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TOOLS TO PREVENT PATENT "HOLD-UP"

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P R O C E E D I N G S
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MR. ROACH: Hello everyone. I want to thank everyone for coming. I'm delighted to see the folks that are here, the interest in the issues today. I must say the welcome, of course, is to the FTC Workshop on Intellectual Property Rights and Standard Setting, the one we've called Tools to Prevent Patent Hold-up.

And I am delighted to see the interest among the folks who are here today, and I am very, very grateful to our panelists, to our crew of panelists, who have come and given us their time to be here today to talk about these issues, and some of them have traveled from quite some distance to be here.

I have a few housekeeping details I'm compelled to pass on. I'm Pat Roach from the Office of Policy Planning, by the way, at the FTC. And, so, if you'll have the patience to bear with me, several little items to take care of, one of them that is -- may be important around lunchtime is that anyone who goes outside of the building without the FTC badge, or even with the unofficial badge, when you come back into the building you are going to be required to go through the machine, through that screening as you come in, but hold onto your sticky patches because it will make your life a lot

1 easier. You'll just be able to be waived into this room
2 again after lunch. And because of that a reminder that
3 it may take just a little bit to come in and return to
4 the auditorium.

5 There are a few other things here. In the
6 event of a fire or evacuation of the building, leave the
7 building in an orderly fashion. Once you're outside, you
8 need to orient yourself to New Jersey Avenue, which is
9 along here on this side of the building. Across from the
10 FTC is the Georgetown Law Center, and the rallying point
11 is across the street in front of the right front
12 sidewalks in case we have a fire and so forth.

13 In the event it is safer to remain inside the
14 building in an event, we'll need to be told where to go.
15 You will be told where to go. And we have some security
16 folks. If you spot any suspicious activity, please tell
17 security.

18 I'm also going to give a welcome to those who
19 are viewing these festivities by webcast, and also have a
20 reminder to those who are here today that the event is
21 open to the public and it may be photographed,
22 videotaped, webcast or recorded. And by participating in
23 the event, you are agreeing that your image or anything
24 you say or submit may be posted at the ftc.gov websites
25 or on another of the government's -- the Commission's

1 publicly available social media. I'm told to tell you
2 this.

3 With that behind us, I would like to begin the
4 substance of the day today by introducing Commissioner
5 Edith Ramirez for opening remarks.

6 COMMISSIONER RAMIREZ: Thank you, Pat, and good
7 morning, everyone. On behalf of the Commission, I want
8 to welcome you to our standards workshop. Our focus
9 today will be on ways to limit the risk of patent hold-up
10 that occur when patented technologies are incorporated in
11 collaborative standards. But before I start, I'd like to
12 take a few minutes to introduce the key issues and
13 questions our three panels will discuss today.

14 I also want to take just a brief moment to
15 thank those responsible for organizing the workshop and
16 in particular Suzanne Michel and Pat Roach from our
17 Office of Policy Planning; Pete Levitas, Assistant
18 Director of the Bureau of Competition; and Joe Farrell,
19 Director of the Bureau of Economics, who will be speaking
20 to you himself at the close of the day.

21 I also want to thank our panelists for taking
22 the time to participate in today's workshop. Our
23 panelists have extensive experience with the technical,
24 business, and legal issues associated with standard-
25 setting activities, particularly in the high-tech sector,

1 and will no doubt have very interesting things to say
2 about the issues to be discussed today.

3 Standards are, of course, everywhere in
4 everyday life. They guarantee that the electrical plugs
5 on ordinary household products fit the standardized
6 outlets in our homes. Ordinary products like printer
7 cartridges and tires come in standardized sizes and
8 specifications which fosters choice and competition in
9 the supply of replacement parts.

10 Standards play a particularly important role in
11 the communications and high-tech sectors, making it
12 possible for us to exchange information seamlessly across
13 competing carriers, platforms, and devices.

14 Interoperability standards are especially important in
15 network sectors like wireless communications where the
16 value of the product to any one consumer grows with the
17 total number of consumers using the network.

18 Sometimes standards arise de facto in the
19 marketplace, which may not always be ideal. Innovators
20 may be reluctant to invest in R&D until they know which
21 standards will dominate the market, and consumers may
22 delay their purchases until a winner emerges. This is
23 one reason why many industries turn to collaborative
24 development through standard-setting organizations.
25 Collaboration can also lead to the adoption of better

1 technical standards with input from a broad range of
2 knowledgeable engineers and technicians.

3 On the other hand, collaborative standard-
4 setting can raise risks for competition and consumers.
5 SSO members are often product or technology market
6 competitors and collaboration can raise the risk of anti-
7 competitive agreements to exclude rivals or fix prices.
8 But since SSO activities can generate substantial pro-
9 competitive benefits, both courts and agencies evaluate
10 most SSO conduct under the rule of reason.

11 The risk of patent hold-up, the subject of
12 today's workshop, is another important competitive
13 concern associated with collaborative standard-setting.
14 In the context of the standard-setting process, patent
15 hold-up describes the situation where a patentee is able
16 to exercise increased market power in licensing
17 negotiations because its patented technology has been
18 incorporated into a standard.

19 The adoption of technical standards can
20 generate switching costs that change the competitive
21 landscape for an industry. After a standard is adopted,
22 firms may begin to make irreversible investments tied to
23 the adopted standard. Moreover, collaborative standard-
24 setting can be a lengthy process that requires SSO
25 members to reach consensus on a large number of complex

1 technical issues. Changing a standard after the fact can
2 add additional delay that slows the introduction of new
3 products, resulting in lost profits for firms
4 implementing the standard.

5 As a result of these costs, patentees that may
6 have faced meaningful competition prior to adoption of
7 the standard may face little competition after the fact.
8 Hold-up occurs when a patentee uses these switching costs
9 to demand higher royalty rates than it would have -- than
10 it could have negotiated before the standard was adopted.

11 Where a firm acquires market power through
12 deception or other exclusionary conduct, patent hold-up
13 can be an antitrust violation as the Commission
14 maintained in its *Dell*, *Unocal*, and *Rambus* cases. And as
15 the Commission concluded in *N-Data*, conduct that permits
16 patent hold-up can violate Section 5 of the FTC Act, even
17 if it does not necessarily violate Section 2 of the
18 Sherman Act.

19 However, even where patent hold-up does not
20 raise an antitrust enforcement issue, it raises an
21 important issue for competition policy more broadly. The
22 risk of hold-up distorts the alignment between investment
23 and reward and can discourage firms from investing in
24 complementary technologies, product development, and
25 commercialization. Moreover, patent policies that do not

1 adequately deter hold-up can lead to excessive royalty
2 rates for essential patents. Where standards are
3 involved, excessive royalty rates may be passed along to
4 consumers in the form of higher prices for an entire
5 class of products.

6 Our three panels today will discuss various
7 approaches that SSOs have employed to limit the risk of
8 patent hold-up. The two panels this morning will explore
9 solutions focusing on the ex ante period before the
10 standard is adopted. Our first panel will discuss patent
11 disclosure rules. Many large SSOs require their members
12 to disclose patents that read on a proposed standard in
13 order to facilitate licensing negotiations before lock-in
14 occurs. Disclosure policies vary widely across SSOs.
15 Some require disclosure of issued patents but not
16 applications. Some disclosure rules apply broadly to SSO
17 members, while others only apply to members directly
18 involved in working groups writing standards.

19 While weak or vague disclosure rules may do
20 little to encourage early negotiations, overly burdensome
21 requirements may slow the adoption of standards or
22 discourage participation in SSO activities, harming the
23 standard-setting process and potentially exacerbating
24 patent hold-up problems.

25 Our second panel this morning will focus on the

1 SSO rules to require or encourage the disclosure of
2 licensing terms for essential patents before a standard
3 is adopted. At least two SSOs, VITA and IEEE, several
4 years ago adopted patent policies that encourage firms
5 holding essential patents to disclose the most
6 restrictive licensing terms they would demand, including
7 maximum royalty rates.

8 Since most SSOs prohibit discussion of royalty
9 rates as part of the standard-setting process due to
10 antitrust risks, both organizations asked the Department
11 of Justice to review their proposed policies prior to
12 adoption. In both instances, the Justice Department
13 evaluated the policies under the rule of reason and
14 concluded that it had no intention of challenging the
15 policies.

16 Following these letters, some expected similar
17 policies to proliferate across SSOs. Yet it's my
18 understanding that VITA and IEEE are the only major SSOs
19 that permit consideration of royalty rates as part of the
20 standard-setting process, which raises another
21 interesting set of issues I suspect our panelists will
22 explore.

23 Some commentators have argued that the VITA and
24 IEEE policies don't go far enough. They advocate for
25 patent policies that permit SSOs to conduct auctions or

1 collective negotiations to force alternative technologies
2 to compete in order to be incorporated into a standard.

3 But here, too, the solution has likely costs
4 and benefits. Some form of collective negotiation prior
5 to adoption of the standard may limit the risk of patent
6 hold-up by licensors, but there's concern that in
7 industries where technologies that do not find their way
8 into the latest standard die on the vine, joint
9 negotiations may lead to royalties that reflect the
10 collective bargaining power of the licensees, rather than
11 the value of the technology exclusive of switching costs.

12 In a joint intellectual property report in
13 2007, the Commission and the Justice Department stated
14 that joint negotiation policies will be evaluated under
15 the rule of reason, which raises interesting and
16 difficult questions regarding the standards for proving
17 licensee market power and competitive effects.

18 At least one commentator has argued for an
19 abbreviated rule of reason or inherently suspect standard
20 which would look first at whether joint negotiations are
21 reasonably necessary to support the pro-competitive
22 benefits of the SSO. I would be interested to learn more
23 from our panelists today about whether, in fact, joint
24 negotiation policies are likely to offer practical
25 advantages over other tools to limit patent hold-up.

1 After lunch, our third panel will discuss RAND
2 royalty commitments, the prevailing ex post approach to
3 limiting patent hold-up. Many SSO rules require members
4 to commit to license patents to those practicing the
5 standard under reasonable and nondiscriminatory terms.
6 While some believe that the RAND commitment works
7 adequately to clarify licensing terms and frees SSO
8 members to focus on technical merit rather than royalty
9 rates, others claim that a RAND commitment is too vague
10 to provide meaningful protection against patent hold-up.

11 In our recent report on the evolving IP
12 marketplace, the Commission recommends the damages for
13 infringement of a patent subject to a RAND commitment
14 should reflect the outcome of a hypothetical negotiation
15 between a willing licensee and licensor at the time the
16 standard was set. In this hypothetical negotiation, a
17 licensor will not be able to charge more for his
18 technology than the value it provides to a licensee over
19 the next-best alternative at the time the infringer
20 invested in the technology.

21 Properly applied, the hypothetical negotiation
22 framework aligns reward with contribution by linking
23 royalty awards to the market value of a technology. But
24 some claim the approach risks harming incentives to
25 innovate or is too difficult to implement. Our third

1 panel will address both the theoretical and practical
2 issues associated with this and other approaches to
3 clarifying the RAND commitment.

4 So, let me conclude by thanking our panelists
5 again for participating in today's workshop. I think we
6 can all look forward to a very interesting and lively
7 discussion. Thank you.

8 (Applause.)

9 MR. ROACH: I think if our moderators are
10 ready, we can begin with panel one. They are Bill Cohen
11 from the Office of General Counsel at the Commission and
12 Pete Levitas from the Bureau of Competition at the FTC.
13 So, welcome.

14 PANEL 1

15 MR. COHEN: Welcome to our first panel of the
16 day, which will cover patent disclosure issues. As many
17 of you know, the Commission has long manifested
18 concern in this area through proceedings such as Dell
19 Computer and Rambus, and it has had great interest
20 in the potential of standard-setting procedures to
21 generate patent hold-up.

22 This panel will discuss the extent and
23 significance of patent hold-up in the standards context,
24 the utility of patent disclosures as a tool to mitigate
25 hold-up problems, and the factors that have guided SSOs

1 in setting their patent disclosure policies. It will
2 then focus on some of the key aspects of these policies,
3 looking where possible for best practices.

4 Finally, it will inquire about the nature and
5 efficacy of remedies for incomplete disclosure or
6 nondisclosure of patent rights. Because we will be
7 discussing ex ante disclosure of licensing terms and RAND
8 commitments in later panels, I'm going to ask the
9 panelists now to try to focus here on patent disclosure,
10 although I do hope to have time at the end to begin to
11 probe the relationship between the disclosure
12 requirements and other possible mechanisms for dealing
13 with hold-up.

14 We have an outstanding panel and a large panel.
15 And what I'd like to do is to very briefly introduce
16 them. On the table out front, there are bios, extensive
17 bios for the panelists, so I'll be very short in my
18 descriptions. At the far end we have Larry Bassuk,
19 Deputy General Patent Counsel at Texas Instruments.
20 Among his duties, he represents TI in the intellectual
21 property right policy matters of standards development
22 organizations.

23 Then Sandy Block is a staff counsel at IBM's
24 Intellectual Property Law headquarters, and he works in
25 areas of patent and technology licensing and standards

1 and patent pool activities. Next to him is Jorge, or
2 George, Contreras. He will teach IP law in the coming
3 year as a visiting associate professor at American
4 University. He has taught at Washington University in
5 St. Louis. He's practiced as a partner at WilmerHale,
6 and he currently serves as co-chair of the ABA section of
7 Science and Technology Law Committee on technical
8 standardization.

9 Next to him is Sarah Guichard, Senior Director
10 of Patent and Standards Strategy with Research in Motion,
11 that's RIM. Michele Herman is next, a partner at Davis
12 Wright Tremaine in Seattle, where she practices for a
13 range of clients and focuses on technology standards,
14 open source software, and technology and patent
15 licensing.

16 And then last on my right, the panelist is John
17 Kelly, President of the JEDEC Solid State Technology
18 Association, which develops standards for the
19 semiconductor and microelectronics industries. Turning
20 to my left we have Dr. Anne Layne-Farrar, an economist
21 and vice president at Compass Lexecon, where she
22 specializes in antitrust and IP matters.

23 Next is Michael Lindsay, a partner at Dorsey &
24 Whitney in Minneapolis and counsel for the IEEE Standards
25 Association. To his left is Amy Marasco, General Manager

1 for Standards Strategy at Microsoft Corporation. Then on
2 down the table is Earl Nied, the Program Director of
3 Standards and Intellectual Property Rights for the Global
4 Public Policy Group at Intel Corporation.

5 Next is Gil Ohana, Senior Director for
6 Antitrust and Competition for Cisco Systems. Beyond him,
7 we have Andrew Updegrove, partner at Gesmer Updegrove in
8 Boston. His practice includes structuring and
9 representing standard-setting, open source software and
10 other groups. And, finally, at the far end, is Naomi
11 Voegtli, Vice President of Intellectual Property
12 Strategy and Standards Group at the software firm SAP. A
13 very distinguished panel.

14 Okay, and we're being urged all to use our
15 microphone. I'm not sure if I am actually doing it.
16 Does it need to be pushed? No, I think it's on. So, the
17 bits of advice before we move into the actual panel
18 discussion, urging each to speak into the microphone so
19 that the webcast picks it up.

20 What we'll do is I will throw out some
21 discussion questions. I hope they will interest the
22 panelists to want to speak. When you -- I'm not going to
23 call on you individually, to throw the questions to you,
24 it's going to leave it up to you to let me know whether
25 you're interested in talking. The way to do it would be

1 just to turn your name tent up. I'll try to reach as
2 many of as you possible on each topic, with a thought
3 that if somebody is missed in one area you'll be
4 certainly picked up the next opportunity around. Because
5 we have such a large panel, I'm not sure everybody can
6 talk on everything, but we'll do our best on this.

7 So, let's begin. And I thought the starting
8 point here for discussion would be to take some views on
9 the significance of hold-up and patent disclosure. I
10 don't want to come in just assuming that we have a big
11 problem here. I want us to discuss this and hear views
12 on all sides. So, the basic question is how significant
13 is the hold-up problem, and by hold-up I'm referring to
14 it in the sense of assertion of previously undisclosed
15 patents after a standard is issued and investments have
16 been sunk.

17 And there are a couple attributes to this, and
18 maybe we can touch on each of them in various answers.
19 And sort of a sub-category here is, does nondisclosure or
20 late disclosure of relevant patent rights seriously
21 undermine the competitive selection of technology for
22 standards by inhibiting the SSO members' ability to
23 consider alternatives to the patented technology and how
24 frequently does this problem arise?

25 At the same time, another type of problem that

1 could be wrapped up in this discussion would be, does ex
2 ante disclosure of patents help implementers to identify
3 and seek licenses to essential patents early in their
4 product development process? So, either or both of these
5 types of potential consequences of a failure to disclose
6 and forms of hold-up. Anybody want to jump in with
7 comments on significance of hold-up? I know you've all
8 spoken on this many times before. Frequency of hold-up?
9 Well, then, I'm going to -- oh, okay.

10 MS. HERMAN: I will say something.

11 MR. COHEN: Michele?

12 MS. HERMAN: I'll start. Well, I think it's
13 really helpful that you mentioned the issue framed as
14 undisclosed patents, but I think there's a further
15 distinction that's also helpful. It's whether or not the
16 patent holders are known, in other words, do we know that
17 there's a patentee out there that says, you know, we're
18 likely to have patents that may contain essential claims.
19 That's a little bit different than just having no idea
20 who might have patents. So, I think that's one
21 distinction that's important when we look at this issue.

22 And I think the other issue that's really
23 important is to also not just look at, you know, this
24 from the patent holder's conduct or what they have said
25 or disclosed, but also from the implementer's conduct.

1 So, for example, if they know who the patent holders are,
2 you know, have they gone and asked about terms or patents
3 or, you know, various things, that information that they
4 may feel is important in making decisions about what goes
5 into the standard in advance.

6 MR. COHEN: I'm not sure I'm following you on
7 that one. If it's an undisclosed patent, how would we
8 know who the patent holder is?

9 MS. HERMAN: And that's why I said it's
10 important to distinguish --

11 MR. COHEN: Right.

12 MS. HERMAN: -- between whether it's just an
13 undisclosed patent or whether or not you know who the
14 patent owners are who claim to have patents. So, I'm
15 talking about specific disclosure versus just a general
16 disclosure. And I think that's an important distinction
17 to make.

18 And, so, if there's a general disclosure, then
19 there is still an opportunity for other participants to
20 go to that patent holder and ask for more information if
21 they want that information.

22 MR. COHEN: Well, now I see some signs. Let's
23 start down with Andy at the far end and work our way up.

24 MR. UPDEGROVE: I guess from just sort of data
25 from the field, I've work with over a hundred standards

1 organizations over the last almost 30 years, and I
2 wouldn't say that more than once every two years does a
3 patent hold-up, as you describe it, you know, pop up in
4 one of those organizations, at least to the level of
5 becoming known to the standards organization.

6 So, from just an empirical point of view,
7 there's a data input of an actual "hadn't been disclosed
8 before" patent. After that, you know, we could talk
9 about how they get resolved, but I guess the first data
10 point I would say is it doesn't happen as often as people
11 might think if you're talking about actual undisclosed.

12 If there would be something to focus on, it's
13 probably something more for a later panel talking about
14 RAND and whether you would have a wider definition of
15 hold-up. But for strict nondisclosure, I don't think
16 it's actually that big a problem when you're talking
17 about members. You have no control over nonmembers, and
18 then you have all the patents in the world to worry
19 about, but that would be for another day.

20 MR. COHEN: Okay, let's take Naomi at the end.

21 MS. VOEGTLI: So, I'd like to give practical
22 data from SAP's viewpoint. So, we are a software
23 company, Europe's largest, so we participate in many
24 standards organizations, have participated in over 100.
25 We are very active right now in 50-plus standards

1 organizations. With our experience, we have never been
2 accused of patent hold-up, nor formally ever accused
3 other company of patent hold-up. So, but this is not to
4 say we have not experienced a litigation where a patent
5 started, alleged to the cover standards, but no patent
6 hold-up.

7 And I'd like to make a few comments about
8 disclosure requirement. For SAP, we usually make a
9 blanket statement, if we do make any, which is we will
10 license on RAND patents related to any contributions we
11 made or whatever the scope of the licensing obligations
12 or IP policy define.

13 Now, if we ought to be required to disclose
14 specific patent numbers or patent applications, then the
15 overhead of participating in standards organization is
16 going to become almost prohibitive for us. Say, 50
17 standards organization we are active, let's assume two
18 specifications per year, so we are talking about 1,000
19 specifications, so they tend to be very lengthy, very
20 technical, very difficult to read. And from there to
21 determine essential patents, that's very difficult for
22 us.

23 As for patenting, like many software companies,
24 we are quite new, so we only have about 1,900 issued
25 patents. Number 51 in terms of annual issued patents,

1 several hundred. To keep up and keep reviewing which
2 patents cover standards -- now, standards isn't static.
3 It keeps changing in terms of specification scope, so
4 it's our portfolio, it's going to be very difficult for us.
5 And our concern is now we see more and more standard
6 organizations discussing what I call punitive IPR policy.

7 So, it requires disclosure of specific patents,
8 and if we don't, then they will impose mandatory IPR
9 policy that is very restrictive, unfavorable to patent
10 holders. And given the difficulty of actually
11 identifying patents or patent applications even our
12 search is good faith. We do whatever we can do, that's a
13 concern to us, also.

14 MR. COHEN: Okay, thank you. For the benefit
15 of the panelists, we are going to reach issues on topics
16 like search later in the discussion, so if we could try
17 to stick right now to hold-up as much as possible, it
18 would keep us moving ahead.

19 Amy, do you have a hold-up comment?

20 MS. MARASCO: Yes. And I think it's important
21 that we discuss how we are defining what is patent hold-
22 up and what is the appropriate role of government to
23 address that problem as defined. And I think that when I
24 hear some of the differing views that we will hear, I'm
25 sure, today, it's largely based, in my opinion, on

1 different people's different definitions of what patent
2 hold-up means.

3 So, for example, you mentioned earlier the
4 Dell, the Rambus, the Unocal cases. I think that there
5 is probably a fair amount of consensus that that could be
6 patent hold-up because there was -- there were
7 allegations of intentional misconduct, someone trying to
8 take advantage of the standard system and adverse effects
9 that resulted from such intentional deceptive conduct,
10 even in the Dell case, because there was concern by
11 industry after the Dell consent decree issued that it
12 signaled a "disclose it or lose it" type view by the
13 government with regard to disclosing patents. The FTC
14 even clarified that Dell's conduct was not inadvertent.

15 And I think for a lot of the industry that's
16 where they may draw a line as to what would constitute
17 patent hold-up. And yet I see other companies say, well,
18 here's a list of current litigation, and we say that this
19 is evidence of patent hold-up. But for some of us, we
20 view that as potentially bilateral disputes between two
21 companies who are disagreeing on a number of issues.

22 There may be some standards-related patents
23 that are on the table, but rarely is the litigation
24 between the two companies just limited to the licensing
25 terms over essential claims given a standard.

1 usually many other IPR issues and other commercial
2 disputes between the two companies. And a lot of us
3 would say that's normal negotiation and competition
4 between different companies, but we would not necessarily
5 call that patent hold-up for purposes of today's
6 discussion.

7 So, I just thought I would throw that out,
8 because I think that will help us when we talk about it
9 in clarifying what do either we as a group or, if we can't
10 agree, what do we individually -- how are we defining
11 patent hold-up.

12 MR. COHEN: For present purposes, I hear what
13 you're saying. We're presently trying to find out to the
14 extent to which failures to disclose leads to business
15 problems, leads to surprises that cause business
16 problems. So, I'm setting aside issues of whether
17 something is intentional or not inadvertent or whatever,
18 which may be elements of whether you've violated
19 antitrust law or some other law, and just trying to focus
20 now on whether there is surprise and ability to extract a
21 higher royalty because of that surprise and how often
22 that arises because someone has failed to disclose early
23 in the process. But I do -- your point is well taken as
24 to the potential significance of some form of intentional
25 conduct there.

1 Anne?

2 MS. LAYNE-FARRAR: I just wanted to follow up
3 on a couple of things I've heard this morning and talk
4 about some of the interplay between disclosure rules,
5 hold-up and other kinds of behaviors within the standard-
6 setting body.

7 I think one of the points that Naomi was
8 getting at is that if you make disclosure rules too
9 difficult to comply with you can have -- or to imply that
10 cases like *Dell* and *Rambus* and such will be filed against
11 you -- you can have one of two effects. You could have
12 overdisclosure where companies are disclosing pretty much
13 everything and anything that could potentially read on a
14 standard, which could falsely signal, say, a royalty stack
15 or far more IP involved in the standard than will
16 actually be the case. That can scare implementors,
17 thinking, oh, my God, there's tons to license out there,
18 when really there's not that much.

19 You could also have another consequence in
20 terms of participation and standards if the rules of
21 participation are onerous. If companies are worried that
22 they inadvertently miss disclosing some IP, even if they
23 would have licensed it on RAND or FRAND terms, they might
24 withhold from participating in certain standard-setting
25 bodies when they can. Obviously some bodies you have to

1 participate in if you want to be in a market, but others
2 you can choose to join or not join. So, there is some
3 balance, I think, that has to be achieved in the rules,
4 both to encourage participation and to encourage an
5 appropriate and helpful amount of IP disclosure.

6 MR. COHEN: Okay, this side of the table has
7 been neglected a little while. Let's turn to Sarah.

8 MS. GUICHARD: So, one of the things I think we
9 all have to consider when we're thinking about this
10 problem is that some SDOs only require blanket
11 disclosures and that that isn't necessarily a bad thing.
12 And we're going to talk later about transfer patents, so
13 I won't get into that, but I do think that failure to
14 disclose, even if you want to limit it to just a failure
15 to disclose at all, will potentially and has impacted
16 companies when there's been a transfer of patents.

17 MR. COHEN: Let's try George.

18 MR. CONTRERAS: Right, so, just picking up on
19 some of the themes that others have mentioned, but first
20 I'd just say, you know, the question about whether hold-
21 up in the classical sense is happening now may, to some
22 degree, be an outdated question, right, because sort of
23 Dell and Rambus-style hold-up or at least hold-up of the
24 style alleged in those cases, I would agree from my
25 experience with Andy and others that perhaps it's not

1 happening that much. But we can't ignore history and
2 that, of course, everyone has learned from these cases,
3 the cases exist. And policies at SDOs, as well as the
4 lawyers who advise the companies and the patent holders,
5 have learned and become more sophisticated.

6 So, that's not to say, though, that
7 opportunistic behavior isn't occurring in the standard-
8 setting world. If it is, it's been pushed to the margins
9 of sort of the core of classical hold-up in situations
10 like others have mentioned.

11 I won't talk about licensing terms, but in
12 licensing terms, in overdisclosure as Anne mentioned, and
13 in late disclosure, which you mentioned, it is still a
14 concern. And my principal experiences with IETF, which
15 I've advised for many years, and there's a significant
16 concern within that organization about late disclosure
17 and what potential effects are and whether it's sensible
18 in this day and age to rely on sort of case law to
19 monitor and whether there should or should not be more
20 stringent descriptions of what happens with late
21 disclosure.

22 And to get to Naomi's point about punitive
23 measures, I'd say most SDOs don't really have those.
24 People are questioning whether -- whether they're needed
25 to a greater or lesser degree.

1 MR. COHEN: Your comments on late disclosure
2 lead directly into what was planned to be my next
3 question, which is what is the optimal time for
4 disclosure for purposes of technology selection for
5 purposes of facilitating ex ante licensing. What's the
6 optimal time, where in the SSO's decision-making time
7 line should disclosure occur? Do you want to follow up,
8 Jorge?

9 MR. CONTRERAS: Certain, thank you. Early.
10 Early in the working group process for patents -- and,
11 again, I'm not talking about licensing disclosure, that's
12 next topic. But for patent disclosure, IETF patents and
13 patent applications both, that's another question, I
14 know, that you raised at the beginning, all have to be
15 disclosed. And the goal is to inform the working groups
16 as early as possible in the technical deliberations and
17 decision-making that goes on among alternative
18 technologies, whether there are going to be patents that
19 are at issue. So, earlier -- at least from that
20 standpoint, earlier is much better.

21 MR. COHEN: John?

22 MR. KELLY: I agree with Jorge. As early as
23 possible, in terms of time, and in terms of quantity, as
24 much information as possible. We set a minimum threshold
25 in our organization for disclosure. We certainly permit

1 more disclosure which kind of segues over to the ex ante
2 area, which -- where I don't want to go right now. But
3 as early as possible, as much as possible.

4 I think the critical end date by which
5 disclosure really has to occur for it to have a
6 significant bearing on the course of standard development
7 would be prior to an -- in JEDEC, it's 30 days before the
8 critical vote, whatever the critical vote, and in JEDEC,
9 that would be the critical vote. At the committee level,
10 because the board simply reviews for fairness and due
11 process. So, at least 30 days before the vote on the
12 substantive ballot within the committee.

13 And, again, I should clarify, in JEDEC, you
14 know, we -- the way we develop standards, there could be
15 hundreds, or in some cases, even thousands, of ballots
16 that lead to a final standard. So it would be the vote
17 with respect to that aspect of the standard as to which
18 the IP is considered essential. So, you can't wait until
19 the whole process is completed; it would have to be
20 timely disclosure with respect to that decision-making
21 point within the standard balloting process. And I use as
22 an example DDR. DDR4 is going to include probably 175 to
23 200 different individual components, each of which will
24 be separately balloted.

25 MR. COHEN: And what are -- what are the

1 objectives -- what are the rationales for wanting at least
2 30 days before that vote?

3 MR. KELLY: So the committees can make
4 intelligent decisions about whether to standardize along
5 the lines of -- that are covered within essential patents
6 or to look at workarounds or other alternatives or even
7 to abandon the standard-setting activity in toto if
8 that's the only viable approach. But without that
9 information it's difficult to make those decisions.

10 MR. COHEN: I see Larry at the end.

11 MR. BASSUK: Thank you. Well, we've heard that
12 disclosure should be early, but I don't really quite know
13 what early means. All due respect, because if you're
14 just starting up a standards organization and you want
15 all your disclosures up front, well, you don't know what
16 the -- what may be essential patents until after you've
17 got some kind of specification started. And, so, trying
18 to get disclosures before you go into the standards
19 development is really -- how do you describe it --
20 difficult to do, impossible.

21 I agree very much with John Kelly, just before
22 the decision point. In fact, as I'm -- as I believe,
23 most or many standards and development organizations that
24 have a decision point in there will set forth that says
25 that disclosures of essential patent claims should be

1 made within a certain period just before the voting
2 occurs. And that's -- that's the way most of these SDOs
3 handle that problem of you don't know what's going to be
4 in the standard until the standard is actually written,
5 but then you need a particular point at which you want
6 all your disclosures made. But then we come to -- I'm
7 losing it here -- I may need to come back. So, that's
8 what we have. But that's it.

9 But let's go into the actual realities of what
10 happens in a standards development technical committee.
11 For example, Texas Instruments is making a proposal to
12 JEDEC, for example. Our engineers back at TI have
13 already done some engineering and they know they're doing
14 something new, likely to be patentable, and so before
15 they make the presentation, we file a patent application
16 on that disclosure. Now, we don't know for sure that
17 it's going to be accepted into the standard, but we've
18 made that filing to protect our rights, the development,
19 the time and money we've spent in developing this
20 material.

21 And we know that after we've made this
22 presentation and this submission to JEDEC that another
23 company is going to make another proposal. And, so, we
24 have to assume that they're doing exactly the same thing
25 we're doing, that they've already done their technical

1 work and that they've filed a patent application on what
2 they're proposing, et cetera, et cetera as you go through
3 it. That's the standard way of doing it in standards.
4 You have to -- a company has to protect its rights at the
5 very beginning.

6 And, so, we all know that everyone -- every
7 company making a proposal and every proposal that gets
8 accepted is likely to be covered by a patent. So, it's
9 no surprise to us that patents are going to be there.
10 And having the standards organization ask for the formal
11 disclosure of a patent at the decision point, say 30 days
12 or 45 days or 60 days into the voting period, that's the
13 right time, because we don't know whose proposals are
14 going to be accepted, whose are not going to be accepted
15 in the specification.

16 MR. COHEN: John, if you have some quick
17 follow-up.

18 MR. KELLY: Yeah.

19 MR. COHEN: Then we're going to go to this end
20 of the table.

21 MR. KELLY: Okay, as far as early disclosure is
22 concerned, Larry's right, I mean, we set an end date, we
23 also say in the JEDEC patent policy that early disclosure
24 is required. That's to some degree subjective, and Larry
25 makes a good point, but it still becomes an imperative

1 for participation in standards to get as much
2 information out as early as possible for the benefit of
3 all the companies that are working on the standard.

4 And it -- that does work, but it brings up a
5 critical distinction, which I think needs to be on the
6 table, and that is the difference between intentional
7 nondisclosure and inadvertent nondisclosure. Intentional
8 nondisclosure usually is part, at least in our
9 experience, of a pattern that includes nondisclosure
10 followed by refusal to license on RAND terms, in other
11 words, a real blocking situation.

12 And that is different in kind from an
13 unintentional nondisclosure followed typically by either
14 a RAND assurance or by simply an agreement among the
15 companies involved in standard setting to cross-license,
16 which has no adverse economic impact on the companies or
17 the outcome of the standard-setting process. So, it's,
18 if you will, the nefarious plan to block a standard that
19 is the crux of the concern in my view, arguing in favor
20 of early disclosure. But you can't really limit the
21 discussion to the disclosure and not the assurances
22 because it becomes part of one pattern of conduct.
23 That's my quick comment.

24 MR. COHEN: Let's just take the signs that are
25 up here and then we'll move to the next topic. Let's

1 start with Earl.

2 MR. NIED: Actually, Gil, I think, was first.

3 MR. COHEN: Gil.

4 MR. OHANA: Thank you. A couple of comments
5 from the discussion. The first is, and this goes to, I
6 think, something, Andy, that was implied in something you
7 said, but maybe to make it explicit, there's a real move
8 away from SDO rules that actually require a patent
9 disclosure toward what I'll call negative disclosure,
10 where if you're sitting in the room, you're licensing
11 your entire portfolio, except for maybe your ability, as
12 people have commented, late in the process to identify
13 specific patents that you're maybe not willing to license
14 or that if you're in an RF group maybe you only want the
15 license on RAND terms. So the reason I think that you're
16 seeing fewer patent disclosure related hold-up issues is
17 that patent disclosure as a feature of IPR policies is
18 less and less frequent.

19 I can't remember the last time that I saw a
20 sector consortium agreement, and I review, I don't know,
21 20, 30 a year, that actually had an affirmative patent
22 disclosure requirement. And I think the reason for that
23 is people have realized that because of no search
24 requirements, because of personal knowledge limitations,
25 they're frankly not all that useful.

1 If you participate in a standards development
2 organization that has a personal knowledge limitation on
3 disclosure and the only patents that are subject to a
4 licensing commitment are those that are disclosed, you're
5 taking a big risk and you've got to know that going in.
6 So, one point.

7 Second, and to quote the old Joni Mitchell
8 song, there's something lost but something gained in that
9 in the sense that what's lost is more knowledge while
10 you're sitting in the room of who has patents and on what
11 specific feature of the standard, which can be very
12 helpful when it comes to things like designing around.
13 What's gained is the knowledge that you know at the end
14 of the process licenses will be available, which is
15 pretty critical when you're thinking about making a big
16 bet in terms of implementing a particular standard.

17 One comment with respect to overdisclosure, and
18 I'm going to leap ahead here to RAND, and I apologize for
19 that. The reason that there's so much overdisclosure is
20 that RAND's meaningless, so why not overdisclose? You
21 know, why not say, I've got a bunch of patents that might
22 potentially be in this area, I'm really worried that I'm
23 not the next target of an FTC investigation, so I'm going
24 to tell you a whole bunch about a whole bunch of my patents.

1 And maybe the standard might, you know,
2 infringe one of the five or ten that I've disclosed,
3 which is why you see huge overdisclosure. If RAND was
4 more meaningful, people would take more time and effort
5 before they actually disclosed a patent and made sure it
6 was actually essential.

7 And, finally, on hold-up, I think it's useful
8 to distinguish between hold-up that antitrust laws,
9 competition laws can remedy and hold-up that better
10 SDO/IPR policies can remedy. I agree with the
11 distinction that people have made between inadvertent and
12 intentional nondisclosure, and it's an important
13 distinction. I would say that SDO/IPR policies should be
14 focused on both, because at the end of the day when it
15 comes to roll out a standard, both really have the same
16 consequences.

17 MR. COHEN: Okay. Andy, he was talking a
18 little bit about one of your points. You want to pick
19 up?

20 MR. UPDEGROVE: Right. A couple of sort of
21 overarching points that I think are useful. One is that
22 practices differ from niche to niche and from technology
23 to technology. So, while I would agree with Gil that in
24 silicon there is a move in that direction, in many other
25 areas of standardization that wouldn't be true at all

1 and, in fact, would be, you know, fought rather
2 aggressively because, if you will, it's the culture of
3 the niche.

4 There are some standards organizations where
5 it's all about asserting patents. I've even had people
6 tell me that everybody in the room is cheating, you know,
7 in some standards organizations. So, there is quite a
8 big difference, and it makes it a little bit hard to
9 generalize.

10 One thing I did want to supplement Gil on is
11 that the concept of disclosure can be solved in two ways.
12 One is by actual disclosure; one is, as he says, by
13 saying we won't assert, you know, walking into the room,
14 we won't assert. And there are reasons to pick one or
15 the other that are not as obvious. One is just the
16 burden of doing the search, the uncertainty of the
17 disclosure, merely because you say you have a patent or
18 don't have a patent, people will argue in court forever.

19 So, what you find -- what is after all a
20 consensus organization, nobody has to be there -- people
21 have to come up with practical compromises that will meet
22 their goals. People will come up with some default
23 solutions like, gee, I won't assert anything, and then
24 you make it work better by insisting on a very well-
25 defined scope for that working group, so that if you join

1 the working group you can look at your patent portfolio,
2 broadly speaking, and sort of weigh what I'm putting at
3 risk relative to what I'm hoping to gain out of this
4 working group.

5 It's a very good solution. It's not one that
6 every organization or every group of companies will do,
7 but it's a very good solution from a practical point of
8 view. It's the ultimate early disclosure by making the
9 disclosure moot. So, that is a helpful practice. I'll
10 come back to the consensus point later but stop there.

11 MR. COHEN: Earl?

12 MR. NIED: So, one thing that I'd like to make
13 sure we don't lose sight of, and this will perhaps go
14 into your question about how negotiations actually happen
15 or if they're useful, but one thing I'd like to point out
16 is is that, you know, the actual value of a patent and
17 where negotiations really take place, around a product.
18 It is not around essential patents to a standard. A
19 colleague of mine, Brad Biddle, at Arizona State
20 University did a paper recently where he estimated that
21 in order to build a laptop computer you're going to have
22 to deal with about 500 different standards.

23 So, if you're building a product, you're going
24 to infringe patents because they're made essential
25 probably by multiple standards and probably because of

1 your own design decisions and making your product. So,
2 you know, when we talk about how this all plays out,
3 let's come back to the -- one of the things that SSOs do
4 is they're looking for help deciding what should go in
5 the standard, so they're looking for information. And
6 the amount of information can vary.

7 As Gil and Andy have said, there are some
8 organizations that are much more aggressive, not the
9 organization but the participants in the organization, are
10 much more aggressive in asserting their patents. And
11 that's their market. And there are others that are not.
12 So, my point is all of this is that when you do have a
13 disclosure process, the SSO is typically going to look at
14 how is this going to deal with my market and my
15 implementers and how can I weigh the costs and benefits
16 of doing that so that I can have an effective standard.
17 And I define effective as rapidly implemented and has
18 longevity.

19 So, you know, they look at that and they'll
20 look at a couple different things. They'll look at,
21 well, should I just have a negative disclosure obligation
22 where it's a RAND commitment to join and maybe there's an
23 exception process if there's somebody introduces
24 something you didn't want and you need to get it out.

25 Maybe it's a "just let me know if you have

1 patents in your contribution." And this is important and
2 quite common in many organizations where it's not a
3 matter of how many patents in a contribution or
4 identifying individual numbers, but rather it's to
5 understand if there is some concern about that
6 contribution. And then still others in the more
7 aggressive environment say, "hey, listen, I want you to
8 identify individual patents."

9 JEDEC is one of those organizations that has a
10 history that would indicate that that's really prudent to
11 have people do in that environment. And there are some
12 others. But it's not universal. And we need to be
13 cautious about looking at the practical realities of when
14 people are actually going to be negotiating things and
15 how people can use that information.

16 So, yes, it's part of the decision process that
17 helps the SSO decide which things to include. Yes, it
18 does alert people that there is a possibility to do
19 negotiations. Do they go run out and do negotiations in
20 the early stages of a standard? Well, they might in some
21 areas, in some standards where there's an existing
22 market, it's been around for a long time, it's well
23 understood, it's an evolutionary technology, maybe it
24 makes sense to do that and they can maybe get a better
25 deal out of negotiating sooner.

1 But as Larry pointed out, there are some areas
2 where the technology is just so brand new there's no way
3 to understand the market, there's no way to make any
4 decisions. You'd actually be foolish to go out and
5 attempt to negotiate for just part of what you're going
6 to need later on. So, end of my comments.

7 MR. COHEN: Good. Our last one on this, we'll
8 take Anne, who's been up for a while.

9 MS. LAYNE-FARRAR: Okay. I just wanted to
10 mention some empirical research that I'd done, not on
11 what should disclosure be but what actually appears to be
12 some disclosure practices. I was noticing that in part of
13 this hold-up debate there seemed to be over years past
14 sort of an assumption that if disclosure is made later,
15 ex post to the publication of a standard, that there must
16 be some sort of hold-up intention.

17 And, so, the one standard-setting body that has
18 enough data to analyze these things is ETSI. They
19 actually disclose which patents are disclosed, what dates
20 are they disclosed, and what technical specifications
21 they're disclosed for. So, you can match up publication
22 dates with disclosures.

23 And I was truly surprised to discover that the
24 vast majority of disclosures are actually made ex post
25 and considerably so. I think the median was about six

1 months after publication date, and some of them were
2 years, one or two years. And this is not just one or
3 two; this is, you know, more than not, well over 50
4 percent, closer to 60, 70 percent, depending on which
5 particular component you're talking about.

6 So, clearly there's something else going on.
7 Either it's really difficult to know which patents you
8 need to disclose or maybe everybody already knows because
9 you're a repeat player, you don't need to disclose. But
10 I think it's dangerous to assume that there's this tight
11 causal link between ex post disclosure and hold-up.
12 There could be, but there isn't necessarily because there
13 is so much of it.

14 MR. LEVITAS: Maybe we could just follow up on
15 that point real quickly. Has that been the experience of
16 other folks at the table that at least some majority of
17 their patents are being disclosed afterwards and, if so,
18 has that been a problem?

19 MR. OHANA: It's worth noting that ETSI's
20 actually changed its rules to prohibit exactly the
21 practice that Anne talking about. ETSI changed its rules
22 in, I think, well, Michael Frohlich, I'll defer to him,
23 but I think 2005?

24 MS. LAYNE-FARRAR: This data was after that, so
25 --

1 MR. OHANA: To require disclosure ahead of the
2 completion of a standard, so if the data is after, I
3 guess people aren't following the ETSI IPR policy.

4 MS. LAYNE-FARRAR: Evidently not.

5 MR. LEVITAS: Marc, did you want to -- go
6 ahead.

7 MR. BLOCK: Sandy Block, and it's probably a
8 wise move to keep the microphone away from me, towards
9 Jorge. I just wanted to make a comment with regard to
10 ETSI. There's a case that confuses me, and it had to do
11 with an ETSI-developed standard. And in that case, a
12 patent holder took position, did not disclose this patent
13 that related to an ETSI standard, and a defendant could
14 not get a license under that patent.

15 The case is very -- it's confusing to me.
16 There are a lot of facts in that case. But basically
17 there was a settlement in the case that supposed -- that
18 seemed to trump the license commitment. But there was
19 also a statement by the court that the patent holder did
20 not disclose this as an essential claim. And there was
21 no flaw on their part and, as a result, there was no
22 commitment on behalf of that patent holder.

23 And it turns out that there were only two
24 parties that could use this -- that would be using this
25 patent in the standard. One was the patent holder, and

1 the other was the defendant. And it's a case where I
2 think the lack of disclosure was a very significant
3 element in this case. And to those who say that there is
4 not a hold-up problem, I think if you go to Andrews, they
5 would say that there is.

6 To a large extent, I think the hold-up problem
7 is whether you're an implementer trying to implement and
8 you're seeing either a patent was not disclosed, this is
9 in the case of Unocal or Dell or some of the other cases
10 like Rambus. Or you're the patent holder that's looking
11 and saying I didn't know about this, I found out about it
12 later, I didn't have a duty to investigate. And I think
13 that to a large extent whether there's a hold-up problem
14 depends on which side of that line you're on.

15 Oh, by the way, I'm with IBM. We have tens of
16 thousands of patents. We're not anxious to run around
17 and do a comprehensive search each time a new feature
18 goes into a standard. On the other hand, we recognize
19 the importance to the success of the standard that
20 implementers have some comfort with regard to the
21 disclosure of patents early on and the license that comes
22 at a later point. And I will reserve comment on that for
23 later.

24 MR. LEVITAS: Michele?

25 MS. HERMAN: Yes, thank you. Yeah, I just want

1 to respond directly to Sandy's discussion about the
2 *TruePosition/Andrews* case. I think if you look carefully
3 at all the pleadings there you'll see that TruePosition
4 claimed that its patents did not contain essential
5 claims. It took that position from the outset, all the
6 way through the case. It was not -- and, so, its point
7 was that it didn't disclose because it did not have
8 essential claims. They also alleged that Andrews was
9 fully aware of the specific patents in this particular
10 dispute because the two companies had engaged in earlier
11 patent litigation which ended in a settlement and the
12 particular patent was a patent that was discussed in
13 connection with that.

14 So, the facts of that case don't really bear
15 out on a nondisclosure case. I mean, it's possible
16 somebody else may have argued that the claim was
17 essential, but True Positions did not disclose it because
18 it was their contention that they were not essential.

19 MR. LEVITAS: So, rather than get into a
20 further discussion of that, let me ask a slightly -- a
21 related question that I think follows up on something
22 that Sandy said, which is, it does seem that there is at
23 the very least some ambiguity in what kind of disclosure
24 requirements there are in various organizations.

25 And it leads to the obvious question of why do

1 we still see this. This has been a discussion that's
2 been going on for a long time, and yet standard-setting
3 organizations appear to some extent content to have
4 somewhat ambiguous policies. So, what are the
5 ambiguities in those policies and why do we keep seeing
6 them? Michael, you want to go?

7 MR. LINDSAY: Sure. Well, I think the reason
8 that you keep seeing variations among SDOs and
9 ambiguities in their policies has been demonstrated by
10 the discussion we had this morning. It's going to depend
11 upon who is in the room, what their perceptions of the
12 problem that are to be addressed are, and what their
13 views are on the best way to approach the problem as they
14 perceive it. And depending upon which of our panelists
15 are in the majority in that SDO's governing body, that's
16 going to tell you what kind of policy they're going to
17 end up with.

18 But the other point is the issues are very
19 challenging, and reasonable minds can differ on the best
20 approach, even if they share a common perception of the
21 problem to be addressed. And the second point is that
22 because the issues are challenging there is no perfect
23 solution. And there is probably going to be necessarily
24 some amount of ambiguity.

25 I mean, I'll give you an example in the IEEE

1 policy, and I'll explain later more about what the policy
2 is. There is an obligation to disclose the identity of
3 anyone that you believe you, the participant and the
4 working group, believe may hold an essential patent
5 claim. Now, it's personal awareness of the person in the
6 room. But the IEEE has also said in its response to FAQs
7 that we still expect people to behave in good faith.

8 Well, that's introducing an ambiguity, but
9 that's because you don't want to go so far as to have a
10 search obligation on a company. You also don't want a
11 company to be sending someone who has been deliberately
12 shielded from knowledge of patents. But how do you write
13 that into a rule that can be enforced? I'm not sure it's
14 possible, and so you're always going to have that kind of
15 ambiguity. And the significance of the ambiguity will
16 get resolved later on if there is a dispute and people
17 aren't able to figure it out for themselves.

18 MR. LEVITAS: Actually, why don't we just go
19 down the line here.

20 Amy?

21 MS. MARASCO: Yes, thank you. I think a number
22 of people have touched on some of the tradeoffs that go
23 into these disclosure policies. Again, if the policy is
24 "disclose it or lose it," you must conduct patent
25 searches. You know, these are viewed as very onerous on

1 patent holders and cause patent holders to not want to
2 participate. It's hugely burdensome for them to conduct
3 multiple patent searches as the standard evolves to make
4 definitive disclosures or risk losing the right to seek
5 RAND licenses if that's their objective.

6 So, that's why most standards bodies don't
7 require that. But then what kind of effort needs to be
8 made? Is it reasonable efforts? Well, how many people
9 do you have to go talk to in your company and then you've
10 decided we've made enough reasonable efforts? If it's not
11 going to be something -- if it's not going to be patent
12 searches, what is enough that's something short of that?
13 How many people have to read the standard? I mean, a lot
14 of patent attorneys may know a lot about the patent
15 portfolio, but they're not there reading the technical
16 specifications that can be hundreds of pages long.

17 So, again, it's a -- it is a challenge, and
18 it's a challenge on where do you draw these lines.
19 There's early versus later disclosure. As we mentioned
20 earlier, if you're going to encourage early disclosure,
21 you are going to get overdisclosure because the standard
22 is in a very early state and will evolve and change,
23 which is why the disclosure requirement for early
24 disclosure is patents that either might or likely will
25 end up containing essential patent claims, vis-a-vis the

1 final standard. But how do you make that assessment? But
2 a lot of companies disclose because they say, well, this
3 is related and I don't want to get accused of not having
4 disclosed it later on.

5 And so, sometimes there are late disclosures
6 or ex post disclosures because a company may not have
7 contributed their technology to the standard, but they
8 ended up having essential claims because of the way the
9 standard was written. And, so, as soon as they find out,
10 they make a disclosure. But, again, it doesn't
11 necessarily mean that they're not willing to offer RAND
12 licenses or that, you know, that there is a potential
13 there for a patent hold-up.

14 And also there's the general versus specific
15 disclosures. A lot of companies make general disclosures
16 because they see the standard's evolving. And, so, maybe
17 these three patents look like the ones today, but they
18 may not be the ones tomorrow as this technical committee
19 does its work. I'd rather just reassure everybody that I
20 probably will have patents that contain essential claims
21 at the end of the day, no guarantees, but there's a good
22 likelihood, and whatever essential claims end up reading
23 on the final standard, I'm willing to make the RAND
24 commitment or RAND royalty-free or whatever it is. And
25 for some companies, that's really the only way that they

1 can manage this and provide the reassurances and make a
2 valuable statement.

3 And then at the end of the day, you know, I
4 agree with some of the other speakers that in some ways
5 what matters most about disclosure is not the specific
6 patents, it's who are the patent holders who likely will
7 hold essential patent claims at the end of the day. And
8 the reason that information is valuable is then you can
9 make a decision.

10 And I'll echo what Earl said, the decision is
11 going to be more than just about essential patent claims,
12 vis-a-vis, a single standard. It's going to be about
13 your product, and you're going to think about your
14 product, look at the different patent holders? Do I
15 already have a licensing agreement with them? Do we have
16 a longstanding detente, you know, what is their business
17 model? Are they the type of patent holder that makes
18 RAND commitments at standards bodies but don't
19 proactively seek licenses, they sort of use their patents
20 defensively, so when someone sues them with some
21 intellectual property they'll go and pull out the stuff
22 that they, you know, where they made a licensing
23 commitment at a standards body?

24 I mean, there's all these different behaviors
25 by different companies with different business models.

1 And, so, really what companies do if you're an
2 implementer is you assess the landscape and you make a
3 decision: Do I need to go and talk to this patent
4 holder? And if you decide the answer is yes, it's not
5 going to be just about the essential patent claims for
6 this particular standard. It's going to be for peace for
7 your product and cover lots of other IPR and maybe even
8 other business arrangements.

9 And I think at the end of the day that's what
10 most people see the value of disclosure is trying to find
11 out who are the potential patent holders who may be
12 players here and assess what is the likely outcome of all
13 of that.

14 MR. LEVITAS: Why don't we take one more person
15 on this and then we'll go to the next one. Earl?

16 MR. NIED: So, I just wanted to make two
17 points. Number one, I wanted everybody to keep in mind
18 the complexity of the standards that we're talking about
19 here and to your point of, you know, why would you make
20 these tradeoffs. Well, as Larry pointed out for, what was
21 it, DDR4, a year in excess of 170-some-odd individual
22 distinctive items that are going to come in front of the
23 board for a vote, and each of those are a specification.
24 Is that right, Larry?

25 So, that -- I'm sorry, John. So, you know,

1 there's a substantial amount of work. If we're talking
2 about ETSI, we are talking about, for just the GSM
3 standards, if you printed them out on paper, you're
4 talking about over a cubic meter of paper. A cubic meter
5 of paper. Go try to do an assessment of essential patent
6 claims on a cubic meter of paper, highly technical
7 paper. And it's a tough job, yet in that environment,
8 that's -- the telecommunications standards are one of the
9 ones where it has been considered very critical that
10 disclosures get made. So, you know, it's daunting, but
11 they're -- you know, there are some ways to deal with it.

12 Now, my last point is, you know, as Intel, and
13 to Amy's point, you know, do people really come to me?
14 Well, at Intel, we commit to -- make a lot of general
15 statements about reassurances to licensed RAND. We
16 actually even on our website say irregardless of -- if
17 the policy doesn't even say so, if we're participating in
18 the organization through final release and we haven't
19 objected, we'll license RAND, just to make sure we're
20 clear. And we don't have to do that. We've made that as
21 a blanket commitment.

22 But in that blanket commitment, and the question
23 is how many people have actually come to us and sought
24 a license? Well, I haven't checked in the past year, but
25 as of two years ago, the number was actually four. And

1 of those four, one of them was a person writing a
2 newspaper article; one of them was a law firm trying to
3 drum up clients; and two were actually seeking licenses.

4 And, you know, that's not indicative of all of
5 the companies here, but, you know, just our experience of
6 how many people are threatened by Intel's in excess of
7 10,000 patents. We don't get a lot of people seeking
8 licenses from us.

9 MR. COHEN: Okay, let's now shift and try to
10 focus for a few minutes on some of the areas of greatest
11 difficulty in creating an effective disclosure policy. I
12 can see four that spring to my mind. If anybody sees
13 another one, you can certainly add it. One of them is
14 search, and we've heard a lot about search already, so
15 I'm not going to go into that. If somebody feels that
16 there's something they really want to add on search, feel
17 free to interject it in one of these other areas.

18 The area that I would perhaps want to start
19 with might be the question of how you define the nexus
20 between the patent and the standard that's sufficient to
21 trigger a disclosure requirement. I've heard frequent
22 mention of whether a patent is essential. I think at
23 times we've seen references to patents that might be
24 involved in the SSO's work. What's the right standard?
25 What's the best practice here?

1 And keep in mind one particular hypothetical
2 that kind of troubles me in the area, and that would be a
3 situation where you have a patent on a technology that
4 isn't technically necessary for practicing the standard
5 but it's the most obvious or the most economical means of
6 implementing the standard and that likely will be built
7 into products unless the patent rights are promptly
8 disclosed. How do you handle that in defining your rule?

9 Who wants to start? Okay, I see Naomi up
10 there.

11 MS. VOEGTLI: Thank you. In terms of your
12 point of nexus between patents and disclosure, for us a
13 number of panelists mentioned the difficulty in terms of
14 actually going through specification and determining
15 which patents are, quote, quote, essential, I think many
16 companies go toward general disclosure that Amy mentioned
17 and also Intel, Earl mentioned a little bit of the RAND
18 commitment.

19 Now, I'd like to mention just one thing which
20 is not directly related to your question. It's -- I think
21 we need to also focus on differences between industries.
22 Because licensing is on the royalty-free terms, on RAND, as
23 opposed to standard being royalty-generating, I think
24 disclosure requirement and also significance of the
25 disclosure is a little different.

1 MR. COHEN: Let's swing over here and pick up
2 John.

3 MR. KELLY: I wanted to comment on the nexus
4 issue in terms of essentiality, and I'm not going to
5 limit my comments to JEDEC, because I think this would
6 apply to the entire organization that I was general
7 counsel for for a number a years, which is the Electronic
8 Industry Alliance that includes actually a number of
9 separate SDOs now, including TIA, the Telecommunications
10 Industry Association, and the Consumer Electronics
11 Association, as well as JEDEC and others.

12 We in the early days, that's my early days,
13 which would have been 20 years ago, referred to standards
14 that were relevant or standards that were related to the
15 committee's work. And this was not limited just to
16 JEDEC, this was true in many of the other parts of EIA.
17 I think that there was a certain logic behind
18 doing that, and the logic was to get as much information
19 on the table as early in the process as possible and not
20 get hung up on technical distinctions of essentiality and
21 mini-patent infringement analyses and things like that.

22 I believe that the Federal Circuit's opinion in
23 the *Rambus* case changed the entire landscape with respect
24 to that issue. As I read the opinion, essentiality is a
25 minimum requirement for disclosure. I think that's what

1 the court said. And that any other standard is simply
2 too nebulous to be enforceable. So, using JEDEC now as
3 my example, we changed our policy as a result of the
4 *Rambus* decision.

5 Previously we required, and this was during the
6 time that was at issue in *Rambus*, we required disclosure
7 of patents that may be relevant to the work of a
8 particular committee. That's different now. If you look
9 at the JEDEC patent policy which is on our website, which
10 was adopted in May 2010 -- and, oh, by the way, you
11 probably gathered that there's a little bit of incestuous
12 relationships between the members of the panel -- many of
13 the members of this panel worked with the JEDEC committee
14 and the JEDEC board in developing that policy.

15 It now refers exclusively to essentiality.
16 ANSI now refers to essentiality in its essential
17 requirements. That portion of the essential requirements
18 that's -- that constitute their patent policy. And I
19 think -- again, this is my opinion, and I'd be curious to
20 know what others think, including members of the
21 Commission staff -- I think essentiality now is the rule
22 as a result of the Federal Circuit's decision in *Rambus*.

23 MR. COHEN: Let's try Gil.

24 MR. OHANA: I think this goes back to a point
25 Amy made earlier, with which I entirely agree, which is

1 that there are a lot of tradeoffs here. You can go for a
2 policy that is broader than essentiality or broader than
3 technical essentiality. The result may be
4 overdisclosure. Cisco's preference is commercial
5 essentiality, precisely because of the case that Bill
6 mentioned where technology is not technically essential
7 but is by far the most efficient way to implement.

8 There are some ambiguities around the term
9 commercial essentiality. I think they pale compared to
10 other ambiguities that we all live with every day in this
11 area, but there are some ambiguities there.

12 To go back to a point earlier, I agree with
13 something Michael Lindsay said about the different
14 memberships of SDOs kind of being meaningful in terms of
15 what patent policies are adopted. But it would also seem
16 that there's a real agency cost problem in this area
17 because the SDOs aren't where the disputes happen; the
18 disputes happen in court. So, an SDO has less of an
19 incentive, frankly, to write a tight patent policy than
20 its members may.

21 And for an SDO, writing -- revising an IPR
22 policy is, as Michael can tell you probably better than
23 anyone, a time-consuming, difficult, expensive process.
24 I see Don Wright back there. Don is a veteran, as I am
25 and some other people on the panel, of the years of IEEE

1 patent policy discussions, many hours, many days spent in
2 a basement in Piscataway, New Jersey, arguing over, you
3 know, very fine, fine points and coming up with an IPR
4 policy. That was difficult; it was costly, but it was
5 meaningful to a lot of the companies that participate
6 regularly in IEEE, including Cisco.

7 But I think Michael would agree that if he was
8 advising another standards development organization
9 whether they wanted to go down this road, the advice
10 would have to be "this ain't going to be quick, it ain't
11 going to be easy, it ain't going to be cheap."

12 MR. COHEN: How about Michele?

13 MS. HERMAN: Yeah, I just wanted to touch on
14 sort of the nexus and the essentiality issue and talk a
15 little bit. I think you asked, you know, are there best
16 practices. I actually think even with this sort of
17 threshold, John, as you put it of essentiality, there's
18 going to be inherent ambiguities no matter how you frame
19 the policy. And this is because some policies have
20 either no definition of essentiality or a very high level
21 one, which obviously leaves the door open to
22 interpretation, okay, well, what do I have to disclose?

23 Other policies will have an even -- a very,
24 very specific and narrow definition, but as a patent
25 attorney trying to review patents against the spec, even

1 with this narrow definition, there will be things in
2 there about, you know, are there any non-infringing
3 alternatives, whether they're technically reasonable and
4 commercially feasible and however that term may be
5 phrased.

6 And as a patent attorney, it's not the same as
7 doing even an infringement analysis where you're
8 comparing the patent to a product. You're comparing the
9 patent to a technical document and then you have to think
10 about, okay, are there other ways to implement this, are
11 they technically reasonable, are they commercially
12 feasible or reasonable, are they infringing other
13 patents? It's a very, very difficult analysis. And all
14 I'm saying is there are inherent ambiguities no matter
15 how you craft the policy, and they're all challenging.

16 So, I don't think you can say that there are
17 going to be best practices. I think there are balances
18 that different stakeholders in different contexts will
19 make, and I think we have to accept that there will be
20 some ambiguities.

21 MR. COHEN: And, Jorge?

22 MR. CONTRERAS: Thanks. Just two quick follow-
23 up points. On essentiality, you know, as we all know, I
24 think the legal standard gets a lot of play in the patent
25 pooling cases, right, and we haven't talked much about

1 those at all, but that's sort of the flip side of
2 voluntary consensus standard-setting. And in the patent
3 pool cases, it's a very front-loaded process and both the
4 case law and the business review letters point to
5 essentiality of patents, and that's determined up front.
6 With open voluntary consensus standard-setting, it's a
7 back-loaded process, right, where you have a very
8 informal determination up front as to whether something's
9 essential that's sorted out in court later.

10 So, the ambiguity, I think, comes from the fact
11 that the study that's done up front for patent pool,
12 which is extensive and costs lots and lots of money,
13 isn't done, that's deferred until there's a dispute in
14 the voluntary consensus standard-setting world.

15 Also, just a quick follow-up on Gil's point
16 about the difficulty of amending policies. I think
17 that's absolutely right, and that's why many SDOs are
18 content to let their policies sit as they are, even
19 though they may contain known ambiguities, sort of the
20 "let sleeping dogs lie" theory. This inertia within
21 existing SDOs is significant because it's this group of
22 people and the people out in the audience who are there
23 talking about the amendments and they are time-consuming
24 and take years. And if they're ANSI-accredited SDOs, it
25 triggers a re-accreditation proceeding at ANSI that

1 itself is contentious and sometimes contested and so
2 forth.

3 And that's why in these policies you see the
4 evolution, if you'd call it that, of policies or
5 increasing complexity and refinement. You see them in
6 new organizations as opposed to changes to the policies
7 of the existing organizations. So, the 20 new ones that
8 Gil referred to and the new ones that Andy sees every
9 year, that's where the advancement and the evolution is
10 occurring in sort of my experience. These policies get
11 more and more complex and refined. Often those are in
12 smaller groups, they're in consortia and so forth, the
13 large existing SDOs generally are content or at least,
14 you know, unless they want to go through a huge effort,
15 stick with their existing policies even though many of
16 the same members have moved on to more refined policies
17 in some of the other groups that inform their
18 interpretation of those more ambiguous policies in the
19 older groups.

20 MR. COHEN: Yeah, let's move to another area of
21 difficulty, since we're coming close to the end of our
22 time. We may go over a little bit over. I hope not too
23 much. I won't go too much.

24 Another tricky area is posed by the fact that
25 both standards and patent claims are tending to evolve

1 over time as this process is going forward. I've heard
2 already and a number of you discussed the fact that the
3 standard takes some time to form and that that's a
4 dynamic and shifting area. Let's set that aside and just
5 focus on the problem of claims that are evolving.

6 I guess the early question would be, should
7 disclosure of patent applications be required? But then
8 following up to that, how should we deal with evolving
9 claims? Should the focus be on the coverage of claims at
10 the time of the SSO's decision-making, or should a patent
11 holder's plans to modify the claims to cover the standard
12 trigger the obligation to disclose? What's the best
13 practice here? Okay, Andy.

14 MR. UPDEGROVE: Let me make kind of an
15 overarching comment that will pick up on some of the
16 things that other people have said. It is so difficult
17 to change a patent policy, you might as well call it a
18 patent policy rather than an IPR policy, because the
19 other aspects of it are non-controversial, that people
20 want to default into known ways of doing things.

21 And many of the things you're bringing up that
22 would make policies arguably better, the benefits that
23 people would perceive from them would not be outweighed
24 by the pain and suffering of coming to consensus on
25 incorporating any of them. You look at any of the

1 policies in major standards consortia that broke new
2 ground, WC3, three years, Oasis, an amendment, two years,
3 IEEE has been mentioned.

4 Any time you try and break new ground -- VITA,
5 another one -- it's a very difficult process. So,
6 there's always a default to the norm, unless you're in a
7 special situation where there's a small group that is
8 similarly motivated and willing to do something else.

9 And I think another thing that's worth noting
10 -- and how to say this delicately -- if those that set
11 patent policies had no or only a few patents, patent
12 policies would look very different. In fact, patent
13 policies are set by the people in this room. In order to
14 think that you want to dedicate a legal resource for as
15 long as two years to be on a biweekly call, you have to
16 really care how that patent policy comes out.

17 So, disproportionately, the people that set IPR
18 policies represent companies with very large patent
19 portfolios. And those players are differently situated
20 than other companies that don't participate in that
21 process. As I say, if you had one patent, searching your
22 patent portfolio would be very easy. And if everyone had
23 more patents than you did, what you would look for from
24 that policy would be very different.

25 At the other end of the spectrum, if you have

1 lots of patents, anyone who comes shooting at you, you
2 could probably shoot at them or you already have a patent
3 cross-license in place. So, you have to worry about
4 trolls, people that only license, they don't make
5 products, but trolls never participate in standards
6 organizations because they have nothing to gain from it,
7 so they're outside the system that we're talking about.

8 So, when we talk about what would be better,
9 it's worth keeping in mind that the industry has worked
10 its way through time into a situation of consensus about
11 where to set the balance points. The balance points will
12 change with the size of the organization. They'll change
13 with how tolerant the product area is for royalties,
14 whether it's an internet standard or whether it's a
15 telephony standard.

16 So, it's moved into these areas where things
17 that economists or regulators might worry about are down
18 at the cost-of-doing-business level that we can deal with,
19 that level of abuse, if you will, because the level of
20 pain it's causing us is less than the level of pain it
21 would cause us to deal with a tighter rule.

22 So, this isn't advocating for a position, but
23 and obviously, you know, other people may want to refine
24 or disagree with what I just said, but I think it's
25 important to understand the dynamic of why things do or

1 don't happen that might arguably be better.

2 MR. COHEN: Let's try Sarah.

3 MS. GUICHARD: So, I can't disagree that
4 depending on the size, I guess, of the portfolio or
5 however you want to say it that you'll have a different
6 -- an opinion. But I think you went back to say that
7 disclosure of claims or disclosure of applications or
8 what should be the focus.

9 And I like to go back to what I think is the
10 ultimate of any of these policies, and that's that the
11 implementers have to be able to implement the standard.
12 And in order for competition to occur, there has to be
13 multiple implementors. So, if you're coming up with a
14 policy that will allow a patent holder to -- however you
15 want to put it -- hold-up, to not have to disclose X or
16 only disclose Y, and the result of that is that they
17 don't have to license that patent, then the result is
18 there won't be the competition.

19 Back when GSM was being done, there was a
20 patent on interleaving paging, which allowed battery life
21 to actually be something where people could carry their
22 phones around without them being a huge brick. Now, was
23 that -- the patents that were covered in interleaving
24 were not essential or were not actually defined in the
25 standard the way some people might interpret it. The way

1 other people would interpret it is it is.

2 I mean, you had to do this in order to make a
3 phone that would work for the public to actually want to
4 buy it. Now, if you would have prevented or allowed the
5 patent holder to have held that patent and not licensed
6 it or only licensed it to one or two companies, then you
7 wouldn't have had competition.

8 And, so, I think that that's -- there's a
9 balance there, and I'm not sure where the answer is, but
10 if we're talking about disclosing applications and
11 focusing on claims or which type of claims, the problem
12 is that depending on how you define it you can get so
13 narrow for certainty that you will then allow companies
14 to abuse the process and create an unfair competition
15 environment, so they can limit the number of
16 competitors.

17 MR. COHEN: To keep things moving in the few
18 minutes that we have, does anybody here have something
19 specifically on applications, evolving claims? Why
20 don't we go with Larry and then with Sandy. Either way.

21 MR. BLOCK: Yeah, I have actually something on
22 point to what you asked. With regard to -- I think the
23 question you're asking sort of looks to the *Rambus* case
24 where an application was actually used to file claims
25 after *Rambus* withdrew from the standard organization.

1 And the question is would those claims be subject to the
2 commitment. And as a general matter, I think I support
3 clarity and certainty in the kinds of commitments that
4 companies make and that the SDOs look for from the
5 various participants.

6 And I would look for something like the
7 application and whatever claims come from it based on the
8 specifications that I knew about at the time that I
9 withdrew. To the extent that that specification finds
10 itself into a final or the technology that I was aware of
11 at that time gets into a final, I should be committed on
12 that. And I should be committed on the applications that
13 I have at that time.

14 I think that's a most fair way to view it
15 because the patent office will recognize that whatever
16 claims you can cull out of your specification are viewed
17 as if they were originally filed with the case on the
18 original filing date. So, if the patent office has the
19 fiction that any claims filed out of your application now
20 or a year or five years from now get the original filing
21 date, I think that it's fair for a standards organization
22 to do the same thing and say that any claims that came
23 out of an application existing at the time you leave, on
24 the specs that you've -- you're aware of any may have
25 approved or voted on or participated in or contributed

1 to, I think provides a clarity and a certainty that's
2 useful.

3 And I just want to back up for one second on
4 what Michele said. The point that I was making before on
5 the *TruePosition* case, it would have been very helpful for
6 Andrews to say, gee, you know, these guys didn't disclose
7 this patent and, therefore, I might have a problem here.
8 So, I think that that's a reason why you want to have
9 both a disclosure obligation and a RAND obligation so you
10 don't find out two or three years down the line that,
11 gee, I thought that was an essential claim, but I guess my
12 view of essentiality is different from theirs and I don't
13 have a license to that or I don't have a commitment to a
14 license to that. So, again, I'm looking for clarity and
15 certainty, which I think is something that not only helps
16 the implementer -- but the patent holder to know what
17 they're committing to and the implementer what they can
18 expect.

19 MR. COHEN: Okay, let's get this done with two
20 more -- Larry, did you still want something? You put
21 your sign down and I wasn't sure.

22 MR. BASSUK: Well, in the interest of time I
23 was just going to say I think Sandy covered the topic.
24 You also have the problem in the Patent and Trademark
25 Office, they don't look at the standard. They don't

1 care. They have no idea what it is. But the claims that
2 come out are going to be limited by the prior art that
3 the examiner comes across.

4 And, so, even though you may have plans to
5 cover the standard, your plans may be thrown asunder by
6 what was old. But understand, most of these things are
7 brand new, nobody's ever done some of these things
8 before. So, you're going to get a patent on something.
9 You just don't know exactly what.

10 MR. COHEN: A final area of major difficulty
11 that we often hear about in disclosure policies is the
12 problem posed by patents held by nonmembers. And does
13 everybody agree that this is a -- or does anybody
14 disagree -- want to state that this is not a significant
15 issue, a significant problem, for effective disclosure?
16 Okay.

17 MR. OHANA: A couple of comments on what is an
18 issue that deserves a lot fuller treatment. I think the
19 default rules of the standards development organization
20 should not reach and should not try to reach the patents
21 held by nonparticipants. Companies, patentees, should
22 have a fundamental right not to participate in standards
23 development and not to get dragged into standards
24 development against their will because you may have some
25 technology that you view as a competitive differentiator

1 and you don't want to license. And no one should sort
2 of, you know, pull you in, so, well you were aware of what
3 was going on in the standards development process and
4 therefore you should be subject to an implied licensing
5 obligation.

6 By the same token, standards development
7 organizations should have as much freedom as they want to
8 write rules that say if you walk into the room, if you
9 participate on our list serve, if you do that for a day,
10 if you do that for an hour, you are subject to our
11 licensing obligations. And I think that's an important
12 balance, and I think both points are true.

13 Let me now contradict my first point in a very,
14 very special circumstance. There are standards
15 development efforts -- I'm involved in two right now --
16 where there's some public interest in the standard. The
17 standard is being created under the auspices of a
18 government, for example. And because of that, there's
19 some view that transparency is important and that the
20 standards development process should be happening kind of
21 in public. And, therefore, the standards development
22 process doesn't have rules that say, you know, if you
23 know about this you have to license.

24 I think that that's dangerous. You know,
25 transparency is great, but we live in a world where

1 people watch what's happening in standards development
2 processes and try to patent ahead of standards. And in
3 groups like that, you know, maybe some sort of implied
4 licensing obligation makes sense, but I would restrict it
5 to that very, very rare circumstance.

6 MR. COHEN: Okay, this might be quick. Does
7 anybody here have suggestions that they would want to
8 urge for mechanisms for an SSO to encourage disclosure of
9 relevant patents held by nonmembers?

10 Sandy?

11 MR. BLOCK: Well, I will answer your question,
12 but let me answer another question first. I agree with
13 what Gil said. One thing I would suggest is that you try
14 to reduce the number of third parties, of nonmembers.
15 And by saying that, there are a number of instances in
16 which you can by -- within the SSO, I think it's fair for
17 you to obligate, for example, affiliated companies, to
18 obligate the employer of the member of the organization,
19 to obligate companies that have withdrawn from the
20 organization, as I just mentioned a few minutes ago, with
21 regard to some of their patents and applications. So, in
22 that way, you can actually reduce the pool of third
23 parties that can enforce their patents against the
24 standard, and I think that's a -- these are reasonable
25 measures to take to avoid that.

1 I also think that there may be some incentives.
2 The main incentive is inviting outside parties to join
3 the standards organization by informing them that this is
4 a way for them to get their technology into the standard.
5 You can have a patent that's very good that's not used by
6 anyone, or you can actually be involved in the
7 participation of developing a standard in which case you
8 may not get the kinds of royalties you would get
9 otherwise, but you'll get a fair share of a large pie.
10 So, I think that providing the kinds of information that
11 parties might find valuable by way of economic incentives
12 could be one way.

13 MR. COHEN: John?

14 MR. KELLY: Your question actually highlights
15 an area that I was hoping we'd touch on but I didn't see
16 any other way to get this comment in. I think that
17 there's a special category of standards activity that --
18 where the disclosure of third-party patents would
19 probably be highly desirable -- and I'm not sure that
20 there's a mechanism in place to do that. And I'm referring
21 to standards that are developed frequently by SSOs that
22 are then handed off to governmental agencies and that
23 promote important governmental interests.

24 Telecommunications is one example. The
25 Consumer Electronics Association obviously contributes

1 standards to the Federal Communications Commission that
2 become part of the Federal communications code and
3 regulate things like radio and television transmissions,
4 all of which represent important national governmental
5 interests, but again, right now, there's no mechanism for
6 the disclosure of third-party patents.

7 So, I think that's worth thinking about and
8 looking at. I know the FCC has thought about that in the
9 case of CEA standards, and there haven't been any good
10 answers. But I think it's a very profound question.

11 MR. COHEN: Gil?

12 MR. OHANA: Oh, I'm done. Sorry.

13 MR. COHEN: Oh, you're done? Let's go to Andy.

14 MR. UPDEGROVE: Just a very brief mechanism
15 which you might already be aware of. The most common way
16 of achieving that is a term that's acknowledged to be a
17 RAND term called defensive suspension so that if someone
18 wants to implement the standard and license it they have
19 to license their essential claims back.

20 Now, curiously enough, there's a variation in
21 how that's done. Sometimes it's done only on a one-on-
22 one, the policy only requires that the person who gets
23 approached by the nonmember patent owner can revoke any
24 license back. Other organizations would say any
25 implementer, it relates to every other implementer, so it

1 sort of broadens the sphere of protection.

2 So, that's the most common market mechanism for
3 doing it, but once again, one of the reasons that patent
4 licensing companies prove to be such a problem -- and as
5 there are more of those companies, become more of a
6 problem -- there's no tradeoff there. They don't need the
7 license back, because all they're doing is licensing
8 technology. So, there's -- the usual solution doesn't
9 help in that circumstance, which is much more likely to
10 generate the hold-up to begin with.

11 MR. COHEN: Let's go to Michael and then Naomi
12 and then one final question.

13 MR. LINDSAY: Yeah, just briefly I was going to
14 state that the IEEE does have a policy that says that
15 participants in a working group shall disclose the
16 identity of patent holders if it's their own self or
17 their employer and should disclose if it's a third-party.
18 The reason for that distinction was twofold. Number one,
19 you might have information about a third-party's patent,
20 at least its application, pursuant to a confidentiality
21 agreement, which could be a concern. And, second,
22 employers get a little bit concerned if their employees
23 are saying the other guy's patent may be essential.

24 MR. COHEN: Okay, Naomi?

25 MS. VOEGTLI: Yes, just quickly, in terms of

1 requiring disclosure to nonparticipant, I think we need
2 to be cautious about that and including if there is a
3 national government interest over -- when I mean
4 interest, that might justify because it's not just U.S.
5 Government, but we need to consider other government
6 using a similar reason. And some government, they don't
7 respect IPR policy as much or they see their national
8 companies disadvantaged in terms of IP haves and have-
9 nots. And compulsory broad disclosure requirement to
10 nonparticipant sometimes lead to compulsory licensing
11 that follows, and we need to be very careful what we do
12 here.

13 MR. COHEN: Okay, I'm going to end with one
14 more question. It's actually got two parts and maybe as
15 many of you as possible might want to give very short
16 answers to it. The question is we've heard all these
17 difficulties in getting effective disclosure. Will SSO
18 policies necessarily leave significant potential for
19 incomplete disclosure of relevant patent rights? And, if
20 so, should efforts to require patent disclosure be
21 abandoned, or should they be maintained and supplemented
22 with other forms of protections? Does anybody want to
23 start? It could even be yes and no, whatever.

24 Amy.

25 MS. MARASCO: Yes. I would just say that while

1 disclosure policies are going to be imperfect, you're
2 never going to have all of the information about all of
3 the specific essential patent claims at the conclusion of
4 developing a standard, there is a lot of good information
5 that gets out there. And I would say that there are many
6 companies that believe that the current disclosure policy
7 approaches go a fair way to addressing some of the
8 concerns in giving companies an opportunity to make a
9 decision -- do I approach these patent holders or not?
10 And, again, there's going to be all these factors that go
11 into those kinds of decisions.

12 And I also just say that my experience has been
13 with standards bodies that they routinely look at their
14 IPR policy. They try to fix ambiguities. They try to
15 take into account some of the issues that are being
16 debated. For example, after the FTC brought the *N-Data*
17 case, I've been sitting on a number of IPR committees at
18 standards bodies that say what can we do, can we -- you
19 know, how far can we go in trying to bind our
20 participants to take some action if they transfer the
21 patent. And I know this is true at DVB. I know it's
22 true at IEEE, even well-established standards bodies.

23 And I think all of that is very healthy. And,
24 so, these issues do get continued to be discussed, and
25 standards bodies and their stakeholders are trying to be

1 responsive to new learnings and new issues. Thank you.

2 MR. COHEN: Anne.

3 MS. LAYNE-FARRAR: Just to follow on what Amy
4 said, I agree, they should be in place. They will -- I
5 also agree they will never be perfect. But it's also not
6 clear that you would want to strive for a perfect policy,
7 given the costs that are so clear in developing them, you
8 know, to refer back to Mark Lemley's rational ignorance
9 kind of line of thinking, you know, a good enough policy,
10 with the courts or agencies to step in on those few
11 occasions where problems arise, is probably more cost-
12 effective and efficient, highlights when those problems
13 are, like *N-Data*, and then action can be taken at it EX
14 post. That's probably a better solution than striving up
15 front to get the perfect policy in place, you know, it's
16 probably impractical.

17 MR. COHEN: Jorge?

18 MR. CONTRERAS: Right, I agree with what's
19 previously been said. You'll never have the perfect
20 policy. Legal documents have been drafted for a thousand
21 years, yet there are inevitably going to be ambiguities
22 in them. Even when SDO policies are the thickness of the
23 tax code, you're still going to find ways to exploit
24 loopholes and get around them if companies are interested
25 in behaving opportunistically.

1 So, for that reason, no matter how much the
2 SDOs try, you absolutely have to have the legal backstop.
3 And the legal backstop is what agencies can do and do do.
4 And it's actually relied upon. I mean, SDOs are more
5 comfortable, as I said previously, in leaving their
6 policy somewhat ambiguous because they believe that there
7 is a legal backstop that will address opportunistic
8 behavior at the extremes, maybe not at the margins. And,
9 so, it gives them -- it gives participants an incentive
10 to comply with the policies or at least to comply with
11 what's perceived to be the intention of the policies,
12 even if they don't explicitly lay out the rules as
13 completely as they could.

14 MR. COHEN: And Gil.

15 MR. OHANA: One other phenomena to keep aware
16 of that just sort of polices some of this stuff is the
17 phenomena of companies voting with their feet in terms of
18 where they choose to do standardization. And what I see
19 at Cisco and what I see in a lot of large tech companies
20 is a move away from traditional SSOs, the ANSI model,
21 towards six and consortia because you are much freer to
22 develop a bespoke set of IPR rules.

23 And often that bespoke set of IPR rules may be
24 mandatory royalty-free, it may be default royalty-free,
25 because we've come to the realization that rules are

1 always going to be imperfect and policed and called up,
2 that there are always going to be bad actors that have
3 the wrong incentives. And we want to form our own little
4 club in some sense to create rules that we know we can
5 live with.

6 There's something lost in that in terms of
7 transparency, but it is a way of policing the system in
8 that new standardization tends to happen in groups with
9 better IPR rules because they're IPR rules that are
10 formed specifically by the participants for a specific
11 goal.

12 MR. COHEN: Seeing only one more nameplate up,
13 we'll end with Andy.

14 MR. UPDEGROVE: I wanted to endorse what Gil
15 just said and again sort of continuing on the pragmatic
16 approach of why do organizations do what they do. The
17 bigger the organization and the more working groups it
18 has operating, the less likely it is that any individual
19 member will be interested in all of them. So, if you
20 have one standard you want to create and get to market
21 very quickly, the people that join immediately are going
22 to be the people that have the same interest. And
23 because it's just a limited scope, it's easy to look at
24 it, easy to look at your patent portfolio and it's easy
25 to do a really tight policy, a really effective policy

1 that maximizes disclosure or delivers the equivalent.

2 Once you get to be bigger, a second dynamic
3 starts to overtake that -- which is I care more about
4 making sure it doesn't ask me to do things than I care
5 about being sure what it does ask people to do. So, the
6 bigger the organization, the more watered down the policy
7 tends to be.

8 Some organizations will try and cure that by
9 making the rules apply only to people that join a working
10 group, but just because of the dynamics of putting these
11 things together, that's kind of hard to pull off. You
12 can pull it off sometimes, not all the time. But,
13 again, I think the thing that I'd like to leave you with
14 is just the concept that there's a tremendous amount of
15 pragmatism here and not a lot of pain. You know, people
16 aren't feeling a lot of pain, I think, and, therefore,
17 they don't want to put very heavy handcuffs on their
18 hands.

19 Now, it may be that the government might look
20 at this and say, well, we think the goal posts sort of
21 shift. But I don't think you're going to see that
22 shifting coming out of the industry except as Gil
23 mentions, that in particular, targeted, you know,
24 situations where people have a clear objective that they
25 can weigh against what impositions it will have on their

1 own freedom of movement, their own bureaucratic burden
2 internally and so on.

3 MR. COHEN: Okay, I want to thank the panelists
4 for providing us with some very, very useful material to
5 think about, and we'll move on to the next stage.

6 (Applause.)

7 MR. ROACH: Well, everyone, we're going to do a
8 break now. We're slid a bit from the timing, so if we
9 could be back in 10 minutes, that would be helpful.
10 Thank you all.

11 (Recess.)

12 MR. ROACH: Hi, everyone. Hello, crew. Hello,
13 everyone. If we could kind of take our places again.
14 Panelists, if you wish to take a look at the slides in
15 the next segment, probably not at the table. You can
16 probably -- if you will find a place out in the
17 auditorium space, that will be helpful. So, thank you,
18 everybody. Appreciate it very much. Welcome back to
19 the festivities. I think we're working here.

20 Hey, everyone, if we could -- if we could -- if
21 I could bring the house to order here, while we get
22 rolling.

23 Hello. And, again, if the panelists want to
24 have a view of the PowerPoint slides for this next
25 portion, I would -- it will be a little easier if you're

1 not looking over your shoulder.

2 Thank you. Thank you. And welcome back,
3 everyone.

4 The second panel this morning, we're going to
5 shift the focus slightly from panel one. We're going to
6 be discussing SSO rules about disclosure during the
7 standards process of not only the existence of patents
8 and patent claims, but of licensing terms that the patent
9 owner will or may charge if the patented technology is
10 selected for the standard.

11 As Commissioner Ramirez noted in her opening
12 remarks, there were -- several years ago, there were two
13 standards organizations, VITA and IEEE, who sought and
14 obtained business review letters about SSO rules dealing
15 with either mandatory or voluntary disclosure of
16 licensing terms as part of their standards process, and
17 they received assurance from DOJ and later, in the 2007
18 IP Report, the FTC joined DOJ in assuring them that they
19 believed that those kinds of activities should be viewed
20 under the rule of reason. And both those organizations
21 adopted rules about it.

22 Now, to begin this session today, we're lucky to
23 have with us Professor Jorge Contreras. He will be here
24 to give us a glimpse of a study that he has been
25 conducting for our colleagues over at the National

1 Institute of Standards & Technology about the experience
2 since those VITA and IEEE rules changes. His report is
3 not finished yet, but we very greatly appreciate his
4 willingness to give us today a glimpse of what he has
5 found. So, thank you, NIST, if you're watching the
6 Webcast. And I suspect we have colleagues there who are
7 doing that.

8 And after that, we will have a broader
9 discussion of these issues about the disclosure of
10 licensing terms in the standards process. So, thank
11 you, Professor Contreras.

12 PRESENTATION

13 MR. CONTRERAS: Thank you very much. Thank you
14 to the Commission for giving me the opportunity to share
15 these preliminary results with you. I do appreciate it
16 and hope it's informative and enlivens the discussion
17 that we'll have afterwards.

18 As Pat mentioned, this is an empirical study
19 that we started working on about a year ago to take a
20 look at the experience that these two organizations that
21 were mentioned have had with their ex ante policies now
22 that it has been a few years since their adoption. And
23 as also mentioned, this is preliminary data. The slides
24 that I'm going to show you will -- they are preliminary,
25 so they won't be posted on the FTC website for this

1 panel, but what will happen is a report is being
2 generated with NIST, and that will be posted as a
3 contractor report sometime soon, once it is submitted,
4 and that should be, again, within the next few weeks.
5 So, you'll just have to hold on for a short while
6 longer.

7 The study essentially looked at the SDOs that
8 we've talked about, VITA and IEEE, which have adopted ex
9 ante policies in the form -- one mandatory ex ante
10 disclosure, one voluntary, and we also looked at IETF,
11 which, as you know, is a large SDO in the relatively
12 similar industry space that does not have an ex ante
13 policy but is large enough that we thought it would
14 serve as a suitable comparator -- a control group, if
15 you will, though not technically a control group -- to
16 compare trends and see whether things that were
17 happening at the ex ante groups were also happening at a
18 non-ex ante group.

19 The time period we looked at, we went back a few
20 years before the ex ante policies were adopted so that
21 we would have a good range of time. We looked at three
22 types of data, which I'll talk about in a little bit
23 more detail, some historical numerical data, we
24 conducted a survey, and then we had informal discussions
25 and interviews with a number of people.

1 One of the motivating factors that led me to
2 propose and perform this study was in the literature,
3 the commentators have put forward a number of theories
4 about ex ante policies and the effect that they would
5 have -- not legally, this isn't looking at the antitrust
6 implications of ex ante policies, which are also quite
7 heavily discussed in the literature -- but on the
8 process-related potential effects of these policies.

9 And there are theories that ex ante policies
10 will reduce the number of standards that are created,
11 that it will take standards longer to develop at the
12 SDOs that adopt them, that standards developers will
13 personally have to commit more time to the effort,
14 members may flee or withdraw from the organizations, as
15 a result, standards will be lower quality, and patent
16 royalty rates will be depressed as a result. Again,
17 there is ample literature that talks about each of these
18 predictions, if you will, theories, and one of the
19 reasons for doing this data collection exercise and
20 analysis was to look at these theories and see and
21 they're borne out by the data.

22 So, we did look at historical data around the
23 number of standards started and approved, how long it
24 took standards to be approved, membership levels, and
25 impact of standards. We also looked at the royalty

1 disclosures themselves. And I'll tell you a bit more
2 about all of this.

3 We also conducted a survey of VITA membership to
4 assess reactions within the organization to the
5 mandatory ex ante policy. We collected demographic
6 data, including industry sector, whether they were from
7 the customer side or the vendor side, experience with
8 patents, experience with SDOs by each of the
9 respondents. And then we asked them perceptual
10 questions relating to how they compared their experience,
11 both before and after adoption of the policy, both at
12 VITA and then with other SDOs, and reactions to the
13 royalty disclosures and the policy adoption itself.

14 Our response rate to the survey was 53 percent,
15 which is -- which is good for a survey. Because of the
16 small size of VITA -- and we'll talk about this in a
17 little bit more detail -- we did survey the entire
18 standards group as opposed to trying to take any kind of
19 a sampling. Margin of error at this rate, with this
20 response rate, was in the 9 to 10 percent range. So,
21 you can bear in mind.

22 So, what did we find about the disclosures
23 themselves? There is a lot of data here. You may not
24 be able to see it all clearly on the slides. There is
25 much more data in the report that will be made public.

1 But these are just some highlights, looking at things
2 like the number of standards adopted at the three SDOs.
3 You can see, across the first row, VITA, during the
4 period 2007 to 2010, which is the post-ex ante policy
5 period, 18 standards were approved by the organization,
6 333 at IEEE and about 1200 at IETF. So, interestingly,
7 there is an order of magnitude increase at each of these
8 SDOs.

9 When you look at the number of overall patent
10 disclosures, there is a similar increase. There's a lot
11 of interesting conclusions that can be drawn and made
12 from these data, but one thing that was very interesting
13 is in the fourth row here, and I don't have any handy
14 laser pointer here, but if you look at the ratio of the
15 standards covered by patent disclosures to the total
16 number of approved standards at these SDOs, there is a
17 remarkable similarity. At VITA, 1 to about 2 1/2; at
18 IEEE, about 1 to 3; and at IETF, about 1 to 2. Now,
19 these are total patent disclosures, and the ratio is to
20 the total number of standards approved.

21 Why is it interesting that these ratios are
22 similar? It's interesting because even though the
23 orders of magnitude differ in the total number of
24 standards approved at these SDOs, the ratio is
25 relatively similar as far as patent disclosures, which

1 implies a couple of possible things.

2 One is that the coverage of standards in this
3 industry -- in sort of the ICT industry overall by
4 patents -- may be reflected by this ratio, in general.
5 Or it could imply that compliance with SDO disclosure
6 policies is relatively consistent among these SDOs,
7 whether they're -- you know, we don't really know
8 whether and we didn't look at noncompliance -- but
9 certainly I think it shows that looking at VITA is not
10 wildly erratic and looking at VITA is not a bad thing to
11 do in terms of overall SDO conclusions. Even though
12 it's a small SDO, the proportion of disclosures, and
13 patent disclosures to patents adopted, is relatively
14 similar.

15 So, the next few rows describe disclosures that
16 contain more than just the identification of a patent.
17 In the previous session, we were talking about
18 disclosures of patents. What we looked at in the study
19 primarily were disclosures not just of patents, but of
20 licensing terms, and not just licensing terms that
21 include a simple RAND commitment, right? We considered
22 a licensing disclosure to be a disclosure of something
23 more than just RAND. So, when there are either
24 royalty-related terms in a disclosure or when there are
25 terms like reciprocity, defense of suspension,

1 grant-backs, those sorts of things, we counted those as
2 an ex ante disclosures of terms before adoption of the
3 standard.

4 At VITA, of course, this is all of the
5 disclosures. They all contain licensing terms. There
6 were seven of them. At IETF, there were a lot, even --
7 despite the fact that at IETF, there is no requirement
8 to disclose licensing terms, there were still quite a
9 lot of disclosures. Interestingly, you know, nonzero
10 royalty disclosures are often thought of as ex ante
11 disclosures, right? When we talk about ex ante
12 disclosures and the ex ante policy at VITA, we often
13 think of disclosing a maximum royalty rate, but
14 economists and others think of royalty-free commitments
15 that are made in advance also as ex ante disclosures of
16 a variety, because they, in advance, do make a statement
17 about the royalties that will be charged with respect to
18 the standard. So, you can see we have collected some
19 statistics about these as well.

20 Now, so, again, this is some basic data that
21 forms kind of the scaffolding for the analysis in the
22 further data that we looked at when we look at the six
23 theories that we talked about at the beginning. And the
24 first one is the quantity of standards. So, on the next
25 slide -- and I hope you can all see it, because the

1 colors -- the green looks like it's a little bit
2 difficult to see -- but we looked at both the number of
3 standards started and the number of standards approved
4 at each of the three SDOs under study, from about 2003
5 or '04 to 2010.

6 There are a number of interesting observations
7 that can be gleaned from the data, but one thing that --
8 I want to point out a few things to you in these slides.
9 Now, these slides reflect the change in the overall
10 number of standards started and adopted, and I'll just
11 flip to the next slide, because these are the standards
12 approved and these are the standards started.

13 The dotted blue line is VITA, the dashed red
14 line is IEEE, and the solid light green line is IETF.
15 The data are normalized on a scale of zero to one so
16 that you can compare these data, because, of course,
17 there are far more standards adopted at IETF and IEEE
18 than at VITA.

19 Nonetheless, what this slide shows is a
20 relatively constant upward slope at IETF, meaning that
21 there has been a consistent increase in the number of
22 standard starts each year at IETF, both before and after
23 2007, which is not surprising. In 2007, nothing unusual
24 happened at IETF. They did not adopt one of these ex
25 ante policies. At IEEE, the red line, you see a gradual

1 increase of standard starts leading up to 2007 and a
2 steeper increase after 2007. At VITA, the blue dotted
3 line, there was a decrease, you know, prior to 2007 and
4 then a much shallower decrease; a continuing decrease
5 but a shallower decrease after 2007.

6 If you compare the standards approved in those
7 time periods, again, at IETF, the slope is relatively
8 constant both before and after 2007. At IEEE, the slope
9 is comparable but steeper after 2007. And VITA shows
10 the most pronounced result, whereas there was a
11 declining trend before 2007, that trend essentially
12 reversed and rose fairly steeply after 2007, meaning
13 that after 2007, there were significantly more and an
14 increasing number and an increasing rate of standards
15 approval at VITA following 2007.

16 Now, we looked also at the speed at which
17 standards were adopted at the three SDOs, because this
18 is one of the more potent complaints that are made and
19 criticisms that are made about ex ante policies, and,
20 again, a lot of data was collected.

21 This slide shows the range in days for approval
22 of standards at each of the SDOs from 2003 to 2010. The
23 time period was shortest at IETF, around two to three
24 years; somewhat longer at IEEE, where the range is about
25 3 1/2 to 4 1/2 years. And interestingly, if you look at

1 the standard deviation in the next row, it's similar,
2 comparable, shown in days here, at IETF and IEEE, and
3 about 100 days is one standard deviation, again, I
4 think, interestingly, showing some similarities in
5 processes.

6 At VITA, which is a much smaller organization,
7 there is a much greater level of variability
8 year-to-year, indicated by a standard deviation that is
9 three times as large, and, again, measured in the same
10 units as IEEE and IETF this time. One single standard
11 that takes very long or very short at VITA does alter
12 the average significantly.

13 Most significant to the discussion we're having
14 is the trend in time to standardization in the periods
15 before and after 2007, fully acknowledging that there
16 are numerous exogenous factors that can have an impact
17 on the time to standardization. And those have actually
18 been studied by Tim Simcoe and others analyzing why
19 standardization increases and why standardization time
20 has increased steadily from the early nineties until
21 more or less today.

22 One thing that you will see from this chart is
23 that both at VITA and IETF, standardization time
24 increased in the period after 2007. If we were looking
25 only at VITA, one might conclude that it might have been

1 the ex ante policy that caused the increase, which is
2 why it's interesting to compare to IETF data as well,
3 because both experienced an increase, and the increase
4 is somewhat proportional. So, hard to say exactly what
5 is meant here, but in trying to determine whether or not
6 there may be a causal effect to the standardization time
7 derived from the ex ante policy, I think this data is
8 informative.

9 To further illuminate the historical data, we
10 asked survey respondents at VITA what their perceptions
11 were about speed of standardization at VITA, and as you
12 remember from the last slide, the speed of
13 standardization after 2007 increased at VITA. The
14 reasons are up in the air, but one interesting result
15 from this is that of VITA respondents, about a fifth of
16 them thought that standardization speed actually
17 increased. Very few -- one person, actually -- thought
18 it got slower. Most thought that there was no effect or
19 didn't know what the effect was or they didn't -- you
20 know, they didn't have enough data to compare, which is
21 interesting.

22 It could mean a number of things. It could mean
23 that there are aspects of standardization at VITA that
24 did get faster, while other aspects were getting slower.
25 Among the factors that Simcoe and collaborators

1 identified that caused the overall slowing down of
2 standardization in the ICT sector are increasing
3 complexity of the standards, increasing commercial
4 disputes among parties, increasing length of the
5 standards documents themselves. All of these have been
6 found to contribute to the lengthening of
7 standardization time.

8 Okay. Personal time commitment I won't spend a
9 lot of time on. Just suffice it to say that the results
10 are similar to what we found with respect to overall
11 standardization speed. Most VITA participants who had
12 an opinion about this felt that there was no effect or
13 couldn't really compare, and then we had a split among
14 those who thought less time versus more time.

15 Now, membership. Again, if you recall, one of
16 the contentions that's made about ex ante policies is
17 that they may drive away members from groups that adopt
18 them, and this was actually a fairly vocal debate at
19 VITA when VITA was considering its policy. So, we
20 collected some data with respect to this as well.

21 The captions here are not exactly accurate on
22 the slide relating to IETF, because IETF, as those of
23 you who know the organization, know it does not have a
24 formal membership like VITA or IEEE; what it has are
25 people who show up at meetings. So, with IETF, we

1 looked at attendance at IETF North American-based
2 meetings during the time period in question. We chose
3 the North American meetings because we felt those were
4 the most comparable to organizations like VITA, which
5 were primarily comprised of members who come from North
6 American locations.

7 So, this graph -- we have quite a bit of data on
8 membership and membership changes, but this graph I
9 think is interesting because it shows changes. It shows
10 the trends in changes. And the legends are very
11 difficult to read, and I apologize for that. Along the
12 X axis, we have the years, of course, and along the Y
13 axis, we have changes in memberships.

14 Based on 2004 levels, we see the starting -- and
15 something erratic happened in 2004 with a dip in IETF
16 attendance and a rise in VITA membership, but if we
17 start at 2005, which is the second point there, there is
18 an interesting correlation between the two
19 organizations, with a rise in 2006, then a dip in 2007,
20 and then a relatively steady rise after that. The
21 trends are similar.

22 We spoke with various members at VITA. There's
23 only one well-documented case of a member that left
24 because of the adoption of the ex ante policy. That
25 case is well known. But we couldn't find any other

1 documented case, and ultimately, we did see a
2 significant rise in VITA membership through 2010, which
3 is following now, of course, the adoption of the policy.

4 So, standards quality. Now, quality is
5 difficult to measure, and we acknowledge that. It's
6 difficult. It's imprecise. It is going to be
7 inherently subjective, and we certainly aren't claiming
8 that we have developed a magical formula to identify the
9 quality of a standard. So, we tried to do something
10 that we thought was intellectually honest, and we looked
11 at three different factors.

12 We looked at impact measured by search engine
13 hits on the standard. This is a measure that is used in
14 the literature both to assess the impact of standards --
15 it has been used for IETF standards and others -- and it
16 is used in many other fields of social science research.
17 So, we didn't just make this up. We also looked for
18 evidence of external recognition of standards, and we
19 asked survey respondents what they thought about
20 quality.

21 So, you know, the citation data, basically we
22 ran Google searches on every VITA standard that was
23 adopted post -- before and after 2007. This is a
24 logarithmic transformation of the results. The range
25 was about a zero for the most obscure standards to, you

1 know, 80, 90,000 hits, and we were fairly careful in how
2 we structured the search query so that we didn't get a
3 lot of extraneous results. And the fact that we got
4 very, very few hits for some of the standards I think
5 indicates that we weren't capturing a lot of, you know,
6 Spanish sites where "vita" is just the word for life and
7 so forth.

8 So, what we found, marked with the diamonds
9 there on the right-hand side of the chart, are four VITA
10 standards that had ex ante patent disclosures following
11 2007. We found that these -- you know, there was not a
12 significant impact on -- impact based on whether or not
13 an ex ante disclosure was made on the standard. Of the
14 21 VITA standards adopted after 2007, they ranked
15 fourth, eighth, eleventh and fifteenth in terms of these
16 hits, which is a relatively even distribution. Two were
17 above the median value, one was the median value, one
18 was below the median value in terms of hits. Again, an
19 imprecise measure. We're certainly not saying that this
20 is the only measure to look at, but informative, we
21 hope.

22 Then we asked survey questions about this. I
23 didn't put up a slide about external recognition, but we
24 did find some -- in 2009 and 2010 both, VITA standards
25 did win awards, the best electronic design awards in the

1 military/aerospace category, which is where their
2 standards primarily are applicable. Prior to 2007,
3 there were not such awards granted to VITA standards,
4 but, again, that's anecdotal as much as anything.

5 The survey perceptions I think are interesting
6 at least to present here. There was reasonably good
7 agreement among VITA participants. About 80 percent
8 felt that quality had improved, and interestingly, among
9 VITA participants with more than ten years' experience
10 at the organization, about 90 percent believed that
11 there had been an improvement. Now, you know, again,
12 there are numerous potentially confounding factors that
13 could impact these results, and we tried to tease these
14 out in the analysis in our report, which will be made
15 public, but, you know, for now, I think these data at
16 least are interesting for discussion.

17 And then finally, we attempted to look at the
18 issue of royalty depression. This is the oligopsony
19 argument that's made in terms of antitrust threats
20 imposed by ex ante licensing disclosures. Will groups
21 of buyers or implementers depress royalty rates below
22 their optimal value or, at worst case, down to zero just
23 because of their market power? Difficult, difficult to
24 test, I have to say up front; nevertheless, we did try
25 to gather some indirect evidence and we did find some.

1 Interestingly, one thing that we found was that
2 of royalty-free disclosures, VITA -- of the seven ex
3 ante royalty-related disclosures made at VITA, only one
4 was of royalty-free terms, saying I'll license my
5 patents royalty-free. At IEEE, of the ex ante
6 disclosures that involved royalty terms, 11 of the 13
7 were royalty-free. At IETF, 263 of 263 were
8 royalty-free.

9 Now, it's unclear what this means, but if it
10 were the case that ex ante disclosure requirements drove
11 royalties to suboptimal or zero levels, one might expect
12 to see a larger number of royalty-free disclosures being
13 made at VITA -- you might; you might not, but you
14 might -- or at least some higher rates of royalty rates
15 being amended at VITA, with lower royalty rates as
16 improper pressure is brought to bear on patent holders
17 to lower their royalty rates.

18 And that's not what we see. It's negative
19 evidence, but it is interesting. What it does seem to
20 imply is that you don't necessarily end up in a
21 situation where all of the patents that are disclosed
22 end up being licensed, at least at zero rates. We had
23 an agreement with VITA, much of this data is not public
24 and will not be published in the final report. Some
25 VITA information is available through the ANSI website

1 for standards that have been submitted as American
2 national standards, others are not available, and I am
3 afraid that you will just have to trust us on this,
4 because we did agree with VITA that we wouldn't disclose
5 the actual companies or royalty rates.

6 So, another interesting thing is that of
7 amendments, VITA does have an amendment policy where ex
8 ante disclosures can be amended subsequently to being
9 made, after things happen. Working groups get hold of
10 the information and look at the royalty rates. None of
11 these amendments, however -- there was only one
12 amendment, and that, interestingly enough, related to a
13 defensive suspension clause in one of the disclosures --
14 and not royalty rates. So, again, that is interesting.

15 We also asked VITA respondents what they did
16 when they came across a disclosure -- a royalty
17 disclosure that they felt was too high. We didn't
18 define "too high." We allowed that to be a subjective
19 determination by the survey respondents. Only a third
20 of respondents actually said that they had encountered a
21 royalty disclosure that they felt was too high at VITA.
22 But what did they do in response to the too high result?
23 The numbers are very small here, because, again, not
24 that many thought there was an excessive royalty
25 disclosure.

1 But the responses were primarily technical and
2 procedural approaches: Raise the issue at a meeting,
3 not clear what the result of that was; design-around
4 attempts; delay until the issue is resolved; there were
5 two who contacted or negotiated with the patent holder.
6 This response, the negotiated with the patent holder, is
7 the response that would lead one to think that there is
8 an attempt to lower the royalty rate, because that's
9 what you do when you negotiate with the patent holder,
10 presumably. Yet that was a -- not many of the
11 respondents said that that was the approach that they
12 took. And this isn't a hypothetical. We phrased the
13 question in terms of actual situations. Were there
14 actual disclosures that you felt were too high? So,
15 again, we have some data.

16 And, again, there's a lot more information that
17 will be provided in the report, and we certainly hope
18 that you will take a look at both the results and the
19 methodology, because we do go to great lengths to
20 describe the methodology we took. There are lots of
21 decisions that have to be made on what sorts of things
22 to look at and how to slice and dice the information,
23 but it was, you know, a fairly significant effort.

24 I'd like to acknowledge my research assistant,
25 Yen-Shyang Tseng, our statistician, Melody

1 Goodman, and Jim Gibson, who helped with the survey
2 design, and also to the staff at NIST who were extremely
3 supportive and helpful, both in shaping the work and in
4 critiquing it and giving lots of input as we went along.

5 One thing that I would also like to lay out is
6 that this is the first step. This is really, at least
7 in my experience, the first empirical study of this data
8 and these data sets. It is not complete. Our survey
9 was limited to VITA. We would have liked to have a
10 larger survey base, and we also are limited by the fact
11 that much of this data, especially private company
12 bilateral negotiated royalty data, is not public, and we
13 didn't in this exercise make an attempt to obtain or
14 study that data just because of the difficulty of
15 obtaining it.

16 But hopefully this type of work will open up the
17 dialogue and will inspire you, who are companies, to
18 share your data to the extent that you can, to enable us
19 and others to continue this kind of empirical work so
20 that we can get better and better views of what the
21 actual market effects are of these types of policy
22 changes.

23 So, with that, thank you very much. Thank you
24 for your time.

25 (Applause.)

1 the help of those of the rest of us who have not been
2 directly involved in the circumstances since the time of
3 the IEEE and VITA changes, see if we can get some sense
4 of the -- of what had been going on within the standards
5 organization world in the aftermath of those IEEE and
6 VITA efforts.

7 The perception, I think, that we have is that
8 there had been some consideration of changes in SSO
9 rules in other directions since then, and so that's --
10 with your interest, if we could have that for now, at
11 least, be the focus as to what we're talking about.

12 First of all, am I wrong? Am I wrong? Did this
13 issue come up in other standard settings for discussion,
14 beyond the VITA and IEEE setting?

15 Gil?

16 MR. OHANA: I guess one experience I'd point to,
17 and it's one that a number of people in the room
18 participated in, was the Next Generation Mobile Networks
19 experience, which was an effort to get some
20 predictability among -- led by mobile operators around
21 the world to get some predictability regarding licensing
22 costs for 4G telecommunications, wireless interface
23 standards. And I think the group started with very
24 ambitious goals, and those goals were scaled back. They
25 were scaled back, in part, because of antitrust concerns

1 that were, I think it's fair to say, stoked by some
2 companies that may not have appreciated where NGMN was
3 going, but I think antitrust concerns were important in
4 terms of why the effort was scaled back.

5 But nevertheless, even in its scaled-back form,
6 it did result in a lot of information about prospective
7 4G licensing rates, where companies had made
8 declarations. So, I think that there's more information
9 available about those rates than was available at the
10 same point, for example, in the development of 3G. So,
11 I would point to that as an example of an industry that
12 has shown a concern about royalty rates and then created
13 a process to get some information about royalty rates.

14 MR. HARTOGS: So, as Gil indicated, when NGMN
15 conducted this exercise, it wasn't quite under the
16 auspices of sort of a mandatory disclosure, but it was a
17 highly encouraged process by the organizers of the
18 effort upon the membership. And I completely agree with
19 Gil, that there was a -- more information was available.
20 The question is whether or not the results give you
21 better information or something Anne alluded to, which
22 might be this view of more information can be bad
23 information.

24 And unlike sort of the formalized approach that
25 was taken in NGMN, similar efforts went on in 3G

1 licensing in the late nineties. Surveys were done by a
2 number of academics of the likely patent holders in 3G
3 technologies, and survey results predicted perhaps
4 alarmingly high royalty rates, as the NGMN survey may
5 have predicted alarmingly high royalty rates, but you
6 jump ahead 10, 15, 20 years, and you find that virtually
7 nobody is probably paying more than single-digit
8 percentage royalty rates for any of the technologies.

9 The difficulty with the mandatory disclosures or
10 the sort of invited worst-case terms disclosures -- and,
11 again, I think this was suggested earlier -- is with
12 limited information early on, companies may feel
13 compelled to take the most conservative approach,
14 assuming all of their contributions are accepted, all of
15 their contributions end up being covered by patents, and
16 unknown circumstances in their licensing negotiations,
17 what would be your worst terms?

18 Well, I think most of us here would say our
19 worst terms might look like not particularly great terms
20 for contracting parties, but at the end of the day, you
21 negotiate with individual companies in your respective
22 circumstances, and the final results will be
23 dramatically different than perhaps the at least
24 allegedly predicted results, by survey results.

25 MR. ROACH: One of the things I'm curious about

1 is the standards organizations themselves'
2 considerations of rules that resemble either the
3 mandatory disclosure in VITA or the voluntary disclosure
4 in -- as was implemented at IEEE. Have we had replays
5 of the internal discussions at those -- that led to
6 those sorts of decisions?

7 John, John Kelly.

8 MR. KELLY: On a very abbreviated basis, as
9 JEDEC revised its patent policy, and I mean very
10 abbreviated. I won't name names, but the subject came
11 up, and I think it was turned down almost immediately
12 because of -- you know, whatever concerns the companies
13 had.

14 I think at one point we had a sidebar -- and,
15 again, I won't reveal the parties, but it's one of the
16 people at this table -- who said, "I have no problem
17 with unilateral declarations of licensing terms; I just
18 don't want engineers and technical committees talking
19 about them."

20 MR. ROACH: I see.

21 Amy?

22 MS. MARASCO: Yes. Well, I think a number of
23 standards bodies have looked into this issue. It's not
24 a new issue. It's been around for many years, and
25 standards bodies do take these things into consideration

1 and question their stakeholders. Do you want to do
2 something like this?

3 It seems to me that in the vast majority of
4 situations, there really was no opposition to a
5 voluntary approach, and some standards bodies may put
6 that in their procedures specifically. Some may just
7 say we don't prevent it. I mean, you make contributions
8 to the technical committee, you can put anything you
9 want in there, frankly, at the end of the day, but you
10 still have to, if there's a mandatory form, submit that,
11 and to go through the regular process.

12 I think the real tensions come when we talk
13 about mandatory ex ante and/or the group discussion of
14 licensing terms, and that's where I think we see much
15 more of a divide. And some of these discussions, I
16 think some of the most infamous were probably the ETSI
17 discussions that lasted for about a year, with close to
18 a hundred people in the room every month, going through
19 all the issues.

20 And one thing that I will say -- I was a
21 participant -- I think everybody learned something.
22 They learned about how does licensing really happen; you
23 know, how did those things play out; and there was a lot
24 of good education and they came away with the conclusion
25 that they would permit voluntary, but they were not in

1 favor of mandatory ex ante or group discussions of
2 terms.

3 And if I were to try to characterize some of the
4 rationales -- and someone correct me if I misstate it --
5 but there was a concern, what is the value of a
6 mandatory disclosure of licensing terms when probably no
7 one wants to take that license? So, companies would be
8 asked to put together a license that many people
9 wouldn't take because they -- if they are going to take
10 a license, they will probably go negotiate a customized
11 bilateral agreement with the patent holder that will
12 involve many more additional things.

13 And for some companies that may grant
14 commitments and don't actively seek licenses -- "the
15 sleeping dogs" -- they said, "This is a burden on us. I
16 mean, everybody is getting the benefit of us being a
17 sleeping dog. If you wake me up and make me do this,
18 maybe I'll change my mind and start a licensing
19 program." And a lot of people said, "Well, we don't
20 necessarily want to do that."

21 There were any number of practical issues about
22 what do you do with this information, what are the rules
23 about what people can do with the information, is it
24 going to slow the process down or confuse things? And
25 then there were any number of legal issues, including

1 concerns about potential buyer cartel and group boycott
2 activity as a result of this.

3 And that's why ETSI decided not to go down that
4 path. They did not see that -- they thought that a
5 mandatory approach or group discussion of terms would
6 raise more issues than problems that they were seeing,
7 and they said, "Those problems are one-off, they can be
8 addressed in the courts, and why burden the whole system
9 with this whole new approach that adds a lot of burden
10 and potentially not a lot of value?" So, that's where
11 they came out.

12 MR. ROACH: Let's see.

13 Michele?

14 MS. HERMAN: I thought I would share a sort of a
15 real-life example that I had, sort of that highlights
16 some of the things that Amy talked about and sort of the
17 standards organization's reaction.

18 MR. ROACH: Michele, your microphone?

19 MS. HERMAN: How's this, better? I have two of
20 them now, okay. One of them should pick my voice up.

21 So, after VITA and IEEE adopted their policies,
22 I had a small client in another organization disclose a
23 patent. They agreed -- they made a license assurance on
24 RAND terms for essential claims. There were members of
25 the working group that were concerned, and the first

1 thing that happened was that a competitor of my client
2 called and said, "Could you please tell me more about
3 your license terms?" And I said, "Sure, tell me what
4 products do you want to license for, you know, is there
5 a particular field of use, you know, what's your
6 distribution model," all the kinds of questions you
7 would need to ask to provide a patent license.

8 And the competitor said, "Well, I'm not going to
9 share my confidential information with you. I just want
10 you to give me a number." And I said, "Well, I can't
11 just give you a number. There's a whole list of
12 different terms and conditions that we need to discuss
13 going both ways, and we're happy to talk with you."

14 What happened from there was that the working
15 group members that were concerned about the RAND
16 licensing assurance spent a few months with us debating
17 what to do about this, talking to us, and at the end of
18 the day, the organization basically just said, "We're
19 going to move ahead with the standard, and you vote."

20 But it was very interesting, that within months
21 of this, the standards organization amended its patent
22 disclosure policy and actually put in a prohibition for
23 the working group to talk about, you know, validity,
24 infringement, essentiality, license terms, business
25 terms, et cetera, because -- you know, I can't speak for

1 the organization, but my view is that they didn't want
2 to see repeats of this. It really did delay the
3 process, and it really didn't show that it was an
4 exercise to get legitimate information or that it was
5 helpful to any of the particular parties involved. So,
6 that was just an anecdote.

7 MR. ROACH: Sarah?

8 MS. GUICHARD: I think one of the concerns or
9 things that we have seen with the ex ante -- and I think
10 this could be true of what people may have posted after
11 NGMN came out -- was that there's no guarantee that the
12 rate that companies would post ex ante are RAND. If
13 you -- like I think was mentioned, when you looked at
14 the cumulative rates for 3G, it was very high and
15 probably not realistic to what could actually be
16 supported by the ecosystem.

17 So, when you have these ex ante disclosures,
18 absent some other safeguards, to say, okay, there has to
19 be something in place such that implementers are going
20 to be able to implement this and not -- I mean, the way
21 some of this stuff is stacking up right now, no one's
22 going to go and do that. There's no way.

23 So, I'm not advocating that there isn't ex ante,
24 but ex ante, by itself, is not probably sufficient to
25 put the constraints on the royalties, because what

1 companies are going to do is put out what they think --
2 like we said, worst case. I think someone said,
3 actually, worst case, what they would want. And if you
4 have a portfolio and you know somebody else has a
5 portfolio and you know you are both going to have to
6 license each other, you don't want to put out a number
7 that's any different than what the other person's
8 putting out, because if you do, then that's going to
9 prejudice you in your negotiations later.

10 MR. ROACH: Gil?

11 MR. OHANA: I'm sympathetic to the concerns that
12 are being expressed here, but I guess I have a couple of
13 observations. First of all, the argument that engineers
14 are somehow incapable of making informed decisions --
15 Cisco is a vertically integrated company, we contribute
16 a lot of technology to standards, we implement a lot of
17 standards. We're motivated to participate in standards
18 development because we face the classic problem -- and I
19 think this is true of a lot of the companies at the
20 table -- we face the classic problem of a durable goods
21 manufacturer, which is that we've got a lot of people
22 out there using our products, and every day they use
23 the product and don't upgrade is a day we're not making
24 any more money on them.

25 So, what we want to do is get people to upgrade,

1 and one of the ways you get people to upgrade is by
2 having a new standard that offers something better than
3 what they have now. You know, we went from ethernet,
4 which had ten megabits per second, to fast ethernet,
5 which had 100 megabits per second, and now we're at
6 gigabit ethernet and 40-gigabit ethernet. So, you want
7 to get people to upgrade, and one of the ways you do
8 that is with standards, you know, 3G, 4G, et cetera.

9 So, you're motivated to have really, really
10 great technology and standards, because that's going to
11 create the buying opportunity. So, the idea that
12 implementing companies are in some sense, you know,
13 purely focused on pricing is just wrong. It's just
14 wrong. That -- that -- but we do care about pricing,
15 because we find ourselves in Federal District Court in
16 the Eastern District of Texas with some regularity in
17 cases involving patents that are essential to implement
18 standards.

19 I just want to sort of, you know, back up for a
20 moment and talk about this at kind of a mental level,
21 and I will talk about something really interesting, not
22 standards, but I'll talk about how I got here this
23 morning. I left my hotel room, and I was staying,
24 fortunately, near a Metro station, so I had this kind of
25 debate with myself. Do I take the Metro? Do I take a

1 cab? I decided to take the Metro. It was cheaper.

2 I made that decision because I knew what the
3 relative prices were of those two things. I went to
4 breakfast. I -- there was granola. I got granola. I
5 ordered the berries with the granola. It was an extra
6 \$4.50. I knew what the price was. Why is standards
7 development some separate sphere of economic activity
8 where the same rules that apply to every other economic
9 activity that's out there, that you know prices before
10 you make some costs, before you incur some costs, why is
11 standards development a price information free zone?

12 And if someone could answer that question for me
13 today, I'll go away happy.

14 MR. ROACH: Well, I see a couple tents up.

15 Earl?

16 MR. NIED: Okay. So, I'll agree with a lot of
17 what Gil said, but I'll also point out a couple of
18 things here.

19 Number one, when you made the decision of taking
20 the subway versus taking the taxicab, yes, you knew the
21 price of the subway, but you had a relative idea of the
22 price of the cab.

23 MR. OHANA: No, I kind of knew pretty much
24 exactly, but -- I'm in Washington too much.

25 MR. NIED: Yeah, maybe, and that's a good point,

1 you're in Washington too much.

2 But seriously, though, the point is is that a
3 lot of this really makes sense when we're talking
4 "relativistically." If we're talking about something
5 is going to be majorly more expensive than something
6 else and if we're talking about, you know, a major
7 contribution to something, especially in an existing
8 market, there's a lot to be said.

9 Sometimes standards development has been
10 analogized to, you know, if I'm building a house, you
11 know, wouldn't I want to know exactly the price of
12 everything in building the house? And unfortunately, a
13 standard is more like the design plan for the house.
14 It's not the bill of materials plan for the house. So,
15 when you go to that builder and say, "Well, gee, I'd
16 like to, you know, take your design, but, by the way,
17 later on, I'm going to change my mind and I'm going to
18 have marble countertops rather than Formica," that's
19 going to change the price.

20 And, you know, that doesn't necessarily happen
21 with regularity, and it depends on, you know,
22 different standards, but for standards where there's a
23 lot of new technology, a lot of new development, there
24 are a lot of unknowns in that. And it is just
25 incredibly difficult to put a price to that, especially

1 when you don't know what kind of product it's going to
2 be in.

3 You know, USB is a royalty-free standard, but
4 consider that when USB first came out, nobody
5 understood -- it was basically going to be a replacement
6 for the serial interface standard of the day, which was
7 basically mice and printers. And we did have some
8 thoughts that it was going to be used for other higher
9 speed things, but nobody anticipated that it would be
10 used for flash drives and the price of flash drives.
11 So, to say that they could universally have predicted
12 that while it was still under development is just -- is
13 just too problematic. There are some things that you
14 can't predict.

15 On the other hand, I take a look at
16 telecommunications standards, and it is an existing,
17 known market. 3G was an incremental evolution of 2G,
18 and 4G is an incremental revolution of 3G. There's a
19 lot to be known and a lot that can be predicted, and
20 "relativistically," you can draw a lot of conclusions
21 there.

22 MR. OHANA: And, Earl, I agree with a lot of
23 what you said about the future uncertainty. I guess
24 what I would say is, who bears the cost of that
25 uncertainty? You know, let's, again, not talk about

1 standards. Let's talk about natural gas. You know,
2 companies enter into 10, 15, 20-year forward natural gas
3 contracts. They do it all the time. Someone's going to
4 win on that and someone's going to lose. If the price
5 of gas rises, the producer is going to lose. If the
6 price of gas falls, the pipeline is going to lose, you
7 know? That's just the way it works.

8 And we don't sort of say, at the end of the day,
9 "Well, you know, there is going to be uncertainty, so
10 we'll have to kind of reevaluate this in the course of
11 that." We're going to allow them to make bets, and
12 someone's going to win and someone's going to lose, and
13 if you're concerned about the future evolution of what
14 the future demand will be, there are ways to address
15 that in terms of the licensing declaration you make.

16 But the idea that because there's uncertainty,
17 we're going to put the owners of essential patents in a
18 world that says, basically, heads I win, tails you lose,
19 is from an implementer's perspective mighty
20 unattractive.

21 MR. ROACH: So, Larry down at the end, Larry
22 Bassuk.

23 MR. BASSUK: Yes, thank you.

24 Well, Gil, I expect that when you got on the
25 Metro this morning, you were not competing on price with

1 any of the other people getting on.

2 MR. OHANA: The Metro was, though. They were
3 competing with the taxicab.

4 MR. BASSUK: Yeah, but the Metro set the price,
5 and everyone was there, and they were all willing to
6 accept that price. Now, you were competing for a place
7 on the Metro, but you weren't competing much on price.
8 You weren't willing to say, "Well, I'll pay a little bit
9 less if you can give me a little bit better place."

10 Now, but let me take this a little bit further.
11 When a standards organization gets set up -- let's take
12 MIPI, for example. These were competitors. These were
13 people who were going into business against each other
14 already, but they had a common problem that they wanted
15 to solve, and they were competing against each other.
16 Each of them knew that the standard that came out, they
17 could build to it and that they could make products to
18 it.

19 Now, if somebody else could also make a product
20 to it, well, all well and good, but I may have to charge
21 you a royalty fee. In fact, I may have to pay a license
22 fee on these things. So, these are competitors going
23 against each other. They don't know the price, because
24 this is brand new technology. Nobody's ever done this
25 before.

1 It's not as if you're on the Metro, which is an
2 old technology, a train, at the lowest level, you're not
3 competing for a place or on price. You're at the edge
4 of technology. And, of course, these people don't know
5 what the prices are exactly, because nobody's ever done
6 this before.

7 And so that's why I don't see the analogy that
8 you can't find the price on it. Everyone knows you're
9 going to have to pay something. Now, let me take it
10 further. These competitors are likely cross-licensed
11 with one another or they've been in licensing
12 negotiations with one another, and there is no fixed or
13 set license form with them.

14 We heard Michele Herman mention some of the
15 different kinds of things that have to be considered in
16 these licenses, and every one of these licenses is
17 unique to that competitor and Texas Instruments. So,
18 the license I write for one is going to be extremely
19 different than the license I write for someone else.
20 The price -- the dollar sign price may be one of the
21 smaller things that are involved here. I may need other
22 things more important than price.

23 And so you're harping on price and why I can't
24 find the price of these things. It's a different
25 environment than your consumer goods, and especially,

1 I'm not sure you would say it was reasonable to pay
2 \$4.50 for the berries, but you did it anyway.

3 MR. OHANA: But it was nondiscriminatory. They
4 were charging everybody else the same price.

5 MR. BASSUK: Exactly right.

6 MR. ROACH: We're doing RAND this afternoon.

7 MR. OHANA: So, Larry, it's precisely because
8 their technology -- it's precisely because they're
9 technology competitors, in other words, they're
10 competitors in an upstream technology market, that
11 knowing information about licensing terms is so
12 important, because I'm going to use that, as an
13 implementer, as an input in the decisions that I reach
14 in terms of what technology I'm going to support for
15 inclusion.

16 Again, to go back to a point that I made
17 earlier, it will rarely be dispositive, just like price
18 is rarely dispositive when we buy a car, when we buy a
19 house, when we buy lots of other things, but sure, it's
20 a factor. And -- well, I'll leave it at that.

21 MR. ROACH: Anne?

22 MS. LAYNE-FARRAR: Well, I was going to diverge
23 a little bit from the Gil debate, so if there's others
24 that want to pipe in on that, I can hold mine for later.

25 MS. HERMAN: I do.

1 MS. LAYNE-FARRAR: Yeah. I'll keep mine, then.

2 MR. ROACH: Michele, then.

3 MS. HERMAN: Thanks, Anne.

4 Gil, you asked about sort of the -- balancing
5 the burden, you know, why should it be all favoring the
6 patent holder. I would say we also have to -- this is
7 what I mentioned first thing this morning, is we also
8 have to look at the implementer, too, particularly those
9 who are participating in the standards development
10 effort.

11 If, you know, somebody discloses a patent, if
12 that information -- their specific terms are of interest
13 to you, I think it's -- you know, it's imperative on
14 you, as a prospective implementer, to go and ask for
15 those terms, because just as we've been saying, there
16 isn't one set of terms that's going to apply to
17 everyone. It's not going to make sense to, you know,
18 provide a set of terms for essential claims for -- you
19 know, we have all said this or many of us have said
20 this.

21 So, I do think there is some responsibility or
22 at least a role for the implementers, particularly
23 those, you know, involved, and I don't think we can
24 discount that. So, if the decision of whether to
25 include this technology because of cost is important to

1 you, I think it behooves you, then, to go and ask for,
2 you know, what's our deal going to look like? Can we do
3 a deal? That's all.

4 Thank you, Anne.

5 MR. ROACH: Anne?

6 MS. LAYNE-FARRAR: And actually, that's a great
7 setup for what I wanted to say. I wanted to step back
8 and talk about the economic incentives at play here and
9 what patent holders are thinking about when disclosing
10 terms and implementers are thinking about when they see
11 the terms.

12 As many people on the panel have already said,
13 if you know that this is going to be the cap on your
14 licensing terms, that you can't charge more than that or
15 people will accuse you of violating RAND or FRAND,
16 you're, of course, going to give your worst case
17 scenario. You're going to give your maximum terms. And
18 so it is going to indicate a far higher burden than you
19 would actually negotiate.

20 Part of that is that you can't capture all the
21 terms that have to actually be in a very complex
22 licensing agreement, grant-back and cross-licensing and
23 geographic restrictions and terms of use, et cetera, et
24 cetera, et cetera, but it's also because you know you
25 don't want to set your cap too low, that maybe as the

1 standard development evolves, you do find these other
2 uses, and the technology turns out to be better, and so
3 you don't want to restrict yourself later on.

4 So, how useful, then, is that disclosure? It
5 wasn't surprising to me at all that Jorge found that
6 most of the disclosures that were actually made were
7 royalty-free, because that's the one instance where you
8 can provide concrete information. If you know you're
9 not going to seek licensing terms, you want to earn your
10 profits in a downstream market, and you could care less
11 about an upstream technology market, because of your
12 business model, then disclosing royalty-free makes a lot
13 of sense.

14 You've put on the table, "Hey, you don't have to
15 worry about my IP; let's include it, go forward." I
16 want to include it because maybe I get a comparative
17 advantage. I know my technology better than you do, and
18 when it comes to implementing in the downstream market,
19 I'm going to be in a better position. That's why I want
20 it included, not because I'm looking for royalties.

21 So, I think that, you know, you can only expect
22 so much from specific royalty term disclosures.
23 Royalty-free, yeah, but specific terms, no. I think
24 they are always going to be higher than you would
25 actually negotiate, and they are higher for a particular

1 reason. You have an economic incentive, no matter who
2 you are or what business model you follow, if you want
3 some positive royalty or licensing, you're going to
4 state more than you really want, because you don't want
5 to bind yourself.

6 MR. ROACH: Michael?

7 MR. LINDSAY: I have to disagree with Anne. I
8 don't think it's true that you will always state a rate
9 that's higher than you will expect, and I would point to
10 the counterexample from the *N-Data* case, because we talk
11 about that case as a transferability of obligations
12 case, and that is, you know, what the law in it is
13 about, but the facts in it, if you go back to the
14 nineties, were that National Semi, in order to get its
15 technology included in a standard, it won a battle, and
16 the way it won a battle was by disclosing a very
17 favorable rate, a thousand dollars for a fully paid-up
18 license. The issue in the case then became, does that
19 commitment follow along with the patent? But that was
20 what National Semi was willing to do.

21 MR. OHANA: Let me sneak in a comment about that
22 example, because it's really -- it's one that deserves a
23 little bit fuller illustration.

24 Way before there was National Semiconductor,
25 there was the DIX license, Digital/Intel/Xerox. If

1 you're just getting into this, Carl Shapiro and Hal
2 Varian, in their book, Innovation Rules, describe it for
3 about a page. In 1983, companies got together and
4 standardized ethernet, first-generation ethernet. Intel
5 was one of them, Digital was one, Xerox was the third.
6 3Com was also in there, though it never became the DI3X
7 license.

8 And all of them committed to a \$1,000 fully
9 paid-up license. I bet Intel -- you know, there were
10 days where people at Intel were probably kicking
11 themselves, because that became a wildly successful
12 standard -- to go to the point before about who bears
13 the burden of uncertainty -- yet the way that Intel
14 monetized that, I think, is that ethernet made PCs a
15 whole lot more useful, because suddenly you didn't have
16 to take the disk out of the drive and run it over to the
17 PC by the printer to print out the document. People
18 probably remember those days.

19 And the effect was to drive demand for PCs,
20 therefore driving demand for microprocessors and
21 netcards and other things that Intel makes. It's a
22 phenomenally successful standard.

23 Cisco makes -- you know, I don't know -- I don't
24 know the exact number, but it's billions of dollars a
25 year in the sale of ethernet switches. And it's a great

1 example of how a patent -- how a standard, where royalty
2 concerns were addressed up front, ex ante, became a
3 wildly successful standard that is -- you know, we all
4 use, probably without knowing it, hundreds of times a
5 day.

6 MR. ROACH: Sandy?

7 MR. BLOCK: Thank you.

8 I can just sort of dovetail onto what Gil just
9 said, because IBM also provided fixed-fee licenses for
10 JPEG and JBIG, which I'm sure everybody is familiar with
11 with regard to the compression of data for photographs
12 and movies and things of that nature.

13 That said, I'm also sympathetic to the concerns
14 that many of the parties here have expressed about
15 coming up with licensing terms and royalties before you
16 really understand the market, because we do have patents
17 and we do license them. So, I do have that
18 understanding as well.

19 What I would like to do, however, is offer up
20 one thought with regard to the benefits of ex ante for
21 the patent holder, which is something that I think we
22 haven't heard, and it relates to a case called Townshend
23 v. Rockwell. In that case, you had a patent holder that
24 was offering licensing terms a year before the standard
25 was finalized, which was the real ex ante approach, and

1 they were later attacked by a defendant claiming that
2 there was antitrust violation, non-RAND offers and so
3 on.

4 The Court said, you know, wait a minute. You
5 were even on the group who approved the standard,
6 knowing what the terms and conditions were of the patent
7 holder. How can you now claim that you allowed this
8 standard to go forward, knowing that that patent and
9 those terms were there? So, this -- the case was
10 actually -- these claims were dismissed against the
11 patent holder. In that case, it was a benefit to the
12 patent holder offering its terms up front.

13 I suggest that there are other conditions as
14 well that can benefit the patent holder by -- especially
15 in the case where Michael was talking about, where there
16 are competing technologies, and then you have somebody
17 like Gil saying, "Well, which one do I want? Here's
18 a -- here's one patented technology that offers 1
19 percent and broad access to the technology, and here's
20 someone else that will charge me 5 percent." It gives
21 another variable for you to look at.

22 I just want to make one other comment, and then
23 I'll turn it over.

24 I think that there may be practical concerns
25 about ex ante. You may have problems figuring out what

1 the best terms might be early on, but I also don't
2 understand the antitrust implications that people throw
3 around with regard to either ex ante or joint
4 discussions of royalties. I think reasonable -- the
5 rule of reason test fits into that context there, and it
6 should not be a litmus test for not applying either of
7 these measures.

8 MR. ROACH: Thanks.

9 MR. BLOCK: Excuse me. I would like to just --
10 I would also like to thank Jorge for doing a great job
11 presenting empirical data and just mention that Jorge is
12 the editor on this book that many of us worked on. It's
13 the ABA Manual on Standards Development, which discusses
14 a lot of the topics that we have discussed today from
15 both -- from the different perspectives. So --

16 MR. ROACH: Hold it up for the camera.
17 Available at Amazon, but selling out fast.

18 MR. BLOCK: I think that it's a helpful guide
19 for people in understanding some of the terms and the
20 issues that we're discussing today.

21 MR. ROACH: That's a transition to another issue
22 that I was hoping we could kick around a little bit.
23 I'm sure we can go back to these other things soon, in a
24 minute. That has to do with the effect of
25 the -- of the antitrust concerns and of

1 the DOJ letters at that time.

2 Was there a -- is there a sense that that made a
3 difference in the thought process of the participants in
4 the standards groups? And if so, I've also heard, I
5 think from some folks around this table, a call for
6 trying to get a little more specific than simply to say
7 that it is -- that it should be a rule of reason
8 analysis in some fashion.

9 I'm interested in hearing views about either or
10 both of those issues.

11 John?

12 MR. KELLY: I wrote an article on this in, I
13 think, March 2003 for the American Bar Association. I
14 won't repeat that right now, but the concern to Sandy's
15 point is not as much antitrust liability as it is
16 vulnerability to litigation, and the case that I cited
17 in the article, which I was also involved in and I will
18 mention to you now, excuse me, is *Soundview*
19 *Technologies*, in which, you know, basically a bogus
20 antitrust claim alleging monopsony was made against an
21 association, the standard developer, and the entire
22 television set manufacturing industry in the United
23 States.

24 It was resolved ultimately not on antitrust
25 grounds, but on noninfringement grounds, in favor of the

1 industry and the association, but the cost was tens of
2 millions and probably more than that in defense costs
3 for the defendants. For SDOs, in particular, that is an
4 onerous burden.

5 And to answer your question, no. I mean, being
6 given an assurance or a representation -- not even an
7 assurance -- by the staffs of the FTC and DOJ that the
8 case, if it goes to court, will be judged on the basis
9 of rule of reason as opposed to per se liability, it
10 provides small consolation to an association, an SDO,
11 that may well be driven out of the business as a result
12 of the litigation. And for that proposition, I would
13 cite the Spa & Pool Institute.

14 MR. ROACH: Michael?

15 MR. HARTOGS: Yes. So, in addition to the
16 concerns of the SSOs themselves about the potential
17 expense of being dragged into litigation arising from
18 conduct of their membership, I would respond to Sandy,
19 when he asks, well, what's wrong with collective
20 negotiation? I think that was not quite the way he
21 raised it.

22 I will tell you, in negotiating with parties on
23 licenses, and as Amy and Michele have both said, you
24 know, you can always start that process at any time, to
25 answer Gil's question, when can I get my information and

1 what is it? The specter of price negotiation, you
2 expect it. It's not a surprise that in every notion,
3 that's one of the elements that is sort of -- if not
4 fiercely contested, certainly expressed vocally, that
5 there are concerns and issues to be worked on in
6 addition to the litany of other issues that need to be
7 resolved.

8 But when you're faced with the prospect of
9 perhaps an entire industry on the other side of the
10 negotiating table, with disparate interests overall but
11 common interests in some areas, the pressure that can
12 result on a licensee or on a licensor is significant
13 enough that if that were the expected process, I think a
14 lot of companies would say, "We aren't going to do it."

15 I'm not an antitrust lawyer, but there are an
16 awful lot of papers, I think, that have addressed this
17 threat of both oligopsonistic purchasing power and the
18 threats of group boycott, the, you know, implicit threat
19 in these kind of collective negotiations is play ball or
20 your stuff is going to be kicked out of the standard, if
21 it's possible. We cite a couple in our submission, and
22 I would encourage folks to read those if they're
23 interested.

24 MR. ROACH: Gil?

25 MR. OHANA: Just on that point, I guess that the

1 antitrust construct that I would point to in terms of
2 how the rule of reason analysis should be structured is
3 the antitrust law that's applicable to joint negotiation
4 in other contexts and joint purchasing in other
5 contexts, where you don't look at whether the
6 negotiation is bilateral or multilateral; you look at
7 the market power of the different sides of the
8 transaction to determine whether there is systematically
9 going to be an anticompetitive effect.

10 Another point I would make is that the scenario
11 that Michael just talked about I think is unrealistic in
12 a number of ways. First of all, the implementers are
13 going to have different interests. Second, if
14 nondiscrimination means something, then theoretically,
15 it means that the licenses negotiated ex ante should
16 have some value in the determination of what happens ex
17 post, in which case the bilateral negotiation that
18 happens ex ante -- and I agree with Michael that it
19 should happen, and the point Michele made that it should
20 happen maybe more than it does -- that should, it seems
21 to me, be awfully relevant for what the patentee can get
22 ex post as well.

23 MR. ROACH: Anne?

24 MS. LAYNE-FARRAR: So, to go back to the issue
25 of why we need to be worried on an antitrust level, I

1 think you need to think about the definition of timing.
2 So far today we've talked about ex ante as being defined
3 during the standard-setting process, but it's ex ante to
4 when an implementer has made investments to implement
5 the standard.

6 But if you really want to look at the full sweep
7 of things, you need to take that ex ante point much
8 further back to before the patent holders have made
9 their R&D investments. So, during the standard-setting
10 process, when patents are in hand, technologies are
11 being debated, and the direction of the standard is
12 underway, the patent holders have already got sunk
13 investments, and so there's a different kind of hold-up
14 that can happen.

15 You want to prevent hold-up on the implementer's
16 side so that their investments in capital, equipment,
17 and plant, et cetera, to take those standards to
18 commercialization aren't held up, but you also don't
19 want to hold up the innovator's investments in R&D. You
20 have got this technology in hand. If it can only be
21 used in a standard-setting body because that's what
22 defines the entire industry, then you're stuck. If you
23 can't take -- if the members of the standard-setting
24 body won't license you or refuse to license you on
25 reasonable terms, they have a lot more pressure, and

1 that can be reverse hold-up. In other words, holding up
2 the investment in R&D.

3 You're looking like you don't agree with me.

4 MR. ROACH: No. No, I'm here to listen today.

5 Let's see, just a little bit -- Earl, please.

6 MR. NIED: Okay. So, as we, you know, know
7 pretty clearly, the unilateral disclosure of licensing
8 terms would seem to be fairly easy to do and not much of
9 an antitrust risk, but when we start looking at, you
10 know, further discussions going on, there are some
11 things that might make good sense, but then it gets to
12 be a very gray area between what makes good sense and
13 what might not.

14 So, you know, I've personally been involved in
15 SDOs, back in 2000 even, well before the ex ante stuff
16 became public, where we actually did discuss license
17 terms from two different vendors that wanted to make a
18 submission to the standard, and they each had a license,
19 and it needed to be discussed at the board levels where
20 we decided to do it. Well, that took some time. It
21 took some particular expertise to understand the
22 difference in the licenses. Most importantly, what we
23 looked at doing was not so much, you know, judging the
24 licenses, but asking the questions of, you know, what do
25 your license terms mean? What is the difference here?

1 Can you explain this further?

2 And that sort of discussion does seem to make
3 some sense, but it was a very controlled situation. We
4 were very careful what we were doing. Counsel was
5 present, et cetera. And, you know, what -- what I would
6 be worried about for any engineers going into such a
7 discussion is them really understanding the borders
8 between that and a discussion that ends up being very
9 anticompetitive.

10 And, you know, there have been situations -- as
11 a matter of fact, the day after the Majoras paper came
12 out, one of my engineers had to leave a meeting in
13 Sydney, Australia, because there was two other parties
14 that immediately got up and said, "Well, we're going to
15 decide what your royalty rate should be." It wasn't
16 Intel's royalty rate, it was of a third company. And
17 our guy basically raised his hand up and said, "I'm
18 sorry, you know, this is a dangerous discussion. My
19 company won't let me participate. We need to stop
20 this." And he left the meeting.

21 So, you know, my problem is the gray area. It's
22 just very difficult to define, and it -- it's a huge
23 potential burden and expense, as John said, when the
24 Soundview case happened. If an SDO is faced with this
25 under a rule of reason test, they are already in a

1 litigation, and that's very expensive to the SDO and its
2 members. So, you know, my concern is just this is a
3 very difficult area to define.

4 MR. ROACH: Let's see, Michele. I think you've
5 been waiting for a while.

6 MS. HERMAN: Actually, I wanted to follow up on
7 something that Anne said, and actually, it's not
8 directly to the specific antitrust question, but it
9 happens to go to your first question that you asked
10 about our standards organizations thinking about now
11 changing their policies.

12 So, when we talk -- it is important to think
13 about the investments that patent holders make as well.
14 Again, it's just another factor, but there are
15 situations where patent holders have participated in
16 standards organizations for a very long time, and they
17 have invested in the standards, they've contributed a
18 lot of technology to the standards. They're really
19 invested, and they help make the standards organizations
20 and the standards successful.

21 If at that point the standards organization
22 would decide to, say, adopt, you know, an ex ante
23 license term disclosure policy that, you know, you've
24 heard the concerns from many of the people here, that
25 that might be very onerous and may be something that,

1 you know, many parties may not want to participate in
2 based on those policies, it becomes very, very
3 difficult. It's like a reverse hold-up scenario in that
4 case. It becomes very difficult at that point to walk
5 away from the standards organization.

6 In other words, you've got to accept these terms
7 or you can't play ball here after you've sunk all those
8 investments. I just think it's another thing people --
9 you know, we need to be sensitive to and consider.

10 MR. ROACH: Sandy?

11 MR. BLOCK: Yeah. I just want to sort of spin
12 off something that Earl said. I agree that in the
13 context of the SDO itself, you want to have the
14 appropriate people there. You don't want to have your
15 technical people discussing licensing and legal terms.
16 Assuming that you have the right people in the room,
17 which we're having more and more, as you can tell from
18 the people on this dais.

19 I'm concerned a little bit about some of the
20 discussion here, because a lot of the standards groups
21 are actually getting into the terms and conditions that
22 these license -- that the licensors should comply with,
23 not necessarily the royalty term itself, but there are
24 other terms as well that are important, some discussion
25 of defensive termination before the geographical term,

1 some of the licensing scope type terms, what is an
2 essential claim, all of these different things.

3 A lot of these are preset by the standards
4 group, by the joint discussion of the various people in
5 the room, and so a certain extent, it makes it a little
6 bit more uniform among the parties for them to say,
7 "Well, these are terms and conditions that we think have
8 to be uniform among the various parties." I'm a little
9 concerned here about the discussions that we're hearing
10 that there may be antitrust implications in that regard.

11 So, I would just want to make sure that those
12 are the people on the dais that always talk about the
13 flexibility of SDOs and the policies that they form,
14 keep in -- keep in regard this -- the actions by the
15 SDOs in sort of framing a common or uniform policy
16 regarding the terms that might be applied.

17 MR. ROACH: This just keeps rolling here.

18 John?

19 MR. KELLY: Sandy, I don't want to get involved
20 in a heated debate here, especially with you, because
21 you're a good friend, but are you referring to
22 discussions about licensing terms that occur among the
23 SDOs as organizations, within the SDOs among the
24 members, or both?

25 MR. BLOCK: Within the organization. It's a

1 world -- we're looking for a worldwide, nonexclusive,
2 nonsublicensable, you can have reciprocity if you like
3 in the license and so on. These are things that the
4 members of your organizations are -- of organizations
5 are addressing.

6 MR. KELLY: But I -- candidly, I've been doing
7 this for 20 years, and I am not aware of any SDO which
8 allows those -- with the possible exception of VITA and
9 IEEE in an ex ante context -- any organization that
10 allows those discussions to occur in the context of an
11 SSO meeting. Now, I may be wrong. That's just based on
12 my experience, but that's my experience, and we're
13 talking about, you know, dozens of SSOs.

14 MR. ROACH: Andy?

15 MR. UPDEGROVE: I've always found the ex ante
16 discussion a little puzzling over the last few years.
17 It became an issue, and I know that there were a number
18 of companies that visited with the Department of Justice
19 and the FTC to talk about it, and then it was a big deal
20 for a while, and then it kind of sank out of sight in
21 the greater part of the standards landscape.

22 So, mostly just an observation is that there
23 appear to be situations where there are some companies
24 that have an interest in this, and the rest of the
25 industry doesn't seem to care or talk about it. So,

1 that's just kind of an observation, that there seems to
2 be something specific going on in the marketplace that
3 gets etched in particular places. And maybe the thing
4 that would be most interesting would be to figure out
5 where and why here and not there, because I think as a
6 generic topic for the marketplace, it doesn't seem to
7 generate a lot of interest in the vast majority of
8 standard-setting venues.

9 So, I don't know where that takes you, but it's
10 my observation as someone who, you know, keeps an ear
11 fairly close to the ground, you know, across the board.

12 MR. ROACH: We are coming up close on my 1:00
13 p.m. target here. If I could have maybe two more
14 comments.

15 Sarah, please? You have had yours up for a bit.

16 MS. GUICHARD: Yeah. I guess I do agree that we
17 should look at why and where, and I think one of the
18 places we might see the why is in the changing
19 ecosystems of people that are in the standard-setting
20 bodies.

21 You've got the emergence of companies that are
22 much more focused on licensing, whether or not they
23 practice or don't practice at all, changing rates,
24 making things unstable to something that was stable.
25 So, if you had a document or some mechanism to know that

1 the rates were what they were, when you're going up for
2 a renegotiation of a license agreement or when you're
3 entering a market, you have some comfort as to what
4 those rates are, and somebody isn't -- your shareholders
5 or, you know -- and we're going to get into transfer
6 later -- isn't changing the rules on you while you've
7 already implemented the standard.

8 I think that historically, if you look at some
9 of the standards that were done, maybe the discussions
10 weren't actually in the meetings, but they were during
11 breaks. There were pamphlets or papers sent around or
12 sat on meeting chairs as people were on their break,
13 anonymously, discussing, you know, maybe news articles
14 or giving information to other people. Whether or not
15 that was proper or not proper, it found its way into the
16 meetings. And to say that, you know, maybe people are
17 more careful, companies are more careful now, that may
18 be, but because the information was kind of there when
19 the standards were being developed and maybe isn't
20 available now is, I think, one of the reasons you might
21 be seeing it come back up.

22 MR. ROACH: Okay, one more.

23 Gil?

24 MR. OHANA: Thanks.

25 A couple of kind of wrap-up comments maybe. We

1 talked before about incentives to innovate and the
2 incentives of patentees to innovate. We aren't really
3 talking about patentees. We're talking about companies
4 with royalty-based licensing models, because as was
5 commented before, everybody in the room has patents.
6 So, we're talking about the incentives of companies with
7 royalty-based licensing models to participate in
8 standards development. Let's be honest about that.

9 On that point, let's look at the rule of reason
10 analysis. Rule of reason is a balancing test. You look
11 at incentives to innovate and the effect the joint
12 negotiation or discussion would have on incentives to
13 innovate. I guess I still remain to be convinced that
14 joint discussion or negotiation would have an impact
15 there. I talked before about the strong interests of
16 vertically integrated companies in having excellent
17 technology and standards, but also, let's look at the
18 track record of the many great, pervasive, widely-used
19 standards that have been developed under royalty-free or
20 default royalty-free licensing models.

21 Anybody in this room get cable broadband? Gil,
22 don't answer. Cable broadband, you know, Comcast, Cox,
23 et cetera? The standard is DOCSIS, default
24 royalty-free. Anybody use a Bluetooth headset?
25 Bluetooth, mandatory royalty-free. Anybody use a

1 webpage with XML or cascading style sheets? W3C,
2 default royalty-free standard IPR policy.

3 The point I'm making is not that royalty-free is
4 better in some sense. The point I'm making is that
5 people who make the argument that joint negotiation or
6 discussion will depress royalty rates and, therefore,
7 drive companies that have royalty-based licensing models
8 away from standards development and thereby impact
9 innovation have a hill to climb. They have a burden of
10 proof to explain why that will happen given that there
11 have been many great standards developed under default
12 RF or mandatory RF standards, IPR policies.

13 Finally, just to wrap up a point regarding
14 pricing information, a lot of what I was hearing was,
15 boy, this stuff is complicated, and, boy, you know,
16 you'll never get the complete story. Let's not make the
17 perfect the enemy of the good. Pricing information is
18 always valuable, even when it's incomplete. It's better
19 than no pricing information.

20 MR. ROACH: Well, thank you. This has been a
21 bit of a free-form, but I have found it useful. So, I
22 appreciate it. We have an afternoon session for those
23 who may continue to want -- continue the tussle at that
24 point. We are at -- it is five minutes after 1:00, so
25 we'd like to come back -- break for lunch now, and have

1 folks come back, if possible, at 2:30, to give people
2 time to grab something at the middle of the day.

3 Just a reminder, keep your sticky, it will help
4 you get back into the place afterwards, and folks who do
5 leave the building, when they return, will have to come
6 in through the screening process again. Thank you all.

7 (Whereupon, at 1:05 p.m., a lunch recess was
8 taken.)

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1 AFTERNOON SESSION

2 (2:30 p.m.)

3 PANEL 3

4 MR. ROACH: Welcome back, everyone. Thank you.
5 This is our panel three. Our moderator will be Suzanne
6 Michel.

7 MS. MICHEL: Thank you. All right, let's get
8 started. Thank you. My name is Suzanne Michele. I'm
9 the Deputy Director of Policy Planning at the Federal
10 Trade Commission. I'm here with Pat today.

11 Before we launch in, I want to remind everyone
12 that we're accepting public comments on this project up
13 until July 8th, and if -- through the FTC website, you
14 can find a hopefully fairly straightforward process for
15 just posting them up there, and if you have any trouble,
16 please feel free to give Pat or me a call.

17 Now, panel three. Well, this morning we heard a
18 lot in panel one that blanket assurances regarding
19 patent rights are increasingly common in
20 standard-setting organizations. A company may not
21 disclose individual patents related to a standard, but
22 instead, give an assurance that it will license any
23 patents that it does own on reasonable and
24 nondiscriminatory terms.

25 We also heard in panel two some of the practical

1 concerns that companies face when they may consider
2 defining licensing terms ex ante, before the standard is
3 set, and for that reason, a lot of times licenses are
4 actually negotiated ex post, after the standard is set,
5 and sometimes after costs have been sunk to implement
6 the standard.

7 Those licensing negotiations take place in the
8 shadow of that RAND committee. So, our goal in this
9 panel is to explore the meaning and the contours of that
10 RAND commitment.

11 Before we get started, I'd like to welcome to
12 this panel Alexa King. Alexa is Vice President and
13 General Counsel for Aruba Networks, where she oversees
14 the company's legal matters, including intellectual
15 property and technology licensing. And thank you very
16 much for joining us here.

17 Our goal will be to end this panel at 4:00, at
18 which point we will be hearing from Joe Farrell, who is
19 Director of the Bureau of Economics here at the FTC and
20 has done much scholarly work on issues involving
21 standard-setting.

22 All right. Let's dig in. We'll follow the same
23 procedure that we did this morning with the table tents.

24 What's the role of a RAND commitment in
25 promoting standardization? Is it a helpful thing? Is

1 it a meaningless commitment process given that it's
2 undefined? How does it encourage the standard-setting
3 process?

4 Any takers on that one? Sandy?

5 MR. BLOCK: Yeah. I still have something left
6 after lunch.

7 Yeah, I -- something that this morning's
8 discussion pointed out, as we disparaged the disclosure
9 of patents this morning, was that the RAND commitment
10 takes on even more importance, because the effectiveness
11 of the disclosure obligation may not be as robust as
12 some may consider.

13 So, I think that the RAND commitment is a very
14 important part of the standards process, even though it
15 is somewhat vague. The reasonableness prong of the
16 test, I think, is something that is fairly well
17 discussed in the patent realm in general, and most of us
18 look to the Georgia Pacific, the U.S. Plywood case, to
19 get some of the factors that are used in that analysis.

20 I would suggest, however, that there are several
21 factors there that may not be appropriate. For example,
22 who is the licensee? I think that that factor, although
23 it fits in general when you're engaging in licensing,
24 may not be quite as appropriate in the standards context
25 where you also have the nondiscriminatory aspect.

1 MS. MICHEL: Okay. And we will be diving in
2 quite a bit, I think, into what do we mean by
3 "reasonable."

4 Andy, what's your take on the importance or the
5 role of the availability of RAND commitments in
6 promoting standard-setting?

7 MR. UPDEGROVE: Well, I think it's maybe a
8 little bit -- I think there's real value, but it's maybe
9 somewhat nonobvious, and maybe a good way to think of it
10 is the old question about what do locks on your front
11 door do, and the answer is, it helps keep honest people
12 out.

13 And your average IPR policy doesn't tend to have
14 teeth, to speak of, does tend to have some key
15 ambiguities that means, in my judgment, that an IPR
16 policy is a fairly weak tool to prevent real
17 game-playing. So, then, where is the value?

18 Well, I think the value that it does provide is
19 it encourages honest people to participate in the
20 standards process, and I had an interesting insight when
21 somebody sent me a paper that they wanted me to comment
22 on that was based upon the premise that because of this,
23 people would run in with their most valuable inventions,
24 and these academics had the sort of idea that they would
25 literally walk in with patent applications and say,

1 "Here, you can use these claims," to which I said, you
2 know, "That's ridiculous, that's not at all what
3 happens." Basically, their paper was without merit as
4 written.

5 But it did help me realize that because that
6 RAND opportunity is at the back end, it means that
7 companies with large patent portfolios, in particular,
8 can feel safe allowing their engineers to go to hundreds
9 of working groups and participate in these organizations
10 and speak freely because their companies know that there
11 will be an opportunity at the end, that if they really
12 feel they need to, they can protect their IPR.

13 So, I think -- in that context, I think they're
14 essential, because people might not be willing, you
15 know, to engage in the process at all if they didn't
16 have that opportunity for people other than engineers to
17 look at these things at the back end and give them a
18 serious valuation.

19 I don't think that's the explanation you would
20 usually get, but I think it's kind of an
21 underappreciated benefit that really does help make the
22 whole process work for people that care about what they
23 might be giving away.

24 MS. MICHEL: So, the value is the ability to
25 say, "I will not license on RAND terms, then; I want to

1 keep this technology for myself to differentiate my
2 products."

3 MR. UPDEGROVE: It's actually a little bit more
4 subtle than that. What it means is not that I will, but
5 I know that I could if I was surprised, and what you
6 find is that in many organizations, they'll have a
7 three-choice: RAND-free, RAND-fee, and will not
8 license. In many organizations, what you will say, is
9 that people just reflexively check off that middle box,
10 just in case, but then they never go and look, and you
11 might get a handful of these things back with the middle
12 box checked, but as a practical matter, you never had to
13 worry about it.

14 But the fact that if they had found something
15 that really surprised them, that they could have checked
16 that off and meant it, I think allows people in the room
17 that might not be there otherwise.

18 MS. MICHEL: Naomi?

19 MS. VOEGTLI: Yeah, thank you.

20 I'd like to follow up in terms of Andy's point
21 from the implementer's perspective. I think RAND
22 commitment sets the tone that, yes, our competitors are
23 sitting across from me, and we are working together to
24 develop standards, and there is an assurance we can get
25 the license, and it should be reasonable and

1 nondiscriminatory.

2 With that said, though, two points I'd like to
3 make is that Michele and other panelists mentioned this
4 morning, is that rarely a negotiation takes place for
5 that particular patent covering the essential claims.
6 So, it's going to be productwide, much broader, and
7 negotiation for the licensing terms, but still, we know
8 that particular patents that are -- that is essential,
9 they are not going to be denying license to us.

10 MS. MICHEL: Okay.

11 Earl?

12 MR. NIED: So, just real quickly, let's look at
13 if there wasn't any sort of commitment made, and if
14 there wasn't any sort of commitment made, then you have
15 the situation of the patent holder has its full
16 statutory rights available to it, including getting an
17 injunction or doing whatever the patent holder would
18 like to do. They don't need to be reasonable or
19 nondiscriminatory. So, you know, it -- in that respect,
20 it is helpful in ensuring that, you know, we don't have
21 people that are blocking the implementation of the
22 standard.

23 When you actually go to negotiate those terms, I
24 definitely want to emphasize and build on what Naomi was
25 saying, and that is, what RAND does is it allows that

1 negotiation to have the appropriate level of
2 flexibility. Sometimes, you know, you have -- you're
3 negotiating with another manufacturing company that has
4 their own patents, and, you know, that may be for a
5 different standard. So, you know, that negotiation can
6 take on many different possibilities.

7 The actual payment of money and royalties for
8 patents is actually kind of rare in the environment, and
9 it's not just because of cross-licenses, too. There are
10 other negotiations that companies can end up going into,
11 and there's also this idea that a lot of times, you find
12 yourself in a stalemate situation, where it's just not
13 worth the effort to negotiate a license, because you
14 both could shut down each other's products, or the other
15 possibility is that the little licenses are so trivial
16 that the cost to actually sit down and do a negotiation
17 for every possible licensee would just be too expensive.

18 So, there is -- having that flexibility is very
19 important.

20 MS. MICHEL: Larry?

21 MR. BASSUK: Well, even outside of the standards
22 licensing and negotiating areas, at Texas Instruments,
23 one of the most important things to us is getting access
24 to technology so we can compete, and this is extremely
25 important to us. In the semiconductor business, IBM,

1 for example, had developed copper interconnect on the
2 chips. Well, we needed access to that technology to be
3 able to make semiconductors and integrated circuits.
4 Intel developed very thin insulators for transistors.
5 We needed access to that technology to be able to
6 compete.

7 The RAND commitment to us is the ability to get
8 access to that technology, to make products so we can
9 compete in the market.

10 MS. MICHEL: How is the RAND -- oh, Gil.

11 MR. OHANA: Just following up on Larry's point,
12 because it touches on something that I think is really
13 important and often overlooked, which is that the way
14 that vertically integrated companies that both
15 contribute technology to standards and also implement
16 standards, monetize, if you will, their contributions to
17 standards, is often through getting defensive positions
18 that can create design freedom for them, and the classic
19 way that people do a lot of defensive patenting in the
20 tech industry, and when people talk about, you know,
21 patentees versus innovators -- or, sorry, innovators
22 versus implementers, I think that distinction is often
23 overlooked, that what you're getting out of
24 participation in standards development is often design
25 freedom.

1 MS. MICHEL: Well, how is the RAND commitment
2 enforceable? Do -- is there agreement that it's an
3 enforceable contract, and if it's not, then what do we
4 do?

5 Larry?

6 MR. BASSUK: Well, that's a really interesting
7 question, because I have to ask you -- let's go back to
8 basic contract law. If Texas Instruments makes a
9 licensing commitment to, say, IEEE or the ITU, where is
10 the consideration? In basic contract law, you have a
11 contract when there is agreements and consideration for
12 the agreement or a promise for the -- consideration for
13 the promise. I mean, it's just basic contract law, but
14 that -- I'm not sure I could tell you exactly where that
15 consideration is.

16 I could say, "Oh, well, it's the fact that we're
17 going to allow your patent to be in the standard." Is
18 that really consideration? I mean, I'm not getting much
19 out of that.

20 MS. MICHEL: You're not?

21 MR. BASSUK: Well --

22 MS. MICHEL: You might be getting a lot out of
23 that, don't you think?

24 MR. BASSUK: But wait a second. What -- am I
25 going to be able to -- I could build that product

1 anyway, even if the standard wasn't there.

2 MS. MICHEL: But your market will be much, much,
3 much, much, much larger if it's a standardized product.

4 MR. BASSUK: Well, where is the consideration?
5 I mean, see? And it's basic contract law. That, to me,
6 is a problem.

7 Now, other people will say, "Yes, but it's
8 equity. Equity will take care of it." Equitable
9 estoppel, all those things. But taking it back to a
10 strict, legal thing, there's the question.

11 Now, I understand full well, we've worked with
12 one another in the past, we are going to work with one
13 another in the future, we have got to honor our
14 commitments, whether there is consideration there or
15 not. I'm simply raising the strict legal question.

16 MS. MICHEL: Okay.

17 Alexa?

18 MS. KING: Okay, thank you.

19 Let me try to give a little bit of context from
20 a slightly different perspective, and just by way of
21 background, Aruba Networks is one of the younger
22 innovative technology companies at the table. We were
23 founded in 2002, literally two engineers in a garage
24 trying to solve a problem. The problem happened to be
25 how do you make wireless networks secure for the

1 enterprise companies, corporations, not just
2 individuals. And we've had some success, a 2007 IPO.

3 I look around the panel, I see our customers, I
4 see our top competitor, I see some of our component
5 suppliers, but we are still much younger. Our patent
6 portfolio is growing but certainly nowhere near the size
7 of some of the other patent portfolios that we are
8 seeing. And so I've got a preliminary question to your
9 question about enforceability.

10 Obviously, RAND commitments to companies like
11 ours are critical, because we came to the table after
12 the standards were set, and we operate in an industry
13 and in a space that is very standards-driven, WIFI, that
14 where interoperability is critical for our customers
15 and our end-users. And so RAND really is what we rely
16 on to ensure that the licenses that we need to take are
17 fair, reasonable, nondiscriminatory.

18 And so my question to the panel is whether or
19 not they're seeing what we've seen, which is larger,
20 older operating companies who have got significant
21 patent portfolios, some of which they claim are
22 standards-essential patents, won't even talk to us and
23 won't even talk to potential licensees about licenses
24 without an NDA in place, which leads me to the question
25 of, how do I know whether or not our conversation is

1 leading to rates that are nondiscriminatory? How do I
2 have a conversation with my component supplier? How do
3 I have any sort of internal dialogue about whether or
4 not these rates are, in fact, nondiscriminatory?

5 So, that's more of a question than an answer,
6 but I think before we get to whether or not RAND --
7 which absolutely, for young innovators like Aruba
8 Networks, is critical -- whether or not RAND is
9 enforceable, how is it even exercisable when I can't
10 even have those conversations?

11 MS. MICHEL: Well, that's an interesting
12 question and I think interrelated to the enforceability
13 point, because I think if it's not enforceable, then how
14 do you even raise those sorts of issues initially? So,
15 I'd like to set a groundwork of what the panelists think
16 about how RAND can be enforced so that we can lead that
17 up into another conversation about hoping that it can be
18 enforced, what does it mean, and how can a company in
19 your position try to take advantage of the fact that
20 there is a RAND commitment.

21 Let's see, Mike?

22 MR. HARTOGS: Yeah. So, maybe to go directly to
23 the question, I would say RAND commitments are -- they
24 are enforceable. They are contracts. I think there's
25 enough give and take between members of an SSO and the

1 SSO's allowing you to participate and contribute your
2 technologies and use their standards to satisfy
3 whatever -- what was the law school word? -- the
4 peppercorn test or sufficient consideration that I don't
5 think there's, in fact, you have a contract, it's a
6 binding contract, and it's enforceable.

7 I have enough confidence in that because it's
8 something we've, you know, personally experienced
9 challenges on FRAND in a contract enforcement setting.
10 The judicial system is well adapted to addressing
11 reasonableness of terms and conditions in license
12 agreements. They do it in the infringement context all
13 the time, and there's a vehicle available for those that
14 feel that somebody is in breach of a FRAND commitment or
15 a license commitment if you license on FRAND terms.

16 MS. MICHEL: Okay.

17 Sarah?

18 MS. GUICHARD: I was simply going to say that I
19 think it depends a lot on the jurisdiction that you find
20 yourselves in, and we're in the United States, the FTC,
21 but I think that there's lots of different legal
22 theories that can be used. But one of the things that I
23 think historically has been used for the enforcement of
24 the RAND commitment is government. I mean, they've
25 been, you know, looking over the shoulder of companies,

1 encouraging them -- maybe not publicly, but maybe
2 privately -- if they see behavior that they think might
3 be causing a problem. These kind of forums kinds of
4 bring it to the forefront.

5 I think that whether it's in contract, whether
6 it's promissory estoppel, depending on the different
7 legal theory that might be brought -- because it depends
8 on the rules of the SDO -- that those are options. But
9 I do think just having the Government look and question,
10 is there a problem, and having a place to go and
11 complain, as companies have done in the past, is another
12 way that things are enforced.

13 MS. MICHEL: Okay. I'll keep going around the
14 table, but as part of this topic, if you have any
15 thoughts about whether if you do consider RAND to be an
16 enforceable contract or somehow enforceable, is it also
17 enforceable by third-party beneficiaries, nonmembers of
18 the SSO? And do you have any thoughts on how on any
19 point related to this topic, SSOs might bring more
20 clarity through their own activities and own rules?

21 I'll stick with this side and then go to Sandy
22 and then come over here.

23 MR. BLOCK: Yeah. The third-party beneficiary
24 approach I think is a sound one, and for those people
25 that are SSOs, I think it might make sense to have in

1 your policies that the members and the implementers are
2 intended third-party beneficiaries of the policy, so
3 that that's a clear point in this agreement that is
4 being established amongst various parties and oftentimes
5 competitors.

6 I think a number of other theories were talked
7 about, estoppel, laches, there are all kinds of either
8 promises or conditions that people are accepting when
9 they become a member of the organization.

10 I would -- there was a question that I wanted to
11 raise before which had to do with the importance of
12 RAND, and I'm sorry, I'm speaking out of turn, but I
13 have a concern that if the RAND obligation is too easily
14 sidestepped, that that has a serious impact on not only
15 the standard but on the licensing landscape in general.

16 I would like to point to two specifics on that:
17 One is -- and that relate to the -- the commitment of
18 flowing. Someone mentioned it before, the commitment
19 flowing to successors of interest in the patent, and I'm
20 looking at one narrow space there, which has to do with
21 bankruptcy.

22 I am concerned about, first, if a patent is
23 transferred to a third party --

24 MS. MICHEL: Actually, Sandy, I'm sorry to cut
25 you off. I would like to come back to that topic and

1 address it at once, because it is an important topic
2 that I think there's a lot of interest in.

3 MR. BLOCK: Thank you. I'm sorry.

4 MS. MICHEL: Thank you. And I am looking
5 forward to --

6 MR. BLOCK: I can't guarantee I'll be awake in
7 two hours.

8 MR. BASSUK: I'll wake you up.

9 MS. MICHEL: Yeah. Larry will kick you in the
10 shins, and that will take care of it. Okay.

11 So, this idea of whether RAND is an enforceable
12 contract, is enforceable by non-SSO members, is there
13 something that SSOs or through some other mechanism we
14 can do to clarify these points? I'd love to get your
15 thoughts on that.

16 Michele?

17 MS. HERMAN: Well, in terms of whether they're
18 enforceable, I think I agree with what a number of
19 people have said. I mean, I think that they probably
20 are enforceable, either as contracts or through
21 equitable means, but certainly, you know, the way you
22 craft -- if you're going to require people to submit a
23 license assurance, I mean, the statement in there, it --
24 you could include language that makes them enforceable.
25 Also, acknowledging third-party beneficiaries is

1 helpful.

2 But I also wanted to recognize the question that
3 Alexa raised. I think that is a difficult question, but
4 I also think it plays into this whole question about,
5 you know, how is RAND enforceable? When we're talking
6 about the RAND commitment -- and, again, we're
7 talking -- we've said this, but I think it makes sense
8 to raise it again -- is that we're talking about RAND
9 with regard to the essential claims, because that's what
10 the licensing commitment is for.

11 It's very difficult for a new entrant, for
12 example, or anybody to talk about what's
13 nondiscriminatory when, in fact, the deals that get done
14 are not the same deal. So, even if you had access to
15 them, in many cases -- maybe not all -- but in many
16 cases, it wouldn't even be very helpful to you.

17 And so I just think that maybe a more important
18 question is what exactly about RAND is enforceable,
19 because the RAND commitment is limited to essential
20 claims. So, not whether it's enforceable, but what
21 aspect of it is enforceable?

22 MS. MICHEL: Yeah. Let's -- I want to see, does
23 anyone have any more comments about whether RAND is
24 enforceable, is enforceable by third-party
25 beneficiaries, non-SSO members? And in particular, can

1 we make that more clear and why don't we, if we can?

2 Andy?

3 MR. UPDEGROVE: I think this is a good example
4 of the old Pogo line about "We have met the enemy and
5 they is us." I have tried to put in IPR policies that
6 implementers, member and nonmember, are intended
7 third-party beneficiaries. I have been able to do it
8 once. And what I run into over and over again in
9 drafting IPR policies is that there is a great reticence
10 to give away even the last quarter of a percent of
11 maneuverability in the courtroom.

12 I've also, after the last go-round on Rambus,
13 when the Court ruled that there was no good faith
14 obligation in standard-setting --

15 MS. MICHEL: I think that was the ALJ.

16 MR. UPDEGROVE: The ALJ, right. And I tried to
17 put in policies that parties would acknowledge that
18 there was a good faith obligation to each other.
19 Couldn't get that through. So, eventually, you quit
20 trying.

21 But I've tried each of those multiple times, and
22 every time, the very companies that would never contest
23 the provisions still refused to allow that to go into
24 the policy. I mean, you can give it whatever label you
25 want, you know, knee-jerk, you know, caution, or

1 whatever, but it is rather frustrating when you're
2 trying to do a policy that has meaning to it, and things
3 that one would think -- like, in particular, the
4 third-party beneficiary -- you would think would be --
5 the system makes no sense at all --

6 MS. MICHEL: No.

7 MR. UPDEGROVE: -- without that. I found it
8 impossible to even get that in. So, it's frustrating.

9 MS. MICHEL: Michael?

10 MR. LINDSAY: Yep. We actually had this very
11 debate during the IEEE's revision of its policy about
12 five years ago and heard many of the same theories, but,
13 you know, the bottom line is if RAND letters are not
14 enforceable, why are we bothering to get them? And I'm
15 not sure entirely what the legal theory is. I tend to
16 think it's a contract, but whether it's, you know, an
17 equitable estoppel or promissory estoppel under, you
18 know, U.S. principles, some way it has to be enforceable
19 or it just doesn't make sense.

20 It is also clear that in the vast majority of
21 cases, the person who is going to have the most interest
22 in enforcing it is going to be an implementer of the
23 standard, and it has to make sense that they are somehow
24 able to enforce them. There may be circumstances where
25 the standards organization itself has an interest in

1 enforcing, because things have gotten so out of hand
2 that it's now hurting the organization as well as
3 individual parties, but one would expect that
4 circumstance to be relatively rare.

5 How do you make all of this clearer? I will
6 tell you. You set up some FAQs on your website, and you
7 use number 30, just to take an example, who can enforce
8 the accepted letter of assurance -- which is what we
9 call RAND commitments in the IEEE -- users and
10 implementers may seek to enforce the terms of any
11 accepted letter of assurance. In certain circumstances,
12 and at its sole discretion, the IEEE may also seek to
13 enforce the terms of an accepted letter of assurance.

14 I mean, it's really that easy. You make it
15 clear either in the policy document itself or in the
16 explanatory materials around it that this is what we
17 mean.

18 MR. UPDEGROVE: Seek to? Seek to?

19 MR. LINDSAY: We never guarantee anyone will
20 win.

21 MS. MICHEL: Anne?

22 MS. LAYNE-FARRAR: I just wanted to point out
23 that if you look to what's happening in the marketplace,
24 the ability of companies like Aruba Networks and if you
25 look in mobile telecom, for example, a whole slew of

1 Asian handset manufacturers didn't participate in the
2 standard-setting body, didn't contribute any IP, and yet
3 they are not only competing in the marketplace, but some
4 of them are hugely successful and are displacing big
5 names like HTC, displacing to some degree Nokia in the
6 handset market.

7 So, I think it must be working for third parties
8 who weren't participating in the standard-setting
9 process to some degree, and they must be, at least at
10 some level, nondiscriminatory or those parties would not
11 be able to compete so successfully. So, I think you can
12 see evidence that, you know, through whatever mechanism,
13 whether it be courts, FAQs, whatever, that parties are
14 successful -- third parties are successful in coming in
15 and taking these standards, implementing them, and
16 competing with members who were around a lot longer than
17 they were.

18 MS. MICHEL: Okay. Let's go to Naomi and then
19 come back to that topic.

20 MS. VOEGTLI: I have two points to make. Just
21 stepping outside a legal enforceability, I think there
22 is also what's called peer pressure. If SAP backs off
23 from RAND commitment, our reputation is going to be
24 tarnished, and also, it's a public relation disaster,
25 and SAP is a repeat player in a standard-setting

1 organization. So, we want to maintain integrity.

2 The second point is here, what we are talking
3 about is a very organized standard-setting organization.
4 Many standard-setting organizations SAP belongs to, they
5 don't have IPR policy. It's not of interest of
6 implementers, nor patent holders. For some
7 organizations, SAP tries to lead an effort just to
8 implement very basic IPR policy, and it gets nowhere,
9 echoing what Andy said.

10 MS. MICHEL: Okay.

11 Gil?

12 MR. OHANA: Just to pick up on one point that
13 Naomi just made, I think it's very important that peer
14 pressure is a significant constraint on what companies
15 do in standards development. Different standards
16 development organizations have different cultures. At
17 the ITF, you know, if you do something that's perceived
18 as being against the community, you will get, you know,
19 a torrent of flame email very quickly, as I personally
20 experienced.

21 I wouldn't overstate it, though, for the
22 following reason: We live, for better or worse, in a
23 very liquid patent market, and SAP may very much care
24 about its reputation, and certainly Cisco very much
25 cares about its reputation as a good player in

1 standards, but the patent assertion entity who buys
2 patents from someone may not have that reputational
3 concern and may, therefore, be very tempted to take
4 whatever ambiguities and elasticities there are in a
5 patent policy and run with them, which is why the
6 cultural arguments about reputation, et cetera, only get
7 you so far, unfortunately.

8 MS. MICHEL: Okay. Let's talk, then, about what
9 about RAND is enforceable, and specifically, from the
10 perspective that Alexa very helpfully brought out, a
11 company that wants to license, that's facing across the
12 table a large operating company with a large portfolio
13 that's made a RAND commitment, what's the meaning of
14 that RAND commitment?

15 And we can break this down, start with what's
16 reasonable? How should we think about what's reasonable
17 and how should this play out in the licensing
18 negotiation? And we would love to also hear your
19 thoughts, for Alexa, on how Alexa has to face those
20 negotiations.

21 So, any thoughts on what's -- either what does
22 "reasonable" mean or how does what the meaning of
23 "reasonableness" is play out in your licensing
24 negotiations?

25 Mike?

1 MR. HARTOGS: There was a thread in the question
2 that I think I can find answerable, which is on sort of
3 how does it play out, right? And this is a thing that's
4 come up a couple of times, which is -- at least in our
5 space and in the experience that I have, and I've done
6 more than 200 licensees for standards-related
7 technologies in patents and products, I can think of one
8 occurrence in 200 where somebody came to me and said, "I
9 just want a patent to these essential claims for this
10 kind of product."

11 It's not the dynamic that exists when
12 negotiations go on between companies, at least in our
13 experience. They, through whatever mechanisms, whether
14 it was a patent disclosure, a general letter of
15 assurance, a brought FRAND commitment, or some other
16 vehicle, have come to us and frequently, responding to
17 something Earl said yesterday, we do get a lot of
18 licensee-initiated negotiations.

19 But the negotiation then proceeds to a
20 discussion or a get-to-know-me. What is your product?
21 What is it you want to do? Where do you want to do it?
22 What's your situation? Is up-front cash a problem and
23 payment terms are a help, or do you have a short-term
24 need or a long-term need? Do you have jurisdictional
25 preferences for law and venue? There is a myriad of

1 topics that get discussed. And at the end of the day,
2 you hopefully achieve an arm's length, bilateral result
3 that's satisfying if not happily satisfying to both
4 parties.

5 The reason for confidentiality is that, you
6 know, because these aren't limited to single-patent,
7 single-issue, single-term type of licenses, there is an
8 awful lot of give and take. There may be things
9 important to Aruba Networks that are not important to
10 Cisco, and in accommodating Aruba Networks, if all of
11 the agreement was public, well, I expect Gil would say,
12 "Well, I want that, too. I don't really need it, but I
13 want that, too."

14 There's a least common denominator you would
15 wind up with, and it would disincend the kind of
16 flexibility that we believe is built into the RAND
17 mechanisms; that is, the license is available, we've
18 given up our right to not license, we have given up our
19 right to exclusively license, come talk to us. But what
20 we then hear is, "We just want to know we'll have
21 everything we need from you and anything else you'll
22 give in that license," and we wind up typically with a
23 portfolio license that the RAND elements of it may have
24 ceded, but we wind up in a much broader context.

25 MS. MICHEL: So, when you say the RAND elements

1 may have ceded, can you expand on that a little bit?
2 Does the fact that some of the patents in the portfolio
3 might be subject to a RAND commitment really influence
4 the licensing dynamic that you've just described?

5 MR. HARTOGS: I think there's a recognition.
6 For example -- and I'll use the cellular space, cellular
7 handsets, not a -- you know, a royalty-free standard,
8 wildly successful, like several of the ones that Gil
9 mentioned, and there's a long list of others, but I
10 won't go there.

11 Without a doubt, if you are going to enter the
12 line, for example, for a 3G cellular phone, you need a
13 license from Qualcomm. It's understood, it's accepted
14 in the industry, and it's one of the reasons, in
15 contrast to the experience Earl describes, we do have
16 companies come to us, but they also know that we have
17 invested significant amounts of our research and
18 development into those things that make subscriber
19 units, as we call them, handsets, extremely useful that
20 aren't the standards-related stuff. Rapid processing
21 power, low-power techniques, all kinds of things that
22 aren't specified by the standards, but good for cell
23 phones, and we want lots of cell phone sales, so we
24 develop these technologies, and we include them in the
25 license.

1 So, the interest in doing the 3G phone sort of
2 implicates standards immediately and the need for -- you
3 know, we sell our patents, but the desire to sort of
4 take advantage of everything that it is we've spent R&D
5 dollars on for the last, you know, 20-plus years is an
6 attractive feature to at least all of the companies that
7 we've dealt with.

8 MS. MICHEL: Okay.

9 Larry?

10 MR. BASSUK: Well, I am going to answer your
11 question a little backwards, about what is a RAND
12 commitment. I am going to say that most and likely
13 almost all patent licenses are reasonable and
14 nondiscriminatory. A company would not enter into an
15 agreement that in its view, in its business sense, was
16 not reasonable.

17 MS. MICHEL: You mean the licensor or the
18 licensee?

19 MR. BASSUK: Both.

20 MS. MICHEL: Okay.

21 MR. BASSUK: Both, because in Texas Instruments,
22 we're doing mostly cross-licensing. We license our
23 patents out, but we want licenses from other people's
24 patents in the same agreement, and those agreements,
25 they strike me as being both reasonable and

1 nondiscriminatory.

2 Now, what are all the terms that are in there?
3 Well, Michele Herman mentioned a few earlier. We've
4 talked about defensive suspension. Sandy earlier talked
5 about nonpublicensable, worldwide, nonexclusive.
6 There's lots of others, terms and conditions.

7 So, when -- Gil, I have to take -- I disagree
8 with your concept that RAND is meaningless. I think
9 it's very meaningful. I think it's -- I think RAND
10 licenses are done every day. I think RAND licenses are
11 done every day in the form of patent licenses.

12 Now, is there the rare case where some company
13 really feels that it's being taken in a license and it
14 has to enter into it? Yeah, but then why is that
15 company entering into it?

16 MS. MICHEL: Well, so, you're talking about
17 broad portfolio cross-licenses, then. Is that right?

18 MR. BASSUK: From -- in a particular sense, but
19 in the general case, I would talk about even individual
20 licenses, maybe to a specific patent, because why would
21 a person enter into an agreement if they didn't think it
22 was reasonable?

23 MS. MICHEL: Okay.

24 MR. BASSUK: If it didn't cut them out of the
25 market?

1 MS. MICHEL: Can I ask you, to what extent is
2 the fact that patents in a portfolio that's subject to
3 these broad portfolio cross-licenses, if just a handful
4 of those patents are subject to a RAND commitment
5 because of a standard, is that RAND commitment playing
6 any role in the licensing negotiation, in your
7 experience?

8 MR. BASSUK: Well, outside the standards
9 organization, we may be asking for a royalty rate that
10 may, at the time, seem higher than what someone might
11 think they would get through a standards organization
12 RAND, but I can't tell you that for sure. I know we
13 hear the argument from the other side, they say, "Well,
14 oh, that patent isn't part of the standards; you can't
15 charge us a whole lot more for it." Well, okay, but
16 here's our whole package license now.

17 So, it's raised and it's discussed, but I don't
18 know that it has a controlling effect on the actual end
19 license. Because remember, these licenses, they are
20 also -- they're business agreements. They're not just
21 patent licenses. How are we going to do business with
22 you for the next ten years, buying and selling product
23 and other things?

24 MS. MICHEL: Okay.

25 Sarah?

1 MS. GUICHARD: I guess I probably don't agree
2 with Larry on several of those points, because I don't
3 know that every company is ever going to enter into an
4 agreement that they think is reasonable or otherwise
5 they wouldn't do it. I think that there's -- I can
6 think of five reasons just sitting right here why a
7 company might enter into an agreement that they would
8 rather not have entered into.

9 But for business reasons, litigations, other
10 things going on in the market, other things going on in
11 their company, they can't afford the continued or the
12 threatened cost of litigation or the threatened cut-off
13 of supply or the threatened -- I mean, I can just think
14 of a couple different things that could cause it.

15 So, I don't know that every -- I don't know that
16 I would agree that all agreements or most agreements
17 that are entered into are done because the companies
18 think it's reasonable.

19 I did want to say that for the RAND -- the
20 reasonableness, I believe when you guys put out your --
21 I forget the name of the paper that was just put out a
22 couple of weeks -- maybe it was a month ago --

23 MR. BLOCK: The Marketplace?

24 MS. GUICHARD: The Marketplace, thank you.

25 MS. MICHEL: The big patent report?

1 MS. GUICHARD: Yeah.

2 MS. MICHEL: Okay.

3 MS. GUICHARD: So, I think there was concept in
4 there about, you know, valuing patents and, you know,
5 what the next alternative would have been, and I think
6 that some of those concepts could be used to encourage
7 what is reasonable, because obviously, you know,
8 reasonableness is not a lock-down and should be looked
9 at before the pressures of the lock-in occurred. So, I
10 would say that that's a place to start.

11 MS. MICHEL: Okay, yeah.

12 Michele?

13 MS. HERMAN: Well, in terms of your question
14 about how important is that RAND commitment with regard
15 to the essential claims in the context of the all
16 uber-deals, if you will, my personal experience with
17 that is most -- in most cases, it's not even discussed.
18 I mean, it's in the context of a broader deal.

19 It does come up when the parties are really far
20 apart and they're having trouble moving together, and
21 then one or both of the parties might pull out sort of
22 standards-related things, "Oh, well, I have essential
23 claims," or, "Well, some of your patents are essential
24 claims and you have made some type of commitment" or
25 "You didn't disclose," and that's why it becomes more of

1 a negotiation tool when the parties are far apart. But
2 in my experience, it doesn't often come up.

3 I'd also like to address this idea of
4 alternatives. I really think, again --

5 MS. MICHEL: Well, let me interrupt for one sec.
6 I want to ask a very targeted question.

7 What is the context in which the fact that the
8 patent is subject to a RAND commitment significant in
9 that it affects the licensing negotiations about that
10 patent? Does it -- can anyone answer just specifically
11 that question? And then we'll come to what RAND means
12 and this concept of alternatives next.

13 MR. OHANA: I mean, if RAND meant more or if
14 there was more consensus on what RAND meant, it would be
15 more meaningful. I mean, to take the really obvious
16 one, if -- as I think should be the law -- a party,
17 having given a RAND commitment, cannot seek an
18 injunction, then the fact that a patent was subject to a
19 RAND commitment would be very meaningful. So, I think
20 that's one.

21 Unfortunately, there's not consensus on that
22 issue. It was the subject of a lot of briefing in the
23 Federal Circuit in the Cyro case a couple of years ago.
24 There was no decision, and there's been a lot of law
25 review articles written about it, but it's not something

1 that has been decided, unfortunately, by the Court.

2 So, if RAND meant more, it would -- it would
3 come up more in negotiation. The fact that there's so
4 little consensus on what RAND means, means,
5 unfortunately, that it's not a useful tool unless it's
6 in negotiations.

7 MS. MICHEL: So, do you think it would be a tool
8 in the portfolio licenses of let's get freedom to
9 operate on this product? Do you think if RAND had more
10 consensus around the meaning, that it would be a bigger
11 factor in those kinds of negotiations?

12 MR. OHANA: Yes. I'm really sensitive to the
13 point that both Larry and Mike Hartogs have made, and I
14 agree with them entirely. I think that the world that
15 leaves us in, though, is that the only way to
16 effectively enforce a nondiscrimination requirement is
17 to litigate, because that's what gets you access to the
18 third-party agreements, but even a litigation, that
19 could be like pulling teeth.

20 And, you know, litigation is just wonderful, as
21 everyone has been through it knows, but a system that
22 requires litigation to enforce a basic term of a
23 commitment isn't a great system.

24 MS. MICHEL: Okay.

25 Anne and then Andy? And one thing was

1 wondering, outside of the portfolio context, you do have
2 situations where patents are asserted in litigation,
3 just a small number of patents, or you might have a
4 situation where the patent's been sold to a troll, and
5 whatever you were going to say, but then I'm also
6 wondering, isn't that -- aren't those contexts in which
7 the RAND commitment has some significance?

8 MS. LAYNE-FARRAR: Well, that was going to be
9 part of what I said.

10 MS. MICHEL: Oh, thank you.

11 MS. LAYNE-FARRAR: I mean, most of the people on
12 the panel here are the larger firms. There's a lot of
13 vertically integrated players here, but that's not 100
14 percent of the standard-setting participation. You have
15 a diversity, and I think that came out this morning on
16 both panels, that there is a huge amount of
17 heterogeneity in participants, in their business models,
18 and how they earn their profits. And you can have
19 smaller participants in a standard-setting organization
20 that have much narrower contributions and for which
21 you're not going to need these giant, overarching
22 business deals, and the RAND and FRAND commitments can
23 be important there.

24 And then I think the second point is the one you
25 just raised, and I think you are going to get to it

1 later in your questions, is how does RAND travel as the
2 patents change hands? So, I'll hold off on -- I'll be
3 patient on that one.

4 MS. MICHEL: Okay.

5 Andy?

6 MR. UPDEGROVE: I think that, you know,
7 particularly from the FTC's perspective, as compared to
8 two people across the table, while I agree that licenses
9 that include more than the essential claims are common,
10 that can kind of mask another concern. First of all, I
11 do have to disagree with Larry. I've spent my whole
12 career representing clients who thought they were across
13 the table from blatantly unreasonable people, whether it
14 be in a merger, an acquisition, a license, a real
15 estate -- every real estate lease, if you've ever been a
16 lessee. So, I don't know what it would change with
17 standards, but I'd like -- it would be nice if it were,
18 but it hasn't been my experience.

19 But if you assume that there are situations
20 where someone only runs into the need for those extra
21 patents because there's a standard in the middle of
22 them, then you still have to face up to the fact that
23 what you're dealing with is a government sanction under
24 the rule of reason monopoly right with value that can
25 apply to that entire package.

1 So, scenario one, someone wants to do a cell
2 phone, and there are patents that they might want to
3 have that have nothing to do with the standard.
4 Scenario two, someone's just putting, you know -- I
5 don't know, a -- something less than that, of which
6 there are many, many examples, but one of the reasons
7 that someone wanted to get their patent in there and
8 give royalty-free or RAND terms was because they knew
9 that anyone logically would want the other patents
10 around it.

11 So, it's a little bit difficult to make it that
12 clear, that, "Oh, well, it just all goes into the
13 general negotiation," because maybe the value of all of
14 those patents has been increasing because of the
15 monopoly, and, again, someone doesn't have a choice but
16 to go into the agreement because it's a standard,
17 particularly an interoperability standard.

18 So, I think that it's -- getting back to what is
19 enforceable, I don't really know how you find the one
20 element of value in there against the whole package.
21 Maybe it's an insoluble problem, but I think it is worth
22 noting that it's not as simple as saying some things you
23 need for the standard and some things you don't, because
24 logically, you don't have a lot of choice to be
25 competitive without the other things anyway.

1 I don't know what answer that leads to --

2 MS. MICHEL: Okay.

3 MR. UPDEGROVE: -- but I think it's worth taking
4 into account, particularly if it was a court trying to
5 figure out what terms were fair.

6 MS. MICHEL: Okay.

7 Michael?

8 MR. LINDSAY: I was going to go back to your
9 primary question about what does, you know, the
10 reasonable component mean, and agree that there's
11 certainly always going to be some amount of vagueness to
12 it, and it is going to be determined, in reality,
13 through the bargaining process, but it's important to
14 understand the background rule against which one is
15 having that negotiation.

16 I think it was someone at this end of the table
17 who mentioned the idea in the FTC's report about the
18 point at which reasonableness should be determined. I
19 just wanted to mention that that was something that the
20 IEEE had also considered doing during its policy
21 revision. The -- one of the versions of the proposed
22 language I had was "reasonable rates are rates that a
23 willing licensor and a willing licensee would agree to
24 in an arm's length transaction, in a competitive
25 environment, prior to the adoption of the standard."

1 And, you know, that gets to the background rule,
2 that you look at reasonableness not as of immediately
3 prior to the infringement; you look at it back when
4 there would have been a time when someone had other
5 choices. And the way that might play out in a
6 negotiation is that it at least gives you an argument
7 that the value that a licensor is demanding is not
8 consistent with that kind of model, and if you ever had
9 to go into a court, that's the argument you would be
10 having.

11 MS. MICHEL: Okay. Yeah, let's focus in on the
12 timing for a second, then, the timing for figuring out
13 reasonableness, because I think this will directly play
14 into what is the role of alternatives and figuring out
15 what's reasonable. Should the timing for figuring out
16 reasonableness be at the time the standard is being
17 discussed and right before it's set, or should it be
18 some other point in time?

19 Michele and then Anne.

20 MS. HERMAN: Okay. Well, I think it depends,
21 and -- I'm sorry that's not more definitive, but it does
22 depend, because, you know, again, if you've disclosed
23 that you have patents and others are concerned about
24 what are the ultimate licensing terms going to be for
25 those essential claims, as well as other possible IP or

1 other terms, you know, you can actually negotiate them
2 ex ante if you're there.

3 So, you have to look at, you know, did the
4 patent owner disclose that they have essential claims?
5 Was the -- is the person complaining about the terms of
6 the deal, were they a participant, could they have
7 actually negotiated because they knew about it? Or was
8 it -- did the patent owner not disclose or is it a
9 completely new entrant who had no ability to negotiate
10 early on? I think they're all relevant inquiries.

11 So, I would stay away from, you know, hard, fast
12 rules that say, across the board, you must look at it
13 ex -- the reasonableness ex ante or you cannot seek an
14 injunction. And I know we are going to talk about the
15 injunction later, right. So, I won't go into that. But
16 it's the same kind of thing. You have to look at the
17 conduct of both parties, as well as the specific
18 circumstances. You just can't have rules across the
19 board.

20 MS. MICHEL: Okay. Anne?

21 MS. LAYNE-FARRAR: I agree entirely with what
22 Michele said, and I wanted just to add a few more
23 things.

24 I think that in the European Commission's
25 investigation, they came to this ex ante/ex post

1 comparison as a possible way of determining after the
2 fact, when parties were disputing, were these terms
3 reasonable or not? And they came up with what I think
4 was the right answer, which is the ex ante/ex post
5 comparison of licensing terms, that is, licenses entered
6 into during the standard-setting process, in the middle
7 of standard-setting, versus after, if the after terms
8 are no greater than the before terms, you have a safe
9 harbor, but if they are greater, you have to investigate
10 more.

11 And that's exactly, I think, where Michele's
12 logic would go in that you have to understand the
13 context, that it's not just a cut-and-dried, yeah,
14 higher than before, you must be exploitative or
15 non-FRAND, because there can be lots of other things
16 that are going on. So, I think that's a nice test that
17 can be used. It doesn't get you all the way that you
18 need to go.

19 In terms of this whole incremental value over
20 the next-best alternative, I think that there's been a
21 lot of debate on that, and I've been disappointed in the
22 rigor of the definitions of terms and clarifying, are we
23 talking about value? Sometimes it seems like people are
24 mixing value with price, and those can be very different
25 things. So, for example, if you think about, you know,

1 a new technology needs to be developed for some
2 standard, just the -- what's available today isn't going
3 to get us where we need to go, and so you're talking
4 about the status quo, and you need a major leap.

5 Well, there might be two people who try to --
6 who are competing to make that major leap. If they
7 know, in advance of making those investments in R&D,
8 that they're only going to get this little increment
9 between the two, they are never going to make those
10 investments, and you don't get that next leap, and you
11 don't have your next standard. So, really, then, what's
12 the comparison point for incremental? Is it just this
13 tiny little increment over the next player or is it the
14 increment over the status quo, which was contributed to
15 the standard and then everybody gets to benefit in the
16 marketplace?

17 Well, to make those investments, to have a
18 risk-adjusted reward that says, yeah, I'll put that
19 money on the line, even though I know I'm going to be
20 competing with other people, and if I'm second-best, I
21 get nothing, I've got to have what I contribute over the
22 status quo. So, I think we need to really clarify terms
23 more to move this whole incremental value debate
24 forward, which is sort of the rule that's been proposed
25 to come into place when you don't have the ex ante

1 licenses to compare. And frequently, you may not.

2 MS. MICHEL: Earl?

3 MR. NIED: So, just to build on a couple of
4 things here, we were actually present on the IEEE for a
5 part of this negotiation as it regards when RAND would
6 be decided, and we were actually in favor of the idea of
7 it being at that time, and the time, in other words,
8 would be the time just prior to the standard being set.

9 We don't believe that the mere fact of
10 standardization somehow imbues magical powers on the
11 patent, nor, necessarily, the passage of time. However,
12 to Michele's point, things vary in different industries,
13 and I think Sandy referenced some of the various tests
14 that have been conducted as far as determining whether a
15 patent value -- how it should be valued. And, yeah,
16 those are going to differ in different industries.

17 So, there are various things that go into it.
18 There is not one perfect solution, but clearly we do
19 feel that it is appropriate that it -- one factor in
20 there is the value of the standard when the standard is
21 set. That said, if you enter into negotiation with
22 Intel, we are going to be very concerned about the value
23 of the patent to our product. If we're seeking a
24 license, we're not going to want to overpay for the
25 value of the patent to the product that we're making.

1 So, that ends up being another very critical
2 factor that enters into this. It's just one of several,
3 but I think there is an important consideration of if we
4 looked at patents -- and it's not necessarily just
5 standards, but patents in general -- when you enter a
6 negotiation, you typically are looking for the value
7 of -- the incremental value that I'm getting out of
8 licensing that whole patent portfolio or that single
9 patent, or whatever the heck it is, to my products that
10 I'm producing. Did I actually -- am I paying more or am
11 I getting a fair value for that?

12 MS. MICHEL: Okay.

13 Gil?

14 MR. OHANA: Just a short point, because it goes
15 directly to a question that the FTC has asked in its
16 RFC. I remember as well, like Michael and like Earl,
17 the discussion during the IEEE process in 2005 through
18 2007 about whether the IEEE should try to define RAND.
19 Just to give credit where credit was due, it came -- the
20 proposal came from Jeff Fromm, who was then the chief
21 patent lawyer of HP, who unfortunately has passed away.

22 It was met by an objection -- I won't say by
23 who -- that that would be an antitrust violation, and it
24 created a -- I have the email somewhere, and it created
25 this, you know, sort of paradoxical thought, which is,

1 can it really be true that RAND is only legal if it's
2 meaningless? And that's a point that the FTC could
3 quite usefully address.

4 MS. MICHEL: Okay.

5 Sarah?

6 MS. GUICHARD: So, when you asked me about the
7 timing of the determination, I think -- I think
8 depending on the industry is somewhat going to factor.
9 I have heard people say that they don't really think
10 that the FRAND commitment plays into when we -- into the
11 licensing negotiations, and I think maybe for some
12 industries, that might be correct.

13 I think for some industries, that's not correct
14 at all; that, in fact, it's the starting point of the
15 negotiation, because you're not dealing with a business
16 partner. You are dealing with a competitor. You aren't
17 planning a business proposition. You are needing access
18 to the standard. You're needing access to the patents
19 that that person has that allow you to do what you need
20 to do to work.

21 And so I think it can be a starting point, and I
22 think when you're trying to figure out what's
23 reasonable, it has to take into account what the product
24 is. It has to take into account what the royalty
25 stacking is going to look like. How many modes do you

1 need to support? And when you're trying to figure out
2 what's fair and not fair, reasonable kind of blurs.

3 I mean, we've got the reasonable and the
4 nondiscriminatory, but it kind of blurs together when
5 you're looking at what companies say they will license
6 early on versus now that the standard's been uptook,
7 they're seeing their pressure from their stockholders,
8 they're getting pressure from their, you know, CFO, and
9 they need to find royalties -- they need to find money,
10 and the royalty bucket is a good place to find it. Is
11 there a change in what they're doing?

12 I think some of these things can all factor into
13 this, but as Gil said, you know, requiring a litigation
14 to prove out all these facts is problematic.

15 MS. MICHEL: Okay. Sandy?

16 MR. BLOCK: A few comments.

17 First of all, I'd like to -- I think I can put a
18 lot of things together with one thought, that when
19 competitors get together to set a standard, almost all
20 but one will be relinquishing their technology in favor
21 of the selected technology, and I think in advancing
22 that particular technology and giving up your own,
23 you're losing a lot of benefits. You're losing lead
24 time, you're losing all kinds of things, and that other
25 party is gaining.

1 I think when the competitors are getting
2 together and they're figuring out what the best
3 technology is, part of what they're thinking of is, if
4 mine isn't selected, there's going to be a RAND
5 commitment there, and I'm not going to be subjected to
6 burdensome royalties or other terms. So, I think that
7 that's a fair overview of the contractual basis in which
8 the parties are coming together to begin with, that the
9 RAND is just part of that.

10 And I think as part of that, we look at the
11 things that the FTC put in the IP marketplace, which are
12 the economic value of the thing itself, rather than the
13 standardization factors that are going into the value of
14 the patent. If I am saying, okay, I'm going to accept
15 your technology as the standard and you're going to
16 have -- there's going to be a disruption of the
17 competition and you're getting the benefit of not only
18 having your patent selected, but everybody's going to
19 use it, and, by the way, with the networking effects,
20 forcing even more people into the play and buoying up
21 the standardization, I, as a competitor, don't really
22 want to see your product getting excess royalties from
23 me.

24 So, I think that's -- I sort of go along with
25 what the FTC said, and let's try to figure out what the

1 economic value is of the invention itself, and that's
2 where you get your royalties. To a certain extent --
3 I'm sorry.

4 MS. MICHEL: Does anyone disagree with that?
5 Does anyone disagree that part of the point of the RAND
6 commitment is to try to come up with royalties that are
7 based on the economic value of the invention, rather
8 than the value of the standardization and the sunk
9 costs?

10 Mike? Then I'll come back to you, Sandy. I
11 just --

12 MR. HARTOGS: Yeah, I -- and I apologize. I
13 don't quite speak the same language in answering these
14 questions, but when you look at the process -- first of
15 all, it -- again, back in the space that I'm familiar
16 with, rarely is it, you know, there's one patent
17 covering the one technology and it's easy to sit there
18 and dissect. We frequently have, you know, hundreds of
19 contributions coming in per technical meeting from
20 multiple parties, each presumptively covered by a
21 patent. I think it's fair to assume that the
22 participants are filing patent applications on most of
23 what they do. Maybe they don't, but you should assume
24 it.

25 But most of them have gotten there through a

1 long cycle of R&D. There is a reinvestment after a lot
2 of failures. There's an awful lot that has to be
3 recovered. Now, Gil said earlier -- and I don't want to
4 read too much into how he said it -- but he suggested
5 that this is really all about people with a royalty
6 business. I'm from a company that has both. We have a
7 product business. We sell billions of dollars worth of
8 chips. We make billions of dollars in royalties.

9 But we fundamentally are a research company. We
10 plow in a huge percentage of our revenue, one of
11 probably the industry-leading percentage of revenue into
12 research and development, and we've had a lot of
13 failures along the way, but we've also been able to push
14 entire industries to disruptive change, often in the
15 face of massive opposition by our closest friends in
16 frequent scenarios.

17 So, to sit there and try and dissect down a
18 particular contribution and its particular economic
19 value to a particular third party's product without
20 recognizing what's gone into getting you there I think
21 is short-sighted. I think if that was really going to
22 be the measure that you were going to limit me to no
23 risk-adjusted return, no failure analysis, failure
24 return, I'm not going to be there. I mean, I think
25 that's the real risk.

1 This test that suggests -- and Anne asked the
2 question, and I didn't hear an answer. I have the same
3 question, because I heard somebody at the ABA spring
4 meeting suggest that two comparable technologies might
5 actually result in a royalty of zero even if two
6 companies have contributed, you know, \$10 million in
7 development. That can't be the answer. But I'm sorry
8 to go on.

9 MS. MICHEL: Anyway, I rudely interrupted Sandy,
10 but I did want -- Larry, did you have a comment on that
11 particular point? And then I should get back -- I want
12 to go back to Sandy.

13 MR. BASSUK: Yes. On the value of the
14 contribution?

15 MS. MICHEL: Yeah.

16 MR. BASSUK: Well, philosophically, we're
17 talking about a patent here and one patent claim and a
18 product coming out of a standards organization, because
19 the reality of it is, as Mike just mentioned, that's
20 rare. That's very rare.

21 In fact, what more likely happens is companies
22 are involved in five or ten-year licensing schedules,
23 but they relicense things over. There's patents coming
24 in, patents coming out. Now, are -- is there a value
25 given to the contribution of a particular patent to a

1 particular product? Yes, but there's also given -- is
2 the patent valid? Is it infringed? And the
3 contribution of that patent to that product is put on a
4 scale right along with the other things.

5 MS. MICHEL: All right. Can I -- Sandy, I
6 apologize for interrupting, and you probably have
7 completely lost your train of thought there, but --

8 MR. NIED: The gentleman reserves the balance of
9 his time.

10 MS. MICHEL: -- I am going to come back to you.
11 Absolutely.

12 MR. BLOCK: Yeah. So, to a certain extent, I
13 agree with what you were getting into, that economic
14 value -- and I understand what Larry is saying, I
15 understand that there are some sunken costs on the part
16 of the patent holder as well, but I think at the end of
17 the day, as a licensee that wants to be able to
18 implement the standard in a way that does not overly
19 disadvantage me, who enabled you to get this position, I
20 think that the economic value approach is a sound one.

21 I would also like to throw something up here out
22 of left field and then see if I can get it in before I'm
23 cut off.

24 MR. NIED: Thank you, Sandy.

25 MR. BLOCK: I think an option that might be

1 available to some of the SDOs, who I know are
2 risk-averse and want to stay out of the middle, they
3 don't want to be the referee standing between the two
4 MMA fighters here, but the possibility of a voluntary --
5 which is a nice word -- voluntary mediation, that SSOs
6 might consider putting together some kind of voluntary
7 mediation approach that can avoid, I think as we heard
8 from the other -- from the right wing of the party here,
9 some of the concerns over litigation as being the sole
10 arbiter of these things, but a mediation rather than a
11 compulsory or binding arbitration. Set up a policy in
12 which you can have this kind of a mediation to try and
13 come to what is a reasonable medium, rather than go to
14 litigation. I think that might be a helpful approach
15 for SDOs to consider.

16 MS. MICHEL: Okay. So, we have talked a lot
17 about some of the practical concerns in licensing.
18 Let's put our -- well, actually, Alexa, can I ask you,
19 do any of these -- of these discussions resonate with
20 you in the kinds of licensing negotiations that you
21 face?

22 MS. KING: Sure.

23 MS. MICHEL: Does the fact that there has been a
24 RAND commitment for the patents that you're seeking a
25 license to play out in the licensing negotiations or

1 not?

2 MS. KING: So, the answer is I wish it did, and
3 let me just preface what I'm sure is very obvious, which
4 is to the extent there are essential patents to a
5 standard, we absolutely want to license and pay the
6 right fee. We prefer to spend our money on our current
7 R&D and innovation, and that's why the RAND commitments
8 are so important.

9 I think the one comment that made me sort of --
10 was most impactful to me, and, you know, Larry, you have
11 got that honor. I think there are lots of reasons why
12 people enter into agreements that absolutely are felt to
13 be unreasonable, and as Gil said, if the only way that
14 we can enforce RAND commitments is through litigation,
15 it's not only the hard costs that litigation brings,
16 which are not recoverable even if you win, but also the
17 distraction.

18 Again, from a company that is most focused on
19 innovating and R&D and trying to just continue to grow
20 and compete with some of the bigger players,
21 litigation -- and I speak as a former litigator, I love
22 a good fight -- it is not the best use of our resources
23 for our shareholders and for our customers, frankly.

24 So, of all the points made, I think that the
25 point about the reasonable -- why would you enter into

1 an agreement that you did not think was reasonable? I
2 think there are, as Sarah said, a myriad of reasons why
3 that would occur, and litigation being the kind of place
4 where we, as the -- we think of ourselves as the
5 innovator, but in this context are the implementer as
6 well, wanting to do what is right to practice the
7 standard, litigation can't be the right answer.

8 MS. MICHEL: Thinking for a moment about, again,
9 still trying to define reasonable, taking the
10 conversation out of the context of the portfolio and the
11 cross-licenses and imagining a situation in which
12 perhaps parties are in litigation and have taken their
13 dispute to a court and saying, "That's not reasonable.
14 Yes it is." And a judge has to decide at some point.
15 We may face this at some point.

16 What kinds of factors do you think should be
17 taken into consideration in that situation if the judge
18 has to decide what's reasonable?

19 Andy?

20 MR. UPDEGROVE: If I could answer that also in
21 the context of your last question and maybe something
22 for Alexa, I think it's important to try and separate
23 convention from impossibility. Just because people are
24 in the habit of negotiating packages of licenses does
25 not mean that they couldn't quote on just the essential

1 claims.

2 MS. KING: We at Aruba are nothing if not
3 unconventional.

4 MR. UPDEGROVE: But I'm just saying that if the
5 FTC wanted to, I mean, they could say anyone has a right
6 to get the unbundled price per implementation of the
7 essential claims, and then at least each party would
8 know what the starting point was and how they might
9 trade that value against a package deal. But at least
10 you would have the right to say --

11 MS. KING: A la carte versus the fixed price
12 menu.

13 MR. UPDEGROVE: Exactly. Exactly. So, there is
14 a way that you could be protected. You wouldn't know
15 how they balanced the -- you know, the final deal, but
16 at least other people would have the same incentive to
17 get the best deal they could relative to that fixed, you
18 know, starting point. So, that was the first thing I
19 was going to say.

20 The second thing is that we have a -- what I'll
21 call a coincidental bias on the panel in that most of
22 the people at the table find themselves in patent
23 thicket situations. That by no means means that most
24 standards are set in a cellular or silicon environment.
25 They aren't.

1 MS. MICHEL: But aren't most standards set in a
2 patent thicket environment, even if they're not
3 cellular?

4 MR. UPDEGROVE: No, not at all. If you were to
5 look at -- but if you were to look at -- let me take it
6 one more dimension. If we were to say a patent thicket
7 in which licenses are required, you would find that
8 there are many, many, many standards organizations,
9 particularly consortia in software and Internet, where
10 there are no assertions. It doesn't mean that there
11 aren't any patents. There are no assertions. Even
12 though they have the right to make them, the dynamics of
13 that niche is unfriendly, you know, to patent
14 assertions.

15 So, I just want to sort of lay that out there.
16 We have this sort of artificial viewpoint that we've
17 presented, and we should recognize that that is a
18 minority of the total technology landscape. It's big in
19 dollars, but in standards, it's not necessarily even the
20 majority.

21 The last thing I was going to say is that there
22 can also be abuses. I've seen tying arrangements where
23 it's not -- you can't just get that standard. You can
24 have this package. There is no a la carte, and -- but I
25 don't need all of those extra patents. Well, I'm sorry,

1 you know, that's what you have to take if you're going
2 to get it at all, which to me would be, you know,
3 something worth looking into from the regulatory.

4 If you were to go then into the litigation
5 context, it seems to me -- and this is why I say it
6 answers both questions -- if you would start with that
7 rack list, what does this standard cost, then you would
8 have a convention to compare to, you know? But right
9 now, if you look at it as being this packaging
10 environment, it would be difficult to even get a
11 professional witness, expert witness, to come in and
12 speak authoritatively, but how do you tease that out of
13 the value of the package? So, we've sort of set
14 ourselves up for failure.

15 MS. MICHEL: Earl?

16 MR. NIED: So, if somebody came to us and said,
17 "I don't care about a package license. I want a license
18 to just the essential claims," we would quote him such
19 a license. The first question we would have is, "What's
20 your product?" And we would look at that product, and
21 we would determine what sort of license would be
22 appropriate for that product, and we would negotiate
23 that.

24 Now, he might be much, much better off if he
25 negotiated for more, but, you know, if somebody wants to

1 do that, we view that we've made the promise to offer
2 the license, and, you know, we'll do that.

3 MS. MICHEL: Anne, then Gil.

4 MS. LAYNE-FARRAR: I think one of the reasons
5 why we've gotten to the place where lots of portfolios
6 are licensed on a package is precisely because it can be
7 so difficult to value these things. It's not like this
8 patent is clearly on X and this patent is clearly on Y
9 and we can give the economic value to X and Y and give
10 you a la carte prices. It's more often the case that I
11 have this patent and it's overlapped by this one and
12 this one and this one, and they kind of cover this
13 general area, and if you don't license all of them,
14 well, you know, it's the whole area that you're valuing.
15 It's the use of that general technology in a product and
16 the use in that product that gives you the economic
17 value as the starting point.

18 I think this a la carte ideal, I can see the
19 attraction to it, but I think as a practical matter, it
20 can be extremely difficult, and I think all we have to
21 do is look at the experience outside of
22 standard-setting, at patent infringement cases, and the
23 wide range of rulings that are given under Georgia
24 Pacific factors and how different parties come up with
25 different -- you know, it's just wild, the wild west,

1 really, how those things are valued. It's precisely
2 because these things are difficult to do, and taking a
3 portfolio as a whole makes it a little bit easier,
4 because you have some comfort that, okay, I'm taking
5 everything that's on this general technology.

6 MS. MICHEL: Gil?

7 MR. OHANA: Just one point on maybe the ND part
8 of RAND, which is that patent licenses are often two-way
9 streets in that there's rarely just an outbound office.
10 There is often a reciprocal license, a grant-back, an
11 out-of-cert or something, and for that reason, given the
12 different patent positions of the licensees, a nominally
13 nondiscriminatory, in monetary terms, license may be, in
14 fact, quite discriminatory.

15 I'll give you the example. I'm sitting across
16 the table from Sandy one day and I license to Sandy's
17 company, all of Cisco's -- everything we have ever
18 disclosed to the ITF, and I ask for a reciprocal license
19 back. Well, that's IBM I'm dealing with. They've
20 got -- you know, you want patents? We've got patents.
21 Compare that to a much smaller company that has a much
22 less rich portfolio. So, if I seek the same amount in
23 those two licenses, the same monetary amount, I'm
24 discriminating.

25 MS. MICHEL: Okay. Alexa, do you want to talk

1 about -- I don't mean to put you on the spot, but you
2 had raised the issue of discriminatory issues and how
3 you face that. Can you raise that question again and
4 tell us what your issues are that you face on the
5 nondiscriminatory issue?

6 MS. KING: I would say there's an observation in
7 our particular market that many -- in fact, many smaller
8 companies will often call me for suggestions and
9 observations, and then, you know, I have got my own slew
10 of people who I call. So, I think what we're seeing is
11 not the companies that have spoken today, not the
12 companies that are concerned with their reputation, not
13 the companies that want to do the right thing and honor
14 RAND commitments, but certain other companies, perhaps,
15 will not even talk to you, will not -- you know, they --
16 for example, if they're in court, everything is filed
17 under seal; before they even have a conversation with
18 you about, you know, why their patents are essential to
19 a standard, what claims they're talking about, what
20 their patent portfolio looks like, they will require you
21 to have an NDA in place, which really I think -- it
22 is -- whether or not we choose to do that should be our
23 option. There might be reasons why we don't want to do
24 that.

25 So, I find that particularly difficult at the

1 front end, because it's really presumed to be not a
2 choice. And so if you do not sign the NDA, then that
3 means you don't want to have our license, then this
4 obviously means we'll see you in court, is essentially
5 how the conversation goes, which, you know, is not
6 really a sign that someone is acting in good faith to
7 talk to a company about essential patents to be licensed
8 under RAND terms.

9 MS. MICHEL: And was one of your concerns then
10 you can't figure out whether what you're being offered
11 is discriminatory or not, because you have no sense --

12 MS. KING: No, you can't, that's exactly right.
13 You also can't talk to -- it might be that you've got a
14 component supplier or someone else, an end-user or a
15 partner that you need to have a conversation with, and
16 you cannot have that conversation, and yet, if you do
17 not sign that NDA, then there is a likelihood that you
18 will be back in litigation, which, as I've already
19 established, I personally enjoy but is not necessarily
20 the right thing for my company or my shareholders. So,
21 that's really the point I was trying to make earlier.

22 MR. UPDEGROVE: Just one quick question? One
23 question would be is an NDA requirement a RAND term?
24 That's an interesting way to phrase it.

25 MS. KING: Yes.

1 MS. MICHEL: Michele?

2 MS. HERMAN: I have accumulated a number of
3 points since my card was up, but I will try not to go
4 through all of them.

5 You know, to Alexa's point, since that's the
6 most recent one, I just want to -- you know, again,
7 that's a legitimate concern, and equally, I was
8 mentioning this morning the concern I had when, you
9 know, somebody contacted me on behalf of their client
10 saying, "Well, you know, we want to get your terms and
11 conditions, but we're not willing to tell you anything
12 about our product and our product plans and we're not
13 going to give you any information," so that you can even
14 craft a license.

15 MS. KING: The flip side essentially.

16 MS. HERMAN: Yeah. So, again, once again, I am
17 going to say, you know, these things have to be looked
18 at in a balanced way, and you have got to look at the
19 conduct of both the patent owner as well as the
20 implementer. They both need to be willing to negotiate
21 in good faith.

22 I wanted to also, you know, talk about -- you
23 know, again, I actually wanted to talk about, like, a
24 real-life scenario where, you know, so, many, many, many
25 years ago, in the DVB, Sun Microsystems had proposed

1 that the DBB incorporate a number of job specifications
2 as normative references. So, if you were going to
3 comply with the DVB standard, you would have to
4 implement these other specifications. And this was many
5 years ago, and I was representing Microsoft at the time,
6 and this is all a matter of public record, and Carter
7 Eltzroth can step in and correct me if I say anything
8 out of line, but it's published. It's been published on
9 the Internet.

10 Basically, Microsoft was very concerned about
11 this technology. Microsoft was already involved in
12 litigation with Sun, and because Microsoft was
13 concerned, Microsoft said, "Gee, Sun, what are your
14 terms going to be for these specifications?" They
15 didn't have to disclose patents, because the DVB's
16 patent policy at the time was only disclose if you're
17 not willing to license on FRAND terms. So, they didn't
18 have to disclose anything, but it was no mystery that
19 they were going to claim IP on all these specifications
20 that they wanted to normatively reference.

21 So, they came out for terms just for essential
22 claims, and Microsoft argued that they weren't
23 reasonable and nondiscriminatory. So, this all took
24 place ex ante, and it goes to my point of if you care,
25 if you're concerned, you're going to ask.

1 Somebody mentioned -- I think it might have been
2 Sandy -- that, you know, maybe the standards
3 organizations should get together and should maybe
4 mediate some of these things. In this case, you know,
5 it wouldn't have mattered whether or not the DVB stepped
6 in and took any interest in Microsoft's concerns over
7 this. They did, they hired somebody to prepare an
8 opinion as to whether or not these terms and conditions
9 righted Articles 81 and 82, you know, for antitrust
10 violations, but it didn't really opine on whether they
11 were reasonable and nondiscriminatory, and that's what's
12 published.

13 But my point is, there are examples. We
14 shouldn't just assume that there's some type of
15 valuation that you can think of before and after. If
16 you have concern, you should be there, and you should
17 be -- and you should be asking about these things. That
18 doesn't necessarily help new entrants, but, again, even
19 there, there is an obligation on both parties' parts to
20 negotiate in good faith, and I think that, you know,
21 these are important.

22 I also want to touch on -- we have heard it
23 several times, the royalty-free versus sort of RAND
24 distinction. I'm just going to mention, in the DVB
25 case, Sun's terms were royalty-free on their essential

1 claims. I don't know what their nonessential claims
2 would have been, but on their essential claims, they
3 would have been royalty-free, with all these other terms
4 and restrictions that Microsoft -- and I will say other
5 parties, also -- thought were not reasonable and also
6 discriminatory. They said, "If you don't like that, we
7 will give you a royalty-bearing license."

8 There were organizations, you know, in the IETF,
9 where people make license statements or nonassertions,
10 and they say, "And if you don't like ours, then I'll
11 give you a RAND license." I love Cisco. Cisco is --
12 Cisco does a wonderful one. They say, you know --

13 MR. OHANA: Thanks. I wrote it.

14 MS. HERMAN: It's excellent, and, in fact, I
15 recommend it to all of my clients, but it basically
16 says --

17 MR. OHANA: We'll discuss royalty terms later.

18 MS. HERMAN: It does. It says if you don't like
19 our nonassertion, we'll -- you know, come talk to us
20 about, you know, a RAND license. I just -- I think
21 that, you know, most people go into a royalty-free
22 relationship with that idea, I'll leave you alone if you
23 leave me alone. Now, if you want to change the game, I
24 want to have full defensive rights. I really would
25 rather have reciprocity with you so I can make the

1 lawsuit, if you sue me, go away altogether, but at a
2 minimum, I want to be able to use my patents and
3 cross-licenses for freedom to operate, and I want to be
4 able to use them defensively.

5 But most people going into a royalty-free
6 arrangement, if you will, IP policy type of
7 organization, it almost doesn't matter what the policy
8 says, because they're not planning to assert those
9 patents unless somebody bothers them first. And so I
10 think that those are some distinctions, and it's not
11 that the royalty-free policy is better. I think it's
12 just the attitude that people participate under.

13 MS. MICHEL: All right. So, I want to wrap up
14 this issue of what's reasonable mean and what's
15 nondiscriminatory mean in the more focused situation of
16 not the big portfolio license, but if a court were
17 facing the issue, what might they think about it?

18 Larry?

19 MR. BASSUK: Well, if I might follow along, I
20 started off this discussion by saying I thought most
21 patent licenses were reasonable and nondiscriminatory,
22 and, of course, I've been met with quite a bit of
23 opposition, expected it. But the opposition that I met
24 had to do with people not liking the license. I mean,
25 Sarah mentioned that there are a bunch of reasons that

1 they wouldn't like it, because it was the lesser of the
2 alternatives of litigation or other things.

3 Andy said that he had been licensing people for
4 30 years and nobody ever liked the license they went
5 into. Well, they didn't like it, but everyone got into
6 the license, and they ended up making money, and that's
7 the end result. They all made money even after they got
8 into these licenses they didn't like. We've been in
9 licenses we didn't like, but we have still made money
10 off of them.

11 We're just trying to say -- we're trying to
12 describe what is reasonable. I tried to take it out to
13 a further sphere to find out what -- and we found what
14 was done on reasonable there, but was it really
15 unreasonable, because everyone still entered into them.
16 They just didn't like that. Thank you.

17 MS. MICHEL: Okay.

18 Anne?

19 MS. LAYNE-FARRAR: Do I have to answer the
20 current question?

21 MS. MICHEL: I still want to hit injunctions and
22 transfer of patents, so anything on this, Sarah?

23 MS. GUICHARD: I just -- I need to respond to
24 Larry quickly. I can think of an example, the company's
25 name is Dancall, who entered into agreements that they

1 didn't think were reasonable and didn't make money and
2 were bankrupt. So, I'm hoping none of the companies up
3 here fall into that situation, but I don't want to --

4 MR. BASSUK: Sure, Sarah. I understand. It's
5 not absolute.

6 MS. GUICHARD: -- leave the impression that
7 these things don't happen.

8 MS. MICHEL: I have a very targeted question
9 here. Does a RAND commitment limit the nonprice
10 conditions that a patentee can place on a licensee? And
11 in particular, I've heard some rumors and complaints
12 about the other side is requiring that I license my
13 nonessential patents in order to get a license to
14 patents that they've committed under RAND as essential
15 patents.

16 Any thoughts about that? Let the record reflect
17 Andy Updegrave is pointing his thumb down. Okay, I
18 think that means a no.

19 Yes, Sarah?

20 MS. GUICHARD: So, I think that there's a big
21 tension with this. A lot of companies enter into
22 negotiations -- we've talked about patent
23 cross-licenses, direct or whatever -- for the ability to
24 participate, make their product, have freedom to
25 operate, and I think that those things are all very

1 important.

2 MS. MICHEL: Right.

3 MS. GUICHARD: At the same time, I don't think
4 that the RAND commitment should allow a -- however you
5 want to phrase it, the stronger party to allow a
6 cherry-picking, allow an ability to go in, get the
7 license, and then start knocking off or copying the
8 things that are -- make that competitor that competitor.

9 So, I -- and I do think we've seen that. I
10 think that RIM has seen it, and I'm sure we're not the
11 only ones who have seen it, where you get into a
12 situation and this company comes in with this portfolio
13 and they demand what they demand, and you can either
14 choose not to be in the market, which is a choice, I
15 suppose, or you can do what you need to do. And then
16 next thing, you turn around, and the thing that you
17 think is most important to your business is now being
18 copied, and their argument is that, well, you signed
19 that license.

20 And you can try to protect, you know, your
21 design patents or your look and feel the best you can,
22 but, again, if they weren't in the position they're in
23 with their essential patents, they wouldn't have been
24 able to dictate those terms. So, there -- but there is
25 a balance, because there does need to be freedom to

1 operate. So, I'm not saying that, you know, you
2 shouldn't be able to get some freedom, but there has to
3 be some balance to just let somebody come in and just
4 copy your product.

5 MS. MICHEL: Sandy?

6 MR. BLOCK: This may be an area where the
7 standard -- I'm sorry. This may be an area where the
8 standards policy may come into play, because I've been
9 into a debate on this with about, I think, two or three
10 people on the panel here, and on the one hand, as Sarah
11 was pointing out, you want to make sure you have
12 reciprocity with regard to the particular work group
13 activities, but is there an area around that one-on-one
14 license back and forth which the party who's granting
15 the license may want to secure by way of the defensive
16 termination provision.

17 For example, suppose you need three different
18 work group outputs in order to practice the standard,
19 and you license someone under one and you want to make
20 sure that you have the -- you have patents to one, but
21 they have patents to the other two. Do you think that
22 it's -- you know, it would -- would you want to make
23 sure that you can practice the standard, because you're
24 going to be licensing them to practice the standard,
25 they will be licensing you back to nothing, but there

1 are two other parts of the gestalt here that you will
2 need that you won't have access to.

3 So, this may be something for the standard group
4 to figure out, because they do have the stakeholders
5 with different interests to say, "Oh, it's just the
6 one-on-one," or "We're going to extend it to the overall
7 standard so that everybody can operate in this
8 interoperability sphere. If you want to go beyond that
9 to the nonessentials, that's out -- nonessentials,
10 nonstandard, that's outside the scope of what we will
11 let you do, but we will allow everybody to implement
12 that standard." I think that's a -- that's a territory
13 where you may want to have some group thought.

14 MS. MICHEL: Andy, then Earl.

15 MR. UPDEGROVE: I personally think that there
16 would be a very great deal to be said for preserving a
17 bright line between essential and nonessential,
18 particularly from a regulatory point of view. I think
19 that essential and no more than essential is, first of
20 all, vastly the majority opinion in the field. So, to
21 try and make exceptions outside of that general -- to be
22 redundant -- general consensus I think is problematic,
23 because it would violate people's expectations. It
24 would almost be like two tiers set of rules here, one of
25 which was an unexpected "gotcha."

1 In reply to Sandy, I could imagine, in
2 principle, that an organization could decide to
3 explicitly say, in their IPR policy, that that was how
4 they were going to look at it, but then you have to get
5 into the situation, which is not that uncommon, where
6 you have a highly consolidated industry, and you've got
7 four or five market leaders, that if they form this
8 organization, that's going to be the standard, you know,
9 and anyone else who wants to be part of that group and
10 implement that standard is going to get their pocket
11 picked. You know, so those four or five companies could
12 make that rule, and that would be it, even though it was
13 going to work very disproportionately, you know, to
14 their advantage.

15 So, I mean, to a certain extent, I sort of, you
16 know, have been playing the theme here, which is, you
17 know, guys, if we want to have IPR policies that do
18 something, we ought to sometimes just sort of say,
19 "Let's bias it towards, you know, an effective system
20 that allows complete competition, as much as we can,
21 that allows us to do work fast, that allows
22 competitiveness, and not play the edge cards. You know,
23 some things we're better off not being allowed to do
24 from the overall benefit that we get from a better
25 standard-setting system."

1 MS. MICHEL: Earl.

2 MR. NIED: So, I would agree with Andy, but I
3 want to point out that there's a -- we shouldn't be
4 condemning this across the board. You know, there would
5 be factors that would come into play, whether or not a
6 party has market power or not, as to whether or not
7 there would even be an antitrust issue.

8 There would also be other issues as to, you
9 know, how far afield this is. Sandy's example, I think,
10 has merit, and I have argued that myself. You know, why
11 would I join a royalty-free standards -- why would I
12 join a body to provide a royalty-free license if I
13 potentially could not build my own product?

14 Now, on the other hand, you know, there may be
15 issues in, you know, how far that defensive suspension
16 should apply. And I think those things need to be dealt
17 with on a case-by-case basis. I think there is a
18 reasonable possibility here. I know when we've kind of
19 faced this in the past, we've asked ourselves the
20 question of, you know, well, yeah, if you want to
21 litigate against me, then that has a different value to
22 me than if you're willing to sign up to a non-assert.
23 So, you know, the way this plays out could be very
24 different, and it shouldn't be something that's
25 blanketly dismissed.

1 MS. MICHEL: Okay.

2 I'm going to move on to injunctions, because
3 it's an important topic. A lot of you have talked about
4 a RAND commitment as a commitment that you are willing
5 to license, and how does that commitment to be willing
6 to license play into the patent owner's ability and
7 right to seek an injunction in a patent infringement
8 case?

9 Okay, Michele.

10 MS. HERMAN: Well, again, I think -- no
11 across-the-board rules, again. I think it would be --
12 you would be going too far to say if you have a RAND
13 commitment, you can never seek an injunction, because
14 there are -- there are many circumstances where an
15 injunction might be very appropriate, even with a RAND
16 commitment.

17 For example, if I'm a patent owner and you go --
18 you know about my -- you know, you know about my patent,
19 because I've disclosed it, and you know about that
20 disclosure, and you never ask me for a license, you go
21 off and infringe, I ask you to take a license, and you
22 tell me to pound sand, I think under those
23 circumstances, I actually think most people would agree
24 that I could at least seek an injunction if you're not
25 willing to negotiate at all in good faith and you're a

1 willful infringer.

2 So, again, the point is I think you have to look
3 at all of the circumstances, and I think the case law is
4 pretty consistent on that fact. You know, you do, you
5 need to consider all of the circumstances.

6 MS. MICHEL: Okay.

7 Larry?

8 MR. BASSUK: Well, I was going to take that one
9 step further and say that if you're in negotiations and
10 you simply can't come to an agreement on the royalty
11 rate, you can go to court and have a judge help you
12 determine what the royalty rate is on your license, a
13 reasonable royalty rate, of course, and then if the
14 licensee still doesn't want to come up with that, then
15 you ask the judge for an injunction.

16 MS. MICHEL: Okay.

17 MR. BASSUK: But that just fits in with what
18 Michele talked about, all the different factors,
19 different circumstances.

20 MS. MICHEL: Gil?

21 MR. OHANA: I guess what I'd say is that the
22 presumption should be that, having made a RAND
23 commitment, you should not be able to enjoin, and the
24 intermediate step that I think was maybe implicit in
25 what Larry said is that some neutral third party has to

1 determine that the licensee -- the licensor's last offer
2 was reasonable. That doesn't mean that it's what a jury
3 would decide, but it's got to be a reasonable offer, and
4 at that point, if the offer isn't accepted, maybe you
5 can get an injunction then, but not before that.

6 MS. MICHEL: What if it's -- your patent's
7 invalid and I'm not licensing?

8 MR. OHANA: Then I think you have got to deal
9 with the validity issue and get a court to rule on the
10 validity issue without an injunction, and if the court
11 rules that the patent's valid and determines that an X
12 percent royalty is appropriate, let the -- give the
13 licensee, the putative licensee, the election, you can
14 either deposit this amount in escrow during the pendency
15 of the litigation or I'm going to issue an injunction.

16 MS. MICHEL: Mike, then Sarah.

17 MR. HARTOGS: So, I would just say as someone
18 who's pretty active in licensing, if there was just a
19 categorical rule that the giving of a RAND commitment
20 was a forever surrendering of the ability to seek
21 injunctive relief, you've completely changed the
22 negotiating dynamic.

23 I am actually close to agreeing with Gil in the
24 sense that I suspect that in the process of seeking an
25 injunction for a recalcitrant potential licensee, the

1 likelihood of an injunction issuing pending a
2 determination of whether or not there have actually been
3 RAND discussions or RAND disclosures, offers, is
4 probably unlikely, but if, at the end of the day, you
5 create no downside for willful infringement -- and
6 usually the enhanced damages piece is lumped in together
7 with the no injunction piece -- you completely reset the
8 table and the potential downsides for a licensee in the
9 negotiating process.

10 MS. MICHEL: Okay.

11 Sarah?

12 MS. GUICHARD: I think we need to be careful
13 when we're considering what the whole goal of
14 injunctions are for. Historically, they were for
15 preventing someone from being able to do something that
16 you yourself want to be the only one to do, and when you
17 make a RAND commitment, you are saying, "I'm going to
18 let other people have access to the technology." So,
19 being able to use the injunction as a threat to increase
20 what might be considered reasonable, if we go to
21 Larry's, you know, why would you enter into that,
22 because it's reasonable, it seems to be
23 counter-intuitive and kind of against what's going on.

24 I think, though, back to Mike's point is that,
25 you know, if you take all the factors into

1 consideration, you probably do get to where Gil said,
2 which is you're going to get someone to determine what
3 that reasonable rate is, and then, if that reasonable
4 rate is not being paid, that's something to be said.

5 But all of that taken into consideration, I've
6 heard that making a RAND commitment should not be akin
7 to IP suicide, in that if you have been sued in a
8 defensive posture, if someone's coming after you with an
9 injunction, that that then kind of takes the handcuffs
10 off the RAND commitment, because it's -- your business
11 is getting shut down if you don't -- aren't able to use
12 every thing that's in your arsenal.

13 So, I would say in that situation, maybe there
14 is some room, because you're saying, "Look, how is it
15 you can shut me down and I can't shut you down?" That
16 seems counter-intuitive, also. But in just
17 licensee-licensor, licensee not liking what the licensor
18 is offering, licensor not liking what the licensee is
19 willing to pay, it doesn't seem that because the
20 licensor is willing to accept monetary consideration,
21 that the injunction should be able to be used, but then
22 we go into the ITC, which, you know, that's all you get
23 is a remedy. So, there's that -- you know, there is no
24 eBay analysis in the ITC. There is no "is this the
25 right remedy" in the ITC, which I think is why we're

1 seeing a lot more cases go to the ITC.

2 MS. MICHEL: So, Earl, anything you want to say
3 about injunctions? But I'm also wondering, you know,
4 what is the motivation for going to the ITC on a patent
5 for which there's RAND commitment? How does it affect
6 the licensing negotiation? Any thoughts on what ought
7 to be done about that from a policy perspective?
8 Anything else, Earl, you want to say about injunctions?

9 MR. NIED: Okay. Well, I agree with Gil on the
10 way this would be approached, but we have a slightly
11 different way of looking at it that I think is helpful,
12 and that is if you've gone to a court and the court has
13 said, "This is a reasonable offer." In other words, I
14 have made a commitment to offer a license on RAND terms,
15 and if a court says, "You have made an offer on RAND
16 terms," and that court can be a court, it can be the
17 ITC, but once that is said, then as far as I'm
18 concerned, you should have fulfilled your obligations to
19 offer that license, and now you have your full statutory
20 rights, as a patent holder, that should be available to
21 you.

22 But, you know, your obligation was to offer to
23 license. If that is proved by a court to be an offer to
24 license on RAND terms, then you should have your full
25 rights and be able to exercise them.

1 MS. MICHEL: Okay. All right. Let's wrap up
2 with our last topic, which is the transferability of the
3 RAND commitment if the patent is sold. Is there -- does
4 anyone think or have an argument or a circumstance in
5 which the RAND commitment should not travel with the
6 patent?

7 Okay, I'm going to -- okay. There's both --
8 there's the should and there's the could and there's the
9 will and there's all sorts of verbs we put in here, but
10 Sandy?

11 MR. BLOCK: Yes, thank you. A topic dear to my
12 heart.

13 The -- I certainly agree that the RAND
14 commitment should flow. I think that there are a few
15 little caveats that I would put in. The first is that I
16 would be concerned with regard to foreign laws. I know
17 that Naomi raised the foreign issue earlier, but I would
18 be careful about imposing obligations on the parties
19 that they can't meet. So, I would just put in that
20 caveat, that while we live here in the United States and
21 we recognize that licenses survive the assignment of a
22 patent, that does not apply everywhere. So, I don't
23 know that we want to impose an obligation on the patent
24 holder that does not translate globally.

25 Can I raise something else in this regard?

1 MS. MICHEL: Sure, please.

2 MR. BLOCK: A topic that's related to this,
3 which is the potential transfer of patents in a
4 bankruptcy, and this is a topic that is also dear to my
5 heart. There is a -- one case that's going on now,
6 Qimonda, in which a German company is seeking to
7 eliminate or revoke all of the licenses, all of the
8 major licenses that it has with all of the
9 cross-licensees that it has on the basis that German law
10 does not have a protection for licensees as we have in
11 the United States.

12 Many of you are familiar with Section 365-N of
13 the bankruptcy law that says if a licensor goes
14 bankrupt, the licensee can preserve its rights by going
15 to the court and saying, "Hey, I've got an interest
16 here." Germany doesn't have that law, and as a result,
17 Qimonda is trying to eradicate the licenses it has with
18 a hundred companies.

19 The only reason that it's relevant here is that
20 a number of the patents that Qimonda has, because
21 Qimonda was the second largest DRAM company in the
22 world, relate to patents, I think some of them are
23 JEDEC -- whoops, I don't see John here, but there were
24 JEDEC patents, JEDEC disclosed patents. So, this is a
25 very significant issue with regard to standards, that an

1 entity can transfer patents to a third party, and then
2 there's a concern about whether your license survives.

3 And I should point out that there's a second
4 case which is currently bouncing around in which -- and
5 now I don't see Amy here -- Microsoft and a few other
6 companies -- hello -- Microsoft and a number of other
7 companies have filed a motion with regard to the Nortel
8 bankruptcy to make sure that standards-related patents
9 that might be assigned in that bankruptcy will
10 respect -- that the licenses with regard to those
11 standards-related patents will be honored by the
12 assignee.

13 So, again, this is a case of involuntary or
14 bankruptcy-related transfer of patents, which I think
15 gives us a sense as to the importance that parties see
16 to the continuation of the licenses and the commitments
17 that they thought were originally part of this standards
18 deal. So, off my soap box.

19 MS. MICHEL: Thank you.

20 Michele?

21 MS. HERMAN: Yeah. To your question about
22 whether the RAND commitment should flow with the patent,
23 I would say in the vast majority of circumstances, the
24 answer is that it should. I have seen a scenario that's
25 come up where the answer doesn't seem quite as clear.

1 I'm not sure if I'd say it shouldn't, but the one
2 scenario is where an entity acquires patents from a very
3 small entity, whose business may hang in there or may
4 not hang in there, and the transferee or the assignee
5 really does do a lot of due diligence, does not uncover
6 any type of standards-related commitment with regard to
7 the patents that it's acquiring, and it pays, you know,
8 a lot of money for the patents.

9 By the time it gets around to licensing them as
10 part of a portfolio later, the small company's gone.
11 So, the small company, you know, gave reps and
12 warranties, indemnities, none of which are meaningful,
13 because it was small to begin with, but they're gone.
14 So, now, this company has paid, you know, a lot of money
15 for these patents, and, you know, so is it -- under
16 those circumstances, should they be compelled to live
17 with the RAND commitment or not?

18 I don't know the answer to it. I just raise it
19 as, again, you know, there are fact patterns that make
20 it a little more difficult to answer.

21 MS. MICHEL: Okay.

22 Anne?

23 MS. LAYNE-FARRAR: So, I wanted to add on to the
24 string of caveats. I agree that RAND should generally
25 travel with the patent. Otherwise, you could really

1 game the system, and that could be horrible for lots of
2 parties. But it also strikes me if you're saying that a
3 RAND commitment goes with each assignee, then there's
4 also some obligation on potential licensees taking that
5 license and not coming -- maybe two, three assignees
6 down the road, where it's never taken a license yet --
7 we're not talking about an existing license and
8 protecting all those, absolutely those should stay in
9 place, but parties who haven't bothered to take a
10 license. They were on notice, they knew they needed to,
11 and they didn't. Do they get to then claim that, you
12 know, these terms that were maybe given five, six years
13 ago still apply to them when they haven't upheld their
14 end of the bargain?

15 I think this -- you know, this then goes to the
16 balance that we have heard throughout the day. You
17 know, there's obligations on both sides of the fence, so
18 let's not make it one-sided.

19 MS. MICHEL: And Gil?

20 MR. OHANA: Let me try to eliminate the caveats
21 with one fell stroke. There's a -- there's a concept in
22 law and economics called the cheaper cost avoider, and
23 it seems to me that that concept really works here to a
24 T. On who should the burden fall? In other words, who
25 is the cheaper cost avoider, the buyer of the patents,

1 even the second, third, fourth, fifth, sixth, nth
2 transferee, or the implementer who knows that they're
3 implementing a standard, may have no idea -- may have,
4 frankly, no access to the information on which they
5 would form an idea -- who participated in the standards
6 development process, what patents they committed to
7 license, et cetera, and then suddenly discovers one day,
8 when they open their mail or read an email or get an
9 invitation to license that some patent assertion entity
10 has bought the patent and is now asserting it.

11 That patent assertion had to do some due
12 diligence, and at some point in that diligence process,
13 they probably figured out this patent's essential to a
14 standard, at least that's my legal theory in the patent
15 litigation, and at that point, the light should go off
16 and say, "Okay, who did I buy it from, who did they buy
17 it from, let's go back up the chain and see if we're
18 subject to a licensing commitment."

19 But putting the burden of that on the innocent
20 infringer in the context of patent litigation is crazy.

21 MS. MICHEL: All right.

22 Andy, and I think I'll ask you to keep comments
23 short on this topic, and we'll wrap up.

24 MR. UPDEGROVE: I think there actually is
25 another argument in favor of making this one go away,

1 because I think almost by definition, the innocent
2 purchaser of the standard would not have taken the
3 potential value of the -- I mean of the patent would not
4 have taken the potential licensing value of that patent
5 into effect, because almost by definition, the seller
6 wasn't asserting it against implementers. So, the
7 buyer's pocket isn't really being picked. They're only
8 losing a windfall that they didn't expect to get when
9 they bought the patent.

10 So, to me, again, I think this is kind of a case
11 where we, as lawyers, because we can think of a
12 situation that might happen somewhere in the field, and
13 because our client, out of all of those companies in the
14 field, might somehow find us in this position, we better
15 not put a really healthy rule into place. And I just
16 see people do that over and over and over again when
17 they're putting an IPR policy together, and, again, I
18 would say this is a splendid candidate for a bright line
19 rule.

20 Failing that, register the commitments with the
21 PTO, but I think that that's just imposing unnecessary
22 bureaucracy where the corner case chance is so small
23 that I think we can ignore it.

24 MS. MICHEL: Okay.

25 Larry?

1 MR. BASSUK: Just a couple of things.

2 First of all, we haven't seen it be a terrible
3 problem so far. I mean, we have seen some cases
4 certainly, but the real problem is we're talking about
5 land law, which we've been in for over a thousand years,
6 but patents are not land law. There is not property.
7 It's a right to exclude. It's a statutory right to
8 exclude. It doesn't have all the same attributes of
9 land, where it follows with the -- where limitations on
10 the land follow with the sale of the land.

11 So, we're really in an area where we're back
12 into equity perhaps, and I don't disagree with what
13 anybody has said here, but I'm still struggling with
14 what is the strict legal basis on which this is
15 occurring?

16 MS. MICHEL: Okay.

17 Sarah?

18 MS. GUICHARD: So, just to address, I guess,
19 Anne's point of the patent and the licensee who didn't
20 take a license and should they then get the ability to
21 rely on that commitment, and I think the practical
22 realities of a lot of -- not every standard, but a lot
23 of standards is that companies will make commitments
24 because they have patents, but they're not necessarily
25 making royalty -- they're not royalty-bearing licenses

1 in that the company doesn't have a licensing program.

2 They merely make the declaration, A, to comply
3 with the obligations of the SDO, so they can put the
4 other people on notice that, yes, hey, I have patents,
5 too, for defensive nature, and if you aren't asked to
6 bring a license or aren't asked to come get a license,
7 you don't know that this particular patent holder
8 actually is looking for licensing revenue. So, the --
9 then that patent gets sold, it might get sold again, who
10 knows where it went.

11 I mean, even most of the SDOs don't require the
12 new owner, I don't think, to register their patents. I
13 mean, a lot of us do that because we want to be good
14 members, but I don't know that everybody's doing that.
15 And so if you then say, "Well, you don't get the benefit
16 because you didn't get a license the day you knew it was
17 committed to the SDO," I think that kind of doesn't work
18 with the realities of the fact that that's not necessary
19 for a lot of different situations.

20 MS. LAYNE-FARRAR: I wouldn't take issue with
21 that. I think you're describing yet another caveat,
22 because there are so many different circumstances that
23 could take place. I was thinking about actually N-Data,
24 when there -- it was some nominal \$1,000 fee. It's
25 nothing. Why didn't companies pay that? They were on

1 notice, and they didn't.

2 MS. MICHEL: It cost more to get your lawyer to
3 take a \$1,000 license for you than to pay the \$1,000. I
4 don't know.

5 MS. GUICHARD: N-Data may not have cared. I
6 mean, it may have been that, as I said, kind of a
7 stand-off thing, or they may have had business deals
8 and, you know, we're not going to bother you, you don't
9 bother us, and who cares about the thousand dollars?
10 We're going to pay our lawyers more than that just to
11 get the thing drafted, so we don't bother.

12 MS. LAYNE-FARRAR: Agreed. So, I just think it
13 means it's a rule of reason, because you could have
14 scenarios where the original owner did have a licensing
15 policy and there were parties who didn't take a license,
16 and should they then get the offer years later?

17 MS. GUICHARD: Yes.

18 MS. LAYNE-FARRAR: I think it's just a --

19 MR. OHANA: But a frequent reason companies
20 don't take licenses is because they're a mutual assured
21 distraction with the licensor. I mean, Cisco doesn't
22 have formal patent licenses with dozens of our
23 competitors. They have never asserted patents against
24 us. We have never asserted patents against them. So,
25 the idea that for the purpose of sort of preservation of

1 rights, we have to go and take licenses from people that
2 we're pretty sure aren't going to sue us, it seems like
3 a lot of effort for not a lot of value.

4 MS. LAYNE-FARRAR: No, but then you could
5 establish that under the rule of reason when it came up.
6 You could say, "This is the -- these were the
7 circumstances and we had, you know, informal
8 non-asserts," so...

9 MR. OHANA: You're right. And, you know, more
10 clarity in the law on this point, that you should be
11 able to assert -- you should be able to basically argue
12 that because I was in mutual assured distraction with
13 Company A, I'm in mutual assured distraction with the
14 patent assertion entity, or I don't owe a license to the
15 patent assertion entity that that company sold a patent
16 to, would be great. I don't know if we'll ever get it
17 there, but it would be a nice rule.

18 MS. LAYNE-FARRAR: I would just be leery of
19 rules that limit us to one business model, so that all
20 standard-setting participants have to be vertically
21 integrated. I don't think that's a good policy. I
22 think years of economics talks about comparative
23 advantage, and there are, indeed, some very innovative
24 firms that don't want to practice their patents. We
25 shouldn't exclude them from the process. We just need

1 to think about how these rule apply to all of these --

2 MR. OHANA: I internally agree with that, but I
3 don't think that the patent transfer issue goes to
4 whether the companies are vertically integrated. I
5 mean, there are -- you know, Michael's company is one of
6 them. There are -- and actually, they are vertically
7 integrated, as Mike readily pointed out before, but they
8 have an active licensing model. There is nothing in the
9 world that's wrong with that.

10 But from the context of -- they're also, as far
11 as I know, not selling patents, and once you start
12 selling patents, the people you sell to have incentives
13 that are very different from the seller.

14 MS. MICHEL: Okay. We will give Michael Lindsay
15 the last word.

16 MR. LINDSAY: I have to largely agree with what
17 Gil said, and we're not talking about the circumstance
18 where someone is a nonpracticing entity, you know that
19 going in, and they're holding onto the patent. We're
20 talking about transfer from perhaps someone who is
21 nonpracticing but for whatever reason not asserting or
22 was vertically integrated, and it's that transfer. You
23 should not be able to use the transfer to increase the
24 value of the patent.

25 And if someone hasn't taken a license before,

1 you know, why are you saying it's their fault? Were
2 they asked to take a license? I think there are all
3 sorts of reasons why someone might not have taken a
4 license in the past, and I don't see that as
5 particularly relevant. The issue is can you increase
6 the value of the patent by trying to cleanse it of these
7 prior commitments? And I say the answer is no.

8 MS. MICHEL: All right.

9 With that, I want to thank our panelists. They
10 have worked very hard today, all day, and we really,
11 really appreciate it.

12 (Applause.)

13 MS. MICHEL: Dr. Joseph Farrell, Director of the
14 Bureau of Economics, will now wrap up this session for
15 us. Thank you.

16 MR. FARRELL: Thanks, Suzanne, and I'll start
17 right away, because we are running late already.

18 Let me start with two disclaimers. First of
19 all, a standard institutional disclaimer. I'm speaking
20 for myself, not for the Commission or any Commissioners.
21 If you want to know what they think, they have said many
22 things about this general area, and you should read what
23 they have to say.

24 The second disclaimer, I decided not to prepare
25 remarks for this closing slot, but instead, to try to

1 react to what I heard through the day and what I read
2 late last night in the written comments received so far,
3 and as a result, this is going to be a little selective
4 and a little reactive. So, take it for what it's worth.

5 One of the big themes that I heard throughout
6 today was a narrative that essentially runs as follows:
7 This is an intractably difficult problem. You have got
8 incredibly complicated moving object of the set of
9 patent and patent claims that are out there and who owns
10 them and who might own them and whether they are valid,
11 for that matter, although that wasn't talked much about.
12 And you have got another incredibly complicated moving
13 object, the set of standards that are out there or being
14 developed or being thought about or talked about. And
15 you have to try to jigsaw these two incredibly massive,
16 fast-moving, shape-shifting, awkward and slippery
17 objects into some kind of coherence, and you really
18 can't expect anybody to do a great job of that.

19 What we see is we have a bunch of standards
20 development organizations that try, and in trying, they
21 pursue a wide diversity of different approaches, and
22 they kind of, sort of, except for some exceptions, seem
23 to do an okay job of it, so what's the Government doing
24 getting interested in this area? That's a narrative
25 that, it seems to me, we've heard all day.

1 So, first of all, evidence of problems and
2 evidence of lack of problems. This was more actually in
3 the written comments than in what we heard today, but
4 there's a temptation, I think, to say -- to identify
5 problems with disputes, maybe even for lawyers, problems
6 with disputes that make it to litigation. I don't think
7 you can do that, and I don't think you can do it in
8 either direction.

9 Just because there's a dispute doesn't mean that
10 there is a breakdown of the system. Somebody might be
11 being unreasonable, and certainly, if you have that as a
12 rule of general inference or procedure, it would give
13 whacko incentives to people to dispute perfectly
14 reasonable offers, okay? So, we can't assume that the
15 presence of a dispute means the presence of a problem.

16 We also can't assume that the absence of a
17 dispute means the absence of a problem. That's what it
18 means for someone not to have adequate alternatives, is
19 they might meekly accept something that's not really all
20 that acceptable, okay? So, looking to the frequency of
21 disputes to gauge whether there is or is not a pervasive
22 or serious problem, it seems to me, quite a leap and one
23 that at least at this point I'm not ready to take.

24 So, the "complex problem, diverse solutions,
25 kind of work, Government, butt out" narrative seems kind

1 of thoughtful, intelligent, Coasian, if you like, until
2 you remember that consumers, by and large, are not at
3 the table. Consumers were not at this table, except,
4 perhaps, in the persons of the FTC staff there, and
5 consumers, by and large, final consumers, are not at the
6 table in debates over IPR policy at SSOs or in
7 technology adoption decisions or licensing decisions
8 within standards, okay?

9 So, one view would be that's what's wrong with
10 the narrative. It's that it omits consumers, and so the
11 key goal ought to be to try to bring consumers more
12 fully to the table. How do you do that? Well, I know
13 some SSOs have language encouraging consumers to come
14 along and participate, and maybe sometimes they do.
15 When I first got interested in consensus
16 standard-setting as an academic, I kind of put out some
17 feelers about could I go along to some standards
18 meetings, and I got a slightly confused response, I have
19 to say. But that was a while ago, maybe things have
20 changed. So, that's a possible approach.

21 Another possibility is that the Federal Trade
22 Commission, or some other consumer-oriented
23 organization, could try to stand in the shoes of
24 consumers, and that's what I hope we're going to be
25 trying to do, okay?

1 So, a natural follow-up question for an
2 economist to that idea is, well, isn't there someone
3 already at the table who, while not actually a final
4 consumer, has interests that are well aligned with final
5 consumers; namely, getting good technology into the
6 standard and getting it cheap, okay? Not either of
7 those to the exclusion of the other, but both of them.
8 And I think it's probably true, by and large, that
9 implementers, as people have been using the word today,
10 prefer better technology in the standards and prefer it
11 to be cheaper, but I think there are reasons to believe,
12 especially if nondiscrimination requirements are
13 strongly enforced, that their incentives are relatively
14 weak, because if you have a nondiscriminatory royalty,
15 it's going to be passed through substantially to final
16 consumers, and so the implementers are not, in fact,
17 bearing the incidence of that, okay? So, I think
18 there's a bias, there's a problem, there's certainly an
19 externality on consumers from the decision rules and
20 from the decisions. So, that's kind of the starting
21 framework, if you like, for my, at least, concern about
22 this.

23 Now, in representing, as we ought to try to do,
24 consumer interests, I would hope it would go without
25 saying, but it did come up, that we need to be very

1 mindful of the value of innovation as well as the value
2 of low prices, okay? And I see this coming up in a
3 couple of places. The first is incentives to innovate,
4 okay? Obviously, if you expect royalties to be
5 depressed below the level that corresponds to the
6 contribution of the innovation or of the innovative
7 effort, then you are going to get inadequate incentives
8 to pursue that. I think that's right, and I think
9 that's important.

10 I don't agree, as a general matter, with the
11 suggestion that incremental value relative to the next
12 best alternative is going to be too low to provide that,
13 okay? The story was told of two firms competing to
14 provide a next leap, and if they reach almost identical
15 outcomes, then one of them will get a small reward
16 relative to the other, and the other will get nothing,
17 and that doesn't seem like enough.

18 And that's true, but in that particular outcome,
19 those are their incremental contributions. The one that
20 came in behind, in fact, contributed nothing to
21 society's technological frontier, and the one that came
22 in in front, in fact, only contributed a little bit, and
23 if we take the more common situation where one of these
24 research efforts is apt to fail completely and the
25 reason we want the other one to be there is so as to

1 supply the innovation when the other one fails, well,
2 the incremental value benchmark provides the right
3 answer there, and I think, in general, I'm sure there
4 are wrinkles and possibilities that say that's not
5 exactly right, but it seems to me, as a first order
6 claim, that's got to be about right, and it had better
7 be, because that's the way the market economy works
8 generally.

9 If I go to Restaurant A rather than Restaurant B
10 because it's offering me a better deal, we don't say,
11 "Well, Restaurant B should get paid something, surely,
12 because otherwise, it wouldn't have an incentive to be
13 in there trying to get my business and failing," okay?
14 So, I think you should be skeptical, not incredulous,
15 but skeptical about that suggestion.

16 The other thing we should think about that was
17 mentioned today and in the written comments in terms of
18 incentives to innovate is what's sometimes called the
19 reverse hold-up problem, the fact that depending on the
20 bargaining institutions, it could happen that the SSO or
21 its implementer members squeeze the patent holder down
22 to a penny for its intellectual property, okay? And I
23 actually think it's progress to call this reverse
24 hold-up rather than monopsony, and let me explain why,
25 okay?

1 There are two things going on there. One is the
2 fact that the patent holder has sunk its research
3 expenses before that negotiation takes place. That's
4 the intuition for why you might call it reverse hold-up.
5 And the other is the fact that for this to happen,
6 probably you have to have the SSO implementer members in
7 some sense negotiating jointly, okay? And I think the
8 antitrust knee-jerk response is to blame the negotiating
9 jointly, because that's more of a generic antitrust
10 problem. I think that's actually perhaps not the key
11 point here and it's the timing that's more important,
12 and here's why.

13 When a standard is important, the technology
14 choice by the implementers fundamentally is a group
15 choice. That's why you have the SSO in the first place.
16 If everybody should just do whatever they feel like
17 doing, there would be no point in having the SSO, okay?
18 So, whether it's implemented with a joint choice or
19 whether it's implemented through bilateral negotiations,
20 one way or another, perhaps through some bandwagon
21 effect of licenses or something, they are fundamentally
22 going to be making a group choice. And it's a little
23 bit of a misfit -- not necessarily a harmful one -- but
24 a little bit of a misfit logically to say they ought to
25 be negotiating bilaterally given that, in the end, the

1 choice dynamics really are collective.

2 However, if you have group negotiations with the
3 patent holder at the time when the technology has
4 already been developed, then you do, indeed, risk a
5 reverse hold-up problem, and so we need to be careful of
6 that. If you look, for example, in the proposal by
7 Baumol and Swanson from many years ago now as to how to
8 deal with these problems, they proposed a very formal
9 auction system where the patent holders and other
10 technology proponents would say once, and only once,
11 "Here are my terms," and then the SSO could choose among
12 them, but no negotiating them down, okay? And that
13 reflects, I think, an understanding that, yes, it is a
14 group choice, that's why it's the SSO choosing, but it's
15 a group choice where you have to be careful to avoid the
16 reverse hold-up dynamic, okay?

17 So, back to complexity. What's the best way to
18 address this kind of problem? What I think we heard
19 coming out of a lot of the discussion today, and more
20 than just today, is it's a real pain and it's almost
21 impossible to get right to the negotiations up front the
22 way Gil did with his granola this morning, okay? You
23 can't say what the prices are; the prices are not of the
24 thing that you really want to buy; you don't know what
25 else you need to buy, from whom; it's just a mess, and

1 so kick it down the road, okay?

2 We heard mention of Mark Lemley's concept of
3 rational ignorance for patent validity. In a sense,
4 what's being suggested here -- and more than suggested,
5 being largely implemented by most SSOs -- rational
6 procrastination, okay? So, how is rational
7 procrastination, as a business model, what kinds of
8 market tests does it get where consumers are at the
9 table?

10 Well, where are consumers most at the table,
11 obviously in restaurants, and so rather than going back
12 to Gil's granola this morning, let's think about dinner
13 at a fine restaurant, and if it's a pretty good
14 restaurant, they'll give you a menu with a lot of
15 options and some prices, and then they come over and
16 they describe the specials, and they are too classy to
17 mention the prices at that point, okay? So, many
18 restaurants make a success out of mostly disclosing
19 price in advance, but a little bit not.

20 There are a handful of fine restaurants that
21 actually do what the SSOs like to do, the rational
22 procrastination. You go, you're seated, you're fed, and
23 then they very tactfully bring you an enormous bill in a
24 small folder at the end of the meal. Those restaurants,
25 for the most part, have remained a niche business. It's

1 not a business model that has seemed to succeed with
2 consumers overall, and I think there's a pretty obvious
3 reason for that, okay?

4 So, in any case, I look forward to hearing a
5 great deal more about many of these deep questions, and
6 thank you all for coming.

7 (Applause.)

8 (Whereupon, at 4:45 p.m., the conference was
9 concluded.)

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