. So, for example, you can have a

significant technological invention that is way before its time, and is not used until after a patent expires and ends up garnering for the patentee nothing. So the point is you do need to distinguish between those two. They're not going to necessarily correlate with each other, but that doesn't mean that you can't discard the question of what was the invention, and once you figure out what it was, you can ask these other questions. Is it the basis for market demand, for a larger product? That's when those questions become relevant but in order to ground the question, you have to start with trying to determine what really is the invention here.

>>MALE SPEAKER

What the invention is what the patenting process is all about. We spent an awful lot of time in the Patent Office arguing over the appropriate claim to be the definition of the invention. And the invention could be an improved hotel room, and it could be that -- and I doubt people are booking because of the shower, but it could be that the data would show that people have a more pleasant experience in the hotel and that hotels find if they install these shower curtains, that they have a lower vacancy rate. I would guess -- I don't know what they're sold for. Maybe it's quite a lot, but I know whatever they're sold for the inventor is sharing the value with the hotel chain. If he weren't, the hotel chain wouldn't be installing them in all these rooms. That's as with all -- as with all invention, the inventor who prices his invention to try to garner 100% of the value if it's \$1

billion and keep it all for himself has an invention that's never adopted. He must share it down the road. I think that a far better way than to try to dissect and -- a claimed invention into its subparts is to compare it with its closest non-infringing alternate, which Gail suggested this morning and I would agree, in our hotel room case would be the hotel room with a straight shower curtain. Or who knows, some other type of shower curtain if that was closer that was non-infringing, and then to compare those values whether it's at the sale of the shower rod or at the hotel room may be a matter of the convenience of the parties negotiating the deal. They might do it on a lump sum, they might do it on a per rod basis, or they might do it on a percentage of the drop in vacancy in the hotel. But these are things that routinely happen in the business world in different business models, and the law shouldn't try to impose an artificial approach to -- in thinking of one thing in mind and when there are an infinite number of circumstances for which no single rule will fit. And just a final comment, Quanta had nothing to do with valuing an invention. As Bill points out it had to do with how much of the invention an inventor could sell and still retain control of unpatented products downstream. And when the inventor sold essentially all of the invention except for some trivial items that weren't included, the Court decided it would be unfair to allow the patent owner to control downstream commerce. It had nothing to do with it arriving at what the invention was worth, evaluation, and what it was worth, the royalty percentage was not part of Quanta at all, and to take some dicta out

of that and try to pretend that the Court has opined on the value of inventions is simply not what the case says.

>>MALE SPEAKER

A couple of points. First of all, I want to be clear that I agree with both Jack and Phil that sometimes what it could be viewed as oh gee, you change three or four molecules or you change three or four little things can make a significant difference in the value of what is patented. However, I do think trying to use the artificial constructs since the United States does not require a Jepson format claim of trying to put everything that's in the prior art up in the preamble and only permitting in the body of the claim what is supposed to be new and unobvious, you really do have a problem. There are articles written saying write claims to cover systems because you can claim a bigger royalty base. That makes no economic sense to me that the patent attorney's decision on how I write the claim is what's going to determine what the royalty base is. I just think that's wrong, and I also with respect disagree with Phil and Bill's reading of Quanta. I do think what the Court was saying is look, we're looking at this, it's in essence double dipping, we're not going to permit this type of double dipping because we can look at this and say look, the additional of the memory, the addition of the other things, I forget what the claim was, I should know it better than I do -- I think we had some involvement in that case -- I do like to kid my colleague who was involved in the license about one of the justice's comments about the license. But

anyway, going back, that was saying look, we can look at this, courts can look at this, and we can say this is not permitted because we can look at this and that's not what you invented. You didn't invent the memory. You invented what in essence Intel sold. Whether that's right or not, I won't comment.

>>FEMALE SPEAKER

And I echo the remark about Quanta. I do think that the Court was regarding additional recovery as duplicative. The other point I wanted to make was that I think that I actually agree with Phil's example, and I think this was an example -- it's very similar to the example I used before in talking about non-infringing alternatives. The issue is not to -- I don't think we discard the learning that we have from so many years of trying to determine what's appropriate for damages and the economic value of an invention. It's that by focusing on the substance of what was invented, focusing on the essential features, I think that informs using many of these other tools, so that's how you can tell the difference, that's how you can figure out what the closest non-infringing alternative really is.

>>MALE SPEAKER

I disagree with the notion that the invention is something different than what's claimed. I think the claims define the invention, that is a question of claiming. If there's a perceived problem in how claims are drafted, that's a different question from that of damages. When it comes time to determine how to draft your claim, there's strategic element there, certainly, but part of it is the more elements that

you're adding to the extent you're claiming the hotel room with the curved shower curtain, well, then, I guess condos don't infringe, right? So there's a balance here that we're reaching, but once that balance has been reached and the claims have been issued I think it's a wrong approach to think that we can dissect the claim into its elements and then inject a second validity analysis into the damages calculation. As to Quanta the essential features of the invention sound like prior art subtraction to me cloaked in a Supreme Court case. It has the premature of more validity. But I echo what Phil was saying. Quanta had nothing to do with actually ascribing value to an invention. It did have to do with double dipping. Whatever that value is, where in the value chain does the patentee exhaust that value? It didn't talk about what the invention is worth much less dissecting the invention and what are particular elements of that invention worth. And I think the idea that we would get better, more objective damages law by going through the entire liability phase of the trial, and then we come to damages, and we essentially recreate validity to determine what is the essential feature or the novel aspect of the invention, and then of course since that analysis leads to zero values for combination claims, so the Post-It note, for example, is worth nothing. The Post-It note adhesive was old, it had been separately patented. Paper was not new. No value, but then we hear but the Court was careful to distinguish Arrow and say this doesn't apply in the sense of combination claims. Now we have another layer of complexity. Is it a

combination claim? Well, most claims are. Maybe this is, maybe this isn't. The idea that we're going to get to a better end state comparing the law today to where it will be with this more objective standard is a fallacy. I don't think it's going to add any objectivity, I don't think it's going to simplify, and I don't think it's going to have any effect other than to lower damages awards, which may be the intended effect.

>>MALE SPEAKER

Thanks very much, and I guess I now -- the phrase another layer of complexity certainly resonates. We really appreciate all of your thoughts, and I'd like to have you go round and give one last set of thoughts. Anything you're thinking about -- the extent to which there's a problem and if so what you think might be done or whatever other closing thoughts you might have. Keith. (Laughter).

>>FEMALE SPEAKER

Last chance for comment. We're wrapping up.

>>MALE SPEAKER

I think we talked earlier in our industry there's a clear -- there's a clear problem, I think it's well articulated and well documented. In terms of the solution, I think you need an objective standard. It should be based the economic value. If damages are not based the economic value, then there's something wrong. What are they being based on? So I'm not sure why there's so much fight over that. But I think regardless of what the standard is, you really need to have gate

keeping in a significant way that can deal with both pretrial and post trial.

>>MALE SPEAKER

One of the problems with non-practicing entities from my conversations with counterpart in the tech industry is that they are being held up, if you will, by the cost of the transaction involved in litigation, that is the \$3 to \$5 million, and they are being coerced to settle without regard to the merits of the claim. Whatever we do, we should do something to discourage people from bringing frivolous actions and taking advantage of the fact that uniquely as many have pointed out in this area frivolous cases can impose such a burden on the defendant that they can extract large amounts of money from them. I don't know if loser pays is the right way or what else is involved, but something needs to be done to stop people from abusing the system at that level.

>>MALE SPEAKER

I'll make two quick points. The first is that I don't think anybody disagrees that economic value is the core idea that we are searching for, but that is very different than economic value of an essential feature or economic value of the invention over the contribution over the prior art. That is not the same thing. So I don't -- I think that that is the core of our disagreement. That is a fundamental change, fundamental change in the damages system, it will have unintended, we think very adverse consequences, and we should be honest that it is in fact a proposed major change in the way we think about this, number one. Number

two, during the stakeholder meetings I think NBCA was very sympathetic to the possibility that there were outlier situations, every system produces black swans as we all now know. And it is very possible that there are true black swan situations out there, real outliers where some truly insignificant component leads to ridiculous damage awards because the jury is somehow incapable of keeping complicated thoughts in their mind, for example, the problem of how do you make the royalty rate low enough against a large base to make the economics work. The math, they just can't do the math perhaps. In those situations we propose let's deal with the outlier, our friends in software, for example, are worried about. If there are cases where there's the contribution of the invention is truly insignificant, has really insignificant economic value, it doesn't shift the marketplace, it doesn't save a lot of money, it's just -- it's a different font for the letter F in Microsoft Word, that -- that could be cutout as a special case. That is the way to deal with what is perceived to be some sort of black swan type outcomes here, which we would in fact be happy to support.

>>MALE SPEAKER

I think one of the interesting issues raised in some of the positions of Dave and Marian is in some ways we're incentivizing innovation for really expensive products. If we're allowing these -- and we're not incentivizing innovation for things like forks that -- where you can't claim something that's really expensive in connection with your innovation, so I think that's sort of a fundamental policy

decision that is there some sort of bad situation that arises from that, and that's where I sort of sympathize with these claims that try and -- these patent claims that try and claim more than what they should with respect to the invention. But I do think that coming at it from a damages standpoint is very wrong headed. I think that we -- we haven't actually seen a whole lot of really bad damages cases, and most of those that we have seen have either not been upheld or can often be explained through specific litigation tactical decisions, so I think there's actually surprisingly few. I think one of the reasons for that is thankfully patent cases are in Federal Court, and I think the quality of Justice you get in Federal Court is a little higher than you get in state Court. So we certainly don't see the type of run away damages cases you see in products liability or other situations like that. So I do think the way to come at this is really more from a patent reform system. Are there things to the patent system -- do we need to open up post grant opposition proceedings so that patents that are really obvious can be challenged early on so they can't be held up against companies that might practice them or things like that that are ways to deal with most of the issues. But I don't think the right way to come at most of this is from a damages perspective.

>>MALE SPEAKER

I'll agree with Jack again. Everybody agrees about the intent to look at economic value. It's a question of what nuances have been put on that term. Paul Romer

(ph) is a pretty influential economist, and he talked about the fact the innovation policy is the single most important policy matter that our country faces. And he contrasted between two different circumstances, one where there's a decreasing return to scale type of regime, it's sort of zero sum, winners, losers. And frankly it echoes a lot of this debate here. Who should win, who should lose, what should be the spoils. That's fine, we can have that discussion but Romer really talks this increasing returns to scale regime. It's part of his emergent economics view, and he distinguishes the old regime with the new, and the difference is ideas. And he talks about how important ideas are in the paradigm of the old, which is decreasing returns to scale and ideas which are increasing returns to scale. And those ideas he talks about fundamentally need to be protected for all the reasons that Jack and I hope I have talked about. You need to encourage people to take risks. You need to encourage entrepreneurs to take risks with their time and venture capitalists to take risks with their money. And the difference between whether we protect ideas or decrease the protection for ideas is the difference between whether we live in an economy that has decreasing returns to scale and is finite or whether we live in an economy that has increasing returns to scale and actually has limitless possibility.

>>FEMALE SPEAKER

I agree a lot of what has been said here, and my company is a good example of one that was willing to take the risk and the reward was there. In today's climate,

I don't know if 15 years ago we had the same debate whether the company would have taken the risks it did, but there are a lot of companies out there who are licensees who are happy we did that, so we need to have the reward system there. Looking at this at a higher level, on a global scale, the only thing that we have right now in our economy is the competitive advantage that we have because of the knowledge base. Because of our intellectual property, that's really the competitive edge we have over the rest of the world. And starting to attack it from all angles is going to allow us to lose that, and where does that leave us? I think -- and Judge Raider (ph) just said this two weeks ago at a conference I was at. Let's take the discussion a few levels up and talk about how can we establish IP laws such that they will promote competition and they will help us with our economy. I think that's what we're all talking about here is how can we do this so as to not create a bad situation for us, not to damage ourselves. Now, a lot of issues came up over the last few years that people said needed to be dealt with, and if you look at the history of what the Courts have done over these years, they've dealt with just about every one of those issues. We had issues about injunctions, eBay took care of that. We have validity issues with patents, are there bad patents out there? Then we got KSR with the nonobviousness standard being strengthened. Exhaustion, Quanta recently came down dealing with that. We've got willfulness and Seagate. Venue issues. MedImmune to some extent has taken care of that. The Courts have really been

able to deal with these issues, and at this point to step in and say we need to legislatively reform the damages standard I think is unnecessary, particularly since as we've discussed several times here the data is not there to support the statement that there is a problem. Yes, there are outliers, courts have dealt with some of them, there's outliers in every area of the law, but we could seriously damage ourselves by coming in at this point and saying we need legislation to fix a problem that really doesn't exist and why don't we let the system fix itself the way it has with some of these other cases, and let's focus on the patent quality. That's what this all boils down to. When we're talking about MPs, we're not talking about companies at least I don't think we're talking about companies like Tessera who spend hundreds of millions of dollars developing technology that is valuable to the industry. We're talking about bad patents, that's what I always understood it to mean, whether you call it a troll whether you call it MP, whatever you call it, we're talking about patents that should have never been issued, so let's focus on issuing the quality patents, let's focus on making the PTO function in a way that allows us to do that.

>>MALE SPEAKER

I think the other panelists have made my points very well, so thanks again Bill and Suzanne.

>>FEMALE SPEAKER

Thank you.

>>MALE SPEAKER

I promise it is an effort to get everybody out of here that I would pair myself with Kevin, so pass on.

>>FEMALE SPEAKER

I'll be brief. I think that it is important to recognize that our intellectual property is a very significant asset of companies today in the United States and worldwide, but certainly with the economic crisis that we're facing, it's very important that our treatment of intellectual property encourages innovation, and in addressing this issue the thing that I think we really need to focus on is how to encourage the development of innovation, how to encourage its implementation in products and how to do that by improving the IP market, by improving the efficiency in how companies come together to trade IP rights, and so that's why it's important to be able to come into a licensing negotiation and have both parties understand and be able to agree on the value of an innovation, and that's the goal for the proposals that I have described I think at this point. But that's the goal of those ideas is to make sure that this market functions efficiently so that innovation is encouraged and makes it to consumers who are looking for it.

>>FEMALE SPEAKER

Thank you, everyone, for your participation and your energy and your interest. As I mentioned this morning, the -- we are -- will continue to accept comments through May 15th. I believe that the website was down last week for submitting

comments, if anyone tried it. It's back up and feel free to contact us. We would love to hear from you, thank you. [Applause]