

>> Susan Michelle: I am Susan Michelle. I am assistant director for policy here at the Federal Trade Commission and leading up this project. And want to thank all of our participants today for being here. We couldn't do this without you. I'll start with a very general question. And if panelists would like to answer any of the questions throughout today, please just turn up your table tent and I'll call on you to speak. And, of course, part of the goal today is to respond to the questions, but also to respond to each other and to have a good conversation, and having spoken with you all individually, I have no doubt that will happen. We will be spending a lot of this session today discussing secondary markets for patents. Where patents are bought, sold, licensed, not necessarily in connection with technology transfer, perhaps in connection with clearing rights or transferring the patent rights. If any of the panelists would like to take a few minutes to introduce yourselves and the role of your company in those markets, to lay the groundwork, I think that would be helpful. Yeah, Paul, thank you.

>> Paul Ryan: Yes. Thanks for the opportunity. I think because Acacia, obviously, is probably, obviously, less well-known than the major other companies here, I think it's important to understand our role in this market. Basically, Acacia partners with America's small inventors, manifested by small companies, universities and individual inventors. It's important to note that approximately 60% of all patents granted in the United States are awarded to these small entities. They are the key drivers in the invention and innovation market, which is so important to the country's leadership and technology and job creation and to America's consumers who benefit from their innovation. Unfortunately, these inventors and innovators have virtually been frozen out of the patent licensing market. They tell us that most large companies routinely ignore their licensing request and use their patented technologies without payment, knowing that these small companies do not have the resources to enforce their patent rights. As a result, these inventors have no efficient way to license their inventions. Acacia's role is to serve this unmet need by providing a licensing channel for these small companies. Acacia provides teams of engineers, patent attorneys and licensing executives that are able to develop and implement licensing programs that generate the appropriate licensing royalties. We generally split these revenues 50/50 with the inventors. To date, our

subsidiaries have generated approximately \$75 million for our inventor partners. Acacia is serving an important role as a clearinghouse and intermediary between large companies who use new patented technologies in their products and these small companies who invented and patented these technologies. We have begun to achieve a rational licensing process with many large companies, but still encounter a significant number of companies who refuse to negotiate. Acacia's value to America's inventors is represented by 52 independent testimonial statements from inventors and companies who have partnered with us. These printed copies are available outside on the table or can be accessed by our website, and they will give you a flavor of what forces the individual inventor and small companies and universities face in the marketplace and they're kind of very brief individual stories, I think, that are quite revealing. Thank you.

>> Female Speaker: Thank you. Laura?

>> Laura G. Quatela: Well, Susan, thanks. I represent the manufacturing company, I suppose, on the panel, and I just want to make it clear that, for Kodak, we come to the markets with a variety of perspectives. We obviously have a long history of innovation, going back to George Eastman, who invented the capture of memories. So, we're a patent owner and we're active in continuing to generate invention and innovation. On the other hand, we also feel an obligation to our shareholders to make sure that our inventions are protected and, so, we're an active licensor. So, whether we're addressing secondary markets or subjects like patent reform, we really sort of sit on the fence and look at every issue from both perspectives, as an owner and as a participant in the licensing market.

>> Female Speaker: Okay. To Steve.

>> Steven J. Hoffman: Thank you, and thank you for the opportunity to be here today. Like Paul, I just wanted to introduce ThinkFire, 'cause we're a small company that many of you probably have not heard of. We play a similar role in the market, as Jim described for Ocean Tomo, in that I view our role as helping the market be as efficient as possible

in valuation and transferring of patents. We work primarily in the technology space with large companies and help them develop and execute strategies to use their patents to their strategic advantage and their financial advantage. We also work as brokers, helping owners of patents sell through private auctions their patents when they decide that those patents no longer necessary for their business. And, so, we have a perspective on the market that is bigger companies, larger portfolios. Typically we're both the buyer and the seller interested in not having it public if they're buying or selling assets. And, so, the work that Jim and Ocean Tomo does is incredibly valuable in terms of helping provide some data on pricing and on value. We work, as I said, with bigger companies and larger portfolios to provide efficiency at that end of the market.

>> Female Speaker: Keith?

>> Keith Bergelt: Keith Bergelt. Open Invention Network is probably not very well-known, either. It's an entity formed by six industrial companies three years ago for the purpose of ensuring that patents don't represent an obstacle to Linux and Open Source. Linux has advanced into a variety of different application spaces, mobile Linux is the most recent entry, but many back office transactions, provisioning a number of other application areas are replete with examples of Linux's use and its pervasiveness in I.T. Intellectual property could potentially represent a threat, and that's why this entity was formed. We are a net acquirer in the secondary market. We acquire patents from a variety of sources, from universities, from brokers, public and private auctions, as well as working to develop alternative forms of intellectual property such as defensive publications. And we also look to eradicate poor-quality patents by utilizing something called Linux defenders, which is a program we put up, which is an extension of the peer-to-patent program and also allows for post issue peer-to-patent, where granted patents can be challenged and prior art identified sufficient to allow for the elimination of poor quality patents that may have been issued during the period of intense patenting that we just came through.

>> Female Speaker: Okay. Marcus?

>> Marcus Delgado: First, let me thank you for the invitation. For those of you in the D.C. area, you probably are familiar with Cox Communications. For others, we are the third largest cable company in the United States, providing video, voice, data and, soon, wireless to our subscribers, our 6 million subscribers in 14 markets around the country. We have been an innovator in these various fields and have been active in filing patent applications and getting patents issued and have participated in the secondary markets largely as a defensive measure. We have become concerned about the commoditization of patents over the past four or five years, and are further concerned about the -- how the law will develop as these markets become more mature and want to ensure that the law reflects the realities that are occurring in these markets. So, I don't know. I may be a voice in the wilderness on this panel, but that's our concern as an operating company.

>> Female Speaker: Thank you. Tracy?

>> Tracey R. Thomas: Thank you. Thank you for having me. My name's Tracey Thomas. I'm the IP strategist at American Express. We began our patent program about nine years ago in the 2000 timeframe, right after American Express began experiencing lawsuits as a result of the State Street Bank decisions. We began to see a lot of business process patent type lawsuits being brought against us. And we decided to develop a defensive program. It didn't take us long to figure out that we also had a lot of valuable intellectual property and, as we began to protect this intellectual property just defensively, we began to realize value from those -- from that intellectual property, thanks to companies like Jim's, you know, which provide a lot of great data around valuation. We are able to not just act by instinct but really make rational, economic decisions about how we leverage intellectual property. So much so to the point where we are now a full, you know, business within American Express, with the bottom line PNL and with financial targets. And so, one of our big considerations now is, you know, is there a market for our intellectual property? We know we have the assets. We know we have the corporate will. But is there a marketplace that can really help us meet the goals that we have set? And we've started to work on an effort that we call the intellectual

property zone or the upper Manhattan intellectual property zone, where we hope to bring together a number of different transactors, just companies like us, for the purpose of facilitating the identification, valuation and evaluation and commercialization of intellectual property. So, a discussion like this is of paramount importance to us, and we're just glad to be here.

>> Female Speaker: Thank you. We have referred to the concept of secondary markets for patents and this kind of trading of patents licensing. How much is that secondary market connected with technology transfer for the purpose of creating a new product? And how much is it about clearing patent rights for a product that has been independently created by the manufacturing company or the service industry? Is this about -- worried about a manufacturing company puts a product out there and now has to be worried about a lawsuit or is it -- is it something else? Jim?

>> James E. Malackowski: So, I think it's evolved over time. If I look at secondary markets, for me, it began with the web-based exchanges in the late-'90s. I think, at one point, we had over 60 exchanges that were attempting to license technology. Yet2.com was probably the most well-known and successful. Today, there are less than a dozen of those that remain. Their original focus was largely on what we would call carrot technology, or new technologies that they were making available for new product development. Since that time, the market has evolved to include both continued efforts towards new product development, but not specifically licensing, evolving into sale. And so, you can imagine, if you're going to make an invest in a new product, to have a license and a right to use it as one of many is not as attractive in many cases to own that right and have the monopoly position. So, that's been the first transition from licensing to sales for what we call carrots. The second transition, I think, is also well-known is that there are large defensive organizations, some that were presented at the table, and Keith may address that point, that are also looking to the clearing.

>> Female Speaker: Keith?

>> Keith Bergelt: Yeah. I think both -- there's been a dynamic over the last six years, seven years where you've had players coming in to acquire assets for the purpose of -- their variety of purposes. I think in the way Paul's described it is one way of describing how companies that are IP aggregators, as a generic characterization, IP aggregators have come in and utilized assets to be able to create value. Sometimes they acquire assets. Sometimes they co-opt assets for the purpose of creating value for the original owner and for themselves. And in other cases, they're looking purely to flip an asset, buy it in the market and then flip it six months later to be able to generate value through a cost-avoidance litigation settlement. On the other side, you see a parallel response just lagging eight months or a year, the formation of defensive patent pools to counteract the effect of IP aggregation that's utilized in a somewhat offensive way. You see defensive pools being formed right now, certainly, in the financial services industry. You see pools being formed. They haven't been announced yet, but companies are getting together to deal with the fact they're being put upon by IP aggregators who are using litigation as their vehicle to make their point. And so, what we do, what RPX does, what Allied Security Trust does, all those are in response to a situation that's created by arbitration in the secondary market. And Jim has contributed to the fact that there is a viable secondary market through the public auctions, and certainly the private auction activity, in tandem, has created certain richness over the last three to four years in particular.

>> Female Speaker: Where are the patents coming from in that kind of market? Are they -- are they the independent inventors that Paul works with or are they coming from large manufacturing companies, some of both?

>> James E. Malackowski: I think some of both. I think some of both. I think one of the evolutions that has occurred recently in the market is that -- taking Tracy's comment that, you know, you started your patent organization, what, nine years ago? Many technology companies, many new companies actually have only recently been in the patent accumulation mode, and they've gotten to the point now, many of them, where they feel like they have adequate defenses and they were solely focused on building portfolios. And now, they realize they got portfolios that give them adequate defense and now there

is an opportunity to start generating some return on that portfolio, either through licensing or through sales. So, the selling posture of large corporations is something that's a relatively recent development. There've always some corporations that have been selling, but the number of large corporation that have started to consider selling their portfolios or, at least part of their portfolios, has dramatically increased over the last couple of years.

>> Female Speaker: Have others had a similar experience, large companies selling portfolios more recently? Laura?

>> Laura G. Quatela: We have begun to sell patents with a targeted program and a staff to support it recently for two reasons. First, is to fund the transformation that the company is experiencing from an analog manufacturing space to a digital space, which is highly expensive transformation. And the second reason is to give our inventors some sense of accomplishment if their inventions are not commercialized. There's a very real, tangible satisfaction rate that goes along with plucking patents that the company won't practice, inventions the company won't practice, and putting them out on the market and realizing a return for the shareholders.

>> Female Speaker: Okay. Paul?

>> Paul Ryan: Yes. I think that the market's kind of started with small companies and individual inventors who had no way to monetize and, obviously, the buying groups are a great resource for those inventors. It gives the ability to sell their patents directly to a buying group. Or, they have the choice to partner with us and split the revenues and go out and license. So, I think the situation has certainly improved for small entities, and I think the value proposition is there and now being manifested by large companies basically doing the same thing.

>> Marcus Delgado: Yeah, I think that, for example, just looking at Ocean Tomo's auctions, I've sort of have followed the lot since they have began offering those patents at

auction, and you can see the progression from, sort of, smaller independent inventors to very sophisticated companies now that provide their patents to that auction pool. And that's -- I guess it's kind of surprised me, but, you know, it's a business model, so I shouldn't be totally surprised.

>> James E. Malackowski: So, I would just respond. Marcus, your insight is exactly correct. When we went to launch the first auction, we visited many of the large companies and were told, "We think it's an interesting concept. We want to be third or fourth. Prove that the model can work." And so, we began with a lot of individual inventors and perhaps technology that was not as valuable as we now see today, but it is just a natural progression.

>> Steven J. Hoffman: I think the other thing we have to talk about is the economy obviously is having an impact. And so, companies that we've talked to in the past that said, "We're not interested in patent sales," have come back and said, "Well, now, maybe we feel a little bit more pressure to generate cash or to be a profit center," as you are, Tracey. And so you see many more companies in the last six months that have historically not been interested in selling patents, all of a sudden, they're starting to consider that possibility.

>> Female Speaker: As recently as six months?

>> Steven J. Hoffman: Yeah. Literally, I think the market's transformed pretty dramatically in the last six, maybe eight months on two sides. One is that there are many more sellers, perspective sellers, than there were even a year ago. And there is some question about whether there are as many buyers as there once were.

>> Female Speaker: That was the next question.

>> Steven J. Hoffman: There's some of the defense aggregators that Keith was talking about, like RPX, which is a recent market entrant, and so they've added to the buy and

demand. But, then -- yeah, the one name that has yet to be mentioned in this conference, Intellectual Ventures, everybody wants to know what IV is up to and what their future purses are gonna be. They've represented at least half of the purchasing market for U.S. patents over the last few years, and there's some evidence that they're sated and/or just slowing down in terms of their acquisition pace. And that's gonna have a dramatic impact, obviously, on the marketplace.

>> Female Speaker: What is that evidence?

>> Steven J. Hoffman: Well, we can -- without getting, you know, into specific details, we find that their appetite for certain kinds of assets, whereas in the past they said, "Bring us anything in this area," they're no longer interested in. Their pace of decision-making has slowed down pretty significantly in terms of valuation of assets and doing diligence. And, you know, they're appropriately quite secretive about, you know, both what they have acquired and what they plan on acquiring. So, the evidence that I have and other market participants, I'm sure, have their own perspective is anecdotal. But it seems pretty clear that they're playing a less aggressive role than they have in the past in the marketplace.

>> Female Speaker: Keith?

>> Keith Bergelt: Patent freedom also tracks, pretty aggressively, the various IP aggregators out there and the companies they create to hold these assets. The other point that I wanted to make on this topic is that -- it ties in to Steve's comment on the economy in that venture capital-backed companies, decisions are being made every day as to which ones are gonna to receive funding, which ones are going to be jettisoned. And so, there's a fair amount of rich, intellectual property that can be harvested from working private equity and venture capital community. And we, as an example, purchased a company last year for the purpose of acquiring its intellectual property assets, retain lead inventors and double the size of the portfolio in a year by distilling the value that was resonate in the engineering notebooks, but also continuing to advance invention of the company,

turning it into an invention machine, which is a variant on the model of simply acquiring things. Why don't we pick an area that we're very focused on, like virtualization is a key area for Linux, and let's invent out into the future to enable Linux --

>> Male Speaker: Wave your arms over there.

>> Keith Bergelt: So that's an alternative approach, and that's feeding opportunity into the secondary market and creating as may be -- you know, there's a lot of content. Some of the content, maybe, isn't at the same level. It's a little spotty. It goes through periods where you've got some great content, big numbers in sales, public and private auction. Then you've got some periods where you've got maybe a little bit of a down period. It's a cyclical -- This is going to be -- this enriches the stew a bit by having these venture-backed companies bleed their assets into the market.

>> Male Speaker: Yep.

>> Female Speaker: Are you talking about situations in which a venture-backed company -- I don't want to say fails. That's not the right word, but that the --

>> Keith Bergelt: They -- by design. They can't wait five years for the technology and the products that the technology supports to actually materialize, so they make decisions to cut their losses and move on. But actually, it is -- it's -- there is also another dynamic just starting, which is quite nascent. Venture companies are recognizing that they don't want to support the costs of intellectual property development. We've moved away from a '90s paradigm where intellectual property was everything and we are now recognizing that it's about the ability to leverage that intellectual property in unique ways. And you're starting to see players with more supple minds that are running venture firms that are actually looking to do sale license back transactions, where they sell the assets and then they license them back, sometimes on an exclusive basis, sometimes on a nonexclusive basis. Sometimes it's a hybrid in terms of their model. And we are negotiating a transaction like that right now.

>> Female Speaker: Jim?

>> James E. Malackowski: I would just comment on the point that Keith made on the cycles because I think that is exactly right. As we view the market, the first major input was the cycle of increased buyer participation from the aggregators, who brought capital and attracted the attention of sellers, and we've been discussing how the volume of sellers has been increasing. Well, many of those aggregators have a full plate right now, so their purchasing power is down. So now, it's essentially a buyer's market, where it was a seller's market a year and a half ago. Our view is that the capital will come back into the market from new players that'll largely be more global in nature. They'll have an Asian, U.S., European point of view, not just a U.S. point of view.

>> Female Speaker: What do you think the motivation of those new players will be? Will it be different than the motivation of the patent aggregators?

>> Steven J. Hoffman: In my opinion, yes. I think we are in a phase where it is largely defense oriented, so aggregators and/or corporate buyers are looking first for that risk-management point of view. I think as you look global, it will be much more offensive oriented, not the sense of acquiring to litigate, but acquiring to protect markets and industries that are core to those geographies.

>> James E. Malackowski: Yeah, I think one of the major new market entrants, and they're just starting to get their feet wet here, but it's gonna transform the market, I think, pretty significantly, is sovereign wealth funds who have the kind of agenda that Jim talked about, which is not just about monetization but it's about building the technology industry and defending the technology industry for their -- you know, whatever country they represent. And they are starting to get very interested in this space. I think most of them are being very cautious, but I suspect they're gonna be the next major new entrant into the marketplace.

>> Female Speaker: Do they focus on one particular technology?

>> James E. Malackowski: I think it varies. I wouldn't be able to, kind of, you know, say that they all are adopting the same technology. I think what they're doing is looking at their own countries and the technologies and the aspirations of that particular country and trying to build a patent portfolio that advances those causes. And so it's gonna be different from country to country and from sovereign wealth fund to sovereign wealth fund. And so, most of them are interested and curious and starting to investigate. I wouldn't say that too many of them have well-formulated plans yet about exactly how their gonna enter the market.

>> Female Speaker: Okay. Paul?

>> Paul Ryan: Yes. In relates to venture capital companies, I think there's a growing awareness that not every start-up is going to have worldwide marketing and distribution to be able to channel -- challenge large, imbedded organizations. So, I think there's a growing reality amongst venture capitalists to seed the development of innovative new technologies, protect them through patents and then license or distribute because, basically, it would parallel what's happened in the biotech industry where you've got a group of young, innovative companies that do the R&D and innovation and then partner with the larger marketing and distribution organizations, basically the large pharma. And I think the continuing trend will be -- you will see the emergence of more pure innovation and invention companies that in turn are then licensing out those technologies to the broad branding and distribution companies to put in those channels.

>> Female Speaker: Tracey?

>> Tracey R. Thomas: Yeah. To Jim's point, I think what we'll see with a lot of these aggregators is that it will turn offensive. People can't just keep buying patents with the idea that, at the end of the day, there's nothing at the end of the rainbow. I'm not saying some of these aggregators, you know, are going to sue, but you can draw that inference. I

think it's imperative upon companies in certain industries like financial services to be more proactive and to look to other models like the RPX model, you know, where RPX says they're not gonna go out and sue. You pay what really amounts to a subscription fee, and patents which are problematic for you can be bought off the market, basically. And I think that might be a better model for companies like American Express than some of the other models that is are out there.

>> Female Speaker: How does that model -- or does that model have a free rider problem? Some companies are paying a subscription fee of patents taken off the street for everybody.

>> Tracey R. Thomas: Yeah. I guess you could look at it that way. From our perspective, we have a policy, and always have had a policy of not violating the intellectual property rights of third parties. So, we can't really worry about, you know, someone else benefiting from our actions. I think you really have to inwardly and say, "What's best for my company?" And I think some of these models tend to be better for certain industries than others.

>> James E. Malackowski: To deal with the specific question, what RPX does is they buys assets, take them off the street, and then they either resell the assets after they've given licenses to the members, and/or they sublicense. And so, you know, they are trying not only to spend money to take the assets, take them off the street, but actually generate revenue to offset the cost of acquiring assets by sale or sublicensing. So nobody actually technically gets a free ride in their business model.

>> Female Speaker: Okay. Keith?

>> Keith Bergelt: NAST has a catch and release model, which is an explicit --\

>> Female Speaker: If I could get everyone to use the microphone.

>> Keith Bergelt: That within a year, everything that AST purchases has to be sold back into the market. So there are increasing attempts to discourage free riders. Our model is very open, and because we can never sue, we are the whitest of white hats in this gambit because our community is the least accommodating of transgressive behavior. Open source community allows --

>> James E. Malackowski: I was hoping we were going to start getting into this.

>> Keith Bergelt: The community does not look fondly on patents in some situations, but looks even less fondly on the notion of its protector acting contra to best practices as to what the most edgy of open source players would prescribe. I think another interesting point, going back a bit, is that because the sophistication and the comfort level with assessing intellectual property and its relative value, some of the things that were discussed earlier, traditional notions of maker buy decisions were getting people more comfortable buying assets and bringing them back in and building businesses around those assets, so creating spin-ins of assets to be able to bolster businesses. This wasn't done before because there wasn't that comfort level. So I think there are a number of other things that have gone on. Financial services is another arena where lending against intellectual property has helped with this overall approach to taming the asset class, turning it into an asset class rather than just an aberrant source of value. And I think some of Jim's presentation earlier helps you kind of see how value is really transferred in organizations from hard to soft, and soft needs to be leveragable.

>> Female Speaker: Tracey?

>> Tracey R. Thomas: Yeah, you know, we talked about the free rider issue. And I may say something that might be a little bit controversial. But if you take a company like Intellectual Ventures, they've been purchasing patents for a number of years. And at American Express, we know anecdotally that some patents that could have been problematic for us probably have ended up in their hands, although it's hard to know because you can't really tell what Intellectual Ventures is buying these days. Right?

>> James E. Malackowski: They have 300 separate subsidiaries.

>> Tracey R. Thomas: Okay. But at the end of the day, we know that we've benefited, at least in the short term. So the question will be, will it be more efficient for us in the long term, you know, when they come and ask for a licensing fee. Right?

>> James E. Malackowski: Right.

>> Tracey R. Thomas: So, you know, free riding takes place at all different levels. And, you know, not all bad has happened because aggregators like Intellectual Ventures out there.

>> Female Speaker: Laura?

>> Laura G. Quatela: Going back to the point Keith was making, we have created a unit which goes out and seeks the small inventor and seeks to build on the small inventor's invention's bigger business. And we have done that largely because we are afraid to respond to inventors when they come to us. And we're afraid because we don't know if they're seeking us out as a target or if they actually want to partner with us. So we decided to become proactive and go out and find our own inventions to augment those we create.

>> Female Speaker: Can you just spin that out a little bit, the fear of the independent inventor coming to you as a target? Just elaborate on that.

>> Laura G. Quatela: Well, as often as not, unfortunately, in this new world we live in, when an inventor knocks on our door, it may not be because they're seeking Kodak out to partner an invention, but rather because they see as a target for their current inventions and they just want more information to use to create a lawsuit.

>> Female Speaker: Okay. Marcus?

>> Marcus Delgado: A couple points. One, I was just going to go back to, sort of, the sum of the factor that have changed over the past couple of years. And I don't want us to lose sight of some of the changes that have occurred in the law, as well, that have had an affect on behavior in these markets and have either increased behavior through certain venues that may be more favorable to patentees or have decreased behavior because, for one reason or another, the obviousness standard has changed, for example. So, you know, that may tend to decrease the likelihood that you will go out and aggregate patents like this. And to follow up on Laura's point, yeah, we also have a -- essentially have a policy that we won't talk to third parties that kind of just knock on our door. You know, we innovate, and we innovate at the same time, and so we don't know, as you said, whether or not someone is looking at us as a true partner or as a target and have been burned in the past when we thought we were being viewed as a partner, but, in fact, we were being viewed solely as a target. And so we have changed our practices. Apparently we don't have enough --

>> Speaker: There we go.

>> Marcus Delgado: -- Live bodies.

>> Male Speaker: We're just too still.

>> Female Speaker: All right. Jim?

>> James E. Malackowski: So I would simply comment that this issue of an inventor that approaches and there is legitimate concern about whether you're a target or partner, that the market continues to try to find ways to solve that problem. And Laura described one. But many companies have now instituted a clean room policy where they engage in independent third party, whether that be a law firm or an IP appraisal firm, to screen all of those incoming submissions and match them against a very specific set of criteria that

the company is interested in, is not currently developing on their own, and then facilitate an introduction that's less threatening. So the point I made earlier in the comments is this marketplace continues to evolve to the changing need in a way I think is quite effective.

>> Female Speaker: Laura?

>> Laura G. Quatela: Sorry.

>> Female Speaker: That's all right. Okay, Tracey?

>> Tracey R. Thomas: Yeah. To pick up on Marcus' comment, I think it's terrible that a company like Cox, which probably has a lot of innovation going on inside of it, is forced to be put in a situation where it has to say, "Hey, you know, we can't listen to third party ideas." I think it underscores the need for a more efficient marketplace so that companies like Cox and American Express aren't afraid to answer the call when it comes. And I think we all know now that, you know, there's a lot of evidence that suggest that the wisdom of the crowds can be very valuable. But if we can't open the door because we're afraid of lawsuits -- and we have the same problem, Marcus -- at the end of the day, I think it's a problem for, not just for these companies, but for our economy as a whole and the need for a better marketplace around intellectual property.

>> Female Speaker: Is it a failure of the efficiency of the marketplace that's causing that problem, and how so?

>> Tracey R. Thomas: Just off the top of my head, valuation. There's extreme inefficiencies around valuation. At last count, I was told there were at least 1,500 different valid ways to value a patent.

>> James E. Malackowski: Which means there's none.

>> Tracey R. Thomas: Which means there's none. And if you can't come to a meeting of the minds about what something is worth, I don't care what it is, it is not likely that you're going to be able to transact around it. So there are plenty of inefficiencies. And for me, I put valuation probably right at the top.

>> James E. Malackowski: Yeah, I think that's exactly right. I mean, we get approached often by individual inventors that want to monetize their patents. And there is, in most cases if not just about all cases, a tremendous gap between reality and their expectations with respect to value. A lot of it has to do with pride of ownership and invention and authorship, which makes a lot of sense, obviously. But a lot of it has to do with the misconception of, how do you go about monetizing a patent through licensing, and what are the risks, what are the probabilities of being successful? And, you know, most of the conversations we have break down because there isn't any way to come to an alignment on what a realistic valuation for an asset is. And I think that's -- if people think the asset is way more valuable than it actually is, they're going to be more aggressive in terms of trying to monetize it.

>> Female Speaker: Okay. Marcus?

>> Marcus Delgado: I attended a talk that Tracey was at where he talked about how you sort of go through valuation of patents. I said, "That's a perfectly legitimate way to do this." But courts don't recognize it, necessarily. I mean, if I go into the next room, someone else could come up with something completely different. And as a lawyer, I'm primarily concerned with how the court is going to look at this valuation issue. And right now, I think courts kind of struggle with how do we, you know, value this thing? And for -- so now they're essentially doing what we sort of do, which is, "Well, how much is it going to cost for us to litigate this thing?" And that's just extremely inefficient, and I think companies have sprung up based on the fact that their entire models are based around how much will it cost to litigate. And since that cost has increased over the past few years, you know, it's become very lucrative. So I think there is a lot of, since there's

s so much mystery around patent valuation, you know, it puts some inefficiencies into the market.

>> Female Speaker: Marcus, do you face any other problems when considering to bring in technology from outside parties, beyond the valuation associated with just the difficulties of what technology's being offered to you and how much further it has to go in terms of developing it into a product?

>> Marcus Delgado: Yeah. So if a third party comes to us and says that they have an idea or that they have a patent on a particular area of technology that we innovate in -- you know, there's a difference between the quality of the engineering that our folks are doing who have been in this for years and have been involved in this technology and understand the problems that can occur and what can prop up versus someone who comes to us says, "I have a great idea I came up with last night on the back of a cocktail napkin." And, you know, it is just -- I'm sure that person is, you know, very intelligent person. But I can't engage in that person. But you know what? That person can go out and get a patent based on what they came up with on the back of that cocktail napkin. And if they're able to convince the patent office that this is new and non obvious, et cetera, now I face a real problem. So, you know, it's difficult to ascertain the quality of the actual idea that the person has come up with. And the patent system doesn't necessarily -- you know, I think you have a great patent system here, but, you know, it doesn't search the way the European patent system searches, for example. And so, you know, a lot of bad thing can come out of the patent office. So those are some of the challenges that we face.

>> Susan Michelle: Did any others have comments on this last point that Marcus made? Okay, Tracey then Paul.

>> Tracey R. Thomas: Yeah, the comment about the inventor putting something on the back of a napkin really kind of begs the question, "is it a good patent, or is it a bad patent?" If it's a good patent, then maybe that person or entity should be compensated

accordingly. A lot of times to your point, it's a bad patent, and you face the threat that this patent, you know, could be used against you later. At the end of the day, though, my instinct is that an efficient marketplace might marginalize the bad patents. Now, that might be, you know, kind of lofty thinking. But if you think about Jim's comments about his exchange -- and I don't want work for Jim -- but you could see where inviting, you know, other investors into the party other than just the buyers and sellers can really create a lot more liquidity. So that it would be expensive to ignore the good patents, basically, and the good intellectual property, so that maybe people would spend more time focusing on valuable intellectual property instead of, you know, nuisance lawsuits. And that includes everybody, lawyers, all the way through the corporate players like myself. And so, you know, to your point about the bad patents, maybe we can marginalize them through a more efficient marketplace is my point.

>> Female Speaker: Paul?

>> Paul Ryan: Yes. Relative to valuation and quality of patents, one of the key functions that Acacia performs, I think, in the marketplace is giving inventors realistic expectations, the problems you have addressed. Because if they have unrealistic expectations, we won't partner with them. They have to understand that large companies have multiple royalty obligations. They have profit margins they're operating under. And so I think our teams of licensing executives who we have recruited in out of the industry have a good appreciation for that and can temper their enthusiasm and expectations to reality. And another function we perform is doing a tremendous amount of due diligence because we probably see, you know, multiples of opportunities, and we only select a very few from a due diligence standpoint. So I think that standpoint, we act somewhat as a clearinghouse. So when we come to companies, they know that we're an objective third party. We don't have an emotional or unrealistic expectation about value. And that's why I think we've had some early limited success and rationalizing the process and actually getting transactions done on behalf of small companies to large companies.

>> Female Speaker: Jim?

>> James E. Malackowski: I would again just encourage a more historical perspective. We have inverted our economy from an industrial economy to an innovation economy in a relatively short amount of time. We have made tremendous progress on the valuation issues. I go back to 1988 when I started IPC group. We were the only firm that would appraise your patent, and there was no FASB standard to look to. Today it is a customary thing. All the accounting firms do it. They use the same FASB pronouncements. There are organizations such as L.E.S. -- and Ken Schoppmann is in the back of the room, their administrative director -- that will now certify you as a licensing professional requiring you to go to training that covers how to value a patent. So we're making great progress. Sure, there are mismatches and expectations, but it is getting better.

My last comment on that is the auction or other publicly reported data is starting to have an effect. When inventors come and they describe the idea, I can tell after 15 minutes, I'll interrupt and say, "Let me guess how much your invention is worth." And I'll say, "\$1 billion." "How did you know?" Well, because it's the third billion-dollar idea I've heard today, and it's not. Look at what patents are selling for on the open market. It's a few million dollars. It's not a billion. And the ability to show them those reference points does make a difference.

>> Male Speaker: Absolutely.

>> Female Speaker: Keith?

>> Keith Bergelt: Intellectual property in general, to Jim's point regarding valuation, the fact that several billion dollars has been put out against intellectual property since '97 as a naked asset where intellectual property is the only and sole source of collateral, I think is very significant because that's the hairy edge of valuation. Where you're basically putting real dollars against that as a naked asset, in the event of default and foreclosure, that's all you have. You don't have anything else to be able to recoup. And so what we're seeing in the market is some of the transactions that were done over the last five to seven years

in particular, where intellectual property was a sole and exclusive use of a loan, where those assets are now coming into the secondary market, which is another vehicle. It ties into the VC side, but it's a similar process. Companies are going, filing for chapter, and once they're in BK, those assets are then held back, taken by the creditor. And then they're being liquidated in the market. And it applies to patents, trademarks and copyrights that are being taken in this way. So the market, it has matured while people have been not watching. Because there's been this whole trend around intellectual property collateralization, which is an extension of securitization. And those things are all dynamics that people need to look at when they kind of think about this whole issue of the secondary market. Because that -- these are assets that are bankable assets. And the reason they're bankable is because they have to be in order to drive economic growth. You can't lend just against hard assets because then you can't lend up to debt servicing capability, reasonable debt servicing capabilities. Private equity does not work if you can't lend against intellectual property. Period. Because private equity is based on leverage, reasonable leverage multiples of three to four times to be able to do a transaction. I think it's important because private equity is the straw that stirs the drink.

>> Female Speaker: We've been mentioning valuation of assets in this kind of market. Is that valuation based on the -- solely on the ability to assert that patent against someone who has independently developed a product? Or is it about getting someone to develop a new product based on that technology? Does it matter? Steve?

>> Steven J. Hoffman: So valuation, I agree with Jim's point, first of all. Two points, I guess. One is that the Ocean Tomo auction has been incredibly valuable because it has provided public data on valuation which has not existed before. It represents a small percentage of the actual transactions, most of which you don't have that data on. But at least it's a foundation. So that's good. And I think valuation has gotten much better over the last couple of years. But most valuation techniques are actually more or less the same, and they take multiple perspectives and try to triangulate. One of which is what you just said, which is, "If I was to assert this patent and try to generate royalties or damages, what is a reasonable discounted cash flow expectation based upon time and risk

and money involved and generating revenue. So that's a starting point. But there are other reasons that people potentially buy assets, including for defensive purposes, replacement versus doing their own R&D, and then the comparable database that Ocean Tomo and others have created. And you take those four different perspectives because you have different buyers that would value it differently and try to triangulate. But it is still an art form. It is not a science. It's a lot better than it was five years ago, but it is still an art form, which creates some of the problems that Tracey was talking about.

>> Female Speaker: Okay. Tracey.

>> Tracey R. Thomas: Yeah. For us at American Express, they patents and technology are inextricably tied when we look to valuation. As we look into the future in terms of, you know, what we think our IP business can do, I can tell you that patent sales, pure patent, paper patent sales and licensing probably represents less than 5% of that. So at the end of the day, for us it's about creating new opportunities in the marketplace, leveraging what we consider our core assets, which is information management around payments. So for us, it is about new products.

>> Female Speaker: Okay. How does the high cost of patent litigation figure in to the operation of these markets and the valuation of the patents? Paul?

>> Paul Ryan: Well, certainly, from the perspective of the small companies, it basically shuts them out of the market. And that's why I think so many innovators have come to Acacia. Because if you -- if they have a realistic expectation of their value, say they think their patent is worth, to a company that's using it, is worth \$10 million. And if they know if they try to assert it in the judicial system, it may take them as many as 10 years and cost them \$20 million, then effectively the award of the patent has been rendered moot by the cost of enforcement. So it has a dramatic affect. Particularly, the less capital the owner of the innovation has, the more dramatic the impact .

>> Female Speaker: Okay. Keith?

>> Keith Bergelt: I look at it from the other perspective in terms of inefficiencies associated with the endless stream of litigation. Well, you know, Paul's taking the position of the small company. I would look at it from companies that are actually reducing to practice, practicing entities, formerly practicing entities. Qualcomm is a formerly practicing entity. Not terribly successful as a practicing entity, but incredibly successful as a formerly practicing entity because of its licensing business. But then there are totally nonpracticing entities, never attempted to reduce the practice, never brought capital to bear. I mean, the structures -- this isn't, you know, an environment where there is no secondary market. This is the best place in the world from which to grow businesses, to be able to attract capital. We have a viable secondary market. We have access to capital. Even in a down economy, you can access capital to bring to bear, grant good ideas. You basically take those inventions, bring people to them, bring capital to them and smart oversight from private equity, and you can build businesses. That's what I would view as a more productive vehicle to leverage value rather than simply to assert and litigate your patents. You create turbulence in the market, what some would call troll turbulence in the market.

>> Female Speaker: Laura?

>> Laura G. Quatela: The practical reality for me is that although there has been the evolution of FASB standards and more rigor, I guess I would say, around valuation methodology, the fact is, when I sit down in a room to commence a valuation conversation, whether it's with accounts, consultants or whomever, I end up in a different place each time. But what I do know is how much it costs to litigate. I know that very well as a lawyer. I understand it. I know in various -- virtually every jurisdictions what will cost to almost a penny. And so, practically speaking, I tend to revert to that type of valuation in a patent discussion. I know it. I feel it. I have a gut instinct around it.

>> Female Speaker: Okay. And does that lead to avoidance payments?

>> Laura G. Quatela: It does. Sadly, it does.

>> Female Speaker: Marcus?

>> Marcus Delgado: I would say to your point that the independent inventor faces a hurdle in patent litigation because they may have to pay \$10 million, \$20 million to litigate. I would say as an operating company, we probably have to pay \$10 million to \$20 million to litigate it, as well. So it isn't exactly a picnic for us on this side. And I would say that in litigation, the costs to us versus an MPE are significantly different. We have the discovery burden on a company of Cox's size is fairly large, and the churn and the depositions and discovery that goes on inside our company is significant. Whereas an MPE who has acquired this patent and may not even have any connection to the original inventor has a very small burden in terms of discovery. So I think that there are some inequities there.

>> Male Speaker: And that retards innovation. That's the bottom line, is you're not putting capital to work where it should be put to work. I would much rather see AMEX or B of A or JPMorgan Chase put the \$400 million or \$500 million a year that they spend on payoffs to be able to make these suits go away, putting it into new products and services that we can all benefit from.

>> Female Speaker: Tracey?

>> Tracey R. Thomas: Yeah. Certainly the MPE problem is increasing. We know that it's increased about 300% since 2001. In financial services alone, we now know there are at least 15 companies, nonpracticing entities targeting financial services. And so we know that we do need models like the RPX model or the intellectual ventures model to say, "Hey, how do we get some of these patents off the street and come up with a more efficient way of dealing with them?" That is well accepted. On the other side, though, you know, and I'm not talking out of both sides of my mouth here. I'm trying to be fair. We know at American Express that some of our most valuable intellectual property has

come from smaller companies where we have acquired the rights. Individuals who did not have the capital or, you know, didn't have the access to the venture capital that Keith was talking about. Some of that intellectual property we're hoping to list on Jim's exchange one day. So at the end of the day, I think you have to look at both sides of the equation. And that's where the more efficient marketplace hopefully can marginalize the troll problem and make it so that it's, as I said before, expensive not to participate in the efficient marketplace.

>> Female Speaker: Okay. Laura?

>> Laura G. Quatela: Just to underscore Keith's point and to give you an example, not only is it money that we're diverting to defensive purposes, but in my group, I have employed the inventor of the digital camera, who has worked for me for fives on defensive litigation. Imagine what he would have invented in those five years if he were out in his R&D community doing productive things.

>> Female Speaker: Okay. And Laura, can you give us any sense of how the number patent searches and litigation against your company has grown?

>> Laura G. Quatela: Yes. In 2000, we had, I believe, two defensive cases in our group. Since that time, we average about 15 to 22 or 23 a year new assertions. And although we have seen a leveling off in the last year, I think that's more to do with the economy than anything else. That's our experience, and we find it through participation in groups, some of which Keith has mentioned. We find it to be a fairly familiar growth rate for other companies.

>> Female Speaker: Okay. Marcus, can you give us a sense of how the amount of litigation that your company participated in?

>> Marcus Delgado: Sure. I joined Cox in 2004. And before I joined there, I believe they had one patent litigation, one patent lawsuit. And since I have joined -- I don't

know, maybe it's because I joined -- they have -- we have had four to five per year that have come up. Some even -- I would say about 90% MPEs that have sued Cox since then. So it's, you know, it has grown significantly and, you know, the litigation costs have just skyrocketed.

>> Female Speaker: Keith, did you have a point on the growth?

>> Keith Bergelt: Yeah. Just a -- I think Jim may be able to provide some data because I think I have seen some slides that you presented, Jim. But maybe I'm wrong. Microsoft and IBM historically, over the last five years, are the biggest targets. Microsoft being the largest target. The deeper the pockets, the healthier the entity, the more activity. And so, these are high growth, very successful companies, and they are routinely put upon by nonpracticing entities.

>> Female Speaker: Okay. Paul?

>> Paul Ryan: I think it's important, and obviously it's a large cost to large companies, but proportionately, it's a dramatically larger cost to small companies. You've probably heard some testimony from inter digital and innovation companies where their legal and litigation budget can be 20% of revenues. So it's a dramatic problem. I think also it's important to understand that there really shouldn't be any distinction on a practicing and nonpracticing entity. I think the chief judge in December was here and gave some testimony and said there's no legal logic as to why that exists. And in our organization, we have an acronym, NPI instead of NPE, which is a nonpaid innovator. So I think it's important to look at it from both perspectives. We certainly understand that large companies may feel put upon. What we have seen historically is if we can engage in a rational discussion, 95% of the time we can come to a rational agreement and eliminate all of that excess cost for both parties. I think a lot of large companies have become over defensive for maybe appropriate reasons and have kind of chilled the conversation, leaving the small innovator the only choice but to litigate. So what we try to intermediate and immediately have discussions and licensing discussion that we think are realistic.

And we've been very successful in taking some of that hostility away and getting down to business and getting realistic licenses done on programs. So I don't think it's impossible to do or problem that can't be solved if you've got intermediaries with the right motivation and you've got large companies with a receptivity to licensing technologies they think they use.

>> Male Speaker: But Paul, isn't most of your -- and this is just the dynamic -- but most of your peace is found on the other side of the war, isn't it? I mean, you litigate, and then you settle, then you get rational discussion.

>> Paul Ryan: It didn't before. Nor before --

>> Speaker: I mean just in the last few years.

>> Paul Ryan: Well, the change in the law has forced us to do that.

>> Female Speaker: Jim, and then we'll come back to that point.

>> James E. Malackowski: Well, from my perspective, the enforcement marketplace has evolved, as well. And I would point to three facts. One is the partnership of the inventors has changed. The contingent law firm option has greatly diminished, in large part because of the economy. But what has taken its place are institutional investment funds from very large firms like Credit Suisse and Deutsche Bank that will now partner with individual inventors to enforce. And why that's significant is their standard of diligence to accept and enter into an enforcement action is, in my opinion, far greater than what used to exist at a contingency law practice. The second change is I think we have had substantial reform, if you want to call it that, through the courts system, and in particular, the eBay decision is a notable decision which has changed the dynamic of the threat of injunction. That's has significant effect on those who seek to enforce. And then lastly, I point to interesting policy experiment that are going on. Google recently announced that if in fact you sue them for patent infringement, they're not gonna settle

with you, period, end of story. It is going to trial. Well, now the calculus of, "Well, this is going to cost me \$10 million as the plaintiff to get to trial, and I know I'm going to have to spend that money," maybe that changes how often you, in fact, litigate. So it will be interesting to see if those policies are, in fact, successful or make a difference. And the last balance that I would mention is although I can understand the stress that the litigation budget places upon the operating entities, as patents are found and shown to have significant value, either through the litigation process or through the open marketplace, most of those operating entities, like Microsoft and IBM that was mentioned by Keith, have their own portfolio of thousands or tens of thousands of patents that ten years not were not given much respect or value credibility. But today, because of the catalysts in the marketplace, people look at their own portfolios in a much different way. So there is a little bit of a counter balance and a value recognition that exists because of such enforcement actions.

>> Female Speaker: Do other panelists have comments on why we have seen this growth in secondary markets over the past seven years, nine years, ten years? Jim mentioned an influx of private capital. Are there others?

>> Paul Ryan: Excuse me. I think it may be more fundamental. I think Jim and the other people have been here for a while. You know, Texas instruments, based on its financial difficulties, went to an aggressive licensing model and was successful. And then, not too shortly thereafter, IBM built a very profitable business out of patent licensing. And certainly companies like Qualcomm. On the other side, you saw great institutions like Bell Labs Xerox and Silicon Graphics, who are great innovators, who didn't get any value for the patents essentially go out of business. So if you're got the largest companies in America wanting to earn a return on the R&D investment, it makes sense that midsize and smaller companies are going to start wanting to earn those returns. And I think it focused more companies on what Jim has pointed out, is the increasing importance of IP as a component of value in any company. And I think that's the fundamental issue is you've had a shift in the economy and it's now reflected in those markets.

>> Female Speaker: Are you suggesting a shift in the source of innovation, away from the Bell Labs models toward a smaller entity model?

>> Paul Ryan: I think it's interesting. I think it's being reinvigorated. People like Intellectual Ventures with their invention group, companies like Tesera and InterDigital. I think it's much more logical in an economy to have specialized companies and innovation, putting that innovation into distribution channels. It certainly worked in the biotech industry, and I think it would have merit in the tech industry.

>> Female Speaker: Jim?

>> James E. Malackowski: Susan, I think you can find the answer to your question of why have we seen all this activity in the last five to ten years at every cocktail party you attend. Because people will talk about manufacturing has left the U.S. for China, for example. And service has left the U.S. for India. And I hear that, and I look at them, and I say, "Well, what's left?" Right? And they don't have a quick response. And what's left is not just innovation, because if you innovate and you can't protect it, it gets quickly moved to a lower cost marketplace. What's left is proprietary innovation, and that's what's driving corporate value. And as the market recognizes it, it's only obvious that it would begin to trade in other value and invest in those assets.

>> Female Speaker: Keith?

>> Keith Bergelt: The proprietary innovation -- this ties into open source because we are not inventing, we're not doing siloed, parallel invention of fundamental technology the way we did 10 or 15 years ago. We are now inventing higher up in the stack collaboratively. And what's proprietary is actually more particlized above the middle ware layer, if we think about telecommunications, electronics and IT. And so it's a different modality for invention that's occurring, far more collaboration higher up in the stack, a lot less concern about contamination and market price fixing and all the other

concerns that we had from an anti-trust standpoint during the '80s and '90s. And we are much -- it's much more of a freer invention environment. So we're changing the way we invent. We're creating attachment points for beyond the G-8 countries, for the global economy to actually connect up to be able to allow the best and the brightest minds to actually attract capital and allow it to flow over the net, out to the developing world rather than encouraging intellectual capital flight from developing countries to places where capital actually existed where a secondary market was, i.e. the U.S., for the most part, during the '90s. And so we're creating -- we're part of this larger macro dynamic where we're still companies that have a somewhat siloed mentality. But a lot of companies are actually participating very aggressively in this changed dynamic of how we invent together. Far more collaboration, far more coordination and invention up in the stack, which mean that what we choose to patent is far more limited.

>> Female Speaker: And do your comments pertain to open source software or more broadly?

>> Speaker: You think about, you know, your business, your business in particular. A lot of it is software driven. And so there aren't a lot of things, as we get more and more intellectual capital driven to Jim's point, more and more focused on creating value out of innovation and invention, those inventions are occurring collaboratively. The idea, it's Brian Arthur's view, of increasing returns. One plus one plus one equals six, not three. And that's what's happening in this economy. And it's globalized invention and innovation. And so, software runs a lot of the business that we look at. And increasingly, this will break down barriers. Software and hardware development will occur through open source model.

>> Female Speaker: Okay. So what are the panelists' views on whether this increased growth in secondary markets -- is it good for innovation, bad for innovation? Innovation in the sense of getting new products to market. Tracey?

>> Tracey R. Thomas: I think it's absolutely good. You know, when you look at some of the surveys that have been out that say that the current IP transfer market is about \$100 billion, but it represents only a tenth of what it could be. I think, you know, the secondary markets can only help through reinvestment. It is part of our policy, just like it was part of the policy of the IBMs and other companies who have been successful leveraging intellectual property to use IP as an investment funding source for more innovation. And so I think anything that contributes to that is a positive thing.

>> Female Speaker: Do we have to weigh against that the cost of the increased litigation that some manufacturing companies are facing?

>> Tracey R. Thomas: I can't speak for the manufacturing companies, and I'm very empathetic to them. But --

>> Female Speaker: Or any private company that faces litigation.

>> Tracey R. Thomas: But, you know, I think if you look at the scale of what the opportunities are -- I go back to this point about marginalizing-- you know, the issues like the litigation issues. People will focus on value if it's there. If we're able to unlock the value that's in our economy now, I think what you will find is that people militate toward that. You will see less frivolous lawsuits. You will see better diligence around future opportunities, as Jim mentioned, because there will be more funding for it. And I think we'll all get smarter as a result. That doesn't mean you'll eliminate litigation. It is going to be there. But you have to take some of the bad, you know, with the good.

>> Male Speaker: And I think I tend to agree with that. I think that these markets ultimately can be effective. You know, my concern is just that I don't think the courts have caught up yet with where they are. I think in -- I don't know. Maybe in five to ten years, when courts are, you know, maybe the damages standards change or they recognize sort of some of the inequities that can occur, I think these markets are great. I mean, I think they offer a great opportunity for investment and innovation and investment

in technology. You know, my big beef is that, you know, the courts are in 1800s patent law and, you know, we are dealing with 21st century technology and business models. And so that's my concern.

>> Female Speaker: Keith?

>> Keith Bergelt: I think it's -- picking up on the point that Marcus made -- it's not even just judicial reform. It's legislative reform. It's regulatory reform. And it's also the market meeting those reforms halfway, the market being much more proactive and involved in recognizing. We talked about free riders. You can't sit on the sidelines and opt out of your obligation and responsibility to help the process because you've got record levels of invention that's being filed in the form of patents. And what you need is the ability to codify what you know so that prior art can be identified and recognized. A lot of the problem has been identifying prior art because of the challenges associated with, particularly our patent examination process and the limitations of time and the employee churn rate. So we have a lot of issues to deal with. But it's not about looking over at, you know, looking to Washington to solve the problems or looking to the EPO to solve their problems. It's the community getting involved, take bad patents out, find prior art, request reexams for patent applications that are in the clear that you can actually see, contribute by identifying prior art that's relevant so that bad applications don't get granted. Help to raise the qualitative level. There's a sea change going on and, we need to actually start to infuse the notion that this is -- as young inventors come into companies, this is, again, their obligation. It is not just invention for that company. It's ensuring that other assets don't come into the fray that can be used negatively by alternative business models like troll models.

>> Female Speaker: Jim?

>> James E. Malackowski: So can I take a little bit of the counter point of view on the court system and patent reform? And my experience base is having been an expert witness on damages for 20 years and testified at 30 jury trials and worked on hundreds of

matters. I think the court system does a pretty good job. I think if you look at the aggregate damage awards for patent infringement during a year and you sum them together -- are we talking a billion or two? How important are patents to our economy? And if there is a tax of a billion or two, let's say that half of that is completely bogus. So there's a billion dollars a year that's flushed away? Look at the opposite contribution. It is not that significant. In the cases where I've testified as an expert, and clearly, I've worked for one side versus the other, but I get to sit, listen to evidence and see what the collective wisdom of 6 to 12 individuals comes back with. You know, they don't always come back with my opinion. But most of the time, in fact, all of the time, I'd say they pretty much got it right. They pretty much understood the balance.

>> Male Speaker: I think you're underestimating the costs, though, Jim, when you think about Laura's point about the opportunity costs that are lost, as well as fees. The fees are where the costs go, not into damages.

>> James E. Malackowski: So I accept that. And so how do you deal with the fee issue? And I go back to the way that the market is emerging, either through more sophisticated diligence before they bring an action through policies like Google that are trying to address and put an equal risk on the plaintiffs on the fee issue. So let the market adept. Again, we're just talking about a transition that's only 10 to 15 years old of this complete inversion of our economy. We can't go and start tweaking with all of the laws and rules to try to fix it as it's maturing. It's a teenager. Let it grow.

>> Keith Bergelt: But I still think we still have the issue of prior art, which is an ongoing problem. And if you have -- you don't have any institutional memory to speak of in our patent office. You have got incredibly high employee churn rates, limited knowledgeability. These are issues that need to be addressed institutionally. So reform is necessary. Maybe I'll accept your point on the judicial side. I think a lot of proactive decisions have actually been rendered in last three years. But I think we do need legislative reform of some level, and we do need institutional level of the patent trademark office to keep up with the process so that we're not just rubberstamping

applications that come through and then creating the need for things like RPX, which generally takes a lot of troubled assets off the table that are what I consider to be one thin claim assets.

>> James E. Malackowski: So I don't know if we should keep going.

>> Male Speaker: I think this is the most interesting part of the conversation.

>> Female Speaker: Please do.

>> James E. Malackowski: So I would have a couple responses to that. One is, my view, the patent office is a rapidly growing organization. Look at the number of applications that have been filed over the last five to ten years. And it is also -- I don't want to say burden. It is a government organization. Right? So it has growth restrictions that are different than if it were Accenture or IBM. It, too, just needs to evolve and grow. There was a study that we published in the LES trade publication on patent quality over time. And our conclusion was, if you measure patent quality by the content of the prior art citations and a number of other variables that all lead to whether these patents are likely to be maintained or abandoned, patent quality has not diminished. In fact, it's slightly trended up. My final point on the prior art comment -- imagine how it used to be where patent agents had to go look through a library or a box of files to find art. Today, Google alone will give you a global access to possibilities that never existed. And you mentioned patent freedom, and there are other organizations that are now out there attempting to assist the market in identifying and discovering those issues so that better patents are issued.

>> Female Speaker: Steve?

>> Steven J. Hoffman: I'm kind of the new kid on the block compared to this panel. And it's actually very interesting. I'm learning a lot today. But one of the things that amazes me about this industry, and this conversation I think reinforces it, there is an amazing

amount of emotionalism in this industry and in this conversation, particularly when it relates to NPES or trolls or whatever we want to call them these days. And so Paul, I think rightfully, talks about the service he's providing to small inventors. To me, I'm missing the point. I guess I'm going to make myself unpopular with the entire panel. I'm missing the point, which is, to me, if you own an asset, it comes with rights, and in the case of patents, it might be negative rights. But it comes with rights. And however you came to own the asset, whether you invented it yourself, whether you purchased it from a company as part of an acquisition, whether you just purchased the patent outright, you have rights to, you know, you have the right to benefit from what comes along with the patent. And that seems to be lost in a lot of the conversations where it's, you know, trolls are evil, trolls are not evil, trolls are doing good for society, trolls are doing bad for society. I think that getting to closure on this and making any progress in terms of the patent system is going to be extraordinarily difficult as long as a lot of the conversations are driven by emotional perspectives rather than, I think, economic or legal perspectives. And I observed, of all the industries I've ever been in in my career, this is by far the most emotionally driven industry that I've ever seen.

>> Laura G. Quatela: I think that's true, although I want to comment our panel actually, I think, having a very intellectual and economically based conversation today in spite of some of the dialogue that occurs out there in the world. Marcus?

>> Marcus Delgado: To your point about emotionalism, I agree. I think that the reason patent case -- patent cases in general can get very emotional. And I think the reason is that accusation of patent infringement is one of theft. And it is not like a -- another commercial type of transaction or accusation. Yeah, you have breached this contract. Oh, you know, we have ways to deal with that. With patent infringement, you are basically saying, "You stole my idea, and you therefore, you know, your people, they didn't innovate anything." And so that's one of the reasons why I think it tends to get kind of emotional. And I agree. I think we are keeping it kind of above the fray, so that's good. And you know, I also agree that, yeah, there really shouldn't be a distinction between, you know, MPE/troll versus someone else that obtains the assets. My concern

is that, you know, in litigation, I don't think that the differences in the organizations are really recognized and that the burdens placed on the different companies are recognized. And so, you know, that's my other concern. And then, Jim, to your point about the market adopting, I think that the market will ultimately adapt. But right now, I don't know what the incentive is for the market to adopt. I mean, if I'm -- if I go and acquire patents, and I know that it costs you X amount of money to litigate it and that the discovery burden will be X and I acquired it for A, there's my business model. That's what the market is. There's no incentive for me to go do any further due diligence. And if I know, for example, that in a particular venue 75% of time juries will award -- will have damages award greater than X amount, that's all I need to know. And so the market doesn't need to be more sophisticated. And as a result, you have all of these cases that have arisen. But I do think that it will become more sophisticated over time, and I hope it does.

>> Female Speaker: Okay. Are there changes to the legal system or to any particular legislative changes that might help lower the cost of patent litigation? That seems to be something of systemic error in a well-functioning market. Tracey, any thoughts on that?

>> Tracey R. Thomas: Yeah. I'll address that kind of indirectly. One is, with respect to litigation from our perspective, once you are in the court system, you've lost if you're in the IP, you know, revenue monetizing business. Because litigation is not efficient. It may be necessary and it may be there to stay, but it's certainly not efficient. One thing I like to say, though, is that to the degree you are able to be in a more proactive licensing mode -- and I don't want suing people. We have never actually sued anyone at American Express. And we certainly don't have the MPE problems that a Microsoft or an IBM have. But at the end of the day, to the degree we find ourselves more in a proactive licensing mode, you find a number of things happen. One is your own patent filings become more focused because you know what's valuable to you and what's not. You find that your diligence becomes better in terms of third party clearances and other issues because you know what's important to you and what's really more valuable to you. And so to some degree, you know, we believe, and I think some other companies do, too, that

to the degree you're able to extract value from your intellectual property, you become smarter about how to diligence some of these third party issues and how to address them by being proactive in your own filings. And I didn't answer your question. I almost feel that no level of, you know, jiggering the patent laws is going to solve the litigation issues. The better stance for me is to stay out of the litigation if you can. Easier said than done, I understand.

>> Female Speaker: Okay. Paul, and also, I would be interested if any panelist have reactions to whether a loser pays litigation system would -- what kind of affect that would have. Paul?

>> Paul Ryan: well, certainly from the perspective of small companies and individual inventors. The litigation issue is hard to believe for maybe some large companies. It is a bigger issue for them. They want to invent and innovate. They don't want to be in court with huge companies with multimillion dollar bills. That's the last place they want to be. And I think the attitudes -- really, a lot of it is an attitude. If there's a willingness to sit down and negotiate, deals can get done. And I think when people talk about, quote, dangerous patents, what does that mean? Or Google start saying, "we don't care whose patents we infringe. We're gonna take you to the Supreme Court." That's not a good attitude in terms of licensing and respecting other people's intellectual property. I doubt they would want people to do that with their underlying intellectual property. I think, certainly, any way we can improve the judicial system, the expediency, specialized courts that can move more quickly. I think the biggest issue is time. Many young innovative companies now have watched their brethren be dragged through the courts for five or ten years and gone bankrupt. Our testimonials sitting outside will attest to that. And large companies can play hardball. They do have lots of money, and they can outlast small companies. So I think anything that would make the judicial system more efficient would be encouraged and would be beneficial to the small entities.

>> Female Speaker: Keith?

>> Keith Bergelt: I just had a small response to Paul. I think there's a fundamental assumption in what you are saying that these patents are valid and have substantive claims. And I think the system allows for one thin claim to support litigation. And to make the litigation go away, which is the normal ultimate response to avoid going forward with litigation or to eliminate litigation's rearing its head. The bar has been lowered so that reform is needed to allow for requisite substance to support these litigants. So that the actions are not one IP aggregator that acts as a troll doesn't have 30 or 40 lawsuits going concurrently and is in the business of litigation avoidance payments. We need to get to the point where we're actually looking at substantive lawsuits based on real value that's being conveyed. We talk about this enabling model. We have to have something that we're enabling, not one thin claim to meet sufficiency standards that are so low right now that there is no bar for litigation to occur.

>> Female Speaker: Jim?

>> James E. Malackowski: So I have a thought exercise for discussion purposes only. This is not necessarily my point of view. We've talked about the fact that the litigated awards have totaled maybe not that significant, but it's the frictional cost of the litigation itself. And I would propose as an exercise, that's okay. Let litigation be expensive because I don't know that you want to encourage, or that we'd be all happy if an inventor knocked on your door and you could snap your fingers and you're in front of a jury tomorrow. I think let the market become a more efficient way to transact intellectual property rights and leave litigation to be a painful, last solution for everyone.

>> Marcus Delgado: Yeah, I think that may work. But I think that the problem is there's a disparity between the costs on both sides, particularly, when you have contingent fee attorneys on one side of the equation, so there's essentially zero costs for someone to bring a case and, you know, millions of dollars for the other company. But I do generally think that that -- that may work. To the question about what types of reforms are -- would be helpful, I would say I think there are many, but I'll bring up a couple. One is one we've already touched upon, which is the valuation issue that the courts can't seem to

really resolve. I mean, we've had a special appellate court just for patents, and they have not been able to resolve this issue. Chief judge Michelle mentioned this recently and said, you know, that we need to figure out a way to value these things or we're going to have a problem. The other issue that we face sort of involves use based damages and the fact that we receive a lot of products from vendors and vendors sell us products and we use those products out in providing services to subscribers, and they also provide indemnity obligations to us. And so when we get sued, the vendor now is in the position of defending us. But they're defending us on a use base model that involves our -- how much the product is used versus the model that they expected when they sold us the product, which is, "We sold it to you for -- it costs this much. We know how much that costs." And so I think that it would be nice if we could get some resolution around the -- "Well, what's the proper model here?" And I think it -- you know, the ultimate cost to the vendor is pretty high and may actually result in less innovation. They may not want to. It's too expensive for them to produce this piece of equipment if they're dealing with a use base model, ultimately. So I just think that's an issue that would be nice if we could resolve.

>> Female Speaker: So that's an issue of patent damages and how to identify what you're going to apply, for instance, a reasonable royalty damage to as a base.

>> Marcus Delgado: Right.

>> Female Speaker: Okay. Laura?

>> Laura G. Quatela: I guess, for the record, when I agree with Jim's view that lowering the barriers to litigation is probably not the direction to go in. Giving only one example of the distractions we've been describing here today. Imagine how much worse it gets if everybody can be in litigation all the time. Innovation falls by the wayside at that point.

>> Female Speaker: All right. So you have lowered the cost to both sides, you've lowered the cost to both sides. So it cuts both ways?

>> Laura G. Quatela: Right.

>> Female Speaker: Okay. Any reactions to a proposal to have a loser pay system in patent litigation? Loser pays both sides' attorney fees. Anybody support or deny that -- or reject that idea? Looks like we don't have a -- too many thoughts on that. Yeah?

>> Male Speaker: I don't think you will get a lot of support for that.. I mean, I think it sounds -- it sounds good and that it, you know, people will -- only people with really meritorious claims will bring these actions. But I think it will -- it probably would limit, you know, a lot of small inventors from ever bothering to innovate in the first place. And I don't think it will get a lot of traction.

>> Female Speaker: The idea of transparency, someone mentioned earlier that it's sometimes difficult to tell, for instance, Intellectual Ventures owns, although the question is not meant to be directed at any one company. Is there a problem with transparency in the sense of who owns what at the level? Steve?

>> Steven J. Hoffman: Yeah, I think it's straightforward. By definition, that makes the markets a lot less efficient than they might otherwise be. And I don't blame IV for not wanting the world to know what they own. But the more information about who owns what, what transactions occur and what pricing occurs in transactions, a lot of problems we are talking about today become a lot more manageable. I don't think that there's a solution to that, however, because I don't think it is appropriate or possible to force a company like IV to share the 20,000-plus assets they have. It's not in their interest to do so, and I can't imagine why they would agree to do so. But there's clearly some inefficiencies in the market because of that. That's not good.

>> Female Speaker: Jim?

>> James E. Malackowski: The other transparency that we've thought a lot about relates to the marking issue. And for those of you who have seen the patent reform bill that's come out of committee, it has a provision allowing internet based marketing. Because today, it's really not practical to put patent numbers on products or brochures when those products contain hundreds or perhaps even thousands of patents. And from our perspective, getting that information to the market so that the market can understand, one, which patents are being frequently used, either by large sales volume of the owner or by a broad licensing model. And two, just how many patents it sometimes takes to put a product to market, such as a PDA, for example. And so that triers of fact will get an appreciation that yes, this may be a good invention, but it's one of a thousand that are needed to manufacture this product. And so I think that that transparency will help a great deal.

>> Female Speaker: Any reaction to a proposal that would require registration with the patent office of just even who owns the patent? The true party and interest rather than the shell company having some kind of registry of that information. And then, beyond that, any reactions as another level, there have been proposals to actually record even the terms of the transaction. Why or why not would that be a good idea? Bad idea? Even possible?

>> James E. Malackowski: I'll start with the comment, in that I don't know that having an identity shielded, whether it be by an aggregator, or in fact a manufacturing concern, is really that big of an issue or a problem. It's a curiosity. But there are legitimate business reasons for an operating company to not necessarily assign its patents to its brand name. They're developing technologies in areas that they don't want the competitors to realize. Perhaps the inventor name will give that away anyways. But if they want to try to protect that as strategy, they should have the right to do so.

>> Steven J. Hoffman: And to the second -- the second half of your suggestion, I should think it would hurt the market. I think it would make the market a lot less transparent, certainly a lot less efficient if companies had to reveal what they were buying or selling

and what the terms were. I think a lot of the transactions that occur not in the auction, but in private auction, are between buyers and sellers that do not want the public to be aware or the competitors to be aware of what they're doing. And I think you'd actually slow down the market. You would make it a lot less efficient. You would make the reallocation of capital, which is what this is all about, happen a lot less efficiently if you force companies to go public. I think that there would be far fewer transactions under that circumstance.

>> Female Speaker: And can you spin that out, why they don't want others to know?

>> Steven J. Hoffman: Yeah. You know, I think the basic reason is that when you sell patents, you are actually making a comment about the strategy of the company, that you are no longer interested in this business, or that it's become less valuable. When you buy patents, you are making comments about what you plan on doing in the future. And I think that kind of strategic information is something that companies are loathe to have public and will not share. And I think if they're forced to make that information public, they will transact less frequently. And I think that will damage the efficiency of the market. It's just about keeping strategic secrets.

>> Female Speaker: Okay. Keith?

>> Keith Bergelt: Public companies -- I think the area where protection is needed and where there is -- there are already built-in materiality clauses, in terms of requirements from the FCC. Anything that's material has to be reported. So if there's a settlement, if there's a windfall, the revenue source or the outflow source has to be provided so that public company investors are protected, which is really the public policy argument to be served. And I think that's -- that's the overarching argument for me.

>> Female Speaker: Marcus?

>> Marcus Delgado: I would say in litigation, there could be more transparency. This should probably be clarified. With respect to what an MPE paid for a particular asset, and what settlements were reached, I think there are a couple of policy issues here. One is, if that's known, the court can use it to determine whether or not this is a fair demand that's being asked by the MPE. And then, the second is that many companies, their business is litigation. I mean, they have gone into the business of essentially litigating. And so why isn't it fair to ask, well, what other settlements have you reached in litigation?

>> Female Speaker: Can you get that through discovery?

>> Marcus Delgado: Usually not. I mean, usually you can't get it through discovery. Courts will tell you that that's not -- that evidence isn't relevant here, or won't allow it.

>> James E. Malackowski: Or in many cases, you can get it through discovery. But your experts aren't allowed to rely upon it anyways.

>> Marcus Delgado: Right, can't rely upon it. Correct..

>> Keith Bergelt: The fact sets are different enough that it's -- it gets back to the whole issue of valuation. Are you comparing apples and apples? Because there are -- very often, it's not just the same thing that you're looking for, especially if you're a large company. You may be looking for some in kind value. You may be looking for JDA, market access. You may be looking for other technology to come in. You may be looking for some other agreement and utilizing your patent portfolio for different purposes with different targets.

>> James E. Malackowski: Can I just ask you, why what they pay for the asset is relevant, as opposed to what the value of the asset is and what the value is to the party using the invention? Why does that -- how much the MPE pay for the asset matter, in terms of the court's decision in your opinion?

>> Keith Bergelt: Because it's -- it should be evidence of perhaps what I should pay is -- it's evidence of what someone paid for it in the marketplace. Which is I assume somewhat relevant to valuation. And so, therefore, you know, if you're asking for -- if you're making a demand upon me, I should probably know that and have that information just from a valuation standpoint. I mean, it is presumably two people, you know, and arms length of the transaction in the marketplace, someone purchased it. That, to me, would seem to be relevant.

>> Female Speaker: Okay. Laura?

>> Laura G. Quatela: Well, I think Keith mentioned it earlier. But this is of the reasons that initiatives like patent freedom are gaining traction, where private initiatives are attempting to discern this information where it can't readily be found through discovery. That's one point. Point two is -- what is point two? The transparency issue. I think that, you know, we have embraced as a society the notion of the need for confidentiality in M&A transactions. And increasingly, in my experience, whereas IP used to be on the fourth or fifth page of the due diligence list as a concern in M&A, it's now the driver of a transaction. And so, to increase transparency around what companies are doing in the IP space means you longer enjoy the confidentiality of your strategies or tactics and your competitive plans. So I really am fearful of any regulatory push to increase transparency in that regard.

>> Female Speaker: Okay. Tracey?

>> Tracey R. Thomas: Yeah, I don't think transparency around specific buyers and sellers and their terms is as critical as the need to have better ways to aggregate information. I'm a big believer that the more aggregate information we have will allow us to make better decisions, do better benchmarking as we go through the monetization process around intellectual property. So I don't think the specific, you know, transparency around

specific deals is that critical. But we do need better mechanisms for aggregating information about deals and transactions.

>> Female Speaker: What kind of information do you want to aggregate and do you have any suggestions of any mechanisms?

>> Tracey R. Thomas: That's a great question. You know, I look at it from two perspectives primarily. One is, you know, even having information so that you can make internal decisions, you know, how do companies make specific decisions about how they were going to transact around intellectual property? And that's not what we're talking about here. But that type of information is very critical. One of the biggest barriers to leveraging intellectual property in many companies is just, you know, how do you sell it internally to your business, your finance, your legal people? One of the biggest things we come up against all the time is brand issues. And then, at the macro level, clearly having aggregate information just about, you know, what patents are worth, you know, thanks to, you know, auctions like Jim's, in general, just having that type of data allows you to make better decisions. So I look at it at a micro level or internally within companies. We need better information about those processes and what's happening internally. And then, also, with respect to issues like valuation. It's going to be critical.

>> James E. Malackowski: So it's interesting. If you go to our website and you search, you can find the sale price of every patent ever sold at auction. And as I speak around the country, I have always made this open offer to others in the room, corporates or MPEs or the like -- send us the data of what you sold or bought for and we'll publish it. I have not gotten a single submission.

>> Female Speaker: All right. Marcus? Do you have a comment? No.

>> Marcus Delgado: Oh, I'm sorry.

>> Female Speaker: Any other ideas on what information would be useful to have and what mechanisms to get it? Should it be a government regulatory mechanism? Are you suggesting something else, let the market bring the information forth? I got -- okay, Tracey?

>> Tracey R. Thomas: Well, I'm going to be biased here. I talked in the beginning about an IP zone that we were working to create. When we recognize that there weren't efficient -- there wasn't an efficient marketplace to get the type of information that we need. So a big part of this zone hopefully will be the collection of information. Now, companies will have to be willing to do that. So they're going to have to see value on the other end, and that is in the exploitation of intellectual property. At the end of the day, I don't know if government regulation is the right way to do it. I think you're going to have to find willing participants who have an economic incentive to do it. That is, we'll get smarter about doing transactions if we participate in this. And there's a trusted source where we know our specific information won't be revealed to the public.

>> Female Speaker: Okay. Laura?

>> Laura G. Quatela: Well, I think that the market is doing a good job of bringing these tools to bear. I think Jim has been a visionary and leader in that regard. As I said, he's got Patent Freedom. The new Stanford IP database is a wonderful collection of very, very useful information, the types of initiatives the Tracey mentioned. I think all that is happening is actually quite exciting. So I personally don't see the need for government regulation so much as just continued creativity in the marketplace.

>> James E. Malackowski: Just to temper that with some real data, so Patent Freedom is a great company. Patent Freedom has two basic objectives. One is to share data with operating companies about who these MPEs are, and their shell organizations and who owns what. And it's, I think, very valuable in that respect. The other objective of Patent Freedom, though, was to create essentially an online community where operating companies who were threatened by the MPEs could share data with one another, and so

they could at least understand, you know, whether they were alone or whether there were other people dealing with the same issues and learn from one another. Most of the members of Patent Freedom have taken advantage of the first part -- you know, the date about who these MPEs are. Almost none of them have actually shared information, even on a confidential basis, about what their own experiences were. And so, you know, I think that the kind of data that Tracey and Laura are looking for, I think it's incredibly important. I just don't see operating companies on their own sharing that kind of information. It's just too proprietary, and Patent Freedom I think is just one data point where it's an easy, confidential mechanism for sharing this kind of information and nobody's taking advantage of it, at least in the current history of Patent Freedom -- or most of the members.

>> Keith Bergelt: It's facilitated in formal dialogue between members. And even though you don't post information, as we are a member, we still will reach out to other members and coordinate. So --

>> Laura G. Quatela: And it's launched even more initiatives. There are a lot of underground conversations going on among groups of companies to start this data sharing. Maybe it's not ready for prime time or the, you know, the light of day yet. But that is happening.

>> Tracey R. Thomas: And I think if there are economic incentives behind it, right, so at the end of the day, by sharing this information, we'll be able to better exploit our intellectual property. I think that's the process that it's going to have to take. And then, you can genericize the information -- that's when I speak of the information in the aggregate to figure, you know, accumulative information can be very powerful in discerning trends, and opportunities. And so, I wouldn't discount that. You don't actually have to know that American Express sold patent "a" for "x" dollars. In fact, that's not going to be that valuable, because that patent is inherently unique. So it's not really going to tell you that much about the other millions of patents that are out there. But the cumulative trending I think, you know, would be very valuable.

>> Female Speaker: Laura?

>> Laura G. Quatela: Well, Tracey touched on it. But along with the sort of private data sharing, comes a private market. So there is a -- I think a remarkably increased sharing among companies with like interests in the patent space of their own IP, for whatever reasons. You become familiar with what one of your colleagues in a patent freedom or somewhere else is interested in and you call them up first when you have something to sell.

>> Female Speaker: All right. Tracey mentioned cumulative genericized data in the aggregate. Is there any role for government to just collect and aggregate information? I have -- I scared you by using the word "regulate." I didn't mean to. Tracey?

>> Tracey R. Thomas: There's always a role for government. But, you know, I think what you will find is from the efficiency standpoint, I just happen to believe that private entities with an economic incentive will probably do a better job of it, just because they have more resources, not because the government, you know, can't do it. But that's my personal view.

>> Female Speaker: Laura?

>> Laura G. Quatela: And academia --

>> Laura G. Quatela: -- certainly playing an increased role, with as an example, the Stanford tool.

>> Female Speaker: All right. Well, that gives us a good segue to the afternoon. We have an academic panel this afternoon. We haven't -- we've been talking about this patent market which, I think you could have listened to some of this conversation, as if individual patents were being bought and sold. How often is that the case, versus huge,

entire portfolios being bought and sold in one fell swoop? And how does that affect the operation of these markets and why is it? Is it happening? Why is it happening? What's the value of a portfolio versus the value of the individual patent that drives companies to accumulate portfolios? I'm throwing out a lot of questions at once -- only to try to understand better the role of portfolios in this market, Jim?

>> James E. Malackowski: So I would say you described both ends of the spectrum. On the one hand, you have the individual asset. And other hand, you have the entire collection. But what the market is dealing with most of the time are what we call families. So a particular inventive technology, that may have a number of U.S. international patents and applications that all go together collectively and are transferred as a group. And the reason you need that is, clearly, if you bought one member of that family but didn't own the rights to the rest, you have a very limited right. And today, I don't think the market is yet efficient enough to extract full value or anything close to full value if you start to sell entire portfolios of tens of thousands of patents.

>> Female Speaker: All right, Keith?

>> Keith Bergelt: You also want applications in your family, because that gives you extensibility. So when you buy a naked asset, if it's -- basically there's no ability to extend and leverage it. It's far less valuable and it doesn't offer the protection against picket fence strategies and other kinds of nefarious approaches to attacking your patent, which may be underway at the time you purchase it. And you may be aware of that. So I think it's important that, up until now, where we had family strategies that are rather traditional, it's very important to try and buy families. And there's more value to smart buyers in families, typically. But in the future, what we can expect to see are fewer patents and more hybridized family development, where you have a core patent. And then you have -- contemporaneous with that, you have a series of defense of publications wrapped around core patents that give you the same protection levels at a far lower cost. And in that case, the core patent will, five years from now, ten years from now, will sit on its own if it's not supporting products and services in the market that that company has

and they look to jettison it. You'll have the same protections, but you'll still be buying only one asset. So it's an interesting shift that we're in the middle of now. But many of the leading companies in industry, particularly in tech, are shifting away from pure play family development, and they're shifting toward these hybridized approaches that are more cost effective, utilizing defensive publications.

>> Female Speaker: Okay, Steve?

>> Steven J. Hoffman: I agree with both Jim and Keith's comments. But one other thing, which is, there's just purely a process of trying to getting rid of some of your less good patents by combining them with one or two really good patents. And you know, there's nothing wrong with it. There's nothing cynical about that. But that's the way companies can sell bad patents. Right now, you cannot sell anything other than really good patents. And so, the only way to get rid of your less good patents, without being pejorative, is to bundle them with a couple of very good patents.

>> Female Speaker: Is the value of that group the value of the one good patent, or does throwing in the bad patents add anything?

>> Steven J. Hoffman: To a large percent, I mean, I wouldn't say 100%. But maybe 80% to 90% is the value of the good patents in the group. I mean, obviously every sale is unique. But it's driven by the value of the really good patents in the group.

>> Keith Bergelt: They could all be good. But it's just -- I think the better term is fundamental, where the fundamental invention is where -- you know Steve's point, that's where most of the value is. And then you get the block and tackling of the family development. But Universities, you talk to somebody else -- But Universities are also an important area and government can do a lot there, because Bayh-Dohle is an obstacle to Universities wanting to dump significant numbers of patents. But because of overarching concerns around running afoul from future funding from government, they don't have a vehicle to sell, so they have to utilize awkward, cumbersome mechanisms such as

exclusive license with a right to sublicense with -- largely with trolls. And so Bayh-DohI is essentially a problem, in that -- to the extent that a lot of Universities thought that they could replicate what Stanford did in the '90s. Complete failure. There are dozens of Universities who are holding onto assets that they would love to jettison, but they can't -- they don't want to abandon them, because that's basically an equivalent of an indication of complete failure. They would like to get returns, but they're stuck in between, because Bayh-DohI restricts you from selling only to patent management organizations. And there's no definitional work, in terms of what a patent management organization is. So that's a Washington issue that would help Universities and help the secondary market, because there are literally tens of thousands of patents trapped inside American Universities.

>> Female Speaker: Steve, when you said fundamental patents, were you thinking, those patents that can't be designed around those patents of a stronger validity?

>> Steven J. Hoffman: Yeah, I wasn't actually -- he said fundamental, I did not. I agree that fundamental is one of the ways that you can take, you know, some valuable patents and package some less valuable ones around them. When I said good patents, I'm thinking about the non-operating company buyers. And what they're going to look at, in terms of buying a patent, is patent that is defensible in litigation that has -- will withstand re-examination, if that's the tactic that the defensive party takes. And so I'm looking, you know, when we're talking about selling a patent to a non-operating entity, their valuation of quality is in terms of litigation quality and defensibility. Not whether it's "fundamental." I'm not trying to justify their behavior, understand me. But that's the way they look at a patent, in terms of "is it a good patent, is it valuable patent?"

>> James E Malackowski: Good enough.

>> Female Speaker: Is that a validity issue or a design around issue or both?

>> Steven J. Hoffman: It's all of the above, plus it's the size of the market that potentially applies the patent. It's how well constructed the claims are, will they survive litigation, will they survive re-examination? So there's a set of criteria, in terms of the value patent. But it has to do essentially, how effective will they be in an assertion strategy? How likely am I to generate either damages and/or royalties if I assert these patents? And how big is the market.

>> Female Speaker: Okay, Jim?

>> James E. Malackowski: So I would like to come back to a comment that Steve's now made twice, about the notion that its valuable patents are higher quality patents that are of interest. And if they're not high quality they are not saleable. And I think he's right. And whenever you have an emerging market, there's always somewhat of a pendulum effect. So when the patent marketplace developed over the last five years, we saw a surge in applications first at the PTO. And maybe a lot of that was driven by the dotcom adventure boom. And then we saw a surge in acquisition. And I think it was mentioned where any patent in this category, there was somebody out there who had a real interest in considering to buy it. That's changed. Today, it has to be a patent of very high quality. And coincidentally, last night, we were having a conversation at dinner about how the prosecution efforts of the PTO have now trended down because owners, both for I think that reason, as well as the economy generally, they don't want to pay for and prosecute patents that don't have value. So that flight to quality that we're seeing across the market is, again, a natural evolution or a maturation of what's happening.

>> Female Speaker: Laura?

>> Laura G. Quatela: I think there's a geographic aspect to this as well, because there's no doubt that, in certain geographies, quality is more important, and in others quantity is more important. And as the pendulum has swung, I think more in the United States, Jim, I haven't seen it swing too much in Asia, where quantity is still really a supremely important factor, in terms of the size of portfolio being marketed.

>> Female Speaker: Marcus.

>> Marcus Delgado: So there are a couple of reasons that sort of lend themselves to -- lend themselves to licensing portfolios, rather than a single patent for us. One is that currently, the Courts don't -- Courts allow you to sue on one patent, lose, and then bring another lawsuit on a related patent, whether it's substantiated or not. There are no remedies for us to sort of force you to bring all of the related patents together in a single lawsuit. So if we're going to license, we probably should license the entire portfolio. The second is what I call the "schmuck factor." Which is, if I license something from you, and we're all happy that we did this license, and you sue me the next day, I look like a schmuck. And so, you know, it's like I'm not gonna do that. I can't go to management the next day and explain to them, you mean the company that we just paid "X" amount of dollars is now -- we're in litigation with them? So that also sort of pushes me towards a portfolio type of license rather than single patent license.

>> Female Speaker: Okay. How important is this quantity versus quality issue? How important is the quantity, the size of the portfolio and asserting it, asserting that portfolio against a competitor or a potential licensee? Jim talked in the beginning about the big stack of patents, and is it really possible to plow through them all, and do a good assessment and decide which ones you need? How does all of that play out, Steve?

>> Steven J. Hoffman: Just one quick comment, which is I think that if you look at intellectual ventures, that is their strategy. There's signs saying they are slowing down their acquisition, and they're only buying high quality things still in there. But they've definitely adopted a volume strategy with the expectation, that if they come to the company and say, I've got 300 of them. How much do you want to bet at least one of them is really good, they get licensing revenue. And so, they are clearly betting, and time will tell whether they were right. They're clearly betting on a volume strategy and they're the biggest player on the market.

>> Female Speaker: What's the ability of a potential infringer, a manufacturing company, when facing a threat, or perhaps IBM, here's my portfolio. Is there any option to play? How reasonable is it to plow through the 500 in the portfolio, 300 you mentioned and see whether they are all necessary? How are companies dealing with this problem?

>> Speaker: It's a very expensive endeavor. I don't know how else to put it. But it's an expensive endeavor and probably not an incredibly practical one. So you've got to weigh, you know, those costs, versus the, you know, the cost of licensing, the cost of litigation, you know, I've faced that situation, where we've had to look at pretty significant portfolio, and it just wasn't, in that particular instance, it just wasn't practical for us to do it. So, we had to look at other options.

>> Female Speaker: And what other options?

>> Male Speaker: License -- well, just look at the licensing cost, just look at the litigation cost. It's -- I don't know what else you really can do.

>> Female Speaker: Laura.

>> Laura G. Quatela: I think it depends whether you dealing with IP or another operating company. If you dealing with another operating company and they come with an expansive portfolio they look at yours to see how big yours is. With an MPE, if you're hit with a variety of patent families analysis is very high. It's sometimes necessary to settle because you can't commit the resources to it.

>> Female Speaker: We've had a couple mentions of case law throughout this conversation and recent changes in the Courts. Jim mentioned eBay. I think the MedImmune issue came up, but wasn't discussed. How has MedImmune changed the dynamic in this market? MedImmune and also the STM electronics decision in which it's much easier to bring a declaratory judgment action, when, in licensing negotiations? Has anyone had direct or indirect experience? Laura.

>> Laura G. Quatela: For us it's stymied discussion. You're absolutely afraid to have discussion now, which is a bad thing, I think. I always prefer to have discussion rather than go to Court. But if you're fearful of having discussion, it's just --

>> Laura G. Quatela: So, as the patentee, you're fearful of having a discussion, because of the potential licensee can then bring then the D.J. action?

>> Laura G. Quatela: Either way, the patent or the patentee, there's consideration on both sides but really makes what used to be a much more free flowing conversational type of practice much more litigation based.

>> Female Speaker: What is the concern from the potential licensee's point of view?

>> Laura G. Quatela: Well, the potential licensee's point of view -- well, I guess I defer to Paul on that question. I think that the consideration is around how you style your approach, and how expensive that's going to be.

>> Paul Ryan: The biggest impact to us, it's driven more small companies, universities and research centers to us out of fear, if they went out the way they used to with a normal licensing proactive program that companies could file against them in multiple districts, and basically be a very expensive proposition. So, I think it's had that effect on our direct approach. We used to always go out and voluntarily enter into discussions with companies before filing litigation. And now, we advise our partners who come in, given the risk level, that we not do that. So, it does chill the conversations, it's usually not a great way to start a conversation by filing a lawsuit, but that's kind of what we had to transform to. We try to engage companies as quickly as we can, saying, sorry, but we had to protect our own interest, but we would, very much, if you like to, entertain reasonable licensing discussions. So we try to break that barrier down as quickly as we can. It's normal reaction to anybody. I think it gets back to emotional issues that Marcus said, if you've been sued, it doesn't tend to -- you take it emotionally. Sometimes, I think

people feel they're being accused of theft. It may not be theft, it might just be that you're using somebody else's property, not that you knew you were using it, or took it deliberately, but there's somebody else holds patent rights. But there's no question that really chilled early staging marketing rights and made the market less efficient. And it actually runs up the cost, because if you're afraid, as a small company to even have the conversation, then you have to engage legal counsel and now your transaction cost to both parties have gone up.

>> Female Speaker: Any way out of that?

>> Paul Ryan: Reverse the decision.

>> Female Speaker: Anyone have a suggestion?

>> Speaker: Okay.

>> Female Speaker: EBay and injunction issue, has that changed the dynamic and discussions or the amounts paid, Paul?

>> Paul Ryan: The biggest effect it's had, I think, is on innovation companies. It really, unduly, penalizes innovation companies for no particular reason. If you're in the business of purely innovating and know you don't want to market and distribute, then why are you penalized for being that innovative company, and obviously that leads to compulsory licensing and leads to less invention. I think it was -- I don't know how many injunctions there really were in the United States. Was this really a big problem, Jim?

>> Jim: I don't believe --

>> Paul Ryan: I think was more of a statement about a scorched earth policy, than it was to address a major problem. I'm not aware of a whole lot of injunctions that occurred in the last 15 years in the United States.

>> Jim: I don't know if you saw a whole lot of injunctions but clearly, the threat of the injunction led to the implicit settlement immediately after the verdict in virtually every case. Because it was not just about the verdict, but what's going to happen tomorrow.

>> Paul Ryan: Uh-huh.

>> Female Speaker: It's certainly driven a lot of litigation towards the ITC. The trend is clear.

>> Do you see that trend increasing?

>> Male Speaker: I don't know if this is true or not, but I read somewhere that actually, the number of injunctions hasn't gone down significantly. The number of injunctions that have actually been granted hasn't decreased significantly. That's just a report I read somewhere, and I can't substantiate that, but -- I think that's because of what we were just discussing, is that there wasn't a high number of injunctions entered per se, in the past, because the cases were settled in the interim of the jury verdict, when that would have been entered. But now, we're starting to see a number of cases where the judge is focusing the financial experts on, "okay, here's the reasonable royalty for the period of infringement, now we need a second analysis and in some cases, a distinct and different analysis of what should be the compulsory license rate going forward. And there are a number of cases that are now explicitly going into that issue.

>> Female Speaker: Any sense whether eBay has lowered settlement amounts or lowered licensing amounts when a nonpracticing entity is involved as a patent owner? Is it too early to tell, or do you expect it to have no effect?

>> Male Speaker: So, what I've heard in the market and what I would echo what was said about the pure innovative company, it does put them in a difficult situation. But as far as the NPE, I've heard mixed results. NPE's saying in part, "this is okay, because now the

court is going to help me facilitate a fair license post trial, where before I just got into another argument over that amount. So I don't know that it's made a huge difference or the consequence was as intended.

>> Female Speaker: We're getting near the end, so I'll throw out any other comments about any of the other recent important core decisions? There's been Seagate on willfulness, for instance, Quanta on exhaustion, Bilski on subject matter patentability. Have these had any real effect on how these markets are operating and how the evaluation is done, or are they ,perhaps, more important in a litigation context? Or is it just not coming up? Is that why we're not getting an answer and things are going on as they have been? All right. Okay. Laura.

>> Laura G. Quatela: Well Suzanne, when you and I talked, I know that I raised Quanta as a conundrum. And I guess what I would say about it is I welcome additional judicial guidance as quickly as possible. They make the prospect of licensing and how to conduct a licensing practice rather confusing.

>> Female Speaker: All right. Tracey.

>> Tracey R. Thomas: This is kind of anecdotal, but I can certainly say that KSR and the abdication of the teaching suggestion motivation test basically made me lose confidence in some of my abilities, because I remember as a young associate drafting patent applications, many times teaching a way, or arguing that an invention taught a way to overcome an obvious challenge and now not really understanding what is the standard. So in some cases, some of these decisions, maybe intentionally, have created more uncertainty. Same thing with Bilski on a couple fronts. It really didn't answer a lot of the questions that I think it was intended to around the transformation issue, and around the machine implementation. You know, right now, I couldn't tell you what degree of machine implementation is necessary to have a business process claim be declared patentable.

>> I just can't tell you, you throw one in and hope for the best. That's just anecdotal from our perspective.

>> Female Speaker: Is it the concern then, with KSR or Bilski or any of these decisions the current uncertainty, or is there a concern with the substance in that we have in some of the prior hearings heard fear about the future, heard -- I don't know what the situation is -- which suggests the uncertainty is a problem, rather than the substance, any reactions?

>> Male Speaker: The uncertainty is a problem, because uncertainty leads to litigation. And that goes right back to the whole purpose of what we're talking about, which is an efficient marketplace which creates certainty on issues like valuation, so you can avoid the courts and these issues. So, I think the uncertainty is a big issue.

>> Female Speaker: Okay. Any other reactions or complaints about the substance or just the level of uncertainty? All right. We're about to wrap up, then, give everyone, if there's any final comments anyone would like to make while we're still on the record, give you a last chance. And if not, I will say thank you very much. This has been very illuminating and helpful to us, and we very much appreciate your time. We'll be back at 2:00, where we have some of the academics doing some of the cutting edge thinking about these issues. Thanks very much.

>> Thank you.

>> Male Speaker: Thank you.

>> Male Speaker: Thank you.