**Patent Assertion Entity Activities Workshop**
**Transcript, Part 4 of 4**

**December 10, 2012**
**4:00 PM (Afternoon Break) to 5:30 PM (End)**

**NOTE: This transcript has not been completely proofed and is intended to be temporary. A final version will be posted soon.**

FRANCES MARSHALL: All right, we're going to go ahead and get started with our final panel of the day.

Good afternoon, everybody. My name is Frances Marshall, and I'm Special Counsel for IP at the Antitrust Division. And this is going to be our wrap 3 panel where we are going to be looking at how does antitrust apply to all of these potential efficiencies and harms that to have been identified and talked about over the course of the day.

Our format for this panel is going to be a little bit different. Phil Malone, who is yet another one captured in Boston, will join us by telephone and is going to give us an academic introduction to our topic. And Phil is the Clinical Professor of Law at Harvard Law School and Clinical Co-director and Senior Fellow at the Berkman Center for Internet and Society. And then we're going to turn to our panel. Phil will try and join our discussion. We'll see how that goes, and we will have some panel discussion focused on a number of hypothetical scenarios.

So, Phil, can you hear us?

PHILLIP MALONE: Yep, I can hear you. Can you hear me?

FRANCES MARSHALL: I can hear you. I'm going to turn the microphone more towards you, and let you start.

PHILLIP MALONE: Great. Well, thanks. Thanks very much. I'm glad to be joining you, and thrilled that the Commission and DOJ are having these hearings and trying to shed a little bit of light and dig into what are really some very important issues.

I'm sorry I'm appearing by phone and not a person. Like Tim, I spent many lovely hours at the airport in Boston this morning starting at 5:00 AM before it became clear that actually getting there was not going to happen. But I'm glad to least be able to be on the phone.

But given that I'm not there in person, and given that you have a really fantastic panel that is, and given the hour, I'm going to try to be very brief and really just give you a very quick and broad introduction and a bit of a framework, perhaps, for thinking about this question of whether and when antitrust might apply to the conduct of PAEs and to the sorts of harms and efficiencies that

the last two panelists were just talking about, that I know people earlier today talked about. Put another way, if the acquisition and/or the assertion of patents by PAEs is a problem, can antitrust be part of the solution? And if so, what and how?

There are a bunch of different ways one could approach this. One is the one that I'm going to use to try to just quickly to identify a category of conduct, a range, of kinds of behavior, kinds of conduct, by PAEs. And then try to see whether there's a legal antitrust theory, whether it's Section 7 of the Clayton Act, Section 1 or 2 of the Sherman Act, or perhaps Section 5 of the FTC Act, that actually fits that conduct and allows us to analyze and potentially reach that sort of conduct.

I want to run initially through a, I think, very quick continuum of some of the possible PAE conduct that we might want to analyze. I suspect that much of this has been described in great detail earlier, and a lot of the panelists have laid out. And I'm sorry I missed that. I had hoped to pull that together. But I'll give you, at least, my take of some of the key categories, and then try to make some sense of whether there are antitrust theories that fit and make sense of them.

So starting at the simplest end and probably the least troubling end, and moving to more complex, we can imagine a situation where a PAE holds and asserts one or more patents. That's it. Simple ownership and assertion.

Moving up a little, a situation where the PAE actually acquires one or more patents, either initially or on top of patents it already owns. Ratchet up a little more, the PAE could acquire a large portfolio all at once or in a single transaction, and that portfolio itself could constitute a thicket in some situations. A slight variation on that is where a PAE acquires a large portfolio, but does it over time through a series of smaller transactions, each of which builds up in an increasing way the potential power that the PAE has, rather than acquiring it all at once.

And then again, going a bit further, a situation where a PAE acquires and then threatens or licenses a substantial number of patents, but in addition to the necessary patents requiring the licensing of a large package of patents, so the kind of mass aggregator situation that Thomas Ewing described in the last panel. So notice, all of those are situations where the PAE is essentially acting on its own, acting unilaterally, to acquire and then assert patents.

A second, distinct category that's important to carve out comes if you vary the details of the acquisition just a little bit, and instead of the PAE acting simply to acquire and assert some number of patents, instead we introduce some element of coordination or ongoing relationship between the PAE and the practicing entity or the operating company that was the patent holder and is the seller of the patents. Without having heard him, I think this is what Carl Shapiro referred to earlier this morning as hybrid PAEs, where there's some ongoing connection, ongoing relationship, between the PAE and the prior patent owner, practicing entity.

So I'll come back to that in a minute, but situations there where, for example, an operating company creates a shell company, a PAE, or perhaps a joint venture with a PAE, then sells patents to it, but retains the license for itself. Again, very that scenario where that happens, but

there's also an understanding or an agreement that practicing entity and the PAE maybe share profits from the licensing or have some joint control or decision making over the licensing.

And then go a step further to situations where two or more competing practicing entities either jointly create a company, jointly create a joint venture, and then license patents to that PAE and take licenses back, and potentially cross license as well. So a number of hybrid situations. And then finally, a separate scenario that we might want to have on the table where a PAE holds or acquires patents that are encumbered in some way with FRAND licensing obligations by virtue of a previous standard-setting process or standard-setting situation.

So that's a super quick, super simple set of some potentially harmful scenarios. So what are the legal theories that might accompany those that we might use to see whether there's antitrust treatment or liability?

So, seems to me Section 7 of the Clayton Act, which typically governs acquisitions and mergers, is the most logical, and in my view, may be a good fit for at least some of the scenarios we're talking about. Particularly ones where either serial acquisitions build up over time to create some sort of market power and create a thicket, or these hybrid PAE situations where it isn't just unilateral conduct by the PAE, but there's actually some ongoing relationship or connection or control between the PAE and the initial practicing entity.

But under Section 7, some tough questions arise, and I'm hoping and sure that the panel will get into some of these, really sink their teeth into these once they start. A few of those are if we're thinking about Section 7, do we need to define markets the way we often do as a starting point of Section 7 analysis? And if so, what kind of markets are we talking about? PAEs aren't producing anything. They're not actually practicing in a market.

So, it's going to be difficult to think of a traditional product market. We're probably going to be thinking of a technology market instead. Does it matter that the PAE isn't competing in that market and wasn't previously competing in the market before the acquisition?

If we think of the analysis in terms of the 2-10 horizontal merger guidelines that the agencies use for analyzing acquisitions, certainly arguments that these kinds of acquisitions may allow the acquiring PAE to exercise market power and may result in price output or innovation affects of the sort that the guidelines speak of. But the question is, how? How do they do that, and does that mechanism fit within the guidelines as we think of them?

Is it simply a matter of what we might call exploitative harm, simply taking advantage of the acquired patent and charging higher royalties or charging certain royalties which is less troubling? Or is it somehow the result of the diminished competitive constraints from the merger that the guidelines call for and that we typically look for? Where the acquisition itself is reducing or diminishing the competitive constraints that existed pre-merger?

So there are a bunch of possibilities. I want to throw just one set of possibilities here to frame this, but there are obviously a lot more. As I'm sure panelists have discussed already today, in

some cases, the PAE may face very different constraints and have very different incentives than the practicing entity, the operating company seller.

Easiest example with a sale to a PAE is probably the shift from the risk symmetry, as Michael Carrier called it in his comments for the workshop, where competing operating companies, competing practicing, entities with large portfolios, run a big risk of counter sued if a assert and sue their rivals. And that often leads to smoother licensing and detente and so on. That's typically not the case with PAEs. They don't face that same risk of retaliation or counter suit because they're not doing anything. They're not practicing in a way that they can be threatened.

And PAEs also, at least in some cases, maybe likely not to have the reputational constraints that a practicing entities may not have. They may not fear the kind of reputational harm that could come from suing other practicing entities within the industry.

I think that's the sort of situation that Commissioner Rush was addressing back in his concurrence to the Commission's challenge to the Ovation acquisition of NeoProfen where he basically said he would have challenged an earlier acquisition by Ovation, the acquisition of a separate drug, because it essentially eliminated the reputational constraints and the risks to other profitable products that the current owner, at that point Merck, had. Those constraints had kept Merck from charging the monopoly price. Ovation as the acquirer of that patent wasn't faced with those constraints, and instead ended up charging 1,300% more post-acquisition than Merck had previously as a result of not facing those constraints.

And in fact, the PAE may have converse incentives to threaten and sue, and perhaps even sue over weaker patents, in order to try to establish a reputation for tough litigation and for being willing to go to the mat and sue to make its future threats even more credible than they otherwise would be.

So if we think about using Section 7 to analyze these situations, what's the theory of competitive harm? We want to ask when we're thinking about harm does it come from collusion? Does it come from exclusion of rivals? And if it's exclusion, what's the mechanism? And most likely is raising rival's costs, and I think you'll probably hear a fair amount about that from the panelists.

If we think of the acquisition of patents, they have PAE in horizontal merger terms, then it's necessarily unilateral effects, I think, that we're talking about. More interesting is likely to be thinking of it from the standpoint of vertical mergers and vertical merger theory, which is a subject I know that at least Carl wants to get into and I'm sure will say a lot more once we get into the panel. So I'll leave it at that.

Just to quickly shift back to a couple of the hybrid scenarios that I threw out for a minute, and these are scenarios that Fiona Scott Morton has raised recently in a speech or two that she's given as well. One is the patent practicing entity, an owner of a patent, that creates a new company, a new PAE-- it's either a shell company or a joint venture-- sells patents to it, and then retains a license. And then the PAE is then able to threaten and sue others, including the previous patent owner, practicing entities, rivals, potentially raising their costs. And at least in theory without the

same fears of both reputational harm and retaliation that the practicing entity would have faced itself had it taken that action and tried to raise rival's costs.

Maybe more troubling is the situation where you have two or more practicing entities to that this, that create the PAE, sell patents to it, take licenses back, and potentially cross license between them. You then have a scenario where two practicing entities who are competing in a market are effectively coordinating or even colluding, potentially, to raise their rival's costs or entrance costs. And depending on how they set it up, maybe even sharing the profits from doing so.

This category of conduct is what some have called privateering, and it's exacerbated by, I think, what Carl referred to-- or I think at least was going to refer to, I didn't hear him this morning-- of a lack of transparency. So the more difficult it is to understand the relationship between initial patent owners, sellers, shell companies, particularly where there may be large numbers of intermediary companies involved, the more difficult it is to see through those relationships, the better this sort of activity may work. Because the greater the disconnect between the prior risks of retaliation and risks of reputational effect may be. So, these kind of joint practicing entity, PAE relationships and conduct may raise Section 1 issues as well as Section 7 to the extent that they involve agreements between the PAE and the practicing entity beyond the mere sale of patents in the first place.

Finally, let me just note quickly the last category I mentioned, that is the role that FRAND commitments may play in antitrust analysis. So we can imagine a scenario where we're dealing with one or more standard, essential patents that have become part of a standard through a process that included FRAND licensing commitments. And we tend to think that patents may obtain greater market power and greater hold up possibility as a result of their inclusion into a standard and then their adoption in the market.

But if those patents which at least previously had a clear FRAND commitment are sold to a PAE, and the PAE then either outright reneges on that commitment or takes a different view of the different interpretation of what kind of FRAND commitments go with the patent-- something that [INAUDIBLE] has described before as incomplete contracts, unclear contracts-- then the PAE may be in a position to at least try to charge higher royalty rates for the patent and hold up users of the standard than would have been possible for the original participating, practicing entity.

Is there an antitrust answer to this conduct? That's a difficult question. Is there an answer in Section 5 of the FTC Act as was the case with the Commission's previous case of data against a subsequent purchaser? Maybe. That may be a case where that applies more directly.

Let me just finish with two very quick other notes that I think are worth having on the table. One is the role that Noerr-Pennington and professional real estate investor's immunity may play in defending against antitrust suits, antitrust attacks, on PAE activity. These give presumptive immunity for a patent holder asserting that patent unless the patent was either obtained by fraud on the patent office or where the infringing lawsuit itself is a mere sham, an objectively baseless sham. Or the anticompetitive effect comes from extending beyond the scope of the original patent grant.

If we're looking at situations of pure assertion and things more on the assertion end, they are certainly people who, I think, would take the position that Noerr-Pennington and PRE would make it difficult to bring antitrust claims. That may be less so as you move away from pure assertion into some of the other conduct that we're talking about. And I think it's just worth having that on the table. I don't think the panelists are going to get into that. But that's an overarching point this is useful to have.

And then I would end by saying we also need to think, when we're thinking about the antitrust application, about remedies. Particularly in the Section 7 context, if we think there might be antitrust liability in an antitrust theory, we also need to have a clear sense of what the remedy might be and think carefully about whether the available and appropriate remedies would in fact make the situation we're concerned about better and not worse.

So if, just to take one example, we're concerned that fragmented ownership of patents might exacerbate a thicket problem, if we require divestiture as a remedy for a Section 7 problem that we see, in theory we might end up making the problem worse. So, thinking carefully about what the appropriate remedy would be is obviously very important as well.

So I'm going to stop there. Frances and Andy, I know, prepared three hypothetical scenarios which are points along the continuum throughout to help focus some of a panel discussion. And so, I will let the panel dive into that and turn it back over to all of you. Thanks.

FRANCES MARSHALL: Thank you very much, Phil. So now, I'd like to turn to my co-moderator, Andy Gavil, and he's going to continue to frame things a little bit. And then we will introduce our panelists and move on.

ANDY GAVIL: I think Phil has done a terrific job of framing up the issues for us. Our big question here is if there is a problem, is antitrust in part a solution? And if so, under what circumstances might it be? And one of the issues that certainly came up in the prior panel is there may be harms, but we're focused on competitive harm, so what kind of competitive harms might there be?

And hopefully with the help of our panel, we'll get more deeply into what would the theory and what devices do we have available to us in terms of different statutory theories, as Phil mentioned would we approach the acquisition issue as a Section 7 problem? Would we look at Section 1 or even 2 of the Sherman Act? Under what circumstances given the current state of the law? Would Section 5 of the FTC Act provide an alternative ground?

So we're going to explore those issues with the panel, and we decided that we might do that productively through a series of hypotheticals. They're a little bit more specific, but as Phil said, they lie along the continuum that he laid out. And we've got some slides to put up, so we'll go to the hypotheticals.

Man behind the curtain, switch the slide. OK, while we're waiting for this slide to switch, we'll go back to Frances who can introduce all of our panelists.

FRANCES MARSHALL: Joining us today to discuss these what I consider to be very interesting and very complex, difficult issues are Logan Breed, who is a partner at Hogan Lovells. And Hanno Kaiser, also a partner, this time at Latham & Watkins. And then Mark Popofsky, who is a partner at Ropes & Gray.

Joining us from academia, once again, Carl Shapiro, Transamerica Professor of Business Strategy at UC Berkeley. And over here, Hill Wellford, who is a partner at Bingham McCutchen and a former colleague at DOJ. And I guess Mark Popofsky as well.

So, welcome to you all, and we've got our first hypothetical up. We can get started.

ANDY GAVIL: Just for the benefit of the audience, if you take a look at scenario A, a PAE acquires patents from a seller operating company. As part of the sale, buyer and seller agree on a pricing arrangement that aligns the PAE's incentives to assert the patents after the sale with those of the seller. The seller primarily seeks to facilitate its own exercise of market power by impairing, excluding its rivals from a market or raising their costs. The buyer wants to maximize its revenues from licensing.

We'll open it up to the panel. Is there any legal theory under which the antitrust laws might view this scenario as problematic? And we can look at both, again, harms and efficiencies in how we might approach the analysis. Logan, you want to get us started?

LOGAN BREED: Sure. This acquisition, depending on the facts underlying the case, could conceivably support a Section 7 investigation or challenge, and Fiona in a recent speech did a very good job of outlining the reasons why that could be the case. And it depends on the business model of the acquiring entity.

And in this fact pattern, we have the potential anticompetitive effect of a PAE acquisition combined with the potential anticompetitive effects associated with the acquisition of a patent by a practicing entity. Because here, the practicing entity retains some element of control over how the patents are exercised, and they have an incentive to raise the rival's costs. A PAE doesn't have that incentive, but there are some unique elements, as we've heard earlier today, in a PAE acquisition that I can have anticompetitive effect.

For example, there could be a royalty stacking problem. If the practicing entity retains some if its patents and divests some to the NPE, entities that had a license to the entire portfolio now no longer have a license that covers the entire polio, possibly, and then would have to pay, in effect, double what they used to pay to cover themselves against the scope of that entire portfolio. PAEs similarly can take unique advantage of, I think, what Fiona referred to as the incomplete nature of contracts in this space.

So for example, there may be a FRAND commitment on certain patents in the portfolio, but that commitment may not travel with the patent. And in those cases, the transfer of that to a PAE who has an incentive and ability to charge higher prices than the practicing entity that originally held the patent could end up raising costs and reducing consumer welfare.

HANNO KAISER: I usually think it's helpful for these hypotheticals to write them down a little bit. So what do we have? We have an operating company, and we have a PAE. Is there anything going on between the two? Yes, they are two things. There is a sale of something, and there is some form of an agreement that aligns interests.

Now, is this a horizontal agreement or vertical agreement? Well, let's say it's not so really horizontal because the PAE, let's say, is a pure play PAE, so this is going to be some form of a vertical agreement. So that puts us kind of in the wheelhouse of Section 1 vertical theories with an exclusionary effect or a vertical merger that also we would have to come up with some theory of exclusionary effects for.

Now, that gets us back, I think, to a number of fundamental problems that we have-- of course, all the challenges also-- that we have with these types of deals. First, we need some modicum of market power. This is not some per se illegal thing that's being described here. We cannot dispense with that step. So we need to figure out what's the relevant market deal.

Let me just pause it because the PAE is not playing in the downstream product market. We're kind of possibly bound by-- what is it? The court said that it's axiomatic that you cannot monopolize a market in which you don't sell, so we'll be stuck with the technology licensing market.

So do we have market power here? Possibly. I think that would be a necessary ingredient for claim. And then we need to come up with a theory of harm, and I think as Logan said, these could be the evasion of certain constraints that, for example, the competitors of the operating company would otherwise face, namely retaliation.

I mean, here it seems to me that if this agreement is really one where the operating company says I cannot assert-- really assert-- this patent against my competitor to raise their costs because they would nuke me back, but therefore I'm giving it to this PAE, and give him essentially a directive, go after my competitor, raise their costs. I think that would give us, given some amount of market power in either the upstream or downstream market, potentially a viable Section 1 or Section 7 case.

MARK POPOFSKY: I guess as we're going down the aisle the church, I'll pile on. But I think we have to be a little precise about some elements of this hypothetical, Andy. What do we mean by aligned incentives? What do we mean by the incentives of the operating company? What do we mean by its market power?

I think it might actually be helpful to be less hypothetical and to be more concrete. So at the risk of talking about companies here, I'm going to, and say there's certainly some elements here that reflect concerns that have been raised in public documents about the Nokia/Microsoft Mosaid transfer. And I think this will get to concrete elements that Hanno and Logan have mentioned. Hanno said that we should look at the technology market. I think you might actually, in some cases-- we can circle back to this when we get to Phil Malone's question about pure play PAE antitrust issues-- talk about the downstream product market.

So what would be one concern that has been raised in public statements about the Mosaid Nokia/Microsoft arrangement is that you have Microsoft with its dominant position in PC operating systems. And no, Phil and Carl, I'm not relitigating the Microsoft case here, but we'll start with that. You have its alliance with Nokia, where Nokia abandoned Symbian, threw an its lot with Microsoft. It strategically aligned with Microsoft.

You have, as Mosaid described earlier today, an arrangement whereby Nokia-- or Nokia described it-- whereby Nokia, seeking to monetize some value if its intellectual property, divests some of its interest to Microsoft. And then the two of them together-- this is what Mosaid's Canadian security filings say-- transfer the patents to Mosaid-- Microsoft and Nokia do-- subject to an agreement that has some interesting rights. And this goes to the alignment of the incentives and how that plays into a competition theory, and I think we have to be precise.

Some of those rights includes, well, what did Mosaid pay for the patents? They paid what can be described as a song, less than the value of a low end Lexus, under $20,000. They're going to make money-- they think a lot of money, according to their filings-- monetizing these IP rights and sharing those revenues back with Microsoft and Nokia.

Second, they have a great incentive to do so because if they don't reach certain royalty milestones, which in the public documents are undisclosed, Microsoft and Nokia have the right to take those patents back and transfer them to someone else. That aligns incentives.

Third, because of that, Mosaid really has a reason to keep Microsoft and Nokia happy. It was said earlier today that PAEs-- I think Fiona said this-- are agnostic. They'll go off and make money no matter what gets sued. I think the Microsoft, Mosaid, Nokia love triangle is an example of where that might not be true.

Mosaid, so this theory runs, has an example to keep those who transferred the patents to it happy lest they seize them and transfer them back. This right to transfer can be waived, so presumably, if Mosaid has difficulty monetizing, it will say to Nokia and Microsoft, please don't take them back. Give us another chance.

All that plus, as you can suspect, a license that likely is retained gives Mosaid a strategic incentive aligned with Microsoft and Nokia to target not just any smartphone maker, but their rivals. That's how the story would run. That might support, as was said to my right, a Section 2 theory or a Section 7 theory.

So that's the alignment of incentives. The question is, what does this have to do with the competition problem? And there, I think, there are two potential theories which are very interesting. One is-- both Hanno and Logan touched on it, and everyone has talked about throughout the day-- is the transfer unconstrains, the PAE because it doesn't face the threat of countersuits. I think that's something that should be very seriously considered.

Let's consider what the Justice Department did when Microsoft tried to acquire the Novell portfolio. So you have Novell out there with its treasure trove of patents, kind of like Nokia has a treasure trove of patents, and a consortium called CPTN seeks to acquire them, and one of them

is Microsoft. And the government gets very concerned that if Microsoft has these patents, it's going to aim them right at Android. And so, it requires the arrangement to be rearranged, to quote the Justice Department press release, to "protect competition and open source."

Now, if it raises a meritorious Section 7 issue to have a changed incentive problem when Microsoft takes a patent from Novell and would assert it differently, I think it equally could raise a Section 7 or Section 2 problem for a strategically aligned group like Nokia and Microsoft to transfer the patents to a PAE who do not face the same constraints or countersuits. changed incentives can't support a theory.

A second element, potentially totally independent element, goes back to what Professor Malone talked about with respect to royalty stacking. It was unpooling earlier, and evading FRAND commitments. One thing that's also in the public record is that Nokia had made a commitment not to royalty stack with respect to LTE patents. It didn't so as part of an effort to get its technology adopted. No more than 2% or so.

You can imagine a concern that when Nokia takes part but not all of its portfolio and gives it to Mosaid that that could unleash the very royalty stacking that Nokia said it wouldn't engage in. Because, well, now Nokia can engage in up to 2% on the patents it retains, and even if Mosaid honors Nokia's commitment-- and I'm not saying they haven't sworn in blood to do so, I'll give that to them for purposes of this argument-- they can extract up to 2% for their part of the portfolio. And I think we heard today that they say they're not coordinating, so that implies to me they're not agreeing to keep the cap at 2%.

So I think these are things that are very much worth considering. I think to make this hypothetical concrete to a real world example, they were fortunate to have the public securities filings respecting helps put it in context. And I think the legal theories there are, because Android is a prime threat to Microsoft, you could have a downstream monopolization theory of PC operating systems. You could even, given what I stated about Nokia's promises to get its technology adopted, you might have a Rambus-style theory under Section 2 in the upstream technology market. And God forbid we might even trot out Section 5 in In re NBC and expand it a little bit.

So those are some thoughts, Andy and Francis.

ANDY GAVIL: Thank you, Mark. Carl?

CARL SHAPIRO: I have no idea how to follow that.

CARL SHAPIRO: Especially the love triangle part if it, I have to tell you. So, let me just--

CARL SHAPIRO: Thank you. I still have no idea how to follow that.

Let me go back to the strict hypothetical, just to-- look, I've got these patents. So I'm an operating company, you're my competitor. I have selling some of them with this arrangement to Frances.

You get to play the role of the PAE. I know you've always wanted to do that, Frances. That's why you had the workshop.

So, I think we're trying to make a lot of antitrust here where I don't see why there is very much. Because, look, I could assert the patents against you. The competition's between me and you. We're the competitors. This PAE is basically my agent-- thank you very much, Frances-- to help me do this.

Now, there are a whole bunch of tricky things here that Frances is helping me do this. Evading commitments, and avoiding blowback, and all this other stuff. One way to think about this, I found an agent who is allowing me to attack you more effectively-- you, my competitor, to attack you more effectively. It's not the type of competition we maybe don't like so much, but I have these patents, so I'm having trouble seeing why creating this agent is reducing competition between us. OK?

There's a lot of fun and games. We might say, wait a moment, this is no good. You're evading the commitment. That's broken a contract or something. And I'm not that was all a good thing. I don't like the outcome of this behavior one bit, but I'm having trouble seeing how it constitutes a reduction in competition, the only competition I saw in this whole picture, which was between me and you.

HILL WELLFORD: This is great, because you've really teed up what I was hoping to say. Carl's point is really what is the merger-specific harm we're talking about? And that's what you've got to start with in a merger. You've got to say, how has, in a merger-specific way, the conditions changed in a way that creates am anticompetitive opportunity that the antitrust laws can reach.

And this is a cleverly done hypothetical. It doesn't specifically say how those conditions have changed. They may have. If they did-- well, let's take the situation where they don't. It's a mere sale to a patent assertion entity that is a pure play PAE. It's not a Mosaid situation. It's a pure PAE.

It's just the idea is, I've got these patents. I'm not very good at litigating for whatever reason, but I'm going to sell them to a company, or maybe hire some people and then create that company, and that company will have a comparative advantage to go assert that patent, get it more revenue than I particularly with my less comparative advantage would have done.

That's actually a very pro-competitive story when we were talking before of what guarantees that that money comes back quickly to the innovator. In that situation, that's a pretty direct way back to the innovator. The innovator says, you know, I'm just not very good at this. I'm going to create an entity that really focuses on it.

What Mark is talking about is the different situation where there is a merger-specific reason to think that some entities have aggregated share or power, and then they have gone out and used that anticompetitively. There is a merger-specific change in that condition that does create the possibility for an anticompetitive activity, and that is a very different situation. So, very

important to start by saying what's the merger-specific change in conditions that creates an anti-competitive opportunity?

You then have a really thorny question, which is can the government catch this in the pre-merger phase, or is it going to miss it under the HSR rules and you're going to be in the consummated merger situation? Putting a little more legal overlay on it, down into the weeds of HSR, that's really what Mark is talking about. In that situation, I think the amount that Mosaid paid, or the amount of the transaction, was at least booked at something like $20,000, but Mosaid expects the revenue to be, in just a few years, about a billion dollars.

You're in a situation there where it's not HSR reportable, so this goes very quickly-- in a situation where it's going to have potentially a major effect on a major market, I think one of the things that you've got to do in this situation is say, what is the antitrust conduct that you're concerned about and identify it very carefully. It may not be that Mosaid is trying to maximize the profit from its patent. It may be that you really can't reach that. That's what people ought to do with patents.

What you ought to say is the problem-- and I'm taking this away from Mosaid and back into the hypothetical, so I'm not attacking them-- the problem in the hypothetical is don't worry about the actions once the deal is done. Think about should we challenge this as a consummated merger if it turns out that it created market power that we didn't realize? The agencies have been quite aggressive about challenging consummated mergers, and maybe that's the way out of it, rather than trying to pound a conduct peg into a square hole.

HANNO KAISER: If I may, I just want to say something to Carl's rendition here. So, Carl, I kind of fail to see why they shouldn't be a problem.

Let me put it this way. Suppose we have two competitors. We're locked in a competitive battle. I'm a monopolist, let's say. I have significant market power in the product market. You're a new entrant into this space. I have a lot of patents, you have some patents. I would love to impose some, let's say, crippling costs on you as a competitor, but feel myself constrained in doing that because you would nuke me back. You also have some patents in this hypothetical.

Then I give my patents to a third party that is unconstrained in that regard that I can either expect or I have contractually committed to that that party attack you. So how is that not the willful maintenance of monopoly power?

CARL SHAPIRO: Sounds like the clever assertion of the patents that you were granted, which may indeed lead to monopoly.

HANNO KAISER: Well, but wouldn't that-- I mean, going back to the baseball bat analogy in the Microsoft case, right? So the fact that you've lawfully acquired an intellectual property right does not mean that they use of that lawfully acquired patent right is also lawful.

CARL SHAPIRO: I'll assume that's a question since I'm being deposed here.

[LAUGHTER]

CARL SHAPIRO: Sure. I mean, look, I wouldn't make such a broad argument about licensing restrictions that the court was dealing with there. Again, I didn't say I like the outcome of this. I think you have me. It's a little bit awkward to put it in the antitrust box. You guys are more creative than I am. Congratulations.

[LAUGHTER]

HILL WELLFORD: Francis, this is a good time for me to get on my Noerr-Pennington soapbox in response to Hanno, I think this might be. There's two issues with this Noerr-Pennington framework that we talked about before. And I won't go on for very long, but very quickly, Noerr-Pennington is a First Amendment doctrine, and the idea is that government has no business telling an entity that is petitioning the government for address of grievances that it can't do it. And not by suing them under the antitrust laws or anything else.

Well, the courts are government, and when you demand a license or you petition a court for an injunction or royalty, that's considered petitioning for address of grievances. So there's no business for the court under the antitrust laws saying if you are purely doing that-- you're only asking for royalties or an injunction, and that's a pure, unilateral decision to do so-- that is within Noerr-Pennington, or actually within PRE, Professional Real Estate investors, which is also a Supreme Court case that develops those in the intellectual property context.

I think that's a pretty clear bar, but notice that I was saying pure, unilateral assertions of patents. If you take it away from the unilateral context, and you add acquisition of market power or merger-specific, or other conduct-specific changes in conditions, that create anticompetitive opportunities, I think that's quite different. And so, you have to pay attention to those two contexts being different. The policy perspective, I wanted to say, is you have to be very careful with antitrust, and you have to show a little bit of humility here.

From a policy perspective, any antitrust enforcement policy would be absurd if it can be reduced to saying, well, we can't trust judges to get it right in a pure patent case. We can't trust them to understand the best use of the patents in the public interest and everything else. But they'll certainly get it right if we add antitrust and patents together, and stir them around, and bring that case as an antitrust case.

So somewhere in that mix, you've got to pull out and say, what is the conduct-specific, changing conditions that's doing something else? Deception, evasion of FRAND obligations, evasion of other contracts, collusion-- these are the something else that you need to focus on. So you can't go after patent conduct exactly by itself, pure patent conduct as Carl is saying. You have to have patent conduct plus. So I think this panel is really about the plus.

FRANCES MARSHALL: I just want to say these are the types of issues that we are thinking about every day at the antitrust division, and I'm sure at the FTC as well. And I'm finding this conversation fascinating, and I'm very grateful that you're all bringing all of these issues to the fore. I think now we're going to turn to our scenario B. It's up.

So reading this one aloud, we have two or more operating company competitors who jointly create a PAE whose interests align with the owners. The owners and the PAE benefit if the patents are asserted to exclude rivals of the operating company owners or raise the cost of their rivals. So, let's discuss this one, and maybe this time, Hill, we'll start from your end.

HILL WELLFORD: I think this is a very similar situation, except for the lack of an explicit plan to go after the rivals in this situation. And so, I don't have a whole lot more to say about it. I'm going to pass over to the other folks, since I just a little time in of own own.

CARL SHAPIRO: This is radically different than the previous scenario.

[LAUGHTER]

CARL SHAPIRO: Because it involves two operating companies who are competitors. I regret to say I believe the scenario is incomplete because it doesn't indicate where the patterns come from, but I will add that the two companies are contributing their own patents and putting them into the PAE. Maybe that wasn't what was intended?

I think it is more definitely more worrisome because they could use this to protect each other's position and basically coordinate to keep out other competitors. So it seems to me this is very rife with Section 1 overtones. This may even have some elements of the old Summit/VISX case that the FTC went after like 10 or 15 years ago. So, it could easily be a big problem.

ANDY GAVIL: Mark, without referring to any actual scenarios, would you care to respond as well?

MARK POPOFSKY: Oh, come on. I had at least three in mind for this one. Well, here, I agree with everything Carl said. I think there's yet a further concern, and I think it's interesting that Carl thinks this is a problem if you didn't think the mere transfer changing incentives was a problem. Because the only way this can actually impair rivals is if there is a more perfect or more perfected enforcement. And so, it looks like Carl's concentrating on the horizontal coordination as the vice rather than the mechanism by which the exclusion occurs, which is exactly potentially the same as in the prior example.

But pausing on that and moving on, I think the other thing that can happen here is you can also have operating companies conspire to shield weak patents. So, one of the things that happens-- and it was described earlier today, I think, very nicely by Cisco-- is what we used to call the IBM model of patent enforcement. Here are five patents, and if you litigate on those, I have five more behind them, and five more behind them, and five more behind them. And you can't afford to invalidate any of them, so surrender.

If you build a big enough portfolio, so the argument runs-- and you can do little mathematical examples where even of you have a 90% chance of beating each patent, if you're the target of the infringement action, you have a vanishing point actual chance of beating all of them. And you're probably going to surrender if there's an injunction threat in the ITC or a high damage award threat. So eventually, if you build a big enough pool, you protect weak patents.

And to go back to one suggestion Phil Malone made, I wonder if the antitrust laws might have something to say about that. It's a little easier here where you have horizontal competitors coordinating to either more perfectly achieve exclusion of the rival by changing incentives, evading FRAND, but what if they're also getting together to shield their weak patents by giving them to a PAE to assert more of them and hold more back? I wonder if that changed incentive to enforce, but it's the PAE will have a greater incentive to enforce the bigger the pool should play into this analysis as well.

LOGAN BREED: I would submit that this fact pattern is maybe a little more complicated, and we would need to unpack, I think, more facts to know what the answer really is. I agree in the abstract with everything that's been said if the facts turn out a certain way.

But for example, if the PAE is no longer controlled by the operating companies that created it, then we're back into a garden variety PAE analysis. If the operating companies have incentives that are aligned with each other with respect to raising their rival's costs, then we may be in the world that we were just discussing. If, however, we have a number of operating companies that come together to create this PAE, and their incentives are not aligned, then it's not entirely clear to me how the PAE is going to take those interests into account.

So for example, you could envision a world where each of the operating companies that contribute to the PAE have a closest competitor, or particularly close competitor, who they want to disadvantage, whose costs they want to raise. And they would rather that the PAE license everybody else on reasonable terms so they can recoup as much of their initial investment as possible. But if each of the operating company members have different closest competitors, then there may not be a lot of agreement as to who they're supposed to go out and attack and who they're supposed to get reasonable licenses from.

So, I think we need a lot more facts to figure out exactly how this plays out, but in the abstract, this scenario could very well go the way that my fellow panel members have described.

ANDY GAVIL: Phil, you still with us? I know that Phil had to leave because we were running a little bit late, so I was going to give him an opportunity to have a last comment, but it sounds like he may have already had to sign off.

I want to go back to something Hill and Carl said that relates to scenario A and might relate to scenario B. Carl, you sort of looked at the merger issue and said that the question would have to focus on the changed competition between the two firms. And that what they might do later on, in the sense of filing lawsuits, that that would not necessarily be relevant to your merger analysis.

But isn't that what we always do in vertical analysis? It's not that the merger is actually involving exclusive dealing, but it's changing incentives in a way that might create an incentive for exclusive dealing later on. So if this sort of acquisition of a patent changes the incentives of the firms, why wouldn't that be reachable?

But then it actually ties into Hill's comment. If it's reachable because the only possible, further act is filing lawsuits, and that's Noerr protected, now I think we have why this is a complicated

situation. If that came out right. So first question, really, for you is if it changes the incentives for future behavior, isn't that still covered under a Section 7 issue?

CARL SHAPIRO: Yes, of course. I think that's what we're always looking at in mergers, because it's all in the future, so it's not consummated. Absolutely.

ANDY GAVIL: So Hill, if the only future conduct is a lawsuit, is that where Noerr kicks in?

HILL WELLFORD: If the only future conduct is a lawsuit and there wasn't any merger-specific change in the way that you would assert that lawsuit, I think Noerr does kick in.

CARL SHAPIRO: I don't want to weigh in on Noerr, but is seems to me we worry about mergers that the companies will raise price, even though, let's say, raising price itself is fine. So that doesn't mean the merger's fine just because the price increase later would be-- in fact, the reason you have to look at the merger is because the price increase later would be fine.

I was making a different point, which is the merger-- this is actually the use of an agent to assert my patents. It's not a merger at all, or the best of patents to this agent-- that's you again, Frances. It doesn't diminish the competition between me and my rivals out there in the audience. It is just, like I said, a clever stratagem for doing that. The fact that it's later going to be perfectly legal for me to make those assertions-- or excuse me, for you, Frances, you're going to be the one doing it-- is neither here nor there from my point of view.

HANNO KAISER: I just want to say a word to the Noerr issue, because I find this really interesting. First of all, Noerr is a defense to a particular antitrust conduct. It's not an immunity. So in other words, it protects a defendant from liability, but not from suits. So stating it as an immunity goes very far.

But more importantly, I think the case law is very clear that a defendant cannot create a defense to an anticompetitive scheme simply by inoculating it or bookending it, if you will, with a Noerr-immunizable conduct. Noerr-immunizable, I said it. Kind of like Noerr-defensible conduct.

[LAUGHTER]

HANNO KAISER: With the Noerr-defensible conduct, if you look at that conduct in isolation. And, so that's why I think these hypotheticals are really well chosen, because we're not just looking at an individual company asserting a patent in court. Obviously if that's all there is to it, even if that company is monopolist, that would be Noerr-Pennington protected. That here, the lawsuit bookends, if you will, a certain type of conduct that began at an earlier stage, and I don't think that Noerr goes that far.

ANDY GAVIL: All right. We're going to move on to our final-- I can't actually see if it-- yeah, C. Great. Scenario C is a PAE buys patents from an operating company. The PAE can monetize the patents to a significantly greater extent than the operating company because the PAE does not have the same reputational constraints or need for cross licenses as the seller. Any antitrust issues? Logan, we'll start with you again.

LOGAN BREED: Well, this one again is somewhat tricky and would have to depend, I think, on more facts. So in the abstract, this scenario presents the least problem from an antitrust perspective.

On the other hand, there may be a relatively small number of really large PAEs, some of which we've been discussing already throughout the day, who stand in a different posture than the typical PAE or and entity that doesn't currently own any patents and wants to become a PAE. And it could be that the aggregation of an immense number of patents into one portfolio or multiple portfolios that are then asserted together create a Section 7 problem where there wouldn't have been one if the portfolio were smaller. The mere size of the portfolio could lead to an anticompetitive effect.

And it's going to be very difficult to assess ex ante, as merger analysis often has to do, whether a given acquisition is going to create that effect. It's really hard to know if transaction X is going to enable a PAE to raise price above the competitive level. But what we could do is go and look at the acquisitions that the largest PAEs have already entered into, and one of the trickiest elements of a Section 7 analysis is always figuring out what the relevant market is and whether price will go up in that market, or output, or innovation, or quality will go down as a result of the transaction. That's the crux of the analysis.

But in a case of a consummated merger, which all of these transactions would be that we're talking about looking at, you may not need to go through that academic exercise. It may be the case that you could look at actual evidence of any competitive effect rather than defining a technology market, or defining a market of any kind, and then going through the analysis of the result of concentration through that transaction.

So in this case, for example, we could look at what the super competitive profits achieved by the PAE were. There may be multiple ways to do it, but one way could be to look at the prices that the PAE paid for the patents it's acquired. And in the open market, you would assume that, particularly in a PAE to PAE transaction, or an NPE to NPE transaction, the purchase price of the patents would be the net present value of the anticipated future revenue stream from that patent. That's the value of the patent.

And if you were to look at the prices that were paid on that basis by a PAE who has aggregated a large number of patents, and then you look at how much revenue the PAE is able to achieve from that portfolio of patents, you could figure out whether there's any super competitive price effect. Now, that's going to take a lot of leg work and empirical analysis, but that would be one way to ascertain whether this scenario leads to an anticompetitive effect that could be actionable under Section 7.

ANDY GAVIL: Hanno, do you want to add anything?

HANNO KAISER: I agree that this is the most difficult scenario. This is the one that conceptually raises the most problems. First, we have some Supreme Court case law here that pretty clearly says the mere accumulation of patents, no matter how many, is not in and of itself illegal. That's the Hazeltine case. And then of course, we have SCM and other cases, and like the

Microsoft case, that essentially say patent acquisitions are not immune from the antitrust laws. These are not very helpful. They're somewhere in the middle here.

So I think what really matters here is, one, as Logan said, what is the relevant market here? And the other thing, what's the quality of the patents accumulated here? If we're looking at, let's say, the substitute patents, there are four technologies out there-- well, three technologies out in the market-- all alternatives for operating companies. And then, somebody aggregates all of them together. So then, I think, we're looking at a somewhat normal, horizontal merger analysis.

But what kind of thicket it is that if you're just accumulating competing technologies? I think in most instances here, we would be looking at situations where we're accumulating very large globs of portfolios of related complementary patents, and I think that's the really hard case. We've heard today from many of the operating companies that say, yeah, but that's exactly the problem, because that essentially makes the individually weak patents very strong. Because you have this IBM strategy of here are five, and here are five, and here are five, and you can't challenge them.

So I really think that that's the point where we need to figure out and think about whether the aggregation of complementary patents in and of itself can be a problem, and who knows? Maybe the BMI type, ASCAP situation cases can be a bit of guidance there. Because clearly, in those matters, we're also dealing with a lot of complementary IP rights. I mean, Stairway To Heaven is not a substitute for California Dreaming.

So these aggregations have been found to constitute separate markets, or when we look at the remand in the Kodak case, the parts market, even though all these parts were clearly complements, the Ninth Circuit said no, we're looking at the market for the aggregation because you really need access to the aggregations. I think that those would be kind of the lines of inquiry on legal side that I would be pushing here, but I don't think that there's a good answer at this point.

MARK POPOFSKY: Just couple quick comments. I agree that this is the toughest situation, and on these facts alone, I think you would not say this is enough. You need to have some market power that's materially enhances to have an antitrust problem, and the mere fact that an operating company has transferred patents to a PAE who can more cleverly assert, as Carl said, alone is not going to be enough. You need the something else.

The something else could be that the scenario C could form part of scenario A. To go back to my hypothetical non-hypothetical, you. can imagine one reason there's a changed incentive is that the operating company who transferred the patents is sort of exiting the standard setting environment, and it doesn't really care about the fact that everyone knows it's going to transfer patents to a PAE. And therefore, it's not going to care that when word leaks out that it's done transfers and there are securities files about it, that no one's going to adopt its technology anymore.

You have to have a story there of why this is going to affect competition, why it's going to have a material fact on whatever market you're looking at-- the technology market in Hanno's example

of acquiring substitutes. Very hard to get your arms around given the opacity of this market. Or in my original hypothetical, maybe because it affects the downstream markets so significantly in a product market to have the changed incentive.

The last thing here for the pure play example Hanno talked about is intriguing. Carl said earlier today he wasn't very creative, and he confirmed that, I think, a few minutes ago--

[LAUGHTER]

MARK POPOFSKY: --where he said if you have non-substitute patents and you aggregate them, I can't think of an antitrust theory. And I think the ultimate defense to the theory I was spinning out earlier, which is if there is, to borrow a random quote of someone in this room, safety in numbers, that the very big portfolios create an incentive to the IBM style enforcement that you just can't beat.

The counter to that is what Carl said earlier. These are likely Corno complements, that if we're concerned there's an anticompetitive effect of shielding weak patents, we have to weigh against that the benefits of creating a pool. And I suggest that if we were to explore this theory, one would try to find the right industry where one thinks, based on the research that is done, the Corno compliment effects are weaker. Maybe we've seen enforcement pattern of targeting a very tight product market with three or four players where all four of them faced the IBM situation, and therefore the whole price of the product marker is taken up.

A very discreet example where we might actually see this problem, but as a general matter, I think this hypothetical shows that antitrust alone cannot invalidate the whole PAE model. Is going to defend on the facts.

ANDY GAVIL: Carl?

CARL SHAPIRO: Well, my answer to this scenario as a written, I believe, can be reduced from things I've said earlier today. Since it's late in the day, I'm therefore leaving this to all of you as a homework exercise.

[LAUGHTER]

HILL WELLFORD: A couple of observations. People have referred, although not to its name, to what's called the birthday problem in statistics. This is the likelihood of any one person having a birthday on a particular day is 1 of 365, assuming it's not a leap year. And if that's a patent, that's very likely to be invalid patent. 1 out of 365 you're going to win, so let's put it in the patent context.

Well, it might surprise you, if you haven't been to a statistics class, to realize that if you have 23 people in the room, the likelihood is 50% that at least one of them has the same birthday as the other. And if you have 57 in the room, 41 it goes to 90%, at 57 it's 99%. So the idea is you put 57 terrible patents together, and you're guaranteed to win.

I do not think, in fact, that patents are quite that probabilistic, to use that word that Carl has helped make famous. Litigation is not quite that random, but there's something to that illustration.

However, I do not see that antitrust has anything to do with the illustration. I don't think there's a hook there of just worrying about numerosity of patents. I think you have to find some plus. Being able to evade a FRAND obligation, so that as Logan mentioned, you could pop into existence some royalty stacking that didn't exist before. I think that's a potentially significant item.

Some other evasions, some other ownership structure, that can get you out of commitments that you had before, I think, is worth looking at in this situation. But the pure situation where they're just, as I mentioned before, taking advantage of comparative advantage that gets you a better return on your patents, that is really at the core of what the Patent Act is about of making sure the innovator can monetize its patents.

So if it is just a pure situation, I don't think you can reach it. If it is this plus, I think you can, and that's the question.

ANDY GAVIL: Any questions? We'll take just a couple of questions. Where are the microphones? A couple, I was being optimistic there. Right there. OK, start there.

RALPH ECKARDT: Hi, Ralph Eckardt from a company called 3LP. I'm an IP strategy consultant, and I wanted to say that I found this panel terrifying. I would have absolutely no idea whatsoever what to advise my clients about what behaviors would be appropriate or inappropriate with regard to patents and patent licensing based on this panel.

I'd like to propose a test that the FTC should think about before they introduce any rules about how patent licensing and assertion entities ought to operate, and my proposed test is that you ought to reconvene this panel. And if you can get agreement across all of these experts about how any particular scenario should be handled, then it's probably appropriate for the FTC to take a step forward and propose some rules.

CARL SHAPIRO: By that standard, we'd no antitrust enforcement at all, you understand.

[LAUGHTER]

HILL WELLFORD: This is an example of incentives. Most of us are private lawyers, and we want to make sure that you have to hire us.

[LAUGHTER]

FIONA SCOTT MORTON: Hi, it's Fiona Scott Morton. I have a question for Carl, which is you have been framing your answer to the first hypothetical as a vertical situation. So I'm the operating company, I make a widget, and I have this intellectual property which is an input into making widgets.

Have you thought about thinking about the operating company as being a licensor, having a business in licensing intellectual property? And the PAE has a business in licensing intellectual property, and they compete with each other in the market for licensing intellectual property? Would that affect your answer?

CARL SHAPIRO: Yes.

[LAUGHTER]

MARK POPOFSKY: We'd agree on that.

ANDY GAVIL: I see a hand, one here.

JERROLD: Thank you. Jerrold A couple of things. In scenarios A and B particularly, I'm reminded of why oh, it's not working.

[LAUGHTER]

JERROLD: I have this effect on everything electronic. I'm reminded of why I liked hypotheticals so much in law school, because you Just to talk about different things. But in A and B particularly, the biggest complaint people seem to have earlier was that the effect of this type of enforcement, of PAE enforcement-- sorry about that.

[LAUGHTER]

JERROLD: This better be really good, huh? The effect of PAEW enforcement was to take questionable patents and suggest that at the end of the day, by the time you bundle things together, you're paying $100,000, $200,000 settlements for cases that really aren't worth very much. A question of the panel, really, is is the type of enforcements you're talking about from antitrust perspective, and certainly anticompetitive types of behavior, does that really move the needle? Are these types of things the types of things that the FTC and the DOJ should be concerning itself with?

The second issue really is, to me, you're talking about changing incentives and reputational constraints. And so, what you do is you, instead of suing company A yourself, you give the patents to a PAE and say, you go sue them. Well, in any circumstance like that, I would say, having litigated for some 40 years, the odds are pretty darn good that the company's going to figure out what you've done and sue you back anyway without regard to the fact that it was done through the PAE. So I just wonder if the hypothetical isn't just that and doesn't really reflect in any way what the real world is likely to be.

MARK POPOFSKY: A couple responses. One, I gave a non-hypothetical hypothetical that had nothing to do with the strength of the patents. It simply had to do with royalty commitments that were made. I think that shows how this can happen in the real world.

Second, I think the gentleman was quite right. I think the logic of you've got the enforcement agent who's not going to nuke it back is the other guy's going to get an enforcement agent if he can-- Maybe not always-- and nuke you back. And I think it's really an asymmetric situation that the agencies really should be looking for and that you might see in litigation. Some reactions.

ANDY GAVIL: One last question. The gentleman over here.

SPEAKER 1: Thank you. This is a question directed at Hill, I think at the end. Maybe this is just late in the day and I got off a red eye, but i was just wondering. I was a little taken aback at your last comment about the goal of the patent not being to monetize patents. Is that your view of the Patent Act?

HILL WELLFORD: No. Money is fungible. Rewards are fungible, and that's the way I was looking at it. It's to reward inventors. And inventors, generally speaking, want to be rewarded in money. Some of them want to be awarded in fame, but those aren't the ones necessarily who are filing the most patents. They want to be rewarded in the coin of the realm, and right now we use dollars for that.

SPEAKER 1: I'm just wondering, that's the goal of the patent? I

HILL WELLFORD: The goal of the Patent Act is to use rewards to benefit society. So yeah, I completely agree. If that's the point you're making, I completely agree with that. But there is an interim step to that, and consistently, that's what the Supreme Court and everything else has held, is that you do that initially by making sure that inventors are rewarded enough. And that question, what's enough of a reward, is really where the rubber meets the road.

FRANCES MARSHALL: All right. Well, we are closing a little bit later than expected. Renata Hesse is here and will be giving her closing statement in a couple of minutes. But I'd like to thank this panel, and I'd like to encourage any of you who find these issues complex and interesting to think about them further and submit any thoughts that you have to us in public comments, and that We'll. Be accepting public comments through March 10. Thank you very much.

[APPLAUSE]

RENATA HESSE: I'm going to do this very fast since I don't want to stand between you all and a beverage or some food. I wanted to thank everyone for joining us today, for a compelling and timely discussion of the implications on competition and enforcement policy of patent assertion entity activities. I want to thank the FTC for co-hosting with us and for the many, many collaborations that we've had over the years on IP issues on workshops and hearings. It's been a traffic partnership that we're very grateful for. And I want to thank Stu Graham for joining us and giving us the perspectives from the PTO today, which was a useful input into all of our thinking on these issues.

My biggest thanks, though, go to the panelists and to all of you have stuck it out until almost 6:00 PM, which is Herculean in terms of sitting in a conference room for a long time, especially

one without windows. You all have put tremendous thought and effort into preparing for the panels and for bringing your insights and perspectives to this group, and we're very grateful for all of that effort and for all the different perspectives that everyone shared with us today.

From our perspective, competition is especially important in innovation-driven sectors that are integral to economic growth. A recent PTO report estimates that more than one third of US economic activity is attributable to IP-intensive industries. So this is an area-- and I think we've made this fairly clear-- that is of great interest and a big priority for the antitrust division.

When we see activity in the IP marketplace that raises questions about how it will affect competition, consumers, or innovation, the antitrust division digs in. We talk with members of the affected industries. We seek out and talk with leading academics or relevant sister agencies like the PTO and other key stakeholders. When it is appropriate to do so, we bring these parties together for a workshop, as we have done today, to hear their varied perspectives and to assess the impact of whatever conduct is at issue on a competitive, efficient, innovative economy.

Today we've been focused on PAE activity, and you might ask why? This workshop was prompted by the dramatic changes in growth in patent assertion activity over the past decade, along with concerns that some of this activity may be hampering innovation and competition rather than promoting it. Critics have argued that through the aggregation of opaque patent portfolios and aggressive litigation and tactics, PAE activity increases costs, slows technology transfer, and taxes consumers and industry. Supporters argue that PAE activity can facilitate the transfer of IP and put more funds towards inventors and research and development. And we have for both of these viewpoints today.

Our panelists today addressed many issues raised by PAEs. We heard panelists paint for us the historical developments of revenue-driven licensing and explain the balance of costs and benefits from this activity, including the effects on practicing entities. Professor Shapiro described for us the motivating theory behind efficient licensing of IP rights and contrasted that with some of the real life challenges we see arising from PAE licensing practices.

These benefits and costs of PAE activity were the focus of our Session B panels. We received an insightful, real world view of the benefits and costs of PAE activities from industry and practitioners in the field.

We want to see an efficient market for the transfer patent rights that appropriately rewards inventors and innovators so as to create incentives for further research and development. We want inventors and innovators to promote adoption of cost effective technologies when producers are making investment decisions ex ante. We do not want a system that harms vibrant, ongoing innovation through inefficient or opportunistic licensing activities.

The courts, Congress, and the administration are all seeking to promote the benefits of our IP system against the potential overreaches of PAE activity. Our courts have sought to align damages with the value of an infringed invention and grant injunctions only when equitable standards are met. Congress passed the American Invents Act in 2011, which includes joinder rules that prevent plaintiffs from filing a single complaint against multiple alleged infringers, and

the PTO is engaged in important efforts to improve patent quality and increase the transparency surrounding changes in patent ownership. And you heard about that directly from Stu just after lunch.

In our final session, panelists explored how PAE activity might harm some competitors and how aggregations of patent portfolios can enhance market power and harm consumers. This falls within the bailiwick of the antitrust agencies. The division will continue to evaluate these theories in view of the activities taking place in the marketplace, and we will continue to work with the FTC in these efforts.

We welcome feedback on the interaction of PAE activity and the antitrust laws, and I want to encourage attendees at this conference and public stakeholders to send comments to the antitrust division and the FTC. As Francis just mentioned, the deadline for submitting public comments is March 10, 2013. Comments received by this date will be posted on our website. In addition, we welcome opportunities to speak with you in person about your competition concerns.

Last but certainly not least, I want to close by expressing my appreciation for the hard work of the antitrust division and commission staff. You can't overestimate how hard Frances , and Erica, and Suzanne, and the teams at DOJ and the FTC worked to put this together.

[APPLAUSE]

RENATA HESSE: It is our staff members that make workshops like this, one, possible and productive, and it is our staff that worked tirelessly every day to investigate and when necessary go to court to protect the American consumer.

Thank you all. Have a good evening, and travel safely if you're traveling.

[APPLAUSE]