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DEPARTMENT OF JUSTICE ANTITRUST DIVISION  
and FEDERAL TRADE COMMISSION

Hearings on:

COMPETITION AND INTELLECTUAL PROPERTY LAW  
AND POLICY IN THE KNOWLEDGE BASED ECONOMY

Standard Setting

Thursday, April 18, 2002  
Great Hall of the U.S. Department of Justice  
333 Pennsylvania Avenue, N.W.  
Washington, D.C.

1 MORNING SESSION PARTICIPATING PANELISTS:

2

3 Morning Session: Disclosure of Intellectual

4 Property in Standards Activities

5

6 Michael Antalics, Partner, O'Melvey & Myers, LLP

7 Carl Cargill, Director Corporate Standards, Sun

8 Microsystems, Inc.

9 Donald R. Deutsch, Vice President, Standards

10 Strategy and Architecture, Oracle

11 Corp.

12 Ernest Gellhorn, Professor, George Mason

13 University School of Law

14 Peter Grindley, Senior Managing Economist, LECG,

15 Ltd., London

16 Mark Lemley, Professor of Law, Boalt Hall,

17 University of California, Berkeley

18 Amy A. Marasco, Vice President and General

19 Counsel, American National Standards

20 Institute

21 Richard T. Rapp, President, National Economic

22 Research Associates

1 MORNING SESSION PARTICIPATING PANELISTS

2 (Continued):

3

4 David Teece, Professor, Haas School of Business,

5 University of California, Berkeley

6 Dennis A. Yao, Associate Professor of Business

7 And Public Policy and Management,

8 The Wharton School, University of

9 Pennsylvania

10

11 MORNING SESSION MODERATORS:

12

13 Robert W. Bahr, U.S. Patent and Trademark Office

14 Gail Levine, Federal Trade Commission

15 Tor Winston, Department of Justice

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1 AFTERNOON SESSION PARTICIPATING PANELISTS:

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3 Afternoon Session: Licensing Terms in Standards

4 Activities

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6 Stanley M. Besen, Vice President, Charles River

7 Associates

8 Daniel J. Gifford, Robins, Kaplan, Miller &

9 Ciresi Professor of Law, University of

10 Minnesota School of Law

11 Richard Holleman, Industry Standards Consultant

12 Allen M. Lo, Director of Intellectual Property,

13 Juniper Networks, Inc.

14 Mark R. Patterson, Associate Professor of Law,

15 Fordham University School of Law

16 Scott K. Peterson, General Counsel,

17 Hewlett-Packard Company

18 Dr. Lauren J. Stiroh, Vice President, National

19 Economics Research Associates

20 Daniel Swanson, Partner, Gibson, Dunn &

21 Crutcher, LLP

22

1 AFTERNOON SESSION PARTICIPATING PANELISTS

2 (Continued):

3

4 Andrew Updegrove, Partner, Lucash, Gesmer &

5 Updegrove, LLP

6 Daniel Weitzner, Director of Technology and

7 Society Activities, World Wide Web

8 Consortium

9

10 AFTERNOON SESSION MODERATORS:

11

12 Robert W. Bahr, U.S. Patent and Trademark Office

13 Carolyn Galbreath, Department of Justice

14 Gail Levine, Federal Trade Commission

15 Tor Winston, Department of Justice

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1 MORNING SESSION

2 (9:00 a.m.)

3 GAIL LEVINE: Good morning. Good

4 morning, and thank you all for coming today.

5 I just want to introduce myself. I'm Gail

6 Levine. I'm the deputy assistant general counsel

7 for policy studies at the Federal Trade

8 Commission.

9 Tor Winston sitting next to me today

10 is an economist with the Department of Justice.

11 And we also have Bob Bahr from the United States

12 Patent and Trademark Office.

13 On behalf of all three of us we really

14 want to thank you panelists for coming to join us

15 today to talk about standard setting issues in

16 the knowledge based economy. I want to introduce

17 all of our panelists briefly this morning.

18 I'm going to do so very briefly

19 because I want us to keep to schedule. But when

20 it's time for us to open our panel discussion,

21 I'm going to ask each of our panelists to say a

22 just few words about themselves and their

1 standard setting backgrounds so that we have a  
2 context within which to place their comments.

3 This morning we have with us Professor  
4 Mark Lemley, who has moved. You moved on me.

5 MARK LEMLEY: I figured I'm not  
6 actually going to block the screen when I'm  
7 giving the presentation.

8 GAIL LEVINE: That's fine. Professor  
9 Mark Lemley is going to be giving our morning  
10 PowerPoint presentation to bring all of us up  
11 to speed on standard setting organization  
12 developments. He's a professor of law at Boalt  
13 Hall at the University of California, Berkeley.

14 We also have with us Mike Antalics, a  
15 partner at O'Melveny & Myers. Carl Cargill; he's  
16 the director of corporate standards at Sun  
17 Microsystems.

18 We have Donald Deutsch, vice president  
19 of standards, strategy, and architecture at  
20 Oracle Corporation; Professor Gellhorn at  
21 George Mason University School of Law, who  
22 apologizes; because of some important charitable



1 work he's doing, he has to leave us early today.

2 But we're grateful for the time we have with him

3 and we're going to make the best use of it

4 we can.

5 We also have with us Peter Grindley,

6 who is the senior managing economist at LECG

7 Limited of London. We have also Amy Marasco, who

8 is the vice president and general counsel of the

9 American National Standards Institute, ANSI.

10 We have Richard Rapp, the president

11 of the National Economic Research Associates;

12 David Teece, an economist and a professor at the

13 Haas School of Business at the University of

14 California, Berkeley; and Dennis Yao, who is an

15 associate professor of business and public policy

16 and management at The Wharton School, University

17 of Pennsylvania.

18 This morning's agenda is going to go

19 like this. We're going to have Mark Lemley give

20 us a presentation of something like 20, 25

21 minutes that will bring us up-to-date on the

22 standard setting issues.

1           Then we're going to open up to a panel  
2 discussion. And we're going to cover three  
3 topics. The first and most -- and the topic  
4 we'll spend the most time on is the question of  
5 disclosure issues.

6           Around 11:00 we'll try and take a  
7 15-minute break. Starting around 11:15 we'll  
8 come back to talk about challenges to the  
9 selection of a standard, challenges to exclusion  
10 from the standard setting organization, then  
11 break for lunch.

12           We'll come back in the afternoon, and  
13 we'll be talking about -- with a different panel  
14 about licensing issues in standards activities.  
15 With no further ado, I'd like to introduce Mark  
16 Lemley.

17           MARK LEMLEY: All right. Well, I'm  
18 just going to do legal background which I hope is  
19 familiar to much of you. And I'm also going to  
20 say a little bit about some studies that I have  
21 done of different standard setting organizations.

22           You can learn everything you need

1 to know about the antitrust rules related to  
2 standard setting organizations when you realize  
3 that we don't actually know what to call them.

4 Sometimes they are standard setting  
5 organizations. Sometimes they are standards  
6 development organizations. Sometimes they are  
7 collective technical organizations. Sometimes  
8 they are consortia.

9 And it's kind of ironic it seems to me  
10 that we can't standardize the definition or even  
11 the terminology for standard setting which  
12 suggests maybe we're in trouble elsewhere.

13 All right. So some brief background  
14 on antitrust issues that relate to standard  
15 setting organizations but aren't specifically  
16 intellectual property issues, and I will run  
17 through these with some haste.

18 If you asked an antitrust lawyer from  
19 40, 50 years ago or certainly from 80 or 90 years  
20 ago, can I get together in a room with my  
21 competitors and exchange information about what  
22 products I'm going to make in the future, they'd

1 go apoplectic, right?

2       The fundamental basis of antitrust law  
3 is hostile to the idea of competitors getting  
4 together to share information. And a bunch of  
5 early trade association cases took that hostility  
6 quite seriously, suggesting that trade  
7 associations themselves might be illegal  
8 because they facilitate cartels.

9       Now, it's true that standard setting  
10 organizations can on occasion be a front for a  
11 cartel. They can facilitate collusion on price,  
12 collusion on innovation in technical areas.  
13 But in fact of course they serve all sorts of  
14 procompetitive purposes. On the vast majority  
15 of occasions they are not fronts for cartels.

16       Nonetheless, there are some modern  
17 cases, notably the Addamax case from the District  
18 of Massachusetts, that exhibit a hostility to  
19 standard setting organizations themselves so that  
20 the very idea of getting together can in some  
21 circumstances be problematic.

22       Even in that case ultimately the First

1 Circuit does not find an antitrust violation.  
2 And it seems to me quite properly that antitrust  
3 has largely moved beyond the idea that standard  
4 setting organizations themselves are problematic  
5 except in the most extreme of cases.

6 A second set of issues has to do with  
7 the standard that is set and its availability to  
8 competitors in the marketplace. Now, there are  
9 two separate issues here. Do I set a standard  
10 that I make available to everyone? And who can  
11 participate in my standard setting organization?

12 Exclusion of parties from the standard  
13 setting organization may constitute a group  
14 boycott. Under the precedent of Northwest  
15 Wholesale Stationers the Court is going to  
16 evaluate exclusion under the rule of reason.

17 It seems to me that except in  
18 circumstances in which the standard setting  
19 organization is going to confer market power it  
20 is unwise to penalize exclusion of particular  
21 competitors from a standard setting organization.

22 Even then closed standards might

1 sometimes serve a useful purpose. They may  
2 create effective competition against the dominant  
3 player.

4       If your goal is to attack a dominant  
5 player in the marketplace, you may do that most  
6 effectively by excluding that player from  
7 membership in the standard setting organization  
8 for fear that they will dominate or capture the  
9 organization.

10       Nonetheless, every time you create a  
11 standard setting organization that does exclude  
12 a subset of competitors in the marketplace, you  
13 raise your antitrust risks. And antitrust courts  
14 are properly concerned with the circumstances in  
15 which you're going to leave people out.

16       A third set of issues with respect to  
17 standard setting organizations has to do with  
18 liability of the organization for setting the  
19 wrong standard.

20       Now, this turns out to be by far  
21 the largest category of private antitrust  
22 cases involving standard setting organizations.

1 Company A says I went to the standard setting  
2 organization; they should have adopted my  
3 standard; my standard is better; they adopted  
4 company B's standard instead, and that has  
5 excluded me from the marketplace.

6 Now, antitrust law quite properly  
7 treats this with some disdain. This sort of  
8 argument virtually always represents sour grapes  
9 rather than a real threat to competition.

10 At a minimum it seems to me before an  
11 agency or somebody else ought to be concerned  
12 with the antitrust consequences of having  
13 selected a standard on the technical merits, you  
14 have to prove that the people who selected the  
15 standard were in fact your horizontal  
16 competitors.

17 Certainly if it's Underwriters  
18 Laboratories or somebody with no direct interest  
19 in competition in the area then there can be no  
20 competitive harm. You have to show market power  
21 in effect, right, that the adoption of the  
22 standard by the organization actually influenced

1 the marketplace.

2 I think you have to show intent,  
3 all right, that is that we chose this standard  
4 deliberately in order to influence the market in  
5 an anticompetitive direction rather than merely  
6 because we tried unsuccessfully to choose the  
7 right standard.

8 And finally it seems to me that on the  
9 merits you've got to show that objectively the  
10 wrong standard was selected.

11 The upshot of all of this is that this  
12 class of cases while it is the most often brought  
13 in court is also the least often successful, and  
14 it's something that the agencies I think needn't  
15 worry about except in extreme cases.

16 The one exception to that has to  
17 do with allegations that a standard setting  
18 organization has been captured, right, that it  
19 has in fact acted unfairly because of abuse of  
20 process within the system. Now, some of these  
21 capture cases can be quite extreme.

22 In the Allied Tube case, for example,



1 the allegation was that the defendant captured  
2 the National Fire Protection Association by  
3 recruiting several hundred new members, flying  
4 them to the organization's meeting, issuing them  
5 walkie-talkies so that it could tell them how to  
6 vote to vote down a particular proposal to allow  
7 polyvinyl conduit to hold electrical wiring.

8         And assuming those facts are true as  
9 the Supreme Court finds, that's a pretty good  
10 example of a standard setting organization that  
11 acts not on the merits -- is polyvinyl conduit  
12 actually safe -- but because it's been captured  
13 by somebody with an interest in banning polyvinyl  
14 conduit from the market.

15         Somewhat less extreme but still  
16 significant, standard setting organizations might  
17 in fact constitute sham groups. You can set up  
18 standard setting organizations which are  
19 nominally neutral but in fact are designed  
20 particularly to promote one standard at the  
21 expense of others.

22         And one good way to identify this is

1 you can look at the voting rules. Allegations  
2 that voting rules are biased in ways that favor  
3 particular companies are allegations that the  
4 antitrust agencies ought to take seriously, not  
5 because they are antitrust violations in and of  
6 themselves, but because they suggest that the  
7 organization may not be acting as a neutral  
8 participant and so may not be entitled to the  
9 kind of deference that I suggested that they  
10 ought to receive in the ordinary course of  
11 business.

12       It's worth noting by the way that  
13 if somebody captures your standard setting  
14 organization the Supreme Court case of Hydrolevel  
15 suggests that not just the capturing party but  
16 the organization itself will be liable for  
17 violating the antitrust laws.

18       So being hijacked, even though in some  
19 sense it makes the standard setting organization  
20 the victim, is not only no defense but may  
21 actually get you in trouble on antitrust grounds.  
22 All right.

1           So much for the series of issues  
2   which relate to intellectual property but aren't  
3   directly intellectual property issues. Let's get  
4   to the heart of the matter which is intellectual  
5   property rules set by standard setting  
6   organizations.

7           Virtually all organizations deal with  
8   this issue in one form or another. And the basic  
9   insight is that standard setting organizations  
10   need intellectual property not because  
11   intellectual property is a bad thing.  
12   Intellectual property is a good thing. But  
13   sometimes there's just too darn much of it.

14           Well, the 175,000 new patents issuing  
15   every year in the United States, to say nothing  
16   of copyrights and other intellectual property  
17   rights, in many industries, semiconductors,  
18   telecommunications, you end up with a situation  
19   in which those intellectual property rights  
20   overlap in a massive and potentially  
21   debilitating way.

22           If we don't have some mechanism for

1 clearing the intellectual property rights owned  
2 by dozens or hundreds of different parties,  
3 nobody's going to be able to make a product that  
4 works with a particular technical standard.

5       Furthermore, if what you want is  
6 to create an open standard, right, to adopt a  
7 standard that is free for everyone to use, then  
8 at least the ordinary logic of the marketplace  
9 suggests that you need some system, some  
10 mechanism for controlling intellectual property  
11 rights that govern that standard.

12       Parenthetical caveat here:  
13 Sometimes ownership of intellectual property can  
14 effectively keep a standard open. The Sun versus  
15 Microsoft case it seems to me is the best example  
16 of that.

17       Standardization preventing forking may  
18 sometimes best be accomplished by not giving up  
19 all intellectual property rights and letting  
20 people do whatever they want, but by allowing  
21 coordination through the use of intellectual  
22 property rights so long as the person who owns

1 the intellectual property rights then commits to  
2 make the standard open.

3 So Sun can say Java must have this  
4 character. All right. All Java programs must  
5 look the same only if it has intellectual  
6 property control over Java.

7 And if it nonetheless releases Java  
8 and says as long as you comply with our standards  
9 anybody is free to use it, then you have an open  
10 system that's not -- doesn't exist in spite of  
11 intellectual property but in some sense because  
12 of intellectual property.

13 Well, one of the things that it seems  
14 to me very important to realize is that standard  
15 setting organization rules governing intellectual  
16 property rights actually vary quite widely.

17 What I have done is surveyed 29  
18 standard setting organization rules in the  
19 telecommunications and computer areas -- those  
20 industries were not chosen at random for reasons  
21 I'll talk about in a minute -- to see what kinds  
22 of policies there were.

1           The first thing to understand is that  
2   about a quarter of these organizations had no  
3   policy whatsoever. Seven out of the twenty-nine  
4   had no policy. One of the twenty-nine  
5   organizations was in the process of developing  
6   a policy at the time I studied it.

7           So 25 percent of organizations have  
8   no rules with respect to intellectual property.  
9   And no rules effectively means free ownership of  
10   intellectual property. Right? Anybody who owns  
11   an IP right can fully assert it, can assert it  
12   for injunctive relief or for licenses.

13          Of those that do have a policy, of  
14   the remaining three-quarters, sixteen out of the  
15   twenty-one organizations require disclosure; you  
16   must tell us if you have an intellectual property  
17   of which you are aware.

18          But interestingly only three of those  
19   sixteen organizations require any search of the  
20   company's own files to determine whether they  
21   have an intellectual property right so that the  
22   standard for disclosure in most cases is actually

1 a little bit different.

2           It's you must tell us of any  
3 intellectual property rights that you own that  
4 you are thinking of at the moment, that whoever  
5 comes to the standard setting organization and is  
6 familiar with this particular standard is aware  
7 of and knows might be relevant, right, rather  
8 than you must search your files and find all  
9 patents which you may later assert.

10           Seventeen out of twenty-one  
11 organizations that I studied require some form of  
12 licensing. Most commonly that is licensing on  
13 "reasonable and non-discriminatory terms."  
14 That's two-thirds of the organizations.

15           But several of the organizations,  
16 three of the twenty-one I studied, require that  
17 intellectual property owners fully give up their  
18 intellectual property rights in one case or at  
19 least require royalty free compulsory licensing,  
20 so that while you may retain your intellectual  
21 property rights for other purposes you have to  
22 license members of the standard on a royalty free

1 basis.

2           It's also worth noting that about half  
3 of the policies cover only patents. So there is  
4 a substantial variance in whether we are talking  
5 about a patent policy or whether we are talking  
6 about an intellectual property policy. All  
7 right?

8           Within these issues there's also  
9 substantial variance in how organizations decide  
10 these cases. So assuming that we have a  
11 disclosure obligation, what is it that I have  
12 to disclose?

13           One substantial issue that comes up  
14 quite regularly is whether I have to disclose  
15 pending patents because patents take on average  
16 about three years to get through the U.S. PTO,  
17 2.77 to be exact.

18           The significance of disclosing pending  
19 patents is actually quite substantial because  
20 standards that are being adopted are often going  
21 to be covered not by old patents, but because  
22 they are new technical innovations are going to



1 be covered by applications that haven't yet  
2 matured into patents.

3       Nonetheless most of the organizations  
4 that require disclosure require disclosure only  
5 of issued patents, not of pending patents. Two  
6 of the sixteen organizations require disclosure  
7 of all patent applications.

8       One organization says we'll require  
9 disclosure of published but not issued patent  
10 applications, but not of unpublished  
11 applications.

12       And one organization interestingly  
13 says you have to disclose your pending  
14 applications, but only if you are the proponent  
15 of the standard that is to be adopted, so that  
16 we apply a differential rule depending on your  
17 position within the organization.

18       There is also variance in how  
19 reasonable and non-discriminatory royalty is  
20 determined. While most organizations call the  
21 reasonable and non-discriminatory royalty the  
22 touchstone for licensing, virtually none of

1    them then tell us what a reasonable and  
2    non-discriminatory royalty might turn out to  
3    be in any given case.

4           A few organizations rather than  
5    requiring reasonable and non-discriminatory  
6    licensing merely request reasonable and  
7    non-discriminatory licensing, presumably making  
8    it optional for the intellectual property owner  
9    to decide whether or not they want to commit to  
10   license.

11          That seems to me a rather useless  
12   approach because if it's optional, you know, you  
13   effectively don't have a policy. You either say  
14   you commit to license on these terms, or you say  
15   you don't commit to license and you can do  
16   whatever you like.

17          Saying please license but if you  
18   really don't want to you don't have to doesn't  
19   strike me as particularly useful. A few  
20   organizations do specify either the terms for  
21   licensing in a particular case or more commonly  
22   the procedures that will be used to determine

1 what a reasonable and non-discriminatory license  
2 looks like.

3 Included in these is a British  
4 institute which applies the very interesting  
5 provision in the British patent act that says if  
6 you have a standard setting organization with a  
7 licensing requirement you can go to the British  
8 Patent Office and the British Patent Office will  
9 determine what the reasonable royalty is for you.

10 Further evidence of diversity in  
11 approaches has to do with the question of who  
12 gets licensed. Virtually none of the policies  
13 that I studied specified who is licensed.

14 Two of the policies do in fact specify  
15 that everyone who wants to use the standard is  
16 licensed rather than merely other members of the  
17 standard setting organization.

18 I don't think it follows from that  
19 that the other 15 limit their licensing to other  
20 members. Rather it seems to me that they just  
21 haven't talked about it.

22 And you would think ordinarily that

1 with respect to a standard setting organization  
2 the rule would be that you licensed people who  
3 wanted to use the standard whether or not they  
4 were members of the organization of membership.

5       A few organizations try to discourage  
6 ownership of intellectual property without  
7 forbidding it outright either through the kind of  
8 policy statement that I mentioned earlier saying,  
9 well, please don't own intellectual property,  
10 or please license it on reasonable and  
11 non-discriminatory terms or through different  
12 policies.

13       So one group will rethink the  
14 selection of a standard if it turns out that that  
15 standard is governed by an intellectual property  
16 right. Now, that expressly does it. My sense is  
17 that a bunch of other groups might informally  
18 rethink selection of a standard if they find an  
19 IP right that they didn't know of.

20       But this group requires official  
21 reconsideration. Another group requires  
22 supermajority approval. It takes 50 percent of

1 the votes to approve a standard, and it takes  
2 75 percent, a majority, to approve a standard  
3 covered by a patent.

4 I would be a lot happier if I thought  
5 that this diversity reflected healthy competition  
6 in the market in which standards organizations of  
7 some sorts put themselves in one category and  
8 standards organizations of other sorts put  
9 themselves in another category. But I can't find  
10 any indication that this diversity is in fact  
11 thought out.

12 First off it seems to me the rules are  
13 often set ad hoc, or they are set in response to  
14 a specific issue so that if you are a standard  
15 setting organization that doesn't have a policy  
16 and an IP issue comes up, you may then adopt  
17 a policy which reacts specifically to the  
18 intellectual property issue that came up in your  
19 case, rather than because you looked forward and  
20 saw what other issues might arise.

21 As far as I can tell, lawyers are  
22 not normally involved in drafting the policies.

1 And certainly lawyers from the various member  
2 companies are relatively rarely involved in  
3 reviewing those policies and deciding what  
4 statements will be signed.

5         Instead the task falls to engineers,  
6 who are notoriously indifferent to patent rights.  
7 And an engineer who wants his standard adopted by  
8 a standard setting organization is likely to sign  
9 away rights even if the company or the company's  
10 legal department might not particularly have  
11 wanted him to do so because the engineer thinks  
12 the standard is important and the patents are a  
13 nuisance.

14         Furthermore, because there  
15 is such diversity and because so many  
16 companies especially in the computer and the  
17 telecommunications areas participate in so many  
18 different organizations with a different set of  
19 rules, getting yourself informed about what it  
20 is that you actually commit yourself to by  
21 participating in a standard setting organization  
22 is not a trivial task.

1           You cannot know very effectively what  
2 price you're going to have to pay because the  
3 reasonable and non-discriminatory license  
4 standard is pretty vague. You could conceivably  
5 learn about all of the policies and how they  
6 interact with each other. But my sense is that  
7 not everybody does so.

8           I also can't find any indication that  
9 the rules vary in a systematic way by the type of  
10 group you are involved in so that large standard  
11 setting groups that apply across industries have  
12 one set of rules, small standard setting groups  
13 have another set of rules, and ad hoc consortia  
14 formed around a particular standard have a third  
15 set of rules.

16           In fact it seems to me that the rules  
17 are across the board without regard to the type  
18 of company. The result is what I call a kind of  
19 messy private ordering. It's commonplace that  
20 you shouldn't watch sausages and legislation  
21 being made.

22           But from the perspective of an

1 economist at least, it may also be the case that  
2 you shouldn't particularly watch standard setting  
3 organization intellectual property rules being  
4 made very closely either.

5         These rules while in one sense are the  
6 operation of the marketplace, they are subject to  
7 limitations. They are subject to information  
8 problems. They are subject to the vagaries of  
9 individuals and of individual differences.

10         All right. What does this mean for  
11 antitrust law? Well, I'm just going to introduce  
12 the issues we will talk about this morning and  
13 this afternoon.

14         The first issue has to do with  
15 antitrust liability for failing to comply with  
16 disclosure and licensing rules. A number of  
17 cases have set the parameters of this.

18         The In Re: Dell Computer case that  
19 the FTC brought in 1995 woke everyone up with  
20 respect to the possibility that you might in fact  
21 get yourself in antitrust trouble by deceiving a  
22 standard setting organization and engendered



1 great fights as to whether or not that was what  
2 Dell had done.

3 More recently the Rambus versus  
4 Infineon case, while ultimately decided on fraud  
5 rather than antitrust grounds, presented the  
6 issue rather starkly of alleged efforts by Rambus  
7 to capture a standard setting organization by  
8 going to the meeting and drafting patent  
9 applications specifically to cover the standard.

10 FTC investigations according to news  
11 reports are ongoing, and I will not say any more  
12 about that because there are people in the room  
13 who must know more about it than I. We'll talk  
14 about issues relating to when disclosure is  
15 problematic.

16 It seems to me market power and effect  
17 are relevant, that intent or at least knowledge  
18 that you are willfully failing to disclose is  
19 relevant. Although from what I can see from my  
20 practice experience, willful or at least reckless  
21 failure to disclose intellectual property rights  
22 is surprisingly common.

1           In a number of cases I've seen  
2 failures to disclose in which the person who is  
3 in the meeting who proposes the standard and who  
4 says, oh, no, we don't have any intellectual  
5 property rights in the standard is also the  
6 person in whose name the patent is issued, making  
7 it difficult to claim that I had no idea there  
8 was an intellectual property right when it was my  
9 invention.

10           The second issue in what we're going  
11 to talk about this afternoon has to do with the  
12 flip side, right, not liability of individual  
13 companies for failing to follow the rules, but  
14 the potential of liability of standard setting  
15 organizations themselves for setting the rules.

16           The government has on a couple of  
17 occasions gone after standards groups that  
18 required licensing of intellectual property on  
19 terms the government considered unfair. One of  
20 these was the European Telecommunications  
21 Standards Institute. The other was an FTC case  
22 back in 1985.

1           There is a set of rules dealing with  
2 buyers' cartels that can be applied in the  
3 licensing context to suggest that you cannot as  
4 a standards group collectively bargain with  
5 intellectual property owners.

6           So if you adopt a standard, an IP  
7 owner from outside the group comes and says I  
8 have a patent and I'm going to sue you all,  
9 collectively refusing to license except on terms  
10 we all agree to, it looks like a buyers' cartel  
11 or in this case more properly a licensee cartel.

12          Similarly while joint defense  
13 agreements are okay in such circumstances,  
14 companies must -- and standards organizations  
15 must be very careful about sharing settlement  
16 authority because that too moves across the line  
17 from information sharing and cost reduction into  
18 actually colluding to reduce the license price.

19          Well, in the last -- let me give you  
20 30 seconds on implications for antitrust and what  
21 I think the policies ought to be here. It seems  
22 to me standard setting organization intellectual

1 property rules on balance are procompetitive.  
2 They're good things. They serve to clear patent  
3 thickets.

4       And I think it's significant that  
5 they exist primarily in industries in which  
6 it looks like patent hold-up is the biggest  
7 problem. You see a lot of standards development  
8 organizations in computers, in semiconductors, in  
9 telecommunications industry. You see relatively  
10 few organizations in pharmaceuticals, in  
11 biotechnology, and so forth.

12       And I think that's not accidental.  
13 Standards development organization intellectual  
14 property rules can get rid of hold-up problems by  
15 eliminating the possibility of injunctive relief  
16 that a number of different intellectual property  
17 owners could hold over the standard, threatening  
18 it.

19       Furthermore, reasonable and  
20 non-discriminatory licensing rules seem to be the  
21 best of all possible worlds because they clear  
22 the hold-up problem. It can't prevent the

1 standard being adopted, but they still permit  
2 patentees to earn value, to earn revenue for  
3 their patents.

4       So rather than saying intellectual  
5 property has no value and therefore perhaps  
6 discouraging innovation, we pay but we pay only a  
7 reasonable royalty. If I'm right about this,  
8 then it seems to me agencies need to focus on  
9 abuse of the standard setting process rather than  
10 on attacking the process itself.

11       The standard setting organizations  
12 ought generally to be immune from antitrust  
13 scrutiny except in extreme cases. And the  
14 agencies ought to focus their attention on  
15 conduct by companies that undermines this  
16 procompetitive value of the standard setting  
17 process.

18       Finally it also seems to me that the  
19 variance that I've talked about between policies  
20 matters. Some standard setting organization  
21 rules are better than others with respect to  
22 antitrust liability.

1           In particular if you have a standard  
2   setting organization rule that compels licensing  
3   of patents that a member owns whether or not they  
4   disclose them, then the risk of strategic  
5   non-disclosure in order to capture an  
6   organization is substantially reduced.

7           There is not much reason to  
8   strategically non-disclose if I am committing  
9   myself to license a patent whether or not I  
10   disclose it. Furthermore, if the agencies are to  
11   go after strategic non-disclosure, it is  
12   important to look at the context of the  
13   particular organization.

14          What did that organization require?  
15   Some don't require disclosure at all. Some don't  
16   require any search so that lack of knowledge is a  
17   very real requirement.

18          And in deciding whether or not conduct  
19   was problematic under the antitrust laws, that  
20   variance, those differences from organization to  
21   organization it seems to me have to be taken into  
22   account. It's 9:30 and I'll stop.

1           GAIL LEVINE: Beautifully done.  
2   Thank you very much, Professor Lemley. A bit of  
3   background on the task he's done for us this  
4   morning. We asked Professor Lemley to cover an  
5   impossibly broad array of legal issues in an  
6   impossibly short amount of time and you managed  
7   to do it magnificently.

8           MARK LEMLEY: You can tell me I talk  
9   fast.

10          GAIL LEVINE: It's a good thing you  
11   can. Thank you very much. And I want to delve  
12   into the issues raised but take care of a couple  
13   of housekeeping matters first. Yes, we will have  
14   air conditioning soon. It's on its way. DOJ is  
15   already working on it right now.

16          The penalty for getting air  
17   conditioning though for our panelists is going  
18   to be we have to talk louder because it's very  
19   noisy. So when it comes we will try to speak  
20   even that much more loudly.

21          A couple of security concerns for  
22   the morning: If you want to leave the room this

1 morning and use the telephones or facilities in  
2 the back, someone will be in the back of the room  
3 to escort you and help you find your way back  
4 into the room as well.

5 And a couple of housekeeping matters  
6 for our panelists today: Tor and I and Bob are  
7 going to be throwing out questions for particular  
8 members and for the whole panel.

9 If you are interested in answering a  
10 question, turn your name tent like this, and  
11 we'll do our best to find your name tent turned  
12 up and then call on you.

13 When you ready to speak, go ahead and  
14 speak into the mike. Don't be alarmed if the  
15 mike isn't working immediately. It takes the AV  
16 guys in the back just a second to slide up your  
17 mike and make sure it's working. So just forge  
18 ahead. And now back to the substance of our  
19 panel.

20 As Professor Lemley noted, standard  
21 setting organizations can be a tremendous engine  
22 of efficiencies and terribly procompetitive. But



1 in certain circumstances when members' patented  
2 technology is incorporated into the standard that  
3 the standard setting organization chooses, this  
4 has occasionally led to questions about  
5 disclosure obligations.

6 Is this an antitrust problem? And  
7 if it is, is there something we should be doing  
8 about it? That's our question for the first part  
9 of the morning. The answers to those questions  
10 depend in part on the costs and the benefits of  
11 standard setting rules. And I thought we would  
12 open with the questions about that. Tor?

13 TOR WINSTON: Yes. Just to sort of  
14 lay some ground work here so we know what we're  
15 talking about in the economic environment, we'd  
16 like to just spend a little bit of time talking  
17 about why standard setting organizations have the  
18 disclosure rules and what sort of costs and  
19 benefits derive from those.

20 And so I think several people might  
21 have some comments on that. I'd like to throw  
22 out a question to Mike Antalics. Just based on

1 your experience if you can, just tell us a little  
2 more about why you have found disclosure rules  
3 are important.

4 And then maybe we can throw that out  
5 more broadly and talk about just under what  
6 conditions is disclosure going to be important.  
7 We've seen that not all standard setting  
8 organizations actually have disclosure  
9 requirements.

10 MICHAEL ANTALICS: Sure. Well, I  
11 guess probably the fundamental reason that drives  
12 most disclosure rules is that people want to make  
13 informed decisions. If they know that there is  
14 intellectual property that's out there, they can  
15 make an informed decision in the standard setting  
16 process.

17 Is it worth it to incorporate this  
18 into the process? It's really designed to avoid  
19 the hold-up situation where they create a  
20 standard without knowing that there is  
21 intellectual property incorporated into it.

22 The standard becomes used by everybody

1 in the industry and valuable, just by virtue of  
2 the standardization process perhaps more valuable  
3 even though the patent at issue may not have that  
4 intrinsic value. The value is that it has been  
5 incorporated into something that has been adopted  
6 by an entire industry.

7         So the idea behind disclosure is that  
8 if the participants and the standard setting body  
9 know up front what intellectual property is out  
10 there they can decide is it worth it; can we go  
11 to, you know, the next best choice.

12         And perhaps it gives them a little bit  
13 of leverage in bargaining for a license fee if  
14 they know up front maybe this is the best choice,  
15 but we can go to a second best choice if you're  
16 not going to be reasonable in terms of licensing.  
17 That's the perception by organizations that have  
18 disclosure rules.

19         Probably the types of areas where it  
20 might be useful, you'll probably get as many  
21 answers there as you have standard setting  
22 organizations. But one that comes to mind for

1 me, I think of it in terms of, you know, when  
2 there are likely to be multiple equally valuable  
3 ways of doing something.

4       You know, you're trying to figure out  
5 the two prongs on the plug. How far should they  
6 be apart? Half an inch apart or should it be  
7 five-eighths of an inch?

8       And it probably doesn't much matter,  
9 and companies can do it either way. You might as  
10 well pick the way that has zero cost, that isn't  
11 protected by intellectual property.

12       So I think that's the rationale behind  
13 organizations that require disclosure. It  
14 certainly has costs associated with it that we  
15 can get to later that have to be balanced out if  
16 you're going to have the type of disclosure  
17 policy that some organizations have at the  
18 extreme where they require early disclosures.

19       DENNIS YAO: This is a question as  
20 opposed to I guess an informed comment. One  
21 thing that I wondered about is whether the  
22 standard setting organizations will sometimes do

1 their own search rather than rely on the  
2 individual firms.

3 The reason I ask that is if the  
4 standard setting organization doesn't encompass  
5 all of the relevant firms, then it would be in  
6 their interest to find out whether or not there  
7 was some intellectual property that could present  
8 them problems.

9 Furthermore, this gets around  
10 partially the issue of a firm deciding to not  
11 tell because it has some strategic reason not to  
12 tell. So the first question I guess is: Do they  
13 do their own?

14 And second, if they don't, actually  
15 how big is the difference or the advantage of  
16 having the firm with the intellectual property do  
17 the search versus someone else, some, let's say,  
18 more objective, independent group. Thanks.

19 TOR WINSTON: Does somebody want to  
20 respond directly to that?

21 MARK LEMLEY: Of the organizations  
22 I studied, only one actually did its own search.

1 The rule was that the company tried to do a  
2 search and submit a search itself and the  
3 organization would do its own search.

4 Obviously if you want to cover pending  
5 applications rather than merely issued patents it  
6 won't be terribly helpful to have an outside firm  
7 do the search. The inside firm will do the  
8 search. They are the ones who define their own  
9 applications. The other factor is an unfortunate  
10 strategic consequence of the patent rules.

11 And that is it's hard to do a search  
12 that is limited to members of the standard  
13 setting organization who may have already  
14 committed to license on reasonable and  
15 non-discriminatory terms.

16 So if you do a patent search and you  
17 find patents for outsiders, you put yourself on  
18 notice that those patents exist, and you will be  
19 liable for willful infringement if it turns out  
20 you adopt a standard that uses those patents.

21 And so a number of companies actually  
22 try very hard to avoid doing patent searches at

1 all because they don't want to learn anything  
2 that might alarm them.

3 RICHARD RAPP: I had a reaction first  
4 to the question that was put to Mike and then to  
5 a phrase that I thought useful in your answer.

6 In considering the question of where  
7 disclosure matters, my sort of off-the-cuff sense  
8 is that where compatibility requirements are  
9 highest the stakes are highest in terms of the  
10 value of standard setting and the activities of  
11 standard setting organizations.

12 But then there was that felicitous  
13 phrase multiple equally valuable ways of solving  
14 the problem, which is I think a happy thing to  
15 focus on because it points to the circumstance  
16 where -- to an individual intellectual property  
17 holder where standard setting makes the most  
18 difference to the value of that patent, let us  
19 say.

20 The observation that I'm making is  
21 this. If you are the owner of one of the rights  
22 to one of those many equally valuable ways, then

1 it is the standard setting process that will  
2 reduce the substitution, possibly eliminate the  
3 substitutes, and elevate your technology to the  
4 most valuable.

5 If you are the possessor of some  
6 kind of blockbuster technology that has few  
7 substitutes in the marketplace, then the role of  
8 de jure standard setting is somewhat less than in  
9 the former circumstance.

10 PETER GRINDLEY: I'd like to make just  
11 a general point. Maybe this is the time to make  
12 it right at the beginning. The whole question  
13 of IP is not just a private gain between  
14 participating firms.

15 We should keep in mind that the  
16 purpose of the standards organizations is to  
17 provide standards that are going to be eventually  
18 used in products that are going to be accepted in  
19 the market.

20 So behind all this you have to  
21 think -- just keep in mind as we are discussing  
22 the private rent allocations, et cetera, that the



1 standard has to be accepted by the market.

2           So keep in mind that issues such as  
3 uncertainty, price of the products that are going  
4 to be using the standards, the uncertainty  
5 surrounding whether the standard is going to be  
6 accepted, should be in the back of our minds to  
7 think whether disclosure affects issues such as  
8 the uncertainty in the consumer's mind about  
9 whether the standard is actually going to be  
10 accepted or going to be successful.

11           I have many other comments about  
12 ex ante, ex post value of IP. Maybe we'll get to  
13 that later on.

14           AMY MARASCO: Thank you. I would just  
15 like to comment that one thing that I think makes  
16 this discussion a little more difficult is that  
17 the U.S. system is so diverse and so distributed.

18           And I think that there's nobody that  
19 would say informed decisions are not a good thing  
20 or that the abuse of the standard setting process  
21 is something that should occur. I think  
22 everybody agrees that that needs to be avoided

1 at all costs.

2           However, there are so many factors  
3 that go into what is an appropriate policy for  
4 any particular standard setting activity, because  
5 it's this great diversity within the U.S.  
6 standardization system that I think it's a  
7 strength.

8           It encourages innovation, enhances  
9 competition. It's market driven. And I think  
10 it's proved successful not only in the U.S.  
11 market but when U.S. interests go and compete in  
12 the international market. It's important to  
13 remember that as well because the U.S. is very  
14 intellectual property rich.

15           And very often other regions of the  
16 world seek to impose patent policies that would  
17 say, well, you have to disclose or you're going  
18 to lose your rights to either seek any royalties  
19 other than very minimal royalties.

20           And that puts the U.S. then at a  
21 disadvantage. So I think we need to be careful  
22 what we come out with as general principles in

1 the U.S. because we wouldn't want to disadvantage  
2 U.S. interests when they participate in the more  
3 international standard setting activities.

4 Basically when it comes down to  
5 determining what is an appropriate policy for any  
6 particular standard setting activity, you really  
7 have to look at a whole complex list of factors.

8 You have to look at the objective of  
9 the standard setting activity. Who are the  
10 participants? What is the process of the  
11 standard setting activity? Is it the formal  
12 process? Is it a smaller, more special interest  
13 group? What are the resources and abilities of  
14 the standard setting body itself?

15 Many standards developers don't have  
16 the resources or abilities to conduct patent  
17 searches, nor would they want to because they  
18 feel their job is to help the experts, the  
19 technical experts sitting at the table come up  
20 with the best technical solution to any  
21 particular standards issue or project and that  
22 they don't want to get involved in the commercial

1 issues or determining patents because that is a  
2 very legalistic question.

3 And also patent searches are imperfect  
4 and that leads to again more issues that can come  
5 up as part of the process. So clearly the ANSI  
6 position is the system not one size fits all.

7 And we think that's great. And we  
8 obviously think the ANSI system is great. But we  
9 recognize that there is a need for diversity and  
10 that the ANSI system is not the only way.

11 For each standards activity they have  
12 to look at the sector, the technological issues  
13 at stake, the participants, the effect on  
14 consumers, the ability of the standard setting  
15 body, and come out with what is the right policy  
16 for that particular activity.

17 The other thing to remember -- and  
18 this has already come up. The policy doesn't  
19 affect the non-participants.

20 So sometimes if you have a policy that  
21 might mandate disclosure and then you say, well,  
22 then the technical committee can work around

1 that, well if they work around it they could bump  
2 into the IP of somebody who is not at the table.

3         So again it's really hard to come up  
4 with something that's going to solve every  
5 particular problem. And one thing we have  
6 probably noticed is we don't see that there are  
7 a lot of problems out there.

8         If you look at the number of times  
9 that people have shouted patent abuse and you  
10 look at the total of the thousands and thousands  
11 of standard setting projects that are underway at  
12 any given time, we would say that all of the  
13 legal remedies that are out there are used when  
14 somebody allegedly does abuse the standard  
15 setting process.

16         And competitors certainly are not  
17 hesitant or shy to take somebody to court if they  
18 feel that something is being abused. And  
19 certainly also the enforcement agencies are  
20 there. And I think people are very aware  
21 of that.

22         And certainly that goes into the

1 consideration of a company in terms of how is  
2 it going to orchestrate its participation. So  
3 basically I think it's just a very complex issue  
4 and that there is no one size fits all solution.  
5 Thank you.

6 GAIL LEVINE: On that note I think  
7 we're starting to hear quite properly about  
8 some of the important costs to participating in  
9 standard setting organizations in particular as  
10 those standard setting activities cross national  
11 borders.

12 We started out this conversation  
13 talking about benefits and now costs are coming  
14 into the picture. On that note, Carl, can I ask  
15 you -- your name tent is already up, so I figure  
16 you are fair game.

17 CARL CARGILL: On second thought --

18 GAIL LEVINE: Can you start? Can you  
19 tell us about some of those costs? We have heard  
20 a lot, for example, about disclosure rules that  
21 require searches as well. What would that mean  
22 as a practical matter?

1           CARL CARGILL: There are several  
2 things. It spins off on that. Taking from a  
3 previous speaker or previous question the idea of  
4 knowing up front, there is nothing in most of the  
5 rules -- and I'd ask Mark to correct me if I'm  
6 wrong -- it says where you have to disclose. It  
7 says you should disclose.

8           And in some of the organizations I'm  
9 familiar with it's like 30 days before last call  
10 or before the standard is published.

11           And that's an interesting point  
12 because if you spend a year and a half creating a  
13 standard and at the very last or after starting  
14 implementation someone asserts in the group under  
15 the rules which are right now accepted, I've just  
16 wasted a year and a half's worth of work or the  
17 committee has wasted a year and a half's worth  
18 of work.

19           The first thing is a degree of  
20 uncertainty because you don't know when you have  
21 to call. That is one of the big stumbling blocks  
22 we have right now. So that's one of the first

1 costs is a lack of knowledge of exactly when and  
2 how you game the system to make that happen.

3 GAIL LEVINE: Let me ask you about  
4 that. With the year and a half that's been  
5 wasted, is that a year and a half that won't be  
6 repeated?

7 CARL CARGILL: It's non-recoverable.

8 GAIL LEVINE: Certainly it's  
9 non-recoverable. But once you bump into a  
10 patent, will the group go back to the drawing  
11 board and take another year and a half?

12 CARL CARGILL: It will attempt to  
13 see if it can find a way -- if it is essential  
14 technology, it will see if it can work around  
15 that essential technology. In other words, how  
16 clever can the engineers in the group be to  
17 design around that.

18 And if it's absolutely blocking  
19 essential technology, you then have a choice.  
20 You either don't make the standard or you accede  
21 to the -- I don't want to say blackmail, but  
22 that's sort of what I would assume it sort of



1 tends to be in that environment.

2           On the search role, in a high-tech  
3 industry we're all high-tech companies. When we  
4 do a search on a name, for a product name, we  
5 spend bazillions of dollars -- or lots of money I  
6 suppose is probably a more coherent phrase -- to  
7 find a name that we can in fact use or protect or  
8 something like that.

9           We all have big databases. We are all  
10 reasonably sophisticated. In the past, maybe not  
11 so. But it is not that hard to envision within  
12 the next few years most large companies having  
13 their own database of patents.

14           I mean it would be logical if in fact  
15 we believe the statement made by lawyers -- and  
16 I understand this audience is prejudiced that  
17 way -- that IP is absolutely essential to the  
18 corporation.

19           Why aren't we filing it in a place  
20 people can access it? I send engineers out right  
21 now. And the engineers, yeah, they will give  
22 stuff away. But it's not deliberate. Most of

1    them have a good idea of what they can and can't  
2    get away with.

3           But it's when they can't find out what  
4    they are doing that becomes a problem because  
5    there is no crosstalk. We file patents at Sun.  
6    We file patents, and we do this extensively. But  
7    we're also building our own databases.

8           It's something that you would expect a  
9    big company or competent company to do. As you  
10   get intellectual property, if it's corporate  
11   value, how do you value if you don't know that  
12   you have it for only a small group of people?  
13   How does an accounting firm value it?

14          So you have to have the database to  
15   know where it is. That's the other thing. And  
16   there's also within the standardization process,  
17   one of the benefits, cost/benefit analysis is, if  
18   you in fact have your technology accepted as a  
19   standard you have tremendous competitive  
20   advantage rendered by that because you are the  
21   first mover, you are the most competent.

22          And from a royalty free point of view

1 because I tend to advocate royalty free, if you  
2 in fact have your technology accepted and you're  
3 the best implementer of it, and then the ability  
4 to charge other people to use the technology  
5 that's yours and the best implementer, it seems  
6 to be slightly unfair over the long term.

7 And it seems to be a double whammy  
8 especially if there's a small competitor.  
9 Because if you're a small competitor and you're  
10 doing a business plan, the only gap you have is  
11 what's reasonable and non-discriminatory.

12 Imagine walking into a manager and  
13 saying this plan's complete except for this  
14 little space here that says reasonable and  
15 non-discriminatory from our biggest major  
16 competitor, and I have no idea what that is  
17 because we haven't negotiated because it's  
18 still blind.

19 It's hard to do a business plan with  
20 that much missing. So those are some of the  
21 issues. I mean cost issues, yeah. It costs us a  
22 lot to track. It costs us a lot to play.

1           The benefits from standards we  
2 believe -- although I don't believe there's any  
3 honest to God proof of this. The benefits from  
4 standards outweigh the costs. It's a matter  
5 of faith. And so far I've told this to my  
6 management, and that's why we've had a good  
7 career. But we assume that's true.

8           There is no proof of that that I've  
9 found in the last 20 years of looking for both  
10 academic and practical research. We assume  
11 there's a validity there. So costs are  
12 extensive. The benefits as far as we know  
13 right now outweigh those costs.

14          GAIL LEVINE: Let me see if I can get  
15 the view from Oracle on those same questions, the  
16 costs and benefits not of just standard setting  
17 organizations, but of the disclosure rules.

18          DONALD DEUTSCH: I think Mr. Antalics  
19 pointed out at the beginning that we are dealing  
20 with a reduction of risk for the participants in  
21 the process. I think Carl Cargill just pointed  
22 out that on the other side for the contributor of

1 the IP that there is a fear of substantial cost  
2 of having to determine whether to disclose.

3 But there is also a very substantial  
4 potential benefit that we get together in  
5 standards organizations for the purpose of  
6 defining things that hopefully will be accepted  
7 in the marketplace.

8 Because if they aren't, we have wasted  
9 our time. So if someone's IP is anointed by the  
10 standards process, then that IP has been greatly  
11 increased in value.

12 Now, on the cost side from the point  
13 of view of the participant there is a risk  
14 because, gee, as Carl points out, I'm not very  
15 enthusiastic about sending my engineers to the  
16 table to assist a competitor to greatly increase  
17 the value of their intellectual property without  
18 knowing what it's going to cost me in the end.

19 I think the new thing I can add to  
20 this equation is that -- well, two new things I'd  
21 like to put on the table. First of all, the  
22 concept of disclosure is not binding. You

1   disclose or you don't disclose.

2           I think you have to look at a  
3   continuum of participants in the standards  
4   process. At one end of the continuum is the  
5   direct primary contributor of intellectual  
6   property to a process. Next to that is a  
7   secondary contributor.

8           But possibly it wasn't, you know,  
9   their spec that started -- that they bring  
10   something else to the table. Still next is  
11   someone who is at the table who is an active  
12   discussant who doesn't actually bring anything  
13   that they own to the table.

14           Still further along the continuum is  
15   the passive member of the organization. There's  
16   many standards organizations that have multiple  
17   standardization activities. My organization, for  
18   instance, is a member of W3C. But we are not on  
19   all of the working groups of W3C.

20           We participate in ANSI technical  
21   committees but not all the technical committees.  
22   So there are members who are not at the table for

1 the specific activity.

2 And then finally as has been correctly  
3 pointed out by Amy Marasco, there's nothing you  
4 can do about the third-party risk of the person  
5 who's not even a member of the organization. So  
6 you have these extremes: non-member on one  
7 extreme, direct contributor of intellectual  
8 property on the other.

9 It is our belief that by limiting the  
10 scope of the disclosure burden to the contributor  
11 end of the continuum you reduce the cost of  
12 disclosure.

13 And consequently and I guess the  
14 second idea I'd like to put on the table, so  
15 now we have people evaluating the risk to  
16 participate. Do I want to be at the table? Do  
17 I want to help my competitor anoint their  
18 technology against a disclosure burden?

19 And frankly I absolutely agree with  
20 ANSI's position. We are dealing with very  
21 diverse organizations, very diverse objectives.  
22 And I think we have almost a classic marketplace

1 situation where you weigh the risk.

2           You weigh the cost. The organization  
3 sets its rules appropriately. And if they do it  
4 incorrectly, then the IP holders won't come to  
5 the table because of too much cost or the other  
6 people won't come to the table because of too  
7 much risk. So consequently that's the way I  
8 see it.

9           TOR WINSTON: I'd like to continue  
10 this discussion for a little while longer. I  
11 think you said it very nicely in terms of too  
12 much cost or too much risk. And so maybe other  
13 people can address those issues as well.

14           DAVID TEECE: Let me just say a few  
15 words here. I think this disclosure issue is one  
16 of those that the deeper you dig the more complex  
17 it gets. On its face disclosure sounds great.  
18 It sort of resonates with our accepted notions  
19 that consumers with more information make better  
20 choices.

21           And it resonates with our notion of  
22 labeling is good for consumer choice, et cetera,



1 et cetera. But then as you hear from the  
2 discussions on this panel, as you start to open  
3 up the issue a number of things of great  
4 complexity start to emerge.

5       Okay, what should you disclose?  
6 Who should disclose it, the company or the  
7 individual? Should you be disclosing patents  
8 before they are issued? Should there be a burden  
9 to disclose proprietary confidential information?  
10 These are extraordinary slippery issues, and  
11 there is no easy answer.

12       And in fact as a result you see that  
13 different standards organizations have different  
14 policies. I think there are some common themes  
15 though or some common economic points that I  
16 think can be made.

17       One is that perhaps the most important  
18 thing is there are many different types of  
19 disclosure rules that are acceptable. But  
20 clarity is of utmost importance. In other words,  
21 standard setting organizations should at least be  
22 clear what their rules are.

1           Then companies can decide whether they  
2   want to participate or whether they don't want to  
3   participate. So point one is you need clarity.  
4   Point two, the agencies in looking at these  
5   issues should recognize that in general standard  
6   setting organizations are populated by users and  
7   not by intellectual property owners.

8           So there's inherent bias. Bias may  
9   be the wrong word. But there is a greater  
10   representation of users than there are producers  
11   of IP because that is the nature of our economy.  
12   There are more users than producers.

13          So if you are trying to balance the  
14   interests of intellectual property owners and  
15   users, it is not going to come out of a majority  
16   vote of any standard setting organization.

17          Secondly, I think it's very important  
18   that we not get this problem out of perspective,  
19   at least from an economic point of view. The  
20   real costs associated with paying a license fee,  
21   or the private costs, are different from the  
22   social costs. The social costs are really quite

1 low. This is a transfer payment.

2       There's a lot of discussion about  
3 the fact that, gee, isn't it bad if you end up  
4 anointing a standard and someone has to pay a  
5 royalty. This is not a real resource that gets  
6 chewed up. It's a payment from one party to  
7 another.

8       And from an economic point of view the  
9 costs associated with that are a lot less than  
10 the costs associated with chewing up actual real  
11 resources. And in none of the debate around  
12 standard setting have I seen any mention of that.

13       And to me as an economist it says  
14 that, well, gee, let's keep this thing in  
15 perspective. The payment of a royalty is not the  
16 wasting of resources. There may be some small  
17 distortion there.

18       But it's not the wasting of resources  
19 as it would be, for instance, if a standard is  
20 not adopted when it could have been adopted and a  
21 market doesn't come into existence when it might  
22 otherwise have come into existence.

1           So as we go down the road of thinking  
2   about layering on, you know, enforcement on top  
3   of existing rules and so forth and burdening the  
4   process, we have to stand back and say what's the  
5   dynamic context here. The dynamic context is we  
6   need standards because we want markets to emerge  
7   so competition can emerge.

8           And my advice to the extent there  
9   is anyone listening here is take the dynamic  
10  viewpoint which is not how do we fix the problem  
11  down the road, but how do we make sure that in  
12  fact the standard process is not overburdened  
13  with antitrust layered on top of the rules that  
14  the standard setting organizations themselves  
15  may adopt.

16          So the bottom line here is one I think  
17  which favors clarity and which recognizes as  
18  everyone here I think is saying I think. There  
19  is not a one size fits all rule that can be  
20  created which unfortunately makes it hard and  
21  difficult for the agencies.

22          Because if it's not a once size fits

1 all world, then what do we do about antitrust?

2 The answer is probably little.

3 GAIL LEVINE: I wonder if we could  
4 take the comments from Professor Gellhorn and  
5 from Mike Antalics on the question of the costs  
6 and benefits of disclosure rules, with great  
7 apology to this side of the table; not because I  
8 want to close the discussion.

9 In fact I want to reopen it, but with  
10 a short sort of substantive break so that we can  
11 spend some time talking about the market power  
12 questions that underlie all of this stuff. After  
13 we talk about market power, we are going to come  
14 right back to this discussion with a slightly  
15 different tack. Go ahead.

16 ERNEST GELLHORN: I guess I bring  
17 a perspective of some skepticism and maybe  
18 hostility to the consensus standard approach that  
19 has generated such enthusiasm here. One  
20 statement, for example, that was made: Well,  
21 there are not lawsuits being brought here or at  
22 least very few; so it obviously must be working.

1           It reminds me of the story of a man  
2   in Central Park who was laying out a large  
3   contraption. Somebody comes by and says what  
4   are you doing? Well, it's my tiger gun. The  
5   response is, well, there are no tigers in Central  
6   Park, to which his answer is, see, it's working.

7           And I think that has some resonance  
8   here. The fact that there aren't a lot of  
9   lawsuits doesn't tell us an awful lot on its  
10   face. Likewise I would suggest in fact that  
11   there are underlying problems here that are  
12   significant.

13          And they go to the basic problem of  
14   standard setting and that in the intellectual  
15   property context the issue is just exacerbated  
16   because you have the problems of network effects  
17   and exclusionary power with the utilization of  
18   patents of course.

19          And that is, for example, if you  
20   travel in Europe, particularly Germany today  
21   where they're rebuilding their highway system to  
22   an incredible degree, you will see highway

1 drainage pipe is all plastic. That's all you'll  
2 see. You go to the United States; it's virtually  
3 all concrete.

4       Why? Because there's a standard. And  
5 the effort to introduce polyethylene pipe in the  
6 United States has been very retarded because of  
7 in my view voluntary consensus standards. The  
8 same thing is true, for example, of plastic  
9 conduit versus steel conduit for wiring.

10       Here you had -- also the unions wanted  
11 to preserve their work opportunities. But what  
12 happens in my view often under the voluntary  
13 consensus standard process is that the system is  
14 itself set up to be gamed. It requires usually  
15 not just a majority but a supermajority.

16       Industry members participate. They  
17 have votes. They may not have more than half the  
18 votes. But if it takes a supermajority, you can  
19 block it. They frequently are members of  
20 committees, indeed chairmen of the committees.

21       And those who control the agenda as a  
22 former law school dean I can assure you control

1 the process. And I think those are questions  
2 that need to be looked at.

3 I mean Bob Bork's book on the  
4 antitrust paradox points out that predation  
5 through government process in his chapter 18 is  
6 perhaps one of the most efficient and effective  
7 ones.

8 And of course the fact that the  
9 standards are then frequently incorporated into  
10 government codes raises in my view the additional  
11 stumbling block of antitrust enforcement. So I'm  
12 not as skeptical, for example, David, as you are  
13 of the use of antitrust here though it too can be  
14 abused.

15 MICHAEL ANTALICS: On the issue of  
16 cost I just wanted to note that. I mean we do  
17 have potential costs on multiple levels here. I  
18 mean it's not just the cost of doing a patent  
19 search and it's not even just one patent search.

20 It may be multiple patent searches  
21 throughout the standardization process that would  
22 have to be undertaken as technology -- as the



1 standard evolves and as the patent or the patent  
2 application is evolving.

3       You have that significant cost. You  
4 also have the cost which David mentioned. It's  
5 going to slow down the process. So you could  
6 have good products that are delayed coming to  
7 market if this whole process is taking longer.

8       And then finally there's yet another  
9 cost which is that if you have mandatory  
10 disclosure there are going to be some companies  
11 that don't want to take that risk. And they're  
12 just not going to participate.

13       So whatever they might have had to  
14 contribute to the process is going to be lost.  
15 And in that regard I'm just wondering in response  
16 to some of Ernie's questions. And we can talk  
17 about this a little bit more as we go.

18       At the end of the day aren't we going  
19 to conclude that among standard organizations  
20 there's a bit of a market based test right now?  
21 You have some that require disclosure for  
22 companies that think that that's important.

1           It seems that most companies or most  
2 standards organizations don't require disclosure.  
3 And for some reason they seem to be, you know,  
4 the dominant technique of standard setting, the  
5 dominant format today.

6           And I wonder if people don't just  
7 choose the standard setting organization that  
8 best suits their needs and if we don't get the  
9 optimal result through competition among  
10 standardization procedures.

11           GAIL LEVINE: I want to hold that very  
12 interesting and provocative thought -- and I know  
13 you have a response to it -- so that we can talk  
14 about those market power questions. But we're  
15 going to come right back to it after we talk  
16 about market power for a moment.

17           TOR WINSTON: Because we are kind of  
18 talking about this in the antitrust context, we  
19 want to talk a little bit about market power.  
20 And I wanted to get an operational definition for  
21 that so that we are all talking about the same  
22 thing up here when we say market power.

1           So I propose that we use the  
2   definition that's in the IP guidelines which  
3   is the ability to profitably maintain prices  
4   above or output below competitive levels for  
5   a significant period of time.

6           So just so it's -- we have sort of a  
7   base to work from there. And I think there are a  
8   lot of interesting issues here. One thing that  
9   a lot of people have talked about is does the  
10   standard setting organization create market  
11   power.

12          And so if I could just open it up to  
13   really anybody who would like to respond to an  
14   issue like that in terms of -- and maybe when a  
15   standard may convey market power.

16          MARK LEMLEY: It seems to me there are  
17   three cases. In one set of cases an intellectual  
18   property right confers market power because there  
19   is no effective substitute for that intellectual  
20   property right.

21          In that case it doesn't seem to me  
22   what the standard setting organization does

1 matters very much. I have an intellectual  
2 property right. I can assert it. You can't  
3 get around it. The adoption of a standard or  
4 non-adoption of a standard doesn't affect the  
5 market.

6       On the opposite extreme you have cases  
7 in which there are substitutes for standards,  
8 right, so that my group may adopt a standard but  
9 there are plenty of other substitutes, and those  
10 substitutes compete.

11       In those cases even influencing  
12 adoption of a standard by a particular group  
13 doesn't strike me as problematic from an  
14 antitrust perspective because it's unlikely to  
15 raise costs.

16       It's the middle group of cases in  
17 which an intellectual property right that I have  
18 would ordinarily compete with other substitutes  
19 but in which I can influence the market by  
20 securing its adoption in a standard setting  
21 organization.

22       When I actually get more power by

1 virtue of agreement in a standard setting  
2 organization than I otherwise would get from the  
3 intellectual property right that antitrust role  
4 might want to be concerned.

5         So for me the question is not so much  
6 whether the intellectual property right confers  
7 market power as is whether the standard  
8 setting -- excuse me -- the standard setting  
9 organization confers market power that the IP  
10 right would not have otherwise given.

11         RICHARD RAPP: I think that's exactly  
12 right and just want to consider just for a  
13 moment another way in which market power can be  
14 exercised inside the standard setting situation,  
15 and that has to do with collusive potential of  
16 standard setting agencies.

17         Since that has to some degree been  
18 discussed also, rather than say what's already  
19 been said I'll just play out the kind of  
20 variation on that theme and say that it is --  
21 that the licensee cartel aspect of standard  
22 setting doesn't always necessarily arise from a

1 subversion of due process in the way that you  
2 described it during your opening remarks, Mark.

3       It can happen differently. It can  
4 happen as a result of what David called the  
5 preponderance of users.

6       The case that comes to mind or the  
7 instance speaking -- still speaking generally  
8 that comes to mind that I think is interesting is  
9 one where you have integrated research based  
10 manufacturers in a standard setting body and you  
11 introduce a firm that is a non-manufacturer that  
12 lives by licensing.

13       And the question is if you have a  
14 bunch of cross-licensing manufacturers who decide  
15 that basically they don't like to pay royalties  
16 because they don't have to pay them to one  
17 another, by what means can the standard setting  
18 process subvert the kind of competition that we  
19 would like to see, because it's so powerful a  
20 force in the American economy, that is to say,  
21 unintegrated producers of research interjecting  
22 themselves into a situation like that. It's a

1 variation on the theme of market power through  
2 collusion.

3         PETER GRINDLEY: If I can try and make  
4 a contribution on this, essentially what's the  
5 value of the power of the IP ex ante before the  
6 standard is decided and ex post?

7         I agree with what Mark has said, and  
8 I think we are probably all in agreement that if  
9 the IP essentially is dealing with a feature  
10 that's almost going to be decided arbitrarily by  
11 the standard, then ex ante before the standard is  
12 decided that IP may have no particular strength.

13         But once the standard has been decided  
14 and adopted and all the various sunk investments  
15 are made in following that standard to make  
16 products and so on that are going to be actually  
17 produced, then it becomes more much difficult to  
18 avoid that particular patent, and it may have  
19 more power in the technology market.

20         I guess we're talking about a  
21 technology market that reads on a particular  
22 standard. That seems fairly clear.

1           Just one point which I think Mark has  
2 essentially said already by talking about the  
3 range of different types of IP; if the IP is  
4 necessary for the standard but whatever standard  
5 you choose it doesn't really make any  
6 difference -- it's a basic patent that has to be  
7 used whatever standard is adopted -- then it  
8 really doesn't seem to be a concern of the  
9 standard organization whether that imposes any  
10 greater market power.

11           It presumably doesn't. You have to  
12 look at the details a bit to just get into that.  
13 But as a general remark, it doesn't. Maybe the  
14 contribution -- maybe I'm adding something by  
15 saying it's a question of when the IP is  
16 asserted.

17           And I think the theme that I probably  
18 will try to keep coming back to is we have to  
19 think about standards that are adopted in the  
20 market. The idea is not merely to set a standard  
21 that's going to produce a nice product.

22           That product eventually has to be



1 accepted in the marketplace. And that's going to  
2 take some time. A lot of investment has to be  
3 made to do that.

4 If the standard is adopted, there  
5 may be a certain time period before all the  
6 various -- basically before that standard is  
7 established in the market, installed bases are  
8 built up, it's supported by a number of  
9 manufacturers.

10 Coming back to the point about when  
11 the IP is asserted, if it's asserted before the  
12 standard is issued, then there's time to change  
13 that decision if that's appropriate.

14 If it's asserted several years after  
15 the standard has been fully established in the  
16 market, then it's very difficult to change that.  
17 So ex ante, ex post doesn't just happen on the  
18 day the standard is printed on the website.

19 TOR WINSTON: I think you brought up  
20 some interesting points that led to another  
21 question I had that maybe we can talk about in  
22 conjunction with this.

1           And that is: What's out there that  
2   would discipline market power that is generated  
3   in a standard setting process? It's something  
4   other people can think about as well in their  
5   responses.

6           DENNIS YAO: One thing that I wanted  
7   to mention was to think about not standard  
8   setting organizations that are sort of general  
9   but standard setting that goes on within a small  
10   coalition.

11           It seems that you can get standards --  
12   obviously you can get coalitions competing to try  
13   to push their particular standard. And there's a  
14   continuum of that from these small groups maybe  
15   of only a few firms to a fairly large network of  
16   firms pushing a particular standard to a general  
17   standard setting organization.

18           And you can ask whether or not you  
19   have any problems with a small group basically  
20   creating their own process, being non-exclusive,  
21   creating side deals in order to push their  
22   particular idea of where the technology should be

1 and their particular IP including things like  
2 trade secrets, their particular advantages with  
3 respect to complementary assets. Is that bad?  
4 Well, maybe it's not if there's some competition.

5 So I think we have to keep those kinds  
6 of things as a context for the discussion we're  
7 having which seems to be more about a general  
8 standard setting organization.

9 ERNEST GELLHORN: Two things. It  
10 seems to me that enhanced market power ought to  
11 be noted. First of all, many standards are  
12 design based, indeed perhaps most rather than  
13 performance based.

14 And the adoption of design based  
15 standards telling them exactly what they must use  
16 and precisely how they use it rather than the  
17 results or compatibility that need to be sought,  
18 it has it seems to be a substantial blocking  
19 effect that ought to be considered.

20 The second is that standards not  
21 infrequently, indeed often are designed initially  
22 to be adopted by government either for

1 purchasing -- and government is the largest  
2 purchaser in the economy -- as well as part  
3 of codes.

4       And once you put it as part of a code,  
5 of course it is much more difficult then to  
6 eliminate it or to change it. So the issue of  
7 incumbency is multiplied substantially as a  
8 consequence.

9       CARL CARGILL: Just quickly in talking  
10 about the panoply of standards organizations from  
11 large to small, the interesting thing that I  
12 think must be noted is that within the IT  
13 industry the major vendors don't select one form  
14 of organization.

15       A majority -- speaking for Sun at this  
16 point in time, a majority of Sun's activities are  
17 now in consortia and what I think Andy Updegrove  
18 has called joint commercial ventures. I call it  
19 alliances. It's fast, very fast paced, very  
20 quick. But we play in all of them. We hedge all  
21 of our bets.

22       There is not an organization in the

1 IT industry I believe that doesn't belong to  
2 at least 30, 40, or 50 consortia, standards  
3 organizations, alliances. We play against  
4 ourselves sometimes.

5 But that's because we can't afford to  
6 lose a standards bet. They have tremendous power  
7 if they're accepted. And we'll push some of them  
8 to the exclusion of others. And it makes us look  
9 silly at times.

10 But one of the things my lawyers told  
11 me before I came was always push back to the  
12 basics on this thing. The whole intent of this  
13 is interoperability. And how you achieve that  
14 interoperability is what you're looking for in a  
15 standards organization.

16 We've been talking about disclosure.  
17 Disclosure rules aren't necessary if everyone who  
18 joins a standards organization agrees to license,  
19 contractually agrees to license. I mean your  
20 disclosure rules then become somewhat bland  
21 because then you're only worried about what the  
22 conditions of RAND are.

1           You're not worried about being held  
2 up. If everyone agrees to royalty free, you  
3 don't worry about disclosure at all because you  
4 know that it's royalty free. So disclosure is a  
5 method of achieving a risk reduction goal. It's  
6 not the end of this purpose.

7           The purpose is interoperability.  
8 Driving back to the basic, you're looking for a  
9 way to get interoperability. Disclosure is the  
10 method. So we're talking about methods rather  
11 than fundamental goals here.

12           And it might be worthwhile to look  
13 back at the fundamental goals of why we do  
14 standards which is that interoperability,  
15 interchange capability which I think is the  
16 competition aspect.

17           TOR WINSTON: Go ahead, Don.

18           DONALD DEUTSCH: Before I say this let  
19 me qualify this so my lawyers don't faint. I'm  
20 not a lawyer, and I really don't have much to say  
21 about antitrust which is the general topic you're  
22 on. However, I've heard a couple things I'd like

1 to put on the table.

2 Let me qualify it further by saying I  
3 represent an independent software vendor and as  
4 such we develop standards that basically define  
5 interfaces. And those interfaces, we want to  
6 define them for the reasons that Carl just said,  
7 to provide interoperability.

8 As such defining interface standards  
9 do not do what Professor Gellhorn had talked  
10 about, and that is define what's inside the box,  
11 how it is that you provide the goes-intos and the  
12 goes-out-ofs of that piece of software.

13 So it occurred to me as I listened to  
14 the discussion that we are talking about this  
15 elephant called standards and we all have got  
16 hold of a different part and it really means  
17 different things.

18 Now let me put on the table what I --  
19 what caused me to raise my hand here. I believe  
20 that historically in the information technology  
21 area at least that the standards forum has not  
22 been a good place for a competitor to go to try

1 to achieve sustainable competitive advantage.

2       There is example after example whereby  
3 somebody goes into a standards forum. They are  
4 there with the purpose of trying to anoint their  
5 technology. There are alternative technologies.  
6 Other competitors do not want to give that  
7 competitor the upper hand.

8       So what do they do? They take  
9 their ball to another court and you end up with  
10 multiple standards. And frankly now back to the  
11 economist we have a real cost because the whole  
12 industry loses.

13       But it's happened repeatedly in the  
14 software area whereby the attempt to achieve  
15 competitive advantage is almost always foiled by  
16 competitors who basically go make sure that there  
17 isn't just one standard. Thanks.

18       GAIL LEVINE: Can we give you the last  
19 word on market power -- on these market power  
20 issues? And then we'd like to return to the  
21 questions that were raised just a few minutes ago  
22 down at this end of the table about whether there



1 is such a thing as an ideal disclosure rule.

2           MARK LEMLEY: Well, this is just  
3 very brief. It's perhaps an unfortunate irony.  
4 Professor Gellhorn is right that some of the  
5 greatest risks of anticompetitive results come  
6 precisely in those cases in which the standard is  
7 designed to be adopted by or pushed through the  
8 government either through purchasing or through  
9 code adoption.

10           And it's ironic I think that those are  
11 the hardest to get at with antitrust law because  
12 of the Noerr Pennington immunity that a standards  
13 organization that is petitioning the government  
14 to adopt its standard even for anticompetitive  
15 reasons gets greater leeway than a purely private  
16 organization that's simply trying to participate  
17 in the market.

18           GAIL LEVINE: Let's see if we can  
19 return to this questions we were raising before.  
20 David Teece touched on some of these questions,  
21 and Mike Antalics raised it at the very end. Is  
22 there such a thing as an ideal disclosure rule?

1 Is variety the best thing?  
2 Should we seek to have a variety of  
3 disclosure rules that work best for different  
4 industries, for different standard setting  
5 organizations? Should we let the market decide?  
6 You had alluded to that solution at the very end.  
7 And I know that Carl Cargill had a response to  
8 that that he wanted to raise.  
9 I think the question was, you know,  
10 will standard setting organizations in  
11 competition with each other work to provide the  
12 optimal disclosure rule, to the extent there is  
13 such a thing?  
14 CARL CARGILL: I would love to say  
15 yes. I would love to say that standard setting  
16 organizations do in fact learn. Again going back  
17 to discussions I've had with many people,  
18 standards organizations either change or die  
19 fundamentally.  
20 Standardization has grown  
21 tremendously over the last 20 years, the use of  
22 standardization within the IT industry. I should

1 point that out. Consortia tend to either stay  
2 important or they tend to go away.

3 As I say, the IT industry with  
4 which I'm familiar has a tendency to use  
5 consortia because we've moved away from other  
6 organizations. We use them for a host of  
7 reasons.

8 But a lot of the reasons are that we  
9 can focus specifically, precisely on a specific  
10 area. And agreeing with Amy here, there are all  
11 sorts of varieties of disclosure rules.

12 And Mark brought this up with its  
13 disclosure and the IPR rules. He also brought up  
14 the point that he doesn't think there's any  
15 thought that goes into them. And I would think  
16 it's substantially less than that.

17 I think in many cases when you put an  
18 organization together it's like I don't know;  
19 we'll just see what's out there. And we'll just  
20 like glom it in because nobody pays attention.  
21 You have to remember that a lot of consortia are  
22 done by marketing people.

1           So you have marketing people and  
2 engineers cooperating to do legal stuff, and this  
3 is where we have a lot of fun. And later on we  
4 have the lawyers look at them. And you'll notice  
5 a lot of lawyers who do this, twitch a lot. So  
6 this is the other thing.

7           But IPR has always been sort of an  
8 afterthought because normally what you see in a  
9 standards organization are -- you're supposed to  
10 be there to work together.

11          And the minute the impact of the IPR  
12 rules like Robert's Rules of Order -- Robert's  
13 Rules of Order control unruly meetings. If you  
14 used them in a standards organization, you'll  
15 probably fail because it's hard to get consensus  
16 when using Robert's Rules of Order.

17          The idea is that it's people of  
18 like-mindedness who are there to do something,  
19 to accomplish something. So will we ever have  
20 a singularity of rules? No. But I would like  
21 to have a singularity of guidelines. In other  
22 words, how can in fact we tell when we're being

1 gamed intellectually?

2 I mean you're right. Engineers do  
3 these things. They don't know when they're being  
4 gamed legally. And the worst thing you ever want  
5 to have is engineers and lawyers arguing about  
6 law because W3C has had this for the last  
7 two-and-a-half years.

8 And they finally figured out that it's  
9 probably best to have lawyers do the IPR policy  
10 and let engineers do the technology. But it's  
11 taken a long time to get there.

12 So singularity, no. Commonality of  
13 rules and a host of underlying expectations I  
14 would love to see. We don't have those now. We  
15 need those. And that then allows a commonality  
16 to derive.

17 DENNIS YAO: I'd like to think about  
18 disclosure in the broader context again. We can  
19 think about disclosure as if you don't disclose  
20 then we might end up with the wrong decision. So  
21 this is a problem in terms of the standard.

22 Then you can ask what other things

1 ought to be disclosed which could also lead to  
2 we've come to the wrong decision. They could  
3 include things like trade secrets.

4       They could include things like -- I  
5 don't know -- your plans for future business, and  
6 a lot of things that we don't expect to have  
7 discussed. And yet they could make a lot of  
8 difference in terms of what's the ideal standard  
9 to choose.

10       So when we pick out intellectual  
11 property patents, we're picking out one thing.  
12 It's an identifiable thing. It's a thing that  
13 you can use for a hold-up.

14       But in terms of are we getting the  
15 information you need to make the right choice,  
16 there's a whole bunch of other things that  
17 perhaps we're leaving out. And it's important  
18 to sort of recognize that.

19       AMY MARASCO: Thanks. I guess just  
20 reacting, Carl, to what you said, I'm not sure  
21 that I see a difference between having a one  
22 size fits all rule versus one size fits all

1 guidelines. I still think it's pushing towards a  
2 one size fits all solution.

3         And I'm not sure that that's going to  
4 work in the diversity of standards organizations  
5 that we have in the U.S. For example, many  
6 standard setting bodies do not mandate  
7 disclosure. They encourage it.

8         Certainly that's a benefit for the  
9 participants and for the resulting standard. But  
10 one of the reasons that they don't is in their  
11 particular context -- and again it's a very  
12 context specific kind of analysis that has to  
13 be made.

14         In those contexts there's too great a  
15 risk that companies that do have large patent  
16 portfolios are going to say I'm not going to risk  
17 a failure to disclose, that someone's going to  
18 allege that I negligently or whatever failed to  
19 disclose that we had a patent.

20         Some companies have tens of thousands  
21 of patents. They have literally hundreds of very  
22 good technical people participating on technical

1 committees and hundreds of standard setting  
2 opportunities.

3       These standards are evolving as I  
4 think Mike pointed out, that there's when do you  
5 do a patent search; when do you try to make the  
6 disclosure. Trying to say that we can have a  
7 guidance as to when all these things are going to  
8 happen in a perfect world is just not going to be  
9 useful in the U.S. standard setting context.

10       So I think that it's not to say  
11 that it's perfect in all standard setting  
12 organizations. But I also think there's an  
13 awareness being raised.

14       And I think the Department of Justice  
15 and the Federal Trade Commission holding these  
16 hearings, looking at all these issues is a good  
17 thing. So thank you.

18       CARL CARGILL: I take what you're  
19 saying and I can sympathize with it. But I'm  
20 not looking -- as a producer I'm not so much  
21 interested in the standard setting organization  
22 as the result of that organization.



1           And the results I am getting are  
2    conflicted results. Because of as Mark pointed  
3    out a lack of clarity, I cannot put a system  
4    together for multiple organizations.

5           I cannot take a system that has the  
6    WAP forum, ETSI, ISO because the IPR rules are so  
7    complex that if I string a system together and  
8    put it out I break. I've got lifetime employment  
9    for international patent lawyers.

10          And your statement that it's a U.S.  
11   system is fine. I'm a multinational company.  
12   The GSM does not come from the United States. It  
13   comes from ETSI, and that's French rules. ISO  
14   comes from Switzerland.

15          That's the Canton of Geneva rules  
16   under Swiss law, and they default to that. Those  
17   are the problems I have. Guidelines may not  
18   be -- may lead to something, but it's better than  
19   what I've got right now which is random acts of  
20   unkindness.

21          I'm having trouble putting a complex,  
22   interoperable, intergalactic system together

1 under those rules right now because if I have an  
2 engineer come back with a solution I have to vet  
3 it through legal.

4 It's like what rules applied when you  
5 brought that in and what rules apply to this one.  
6 And look. They don't match. And if you're a  
7 small company you're doomed. I'm big enough to  
8 get lawyers to help me do this because we've got  
9 lots of lawyers.

10 But if you're a small company, you're  
11 dead because you can't sue because you're not big  
12 enough, and you're just dead. And that's the  
13 death of innovation, and that's what we can't  
14 afford to live with.

15 GAIL LEVINE: Mike?

16 MICHAEL ANTALICS: I was just thinking  
17 that in antitrust law we usually reserve black  
18 and white rules for areas where we have a lot of  
19 certainty. I mean we have a per se rule against  
20 naked price fixing because almost all the time  
21 that's bad for consumers.

22 Maybe not all the time. But we're

1 pretty sure that most of the time it is. I'm not  
2 sure with standard setting organizations we can  
3 say most of the time any particular method  
4 is bad.

5 In fact I think all of them do serve  
6 different purposes by virtue of the fact that  
7 different companies have adopted different  
8 standard setting procedures.

9 And then I guess the final point would  
10 be, Carl, there's a little bit of you better be  
11 careful what you wish for because if we're going  
12 to look for some sort of a general rule, at least  
13 the dominant -- I don't know what the numbers are  
14 precisely. But my guess is ANSI type standard  
15 setting is the dominant system that's out there.

16 CARL CARGILL: No, not in IT.

17 MICHAEL ANTALICS: I think that makes  
18 a point though. If you want to do a consortium  
19 type of standard setting, that may work for a  
20 particular industry, and you can kind of set the  
21 rules of the game as you get into each  
22 organization.

1           But I'm not sure you can lay down  
2 rules or guidelines that are going to be useful  
3 that would apply to everybody. I just don't  
4 know.

5           RICHARD RAPP: Just on the subject  
6 of a single optimal kind of solution to this  
7 complex problem, two things that I will mention  
8 that we all know. One is that there is great  
9 variation among markets and industries in the  
10 degree of intellectual property dependence and  
11 the degree to which IP matters.

12           There are also obviously great  
13 differences among markets and industries in the  
14 degree to which compatibility matters. And I'm  
15 inclined to ask in those two things what more do  
16 you need to know to know that a one size fits all  
17 rule won't work.

18           The other observation that I would  
19 make -- and perhaps I'll put it in the form of a  
20 question to those who are in the trenches. When  
21 we talk about finding the optimal patent rule,  
22 how much progress would it be toward the solution

1 to your problems if we just had the clarity of  
2 which David spoke at the outset?

3 In other words, if we didn't go all  
4 the way to a uniform rule, but just whatever  
5 standard setting circumstance you walked into you  
6 knew exactly where you stood with respect to  
7 disclosure and the rules of licensure, wouldn't  
8 that take you a long way?

9 DAVID TEECE: Yeah. I think that  
10 there are only three rules I can think of. The  
11 first one is that there shouldn't be only one  
12 rule. I think there seems to be a fair amount of  
13 resonance around that one.

14 The second rule should be whatever  
15 rules an organization has, they should be clear.  
16 And the third one is that they should be  
17 structured so that lawyers are not part of  
18 the game.

19 Because as was pointed out before, if  
20 you burden this process such that the technical  
21 and marketing people who are there trying to  
22 create standards and move markets forward, if

1 they have to bring the lawyers along you know  
2 what that means.

3       It means that it's going to slow the  
4 process. It's going to make it more deliberate.  
5 And we have to recognize that trade-off. It's  
6 not all bad that these consortia and so forth are  
7 driven by the marketing people and the technical  
8 people. In fact that may be close to optimal.

9       The minute we start adding on the  
10 baggage associated with lawyers and rules,  
11 et cetera, et cetera, people are then going to be  
12 careful. They're going to be deliberate. There  
13 may be some benefit in that in the total  
14 equation, but you have to look at the big  
15 picture.

16       The big picture is the companies  
17 are out there competing in markets that move  
18 extremely quickly where product life cycles are  
19 not years but are months, where the failure to  
20 reach a standard means that there could be  
21 billions of dollars of consumer benefit that  
22 are recognized.

1           So whatever we do here, we have to  
2 keep in mind the dynamic context of evolving  
3 markets and the importance of standards for  
4 creating markets.

5           And I think if somehow or other as the  
6 agencies begin to think about this they can think  
7 about the dynamics or the benefits of the  
8 competition not yet created, rather than sort  
9 of focusing on the ex post side of things.

10          PETER GRINDLEY: I want to go back  
11 about two comments. Just a general one is that  
12 we see a variety of disclosure rules, IP policy.  
13 We just don't see differences between  
14 organizations.

15          You also see them evolving over time,  
16 and they will evolve within a given organization  
17 which may change its IP policy depending on what  
18 its members think is important.

19          As Donald has said, companies have  
20 lots of options out there, alternatives for all  
21 but maybe the largest standard organizations.  
22 There are many committees that they can go to if

1 they are not happy with the one that they're  
2 dealing with.

3 And that puts a lot of pressure on the  
4 organization itself to review its trade-off in a  
5 sense between participation, the breadth of its  
6 membership, and its IP policy, the happiness of  
7 its members with the IP policy. So they are  
8 responsive and so we do an evolution there.

9 So maybe the great variety that Mark  
10 pointed out in the beginning is evolutionary or  
11 maybe it's just lack of direction. I'm not sure.  
12 I would say it's probably evolutionary.

13 GAIL LEVINE: Don and then Mark.

14 DONALD DEUTSCH: I'd like to respond  
15 to Richard Rapp. I believe I characterized  
16 myself as someone in the trenches. I've been  
17 involved with technical standards for over  
18 25 years.

19 And the way I understood the question  
20 is sort of a specific one size fits all rule; is  
21 there some more general statement about the  
22 openness and clarity of the process that would



1 assist.

2           And I'm not willing to go quite  
3 that far. But I can say that the criteria we  
4 use in evaluating the forum is that we want to  
5 participate in forums that are open to all  
6 interested parties.

7           I think the characteristic of a lot of  
8 places where we are working today and others are,  
9 that is not true. And Oracle is the second  
10 largest software company in the world today.

11           But when the standard for the sequel  
12 language which is the interface to our core  
13 product was being established in the mid-1980s,  
14 Oracle was at the table. And at the time you  
15 would characterize us as a garage.

16           One of the characteristics of the de  
17 jure standards process under which this is done  
18 is that all interested parties, large and small,  
19 regardless of technical philosophy are at the  
20 table.

21           We think even though now maybe we're  
22 considered the big guy, that that's one reason

1 the United States continues to be the dominant  
2 force in the information technology industry,  
3 because we do include the entrepreneurial,  
4 creative part of our industry.

5       The second thing that we look for in  
6 a forum is what I've termed in my contribution  
7 transparency. We want to know going in what is  
8 the objective of the organization; what are the  
9 rules under which the organization operates; who  
10 will be the other participants and when I'm  
11 participating who they will be.

12       And some of you in the audience with  
13 hold of a different part of this elephant may say  
14 what's he talking about. And I can tell you that  
15 today I have engineers participating in consortia  
16 standards processes where they know that someone  
17 from another company is at the table but they  
18 don't know who that engineer is.

19       So we do have some rules that we use  
20 in evaluating organizations. Unfortunately  
21 sometimes we still make the decision to go to the  
22 table despite the fact that those rules aren't

1 quite there.

2           MARK LEMLEY: I just want to bring us  
3 back to the rule of the agencies. I take it that  
4 the agencies are unlikely to adopt a rule that  
5 says all standard setting organizations must have  
6 the following disclosure rules and no other.

7           When we are talking about by a one  
8 size fits all rule as a government mandated rule,  
9 that doesn't seem to me to be a particularly  
10 plausible solution.

11           What it does seem to me that the  
12 agencies can do is take account of the fact that  
13 different standard setting organization IP rules  
14 have different disclosure consequences, and some  
15 are better able to be gamed than others.

16           So Carl said earlier -- and I want to  
17 endorse it -- in a world in which you are  
18 compelled to license all your patents royalty  
19 free there is no need for a disclosure rule.  
20 Yeah, you can disclose it to us, but we don't  
21 really care because we're getting it for free  
22 anyway. I know that's an extreme case.

1           Most organizations don't have a such a  
2 policy. If the rule is everybody has to license  
3 on non-discriminatory terms, we'll want to know,  
4 right, because you want to know how many patents  
5 you're getting yourself into if you adopt a  
6 particular standard.

7           But it's not as critical that you know  
8 because you know at the end of the day you're  
9 going to have a licensing process and some set of  
10 rules to figure it out. You're not going to be  
11 held up by injunctive relief.

12          On the other hand, I take it if the  
13 organization has a no disclosure rule and it  
14 basically says do whatever you want, then the  
15 agency ought not particularly to be concerned  
16 about intervening because as long as people know  
17 that that's the rule they've committed themselves  
18 to that.

19          It's in the situation in which we  
20 require disclosure but we don't require licensing  
21 that disclosure becomes so important that the  
22 gaming of the system becomes particularly

1 problematic because presumably the only benefit  
2 that the organization gets is effective  
3 disclosure of the information.

4       So it seems to me the agencies can  
5 concentrate their efforts in the subset of  
6 circumstances in which strategic non-disclosure  
7 is likely to be a problem.

8       And that's going to be driven by what  
9 the rules are. Now, that's not a mandate; you  
10 must use one rule or another. But it is a  
11 context specific response to the diversity that  
12 we've talked about.

13       CARL CARGILL: Just a comment. One of  
14 the points that Mark raised is on the second one  
15 where you have the reasonable and  
16 non-discriminatory.

17       It's a question that has puzzled  
18 people. When we were in one of the committees  
19 and someone brought this up, the response was  
20 well, we don't know what it is but we'll know it  
21 when we see it from the group of lawyers that  
22 were there. Hard to do a business plan on that.

1           So one of the things I would like  
2 to focus on is a more precise definition of  
3 reasonable and non-discriminatory because  
4 again if I'm doing a plan and I have a standard  
5 that has ten or fifteen reasonable and  
6 non-discriminatory licensing fees, I could very  
7 well be out of business because my product will  
8 never be competitive because I have 30 percent of  
9 it immediately disappearing into licensing fees.

10           So when everyone says RAND it sounds  
11 nice. But you're looking at profit margins.  
12 Every time I pay a royalty, every time I give  
13 a royalty away I am incurring a cost.

14           And that giving of money away to  
15 someone else has -- in other words, I'm paying  
16 them to implement their technology, as Don said,  
17 to make my competitor successful.

18           There is something -- while we  
19 understand that's the cost of doing business, in  
20 the standards organization especially when the  
21 standard has sort of a lock on the market, you're  
22 driving to a very unusual position where I'm

1 paying you so you can lock the market against  
2 me so that I can continue to pay you.

3         And it's one of those very -- I'm not  
4 quite sure how to deal with it. But I know that  
5 when something like the web comes up and you have  
6 the web developers who first of all mistrust  
7 lawyers and they see a reasonable and  
8 non-discriminatory, every alarm bell in  
9 their little, tiny brains goes off.

10         And that's why you have open source  
11 because open source is the ultimate response  
12 to this dilemma on the part of developers and  
13 software which is, no, IPR doesn't count. It's  
14 we have to develop for the good of humanity.  
15 That's a very extreme position and I don't  
16 espouse that, by the way.

17         GAIL LEVINE: Let me assure you that  
18 those licensing issues are going to be the topic  
19 of the entire afternoon's discussion. If you  
20 want to respond to that --

21         AMY MARASCO: Well, just very quickly  
22 I would say that again you're balancing so many

1 different interests here. You're balancing the  
2 rights of and interests of people who want to  
3 compete in manufacturing products that meet the  
4 standards, balancing the rights of consumers and  
5 what's going to be good for them is this  
6 technology and the standard going to be a good  
7 solution, and the rights of the IP holders.

8       And I think that it's important to  
9 realize that they do have rights under the patent  
10 laws and that whenever groups seem to look like  
11 they are trying to take those away without the IP  
12 holder's consent, you know, there's a need to  
13 look at that closely and the fact that they do --  
14 they put in the money for research and  
15 development, and they are entitled to get  
16 something for the sharing of their technology.

17       But that may in turn benefit all of us  
18 because then it will become standardized in a  
19 product. That's not always the right solution.  
20 But when it is the right solution, I don't think  
21 we have to every time we see RAND say, oh, my  
22 goodness, this is going to be a terrible problem.



1 Again it's a very case-by-case analysis. Thank  
2 you.

3 GAIL LEVINE: I think -- let's see if  
4 we can spend the next sort of ten minutes before  
5 we take our 11:00 break dealing with one last  
6 disclosure issue question. And that is the  
7 question of legal redress and legal remedies.

8 To the extent that a failure to  
9 disclose ever poses or does pose an antitrust  
10 question, are there effective means for those  
11 anticompetitive consequences to be addressed?

12 Are those means to be found within the  
13 antitrust laws? Are there non-antitrust remedies  
14 that can do the job? And what does it mean when  
15 the state is getting involved in those standard  
16 setting organizations? And how does that impact  
17 the remedies available? Is there anybody who  
18 wants to jump in on that right away? Mike?

19 MICHAEL ANTALICS: Sure. Well, back  
20 when I was at the Commission we did the Dell case  
21 which I should say really was based largely on  
22 some principles arising out of the equitable

1 estoppel doctrine where we thought it was a good  
2 starting point for us because here you have  
3 courts sitting in equity saying this is not fair.

4         So we thought we were on the right  
5 side if we based it on that. But the equitable  
6 estoppel doctrine just requires some misleading  
7 conduct that's relied on, and then there's injury  
8 as a result of that.

9         It doesn't even have to be intentional  
10 misleading acts, just a misleading act. In our  
11 case, in the Dell case, we certainly had a  
12 misleading act because the association required  
13 the companies to certify whether or not they had  
14 an intellectual property.

15         And Dell in fact certified twice  
16 that they did not. We also had the fact that  
17 everybody then used the standard. The standard  
18 became wildly successful back at the 486  
19 generation of computers, to date myself a  
20 little bit.

21         And in fact I think it was people got  
22 locked into the standard just because it was a

1 standard as opposed to, you know, the value of  
2 the patent itself. And then there was injury  
3 there.

4       You know, Dell was demanding royalty  
5 payments which, as Carl said, these are  
6 incremental costs that -- you know, marginal  
7 costs that are going to get passed on through to  
8 the consumer ultimately.

9       Somebody's going to pay for it.  
10 If everybody pays an extra dollar for their  
11 computer, you know, that's an enormous cost to  
12 the consumer ultimately. So you do have  
13 certainly potential antitrust remedies.

14       I think in our case we saw a market  
15 effect. And I think in a monopolization case you  
16 would want to go into a market analysis and make  
17 sure that there is some market effect.

18       But as far as individual companies are  
19 concerned, even absent the antitrust angle there  
20 is the doctrine of equitable estoppel that's  
21 available to companies if they are injured as a  
22 result of relying on another company's

1 misrepresentation in the standard setting  
2 process.

3       And there are some cases as well that  
4 would extend that out so that the misleading  
5 conduct doesn't even have to be an affirmative  
6 misrepresentation. If you have a knowing silence  
7 in order to mislead the standard setting body,  
8 that may also be sufficient under the equitable  
9 estoppel doctrine.

10       Mark, I know -- although I haven't  
11 read all of your paper, I did see you -- you  
12 talked about quite a few various remedies that  
13 are available to people. And maybe you can  
14 elaborate on some of them.

15       MARK LEMLEY: Well, yeah. I take it  
16 that -- I would and I hope you would all start  
17 with as a first principle the idea that antitrust  
18 ought to be a remedy of last resort, that if this  
19 is in fact a problem that can be solved under  
20 doctrines of contract law or under doctrines of  
21 intellectual property law, or maybe even under,  
22 you know, common law torts like fraud, then

1 there's less need for certainly the agencies to  
2 intervene because private litigation can take  
3 care of the problem.

4 I'm a little less sanguine about the  
5 effectiveness of some of those remedies. There  
6 were at least questions. In contract law I think  
7 the problem's pretty clear.

8 There are remedies you would  
9 ordinarily get for breach of a non-disclosure  
10 contract which are not going to put the  
11 marketplace back in the position that it really  
12 should have been in had the information been  
13 properly disclosed.

14 In the intellectual property context  
15 equitable estoppel is a much stronger doctrine.  
16 And to the extent that equitable estoppel will  
17 effectively constrain somebody from strategic  
18 non-disclosure by preventing them from enforcing  
19 their patent rights in that case, then it seems  
20 to me antitrust agencies ought to say, great,  
21 nothing we have to worry about here. Right?

22 Now, there are some limits on that.

1 Let me identify two in particular. One is the  
2 extent to which these doctrines can be applied to  
3 non-members of the standard -- or by non-members  
4 of the standard setting organization.

5 So the Court periodically talks about  
6 reliance interests. And one of the things I have  
7 to demonstrate for this estoppel to work is that  
8 I relied on this statement or misleading silence.

9 And it may be more difficult for a  
10 non-member of the organization to say that they  
11 relied on non-disclosure within the organization  
12 when in fact they may have not known about it.  
13 So they may not be able to effectively use the  
14 equitable estoppel defense.

15 The other issue which is just an  
16 unresolved issue that intellectual property is  
17 going to have to deal with has to do with  
18 licensing so that if I commit to license on  
19 reasonable and non-discriminatory terms and then  
20 I don't, what's the remedy?

21 One view would say, well, you've just  
22 breached my contract and so I can sue you for

1 patent infringement. You might have a breach of  
2 contract action against me. If that's right,  
3 then it's not -- you're not going to make the  
4 potential licensees whole.

5       Alternatively you might say what I've  
6 done is impliedly licensed, right, that by  
7 signing on to this commitment I've impliedly  
8 licensed my IP. And the difference is one of  
9 remedy. Am going to get injunctive relief? Am I  
10 going to get treble damages for willfulness and  
11 attorneys' fees and so forth?

12       Or am I going to be able to sue  
13 for what I should get under a reasonable and  
14 non-discriminatory royalty in circumstances where  
15 we can't come to an agreement?

16       So I guess, you know, what I would say  
17 ultimately is I think there are a number of other  
18 legal options, and antitrust ought to be a rule  
19 of last resort although it's not so clear when  
20 you walk through the doctrines that they're going  
21 to cover all the situations.

22       ERNEST GELLHORN: Building on the last

1 two comments, it seems to me one thing we also  
2 ought to note is that in the intellectual  
3 property area which is somewhat unique is speed  
4 and duration of any particular technology in  
5 contrast to other industries. And antitrust  
6 moves slowly. So as a consequence it's  
7 necessarily very confined.

8 That seems to me to go back to our  
9 prior discussion in that there is a special role  
10 here for guidance by the agencies in terms of,  
11 one, factors that ought to be considered,  
12 openness, transparency that was suggested, and  
13 also factors that ought to be looked at with some  
14 great care because of risks that they create.

15 Then the second area I would point  
16 to is that the antitrust rules here are somewhat  
17 different. In contrast to most areas of  
18 antitrust, we have the Supreme Court  
19 acknowledging that a merits based decision  
20 is essentially immune.

21 And also implicitly acknowledging and  
22 being able to determine whether it's merit based



1 is very difficult because there's essentially  
2 always going to be an argument I would say for  
3 the other side or maybe other two or three sides.

4       So the focus of the Supreme Court in  
5 Allied Tube as Mark mentioned was process. And  
6 yet that has not been an area that's been  
7 explored and I think ought to be explored and  
8 could be explored at least in terms again of how  
9 the process could be set so it's more difficult  
10 rather than easier to game.

11       And then finally there is I think  
12 the misinterpretation of the Supreme Court's  
13 application of the Noerr doctrine to extend a  
14 causation break so that whenever government  
15 adopts a standard unless one can show independent  
16 harm from the action prior to the government's  
17 adoption of the standard that there is going to  
18 be either no antitrust liability or damages in  
19 terms of private relief.

20       I think that goes way too broadly and  
21 as a consequence is an area that I would urge  
22 the Commission or the agency -- the Justice

1 Department to attack first by rule as a  
2 possibility or, second, by action.

3 GAIL LEVINE: Can we give you the last  
4 word before we take our 11:00 break? And then  
5 we'll come back after that break to talk about  
6 challenges to selections of a standard.

7 DENNIS YAO: Since the last word is a  
8 question, that could be a problem. I wanted to  
9 remark about -- we were focusing on the legal  
10 remedies.

11 But one thing that we should also keep  
12 in mind is since we're trying to I guess deter  
13 this fraudulent behavior is what in some sense  
14 the reputation and business costs are for Dell or  
15 for some other company that engages in this  
16 behavior.

17 They could be sufficiently large as to  
18 be the primary deterrent as opposed to whatever  
19 legal remedies we come up with.

20 And so the question was really to  
21 throw it to the business people to ask them about  
22 the effect on Dell, for example, of this bad

1 publicity regarding their I guess alleged  
2 fraudulent use of the standard setting process.

3 GAIL LEVINE: Well, that's worth  
4 waiting for. We'll indulge. Any answers?

5 CARL CARGILL: Let's wait. No.  
6 Don and I can talk. I don't think -- Dell was  
7 shocked by it. I think the largest shock was to  
8 the entire community because soon everyone in  
9 standards was talking about the FTC versus Dell.  
10 We didn't know what it meant, but we all knew  
11 that we should be concerned.

12 So there was a behavior change brought  
13 about by that. And we now tell all of our  
14 engineers that, you know, you've got this thing;  
15 you've got to disclose if you know about it, so  
16 don't learn about the IP we hold because that  
17 makes you dangerous.

18 There's all sorts of interesting  
19 things there. But as far as Dell being damaged  
20 in standards organizations, I don't really see  
21 it. Because it was hit so hard, I mean it was  
22 smacked upside the head pretty well. That's

1 an old marketing phrase that I slip into  
2 occasionally.

3       Because they are under such restraint,  
4 people trust them. It's when you get by with a  
5 game and no one catches you, that's when you  
6 start to see this kind of penalty applied.  
7 Someone brought up in the -- it was Stan Besen  
8 who said it's game theory.

9       You fool people two or three times and  
10 the next time you go back to play with them they  
11 don't like you. And that hurts more than the  
12 actual remedy. Remedy, it's over and done with.  
13 They've been hit.

14       People know and it's very clear that  
15 things have happened. It's when you game the  
16 system and you hurt people several times in a  
17 row. People start to mistrust you after that.  
18 And that's what you're looking for here.

19       But again that's just among the  
20 standards people who play. It's like, yeah, you  
21 got me last time; I'll remember that. And the  
22 next time you may be allied with them and have to

1 support them no matter what. So it's not really  
2 deep penalties.

3 I mean we play too quickly, too fast.  
4 If you get legal remedies, everyone knows and  
5 that's done with that because you have to be  
6 clean after that. Everybody knows that.

7 GAIL LEVINE: All right. With that  
8 maybe we can take a break and meet back here at  
9 11:15. Thanks.

10 (Recess.)

11 GAIL LEVINE: This is probably a good  
12 time to get started again. The good news is that  
13 we have our air conditioning back on again. So  
14 it's going to get much more comfortable in here  
15 very soon.

16 The penalty is we warned you before  
17 that we're going to have to ask people to speak a  
18 little bit louder than they did before, also to  
19 speak directly into their microphones. I was the  
20 worst offender on this one. But you all please  
21 do as I now am doing. Grab the mike, take it to  
22 you, and really speak right into it.

1           The issue we're now going to talk  
2   about for the next 30 minutes or so will be the  
3   question of challenges to the selection of a  
4   standard in the standard setting organization.

5           In a paper submitted for this  
6   workshop, Professor Gellhorn posed the argument  
7   that incumbents can use a standard setting  
8   organization to exclude newcomers and to block  
9   the innovation of rivals. It's an area that  
10  others on our panel have written on before.

11          And I wanted to use those thoughts as  
12  a springboard for our discussion today of whether  
13  this kind of conduct can indeed raise antitrust  
14  concerns, the efficiencies afforded when  
15  incumbents play key roles in standard setting  
16  organizations, and what if anything we should be  
17  doing about it. Professor Gellhorn, do you want  
18  to start us off?

19          ERNEST GELLHORN: A couple of  
20  comments. First, I guess in reaction to what  
21  we've already talked about I've learned a couple  
22  of astonishing things today.

1           The one that we ended the last session  
2   on that I really did love was that I can now tell  
3   clients that they ought to engage in antitrust  
4   violations because it's going to improve their  
5   reputation. And I thought that was just great.  
6   And what's interesting of course is that market  
7   reality does affect things.

8           There was a point that I hadn't  
9   thought about before. But I do think in any case  
10   that Mike Antalics now can go sell himself to  
11   Dell as being their greatest beneficiary.

12          The second thing is -- and this goes  
13   back to Mark's paper, and by the time I'm done  
14   I'll have probably disagreed with everybody.  
15   And that is we start out I thought from the  
16   presumption that when competitors get into the  
17   same room together as Adam Smith said, little  
18   good can come out of it.

19          And what we're suggesting here at  
20   least -- I've been listening to the legal rules  
21   coming out as no, no. Presumptively what  
22   standard setting associations do by bringing

1 competitors together and getting them to focus on  
2 merits is a good thing.

3 Well, I agree that theoretically a  
4 standard setting session can be a good thing. It  
5 can improve the efficiency. But I don't think  
6 presumptively, depending on the process, that it  
7 will or is likely to.

8 Now, this is an area where in contrast  
9 to usual antitrust cases we don't look at  
10 results, basically the Supreme Court said, unless  
11 you've got egregious conduct, because Courts and  
12 agencies really are not in a position to evaluate  
13 whether or not it was a good or a bad standard.

14 Whereas as lawyers we're always  
15 comfortable with evaluating process. And as  
16 basically an administrative law lawyer I'm  
17 confident that we can give you great guidance.  
18 Actually there's a little skepticism on that.

19 But I do think here that the critical  
20 thing to do is to look at the process, and is the  
21 process one whereby -- and I think the rules  
22 ought to be fairly simple.



1           Those who participate who have an  
2 interest in what's being done can either control  
3 the agenda, a point I noted earlier which is very  
4 powerful, or determine or influence the outcome.

5           And that one of the areas we haven't  
6 talked about that ought to be a focus of a  
7 standards guideline is a conflict of interest  
8 policy that is utilized by the standard setting  
9 organization because once you get into signing  
10 that I have no conflict of interest, people start  
11 to worry and think about it.

12          The other two points I would make is  
13 that there are I think backward antitrust rules  
14 that we have developed here, I think by Circuit  
15 Courts, not the Supreme Court. And the first is  
16 the Joor Manufacturing case, Sessions Tank Liners  
17 versus Joor Manufacturing cited in my paper in  
18 the Ninth Circuit.

19          I'm confident and comfortable speaking  
20 about the case simply because the author of the  
21 opinion was a coauthor with me on an article many  
22 years ago. And so this dispute between us

1 started many years ago.

2 And that is basically what Judge Canby  
3 for the Ninth Circuit said was that where the  
4 standard is being applied by government we can't  
5 deconstruct what is the cause of the harm.

6 And as a consequence even if the  
7 standard were put together in that case by  
8 relatively egregious conduct or by what otherwise  
9 looks to be cover agreement or self-interests  
10 joining with each other, you can't find liability  
11 or certainly no damages because of the fact that  
12 it was government conduct which caused the injury  
13 through the adoption of a code or enforcement or  
14 application of it.

15 And therefore Noerr Pennington comes  
16 into play. I would urge a different rule.  
17 And that is that Noerr Pennington be read as  
18 applicable to the petitioning process when a  
19 standard setting organization asks for government  
20 approval.

21 But if the liability -- or excuse me.  
22 If the conduct which is harmful is caused by the

1 misuse of the process, then liability ought to be  
2 possibly attached.

3 Now, that goes back to my initial  
4 point, and that is some skepticism about the  
5 desirability of all the standards we have  
6 created. My basic concern is the advantage of  
7 incumbency.

8 And that's why perhaps in the  
9 intellectual property area where things move so  
10 swiftly it is less of a concern. But I'm not yet  
11 persuaded.

12 DENNIS YAO: I'd like to follow up a  
13 little bit those comments by Professor Gellhorn  
14 concerning agenda setting. It's very clear in  
15 the political economy literature that decision  
16 making processes are easy to manipulate.

17 And we've seen that in -- it's been  
18 shown in experiments. It's been shown through  
19 various case histories and other such things.

20 I think in this particular case it  
21 might be even worse because there is a desire to  
22 increase -- because speed and quickness of

1 getting the standard is of the essence, the  
2 decision process may in fact get a little more  
3 truncated than usual.

4       If that's true, then perhaps the range  
5 for agenda setting increases. And so I think  
6 that's something that we should be very concerned  
7 about. Now, there was -- a lot of this depends  
8 upon thinking about the participants as being in  
9 self-interest mode.

10       Now, one could argue that a lot of the  
11 participants are not fully in self-interest mode,  
12 and that would change the nature of the decision  
13 making process. And I don't know what way to  
14 think about this.

15       If we have engineers who are  
16 interested in the best technical outcomes as  
17 opposed to someone who is worried about the  
18 firm's best business interest, then maybe we'll  
19 get some different kinds of results.

20       But that's an empirical question.  
21 There was some comment as well that if you're  
22 playing in a particular standard setting

1 organization that -- and someone's trying to pull  
2 a fast one on you, that you can somehow stop  
3 them. And if that's true, that suggests that the  
4 process won't be manipulated quite as badly.

5 But if you stop them, you end up with  
6 nothing. So it slows everything down. And I  
7 think that's a problem. And if you stop them,  
8 maybe the way you stop them is by leaving and  
9 starting your own organization.

10 And that creates a competition of  
11 standards which we should probably talk a little  
12 bit about. I did want to mention one thing about  
13 smaller standard setting organizations.

14 Again we've been talking about sort  
15 of the larger groups. I can imagine again a  
16 coalition of firms banding together to try to  
17 push a particular standard. And in that  
18 particular coalition democratic decision making  
19 processing and the like may be irrelevant.

20 They may basically follow some central  
21 leader who has some hierarchical kind of decision  
22 making relationship. They can do lots of trades

1 within the group that you wouldn't normally do in  
2 a normal standard setting organization.

3 And perhaps one can think about these  
4 smaller organizations as the exit option for  
5 disgruntled coalitions of people playing in the  
6 bigger standard setting group. And I would like  
7 I guess that people sort of think about that  
8 possibility as well as thinking about the big  
9 standards.

10 GAIL LEVINE: Thank you.

11 AMY MARASCO: First with regard to the  
12 consideration of having a conflict of interest  
13 policy for standard setting organizations or  
14 projects, I think it would be difficult to  
15 imagine a standard setting process where you  
16 didn't have people who were interested in the  
17 outcome being the ones to help formulate what is  
18 the successful solution.

19 Those are very often the people who  
20 have the necessary expertise and the resources to  
21 go and to work on these standards because they do  
22 have an interest in this.

1           And I think that basically certainly  
2   the ANSI process encourages people who have an  
3   interest in the standards to participate in the  
4   standards development process.

5           Under our process though we believe  
6   there are a lot of due process safeguards with  
7   how the standard is formulated and finalized.  
8   Basically we require a balance of interests. And  
9   those interests are dependent on the nature of  
10   the standard.

11           But certainly it's not just all  
12   competing manufacturers. There are other  
13   interests at the table. And a consensus has to  
14   be reached. And then there are -- there's a  
15   public review period.

16           And there's also an appeals process.  
17   So there are safeguards built into the process so  
18   that it's very difficult for someone to game the  
19   system without it being certainly noticed by  
20   everybody and an alarm can be raised and it can  
21   be brought to the proper attention.

22           So under the ANSI process we find that

1 it's very difficult for the standard setting  
2 process to be gamed without the safeguards that  
3 are built in causing the issue to rise to the  
4 surface.

5 Now, I know some people say, well, the  
6 ANSI process maybe sometimes isn't as fast as  
7 consortia so we cut down on some of the due  
8 process requirements in order to speed up the  
9 process. And that can be true some of the time.  
10 But again it's not true all of the time.

11 I think that really what drives the  
12 length of time that it takes a standard to be  
13 developed is not only the procedural requirements  
14 but also just the degree to which the standard is  
15 controversial or whether a consensus can be  
16 arrived on -- arrived at easily.

17 Very often what builds time into the  
18 standard setting process is the fact that the  
19 group can't come to a consensus on what the  
20 outcome should be.

21 CARL CARGILL: Several points if I can  
22 bring it up now if it's safe. With respect to



1 what Dennis said, the concept of the small  
2 organization as the ultimate refuge, that's open  
3 source.

4 What you described was open source:  
5 a single individual or small cadre taking input  
6 from a large number of disaffected people to  
7 create a viable alternative to standards. That's  
8 an open source methodology.

9 And that's exactly what -- if you look  
10 at all of the open source activities from Samba  
11 to Linux, they have the guru who takes inputs  
12 from a vast community but makes the decision.  
13 It's -- so what you are looking at is a rejection  
14 of the formal process in exchange for speed and  
15 various other things.

16 Agreeing with Amy, which happens, the  
17 benefit the consortia have is that consortia have  
18 marketing. So they announce they are going to  
19 achieve a result and they may take the same  
20 amount of time, but at least they have announced  
21 up front there's a result so there's market  
22 expectation of result.

1           Secondly, consortia tend to be like  
2 minded people. So, yes, by definition there is a  
3 conflict of interest in consortia based activity  
4 because we're there to get something done, to  
5 standardize something for the industry.

6           And so a conflict of interest, yes,  
7 we would all have to sign it and say we're all  
8 conflicted. But that's why we were there. So  
9 consortia can act more quickly because everyone's  
10 there to accomplish the same thing generally.

11           It's a self-selecting audience. But  
12 rather than look at the input of the process,  
13 what I'd like to focus on just for a moment is  
14 the output of the process.

15           If the standards focus is to provide  
16 competition in the market by letting multiple  
17 parties create it and use it, you don't much care  
18 how many people play when it's created as long as  
19 there are multiple people who can implement it on  
20 the outside.

21           If one person creates a standard  
22 that's implemented by a thousand other people in

1 competition with one another, you succeeded. If  
2 a thousand people make a standard implemented by  
3 one person, you failed.

4 One has thorough, complete openness,  
5 and due process. It's just it has failed as a  
6 standard. So rather than look at the process,  
7 look at the outcome of the process because that's  
8 what's important for the industry.

9 The process may be completely open,  
10 equitable, and ultimately unfair. So what you're  
11 looking for is what does a process produce. And  
12 from a business point of view that's what I'm  
13 interested in, is what do you get from the  
14 process. Is the process fair so that multiple  
15 people can play? Do you increase competition?

16 ERNEST GELLHORN: Well, I take an  
17 awful lot. I accept that amendment. Basically  
18 we're starting from different assumptions it  
19 seems to me. When you're talking consortia, I  
20 assume you're talking generally in situations in  
21 which market power may not be present or is  
22 unlikely to be present.

1           If on the other hand market power is  
2 present, then it seems to me you have an inherent  
3 difficult antitrust question because you're  
4 having the competitors with market power getting  
5 together to set the standard.

6           And you put I think or we ought to be  
7 putting on you a heavy burden to demonstrate that  
8 it is in fact merits based rather than a cartel  
9 of like minded groups getting together to be in a  
10 position to exclude outsiders.

11          To the extent to which you adopt  
12 techniques such as open source I think you're  
13 absolutely right. You reduce the risks and  
14 potential for abuse. On the other hand, I guess  
15 I take a different position than Amy does in  
16 terms of the questions of conflict and balance of  
17 interest.

18          I think the consensus process itself  
19 to the extent to which it gives interested  
20 parties a position to veto results either by  
21 supermajority requirements or, second, by the  
22 actual vote of the participants or, third, by the

1 ability to submit a negative and send the process  
2 back to start all over again, are all process  
3 points at which difficult issues can arise.

4 I'm not going to say they are  
5 automatically bad. That's not my point. It is  
6 rather that's when you need to start being very  
7 careful.

8 And why do I say that? Because I  
9 start out from the assumption that the standard  
10 setting operation, whether it's consortia or a  
11 standard setting group, is potentially one that  
12 runs into conflict with antitrust.

13 PETER GRINDLEY: I'd like to say  
14 something about process as well as the rules of  
15 IP. I'm glad that we're now talking about how  
16 the process that goes on in standard setting  
17 institutions can work with the IP policy and  
18 perhaps disadvantage some IP owners at the --  
19 for the benefit of others.

20 The case I've got in mind is the ETSI  
21 case, and I don't want to go into too many great  
22 details about this.

1           But just to bring out some basic  
2 points about how -- two points; how the voting --  
3 essentially the voting rights can affect the  
4 intellectual policy -- intellectual property  
5 positions of the members, and how that either  
6 benefits one group to the disbenefit of another  
7 or can imply the effective exclusion of one party  
8 versus another.

9           The case in point is essentially about  
10 Qualcomm that controlled the technology for basic  
11 CDMA mobile phone technology and whether it was  
12 able to have a voice in ETSI which was setting  
13 essentially the European standards for third  
14 generation mobile.

15          Now, the voting rights -- and I should  
16 say that this is obviously a very important  
17 strategic -- of great strategic importance to  
18 all the participants whether it's uses or  
19 manufacturers, because the ETSI is -- I guess it  
20 can be described -- it is actually a consortium  
21 but it has some potential power to set standards  
22 throughout Europe if they're not de facto

1 adopted.

2       So it was very effective with GSM, the  
3 original TDMA standard. But there was a question  
4 about to what extent any mandatory power would be  
5 used with third generation.

6       Now, the point about potential  
7 exclusion in the process is that the voting  
8 procedure at ETSI is based on share of European  
9 market. So it obviously is biased or benefits  
10 the European incumbents or firms that are very  
11 involved in the European market.

12       Votes are assigned according to market  
13 share. If I can remember some of the details, it  
14 can apply -- subsidiaries can also be members  
15 depending on their market share and also have  
16 voting rights.

17       So a company that's operating in  
18 Europe can pretty much -- or companies that are  
19 operating in Europe can pretty much dominate  
20 which standard is chosen or the voting in the  
21 individual committees.

22       In addition I guess there's another

1 aspect to this and it gets -- as we get into it,  
2 it gets -- it seems to bring in so many points  
3 about process that it's -- I wish I had had time  
4 to put together a proper presentation on this.

5 But it also affects the voting rights  
6 of users versus manufacturers. The users, the  
7 national PTTs had block voting rights or had  
8 preassigned voting rights so that the combination  
9 of the national PTTs and the essentially European  
10 incumbents would dominate almost any vote  
11 procedure.

12 This is not to say that they didn't  
13 have disagreements between themselves about which  
14 was the right standard. Qualcomm is almost the  
15 exact opposite. But it's obviously very  
16 interested in what's going on in the standards  
17 situation in Europe for something as important as  
18 third generation.

19 But it has almost no sales in Europe.  
20 Of the literally hundreds of votes -- and I think  
21 it's maybe 400 votes. Maybe I got that number  
22 wrong -- but that are totally involved in the



1 voting, Qualcomm had two.

2           It has one vote just for being a  
3 member, no market share, so it has very little  
4 share. The fact was that Qualcomm was unable to  
5 effectively influence the standard. So that's  
6 the main story.

7           An interesting corollary of that is  
8 if it takes part then the intellectual property  
9 rules of ETSI were such that it was obliged to  
10 license on reasonable terms.

11           One interesting point about this  
12 is that the IP, the technology that Qualcomm  
13 controls is so basic to CDMA that it was  
14 effectively impossible to avoid this by  
15 definition of a standard.

16           So although attempts were actually  
17 made to define a standard that didn't read on the  
18 Qualcomm patents, it turned out to be pretty much  
19 impossible.

20           So Qualcomm is there in a situation or  
21 a situation can arise where a firm can either  
22 choose to not participate or if it does

1 participate it runs the risk that its very  
2 valuable IP, which may in fact not even be  
3 affected by which choice of standard, can be  
4 involved in an enforced licensing situation.

5 Now, the alternative I guess facing  
6 Qualcomm is, well, why not just not participate?  
7 Why not go to one of the other standards groups  
8 that may be available?

9 And we've talked about the fact that  
10 there are many standard setting organizations  
11 that are alternative and that if one doesn't  
12 fulfill the needs of a particular company then  
13 the market can speak and it can go to another  
14 group.

15 Well, if the -- I think the proviso  
16 with that is that if the standards organization  
17 is so large that it effectively covers the bulk  
18 of the industry or it's so established, then  
19 there may not be anywhere else to go.

20 So the only choice is to self-exclude.  
21 That was not very attractive in this case, the  
22 standard being so important to Qualcomm's future

1 and to the future of 3G standards worldwide that  
2 self-exclusion was not an option.

3         So it then was forced to assert its  
4 patent rights and eventually conclude licensing  
5 agreements with other members, essentially with  
6 Ericsson. So in a sense this is a cautionary  
7 tale, but it just pinpoints I think the way that  
8 process can be very important and the kind of  
9 problems that can lead to.

10         MARK LEMLEY: I agree with the process  
11 concerns and so on. So I won't say anything  
12 about that. I do disagree with the -- it seems  
13 to be with respect to the substance that where  
14 you start out depends on whether you think  
15 standardization is pro- or anticompetitive.

16         Now, I take it that that is an  
17 industry specific and maybe even within industry  
18 specific determination.

19         Certainly if somebody came -- if all  
20 of the people in the fashion industry came  
21 together and they said, you know, we have too  
22 much variation in fashion and we've really got to

1 standardize this, the agencies properly should  
2 look askance at that because they would say  
3 what's the substantive benefit of cooperation  
4 here, of having a single standard, relative to  
5 competition. And the answer is it's not much.

6 By contrast in the industries we have  
7 primarily been talking about, in the computer and  
8 the telecommunications, in the semiconductor  
9 industries, where most of these organizations  
10 seem to congregate, the value of standardization  
11 it seems to me is a lot greater, right, because  
12 of the value of interoperability as Carl  
13 mentioned earlier.

14 And indeed in many of these  
15 circumstances because of network effects you will  
16 have standardization whether you choose to do it  
17 or not.

18 And the only question is whether you  
19 have standardization within a group that allows  
20 different companies to compete to make products  
21 that embody the standard, or whether you have  
22 de facto standardization, right?

1           And the operating system market is an  
2 excellent example of that. You don't have to --  
3 you don't have to create a standard setting  
4 organization. But you should not assume in all  
5 of these industries that you will get competition  
6 as the alternative.

7           So it seems to me that rather than a  
8 presumption standard setting organizations are  
9 always good, standard setting organizations are  
10 always bad, the real question is what's the  
11 economic value of standards itself and what's the  
12 likelihood that the industry would standardize  
13 with or without it.

14           And I guess I start from the  
15 presumption that in most of the industries in  
16 which these standards are of concern some kind of  
17 standardization turns out to be important.

18           DONALD DEUTSCH: I want to elaborate  
19 on the discussion of de facto standard. I think  
20 the reality is whatever organization creates a  
21 standard it's the marketplace that determines  
22 the success of the effort.

1           It is not uncommon for the marketplace  
2   to have spoken prior to the initiation of a  
3   standardization effort. A technology -- in my  
4   field, computer software, a technology is  
5   embraced by the industry so that everyone is  
6   building the technology.

7           The technology is defined by one  
8   player, let's say. Now, the choice is do we want  
9   to include the player. And I think Professor  
10   Gellhorn suggested that that could be  
11   anticompetitive in some ways. And once again  
12   I disclaim any legal knowledge in this area.

13          But I can tell you I know of a number  
14   of instances where there was a great deal of  
15   enthusiasm about establishing the standardization  
16   activity with the major player at the table  
17   because the other players then feel, okay, they  
18   created the initial specification; we would  
19   rather be at the table helping to create the next  
20   specification, the follow-on specification,  
21   rather than waiting for them to release their  
22   product and I have to hurry up and revise mine

1 because there's a de facto standard in the  
2 marketplace.

3 So in many cases it is very  
4 procompetitive to get that dominant player to  
5 the table because what it does is it allows the  
6 industry to chart the future direction of the  
7 technology rather than a single player to chart  
8 that direction and the rest of the industry  
9 trying to always catch up one step behind.

10 MICHAEL ANTALICS: Let me just make  
11 one observation. I think -- I agree with that.  
12 I think the danger comes not so much in the  
13 standardization as agreements perhaps among  
14 participants as to who they will deal with down  
15 the road.

16 That's where you could face the  
17 antitrust problems, if there was an agreement  
18 only to cross-license each other, for example, or  
19 to deal with each other in some fashion. That's  
20 where the real danger comes, there as opposed to  
21 the standardization itself.

22 GAIL LEVINE: Mike, is that a very

1 common practice? Do you see that very often,  
2 those kinds of agreements to only cross-license  
3 to each other?

4 MICHAEL ANTALICS: Well, if we did  
5 we would have more cases at the Federal Trade  
6 Commission probably. No. The danger comes when  
7 you have firms -- would come where you would have  
8 firms with some market power that could exclude,  
9 you know, kind of the next generation rival or  
10 somebody with some, you know, unique attributes  
11 where they can keep their little club.

12 That's where you would run into a  
13 problem. No. I don't think it's real common, to  
14 answer your question.

15 DENNIS YAO: Another question: Is it  
16 natural to think of the participants within a  
17 standard setting organization to be in various  
18 cliques or groups depending upon their business  
19 relationships outside of the organization?

20 And if so, how does that affect the  
21 process and the kinds of deals that can be worked  
22 out that can make a particular standard emerge?



1           CARL CARGILL: The question is are  
2 there cliques. Of course there are because we  
3 clique by basis of location, industry background,  
4 education. You always have the hallway  
5 conversations.

6           However, since, oh, say, I think it  
7 was the Allied Tube case, the people who --  
8 such as myself who managed the standards  
9 infrastructure have made it very clear that  
10 people who go to these meetings do not engage  
11 in anticompetitive behavior.

12           And we give our people instructions on  
13 how to avoid those situations. If people start  
14 to talk about price, you announce you are  
15 leaving. You ask for it to be minuted. You  
16 knock something over so everyone notices, and  
17 then you leave.

18           I mean the rule is you just don't  
19 leave quietly. You leave so everybody knows you  
20 have left so you are clear on this. We are very,  
21 very clear. Dell had another effect on it. It  
22 brought it back.

1           It's made it into a discipline.  
2   There is a possibility always of the Adam Smith  
3   competitors getting together to do evil. It's  
4   very hard to find that because most of the people  
5   are gun shy.

6           Remember, one of the great lines is,  
7   well, don't worry about it; you're civilly and  
8   criminally liable personally. And an engineer  
9   with a lot of stock options is really careful  
10   about that.

11          And so they go to talk technology.  
12   And when it's other than technology, it's about  
13   family, friends, other things. It's not about  
14   their company's business. That's very, very  
15   rarely do you get them talking about business.

16          DENNIS YAO: I guess in response to  
17   that, I didn't mean that they would get together  
18   and talk about anticompetitive things.

19          I was thinking that since you have  
20   various relationships with other firms, you have  
21   strategic alliances with them, that in those  
22   strategic alliance discussions possibly outside

1 of the standard setting venue there would be  
2 discussions.

3         Gee, you know, this standard is sort  
4 of better for us because we're trying to develop  
5 this particular thing jointly. So let's support  
6 this, and also other people who are connected to  
7 you, why don't you encourage them to support  
8 it to. So I wasn't thinking that that by itself  
9 was anticompetitive or any sort of problem.

10         But it's a natural -- it's a context  
11 for thinking about the process of the standard  
12 setting, which is there is a standard setting  
13 thing going on, and then there are these groups  
14 talk together each other for other reasons for  
15 which the standards matter, something like this.

16         DONALD DEUTSCH: I'm prepared to  
17 respond to Professor Yao's question by saying  
18 it's even worse than you imagine. But wait a  
19 second.

20         The fact is if you walk into a  
21 standards meeting in the information technology  
22 industry, you walk into a standards meeting and

1 you look around the table at the 20, 25, 30  
2 people who are there, chances are you have a  
3 relationship with most if not all of them in  
4 some area.

5 The term I believe which has been used  
6 is co-opetition. We compete with these people.  
7 We compete with these people. You know, very  
8 aggressively, but we also have cooperative  
9 arrangements with just about everything.

10 And I think that's the reality of the  
11 IT industry. So because it's even more pervasive  
12 than you might have thought, I think I do not  
13 believe that it is the anticompetitive kind of  
14 force that you might imagine, because, yeah, I've  
15 got all kinds of relationships with Sun, I have  
16 all kinds of relationships with IBM.

17 We're on different sides of some  
18 issues. We're on the same side with some issues.  
19 That's just the reality of business today.

20 PANELIST: There is also a distinction  
21 between getting together and having common  
22 interests to create a product that you both have

1 an interest in that's going to increase output  
2 and an agreement that's going to in some fashion  
3 keep others from having access to that standard.

4 TOR WINSTON: One thing we may want to  
5 turn to here, you mentioned cliques. And I think  
6 that leads to our next topic that we'd like to  
7 discuss for the last remaining time here. And  
8 that is the issue of exclusion.

9 And I know that, Don, you said that  
10 you prefer to deal in organizations where there's  
11 a pretty inclusive environment. That might  
12 contrast with some of the consortia that you deal  
13 in, Carl.

14 And I was wondering if we could just  
15 sort of explore some of the issues that exclusion  
16 might present to the antitrust authority.  
17 Whoever?

18 DONALD DEUTSCH: First of all, I  
19 stated earlier that Oracle vastly prefers and  
20 believes that the best situation is a forum where  
21 all stake holders are welcome at the table. That  
22 doesn't mean they have to be at the table. But

1 they should be welcome at the table.

2 Are there situations where the  
3 exclusion of a stake holder might be justified?  
4 I would expect -- in general I would say that  
5 would be truly unfortunate, because I think --  
6 for a couple of reasons.

7 One is if the stake holder is excluded  
8 I think there may be some legal issues. And  
9 again I'm not able to speak on those, okay, but  
10 it would cause me some concern, and I would have  
11 to turn to legal counsel.

12 But the second is I think there's a  
13 much higher probability that the standard is not  
14 going to be successful if a major stake holder is  
15 not there.

16 But that doesn't mean that there  
17 aren't some hopefully very rare situations where  
18 maybe someone should be excluded. And the one  
19 situation that I can think of would be a case  
20 where a participant is -- comes to the table  
21 solely for the purpose of obstructing the  
22 activity.

1           I don't think such a decision can  
2 be made lightly. But I can imagine future  
3 situations, and I have observed situations in the  
4 past where the participation of a certain party  
5 was clearly an obstructionist intent.

6           And in that case you better have  
7 some mechanism, a very high bar, but some  
8 mechanism to get on with the job. Now, I guess  
9 this is another case where I probably disagree  
10 with Carl, but that's probably because Carl  
11 hasn't really done any technical standards work  
12 for a long time.

13          But that's why you have Robert's  
14 rules, okay, so he votes -- you know the  
15 obstructionist votes one way; everyone votes the  
16 other way; you get on with it.

17          But, you know, whether that's  
18 exclusion or not or what the mechanism is, I  
19 don't know. But that would be the one case that  
20 came to mind where such a situation might be  
21 justified.

22          GAIL LEVINE: I want to just ask you

1 one quick follow-up on about the idea of the need  
2 to exclude the firm who has come to the table  
3 just to sabotage the standard setting  
4 organization's activities.

5 What kind of behavior is that kind  
6 of -- what kind of behavior amounts to sabotaging  
7 or attempting to sabotage the standard setting  
8 organization's work?

9 DONALD DEUTSCH: That's really hard  
10 to answer, and it's probably very situation  
11 specific. So, you know, I'm not even sure that I  
12 could make any kind of general statement. I'm  
13 not talking about the case of someone who comes  
14 to the table and tries to kill your standard with  
15 technical kindness.

16 And we see this all the time. You  
17 know, we found a problem. We fixed the problem.  
18 We found another problem. At some point you have  
19 process in place that says, okay, enough is  
20 enough; let's go with it.

21 I'm really talking about something  
22 that's much more egregious than that. And it has



1 to do with the actions of the individuals that  
2 are at a table. It may have to do with legal  
3 actions that are taken. But I'm talking about a  
4 pretty high bar. And I'm afraid I don't have  
5 much more specific to say.

6 GAIL LEVINE: Carl first and then  
7 let's get back to Mark.

8 CARL CARGILL: Because I do deal  
9 with the administrative things because that's --  
10 unlike Don I don't go to technical committees.

11 The administrative committees, you see  
12 a person who will request recapitulation of the  
13 previous meeting. In other words, in the  
14 previous meeting we had this, but I'd like to  
15 reopen that question.

16 And the phrase reopen the question  
17 is repeated ten, twelve, fourteen times in each  
18 meeting because many times the process doesn't  
19 allow you to close it down. It's like, no, we've  
20 killed that snake; move on to the next one.

21 But you can't because you're trying to  
22 be open. And I'm new so I'd like to reopen this

1 question and can we discuss it again. And how  
2 about this? Can we vote on that? And you have  
3 this constant series of small, little questions  
4 or, wait, is this really within the scope of this  
5 organization.

6         So you get questions like that. And  
7 it's a tremendously effective blocking -- unless  
8 the committee will finally say, look, we've  
9 killed that. We're getting on with it. What's  
10 the next one? No. That's silly. You know why  
11 you are doing it. Just let it go.

12         And the process protects in many  
13 cases. It gives the chairman or the chairperson  
14 the right to say you're disruptive. That's where  
15 the process is really effective in the  
16 administrative committee.

17         So the process there -- and I agree  
18 with Amy. The process does protect on that end.  
19 That's where the process has its fundamental  
20 value of maintaining an order.

21         So yeah, there are ways to do it.  
22 It's not that difficult. It's what you do with

1 any meeting you don't want to have go forward.

2 You can block it by kindly death.

3 MARK LEMLEY: Well, I want to make

4 sure we bring this back to the issue of antitrust

5 salience, right? I mean there are lots of ways

6 that people can do things which are pesky and

7 annoying and maybe even technologically

8 unfortunate that are not antitrust violations.

9 And so it seems to me that we're

10 really talking -- when Ernie Gellhorn is talking

11 about process concerns, they are of a somewhat

12 different order. They are of ways to use the

13 standard setting process to capture a market that

14 it could not otherwise capture.

15 So the only set of circumstances in

16 which it seems to me we ought to be concerned

17 particularly as an antitrust matter about

18 obstruction are where they fit into that

19 category.

20 Now, ironically enough where the --

21 where the concern of abuse or takeover is an

22 intellectual property hold-up concern, then it

1 seems to me with respect to most standard setting  
2 groups, those that require some form of licensing  
3 either on RAND or on royalty free terms, you are  
4 much better off having the person suspected of  
5 holding up the process in the organization and  
6 therefore bound to the licensing terms than you  
7 are to have them outside.

8         And so the real threat to the  
9 standardization process from somebody who wants  
10 to engage in hold-up are the people you're not  
11 going to see in the organization because they are  
12 going to stay outside and bring their patents to  
13 bear only after the standard is adopted.

14         And I don't know that there's much a  
15 standard setting organization can do about that  
16 problem. And I'm not sure frankly there's much  
17 antitrust can do about that problem. That may be  
18 a problem we have to solve with somewhat more  
19 rational rules respecting intellectual property  
20 and its use.

21         GAIL LEVINE: I know you've been  
22 trying to talk and the air conditioning has kept

1 blowing your card down.

2           DAVID TEECE: Just briefly, I think  
3 when you ask the question about exclusion or  
4 openness you have to -- and I think Mark Lemley  
5 is framing it this way too -- ask from what  
6 perspective.

7           I think there are issues from the  
8 point of view of how you manage or organize a  
9 standard setting organization. In many cases  
10 things can proceed more quickly and quality  
11 standards can get put in place more quickly if in  
12 fact you do exclude certain parties.

13           In some instances it may be the other  
14 way around. The question though for this group  
15 is is there antitrust -- is there a role for  
16 antitrust here. And I really have to scratch my  
17 head hard to find a role for antitrust.

18           I mean I think that standards  
19 organizations need to think these issues through  
20 from the perspective of how can I get good  
21 quality standards in place in the marketplace  
22 quickly. And that is tricky.

1           But, you know, layering antitrust on  
2 top of this, there aren't clear answers I think  
3 from an antitrust point of view. And therefore  
4 if you lay it on you create additional  
5 uncertainties which in fact come back to bite you  
6 in the sense that it slow it is standard setting  
7 process, adds cost, and delays competition.

8           RICHARD RAPP: I guess I'm puzzled.  
9 And the reason that I'm puzzled by what David and  
10 Mark have to say is that I have this kind of  
11 informal mental antitrust danger index.

12           And contrasting the first part of the  
13 morning's discussion about disclosure and so  
14 forth with the second part, I say to myself that  
15 the morning was all about single firm behavior  
16 and fundamentally opportunism.

17           And there has been a very healthy  
18 debate among antitrust economists and lawyers  
19 about whether opportunism is really an antitrust  
20 issue.

21           And now talking about exclusion in  
22 its various forms after the break we seem to be

1 talking about multifirm behavior, excluding  
2 individuals from standard setting committees,  
3 excluding participants from the standard setting  
4 process, collusive underpayment, all of which are  
5 variations on this theme.

6 And I'm saying to myself that's where  
7 antitrust belongs. That's where thinking about  
8 it in terms of enforcement policy we want to have  
9 scrutiny, not interference, but scrutiny rather  
10 than in the earlier set of circumstances we  
11 discussed by and large single firm issues. So  
12 I think I'm in disagreement.

13 GAIL LEVINE: Carl? Oh, excuse me.  
14 Do you have something that responds directly to  
15 that? Okay. Go ahead.

16 DAVID TEECE: Obviously whenever  
17 there are multiple parties you have to always be  
18 vigilant. And I suppose the scrutiny issue I  
19 would agree with in some loose sense.

20 But should you have regulation and  
21 specific rules? I think that's what the issue  
22 is. And it's hard for me to think of a specific

1 rule that is unequivocally going to advance  
2 competition rather than slow it down. If you  
3 can think of one, let's discuss it.

4 GAIL LEVINE: I wanted to return for a  
5 moment to a point that, Don, you raised early on  
6 in this conversation about the need to have all  
7 the relevant stake holders at the table when a  
8 conversation about standard setting begins.

9 What's the universe of relevant stake  
10 holders? Who are the stake holders when a given  
11 standard is going to be discussed?

12 DONALD DEUTSCH: First of all, let me  
13 qualify what I said. And that is, the stake  
14 holders should have the opportunity to be at the  
15 table. They may choose not to come to the table.  
16 That should be their choice.

17 Second of all, I think in a lot of  
18 cases that is a self-determined thing, that  
19 someone decides I have an interest in this.  
20 Frankly a statement was made this morning about  
21 how the standards fora were user dominated. And  
22 that's inconsistent with my experience in the



1 technology standards area.

2 But it may be true on other parts of  
3 this elephant. So if you define the entire array  
4 of stake holders from producers of the technology  
5 to users of the technology -- and there's  
6 different classes of users in the case of  
7 information technology.

8 We may define a standard in our core  
9 product area that is an interface that's used by  
10 people who produce products that run on top of  
11 our products.

12 And they have end users, okay,  
13 customers. Frankly in the United States the user  
14 participation in the voluntary standards activity  
15 is less robust than one of the speakers thought  
16 it was. And I think the reason is their stake is  
17 smaller and there's a cost of participation.  
18 There's a cost of going to the meetings.

19 There is a cost of reading the  
20 documents and preparing to say something  
21 intelligent about what's going on. And so, you  
22 know, my answer goes back to it's a self-defined

1 level of interest.

2           And all I look for is a forum that  
3 allows everyone who determines they have some  
4 interest to come to the table. And that would be  
5 rules that allow that. That would also be a  
6 publicly visible activity so that they know  
7 there's a table to come to.

8           TOR WINSTON: So one thing that I  
9 thought might be good to discuss a little farther  
10 is the issue of that we're not dealing with  
11 standard setting in a vacuum here. Firms have  
12 lots of opportunities to seek standards in other  
13 fora rather than just standard setting  
14 organizations.

15           I was wondering if we could sort of  
16 revisit some of these issues in terms of the  
17 disclosure issues or the procedural issues and  
18 talk about how those issues affect a firm's  
19 willingness to participate and to come to the  
20 table and agree in a standard setting  
21 organization, rather than sort of taking that  
22 activity elsewhere, and also then how might

1 scrutiny or guidance from authorities affect how  
2 those decisions are made.

3 MARK LEMLEY: I'm not sure if this is  
4 particularly responsive, but I'll give you one  
5 specific example.

6 There are standard setting  
7 organization out there which not only  
8 don't determine what a reasonable and  
9 non-discriminatory license might be as a group  
10 matter, but aggressively discourage people from  
11 having any discussion whatsoever about what a  
12 license price might be.

13 And as far as I can tell the reason  
14 they do this is because they are concerned that  
15 if they sit down in a room and discuss price,  
16 right, here the license price, they will be  
17 subject to antitrust scrutiny.

18 Now, it seem to me there are some  
19 pretty good reasons to want to encourage people  
20 to have some idea of what price they are going to  
21 pay before they adopt a standard.

22 And so the -- one implication of at

1 least an antitrust fear, whether or not it is a  
2 justified fear, is that it discourages people  
3 from actually gathering the information they need  
4 to have to decide whether or not a particular  
5 standard is cost effective.

6 AMY MARASCO: I would just say that in  
7 response to that you have on behalf of some of  
8 the standards developing organizations out there  
9 both legal fears and then practical implications.

10 I think the legal fears that you get  
11 from some of them are what you described, the  
12 concern that there may be an antitrust problem or  
13 a contributory patent infringement problem.

14 There is a case pending right now in  
15 the District of Connecticut where a standard  
16 setting body tried to step in more and ascertain  
17 what were essential patents; could they be worked  
18 around; what would the terms and conditions be,  
19 and is now a defendant in a lawsuit up there.

20 So that does not encourage  
21 standards developers to want to undertake that  
22 responsibility.

1 I would also say as a practical matter  
2 the people that are attending most of these  
3 standard setting activities are technical  
4 experts, and they are the right people to be  
5 there to help determine what is the right  
6 technical solution to the standards issue.

7 However, I would say that most of them  
8 do not have legal or business backgrounds. So  
9 for them to be in a position where they would be  
10 debating terms and conditions may not be just as  
11 a practical matter truly feasible.

12 I think that -- I don't know that  
13 there are really any standard setting bodies that  
14 would say there is a problem with a patent holder  
15 disclosing if they want to what their proposed  
16 terms and conditions may be.

17 It's just that I believe that some  
18 standards developers do not want to be a forum  
19 for any negotiation or further discussion of  
20 those terms and conditions.

21 DENNIS YAO: I wanted to remark about  
22 patents versus trade secrets in this regard. So

1 if you've got a patent it's easy to talk about  
2 perhaps in a foreign setting -- in a standard  
3 setting forum.

4 If you have a trade secret it may be  
5 a lot harder to talk about. You don't have the  
6 natural protection. And so you may not be  
7 willing to talk about it. Now, consider a  
8 situation in which you're forced to disclose  
9 patents and license them according to the rules.

10 Would that cause one as a firm to  
11 possibly change the mix of things that you would  
12 choose to patent versus keep secret? And would  
13 that create a problem? This is sort of a general  
14 question to the practitioners.

15 I wouldn't -- if you're thinking about  
16 patents that occurred before the standard was  
17 really being thought about, of course it wouldn't  
18 have any effect. This would really affect  
19 ongoing efforts at the firms during the time in  
20 which the standard was being considered.

21 Comments?

22 GAIL LEVINE: Carl, did you want to

1 respond to that? I know you've been --

2           CARL CARGILL: One of the -- you bring  
3 up one of the core questions we have which is  
4 when do you want to disclose; how much do you  
5 trust what -- I mean. You're looking for a level  
6 of trust and a level of need.

7           If you have -- it comes down to if you  
8 have a trade secret that's not patented and not  
9 protected. If within the standards organization  
10 there is a move to standardize -- let's put it in  
11 a real case, the IETF, Internet Engineering Task  
12 Force.

13           I have an engineer who goes, has a  
14 great idea. There is a four-month window in  
15 which his idea or her idea is valuable. Now the  
16 question becomes do you take it back, patent it,  
17 go through the patent process? Or do you just  
18 say blurt it out and hope that good things  
19 happen?

20           It's a dynamic tension. There is --  
21 it's very hard to do a very clear rule. You say  
22 trade secrets are more -- no. Trade secrets are

1 blurted out all the time.

2       If you go to the IETF the first thing  
3 you get is a statement: Know well that anything  
4 you say here is open; anything you say within the  
5 this context is open. So if you blurt something  
6 out, it's out. If it's a trade secret, you may  
7 have lost it. So that's one of the questions.

8       There's no easy solution to it because  
9 again it's intellectual property that has an  
10 ascribed value. If it's a really neat thing that  
11 only works in a network and you patent it and  
12 keep it to yourself, you have a really neat  
13 stupid thing because it's got no utility  
14 whatsoever.

15       So in many cases standards gain  
16 utility from being exposed or technology gains  
17 utility from being exposed. And again that goes  
18 back to what -- the purpose of this is to grow  
19 the market, ultimately grow the market, grow  
20 market size.

21       It's not to sit on the biggest pile of  
22 IPR, but to sit on the biggest market as a player



1 in the biggest market. And that's what you're  
2 looking for with all standards. It's we all work  
3 together so we can go to the market.

4       It's not a bigger piece of a small  
5 pie. It's a same size piece of a huge pie which  
6 is pretty cool. So that's a lot of what we're  
7 looking at. There was an earlier question I'd  
8 like to address very quickly on the idea of large  
9 firms getting together, all the stake holders  
10 getting together monopolizing.

11       One of the most successful attempts at  
12 that was open systems interconnect. It was not  
13 an attempt at it. Open systems interconnect was  
14 an attempt by I'd say the ten largest computer  
15 vendors to put together a style of computing that  
16 was for interconnecting computers to transfer  
17 data.

18       I was at DEC at the time DEC, IBM,  
19 Hewlett-Packard and a whole bunch of us spent --  
20 I have estimated it at \$4 billion. Mike Spring  
21 at Pittsburgh has estimated half a billion. So  
22 we have some variances in how much we spent on

1 just the standards.

2       The reason you don't hear about OSI  
3 anymore is because, well, JTC won and ISO was  
4 doing OSI. A little group called the Internet  
5 Engineering Task Force was doing something  
6 different.

7       And all the little vendors who  
8 couldn't afford to compete in the big standards  
9 organizations because we couldn't go to all the  
10 places put out TCP/IP.

11       That's why we have the internet, not  
12 the OSI-net, because the users said one is big  
13 and complicated. It's 300 standards, twelve  
14 bazillion lines of code. The market said, wow,  
15 internet works simple, just in time standards,  
16 cool.

17       It's just because you have all the  
18 players, just because you have all the players at  
19 the table doesn't mean you are going to succeed.  
20 Sometimes it's a really stupid idea standard.

21       But it shows that just because the big  
22 ones are there it doesn't mean you have success.

1 You have significant failures at times. And that  
2 was an expensive, ugly one.

3 GAIL LEVINE: Don?

4 DONALD DEUTSCH: Yeah. Gail, I'd like  
5 to go back to the question that I understood that  
6 you asked, and that is you wanted to go back and  
7 talk about disclosure and procedures.

8 And not wanting to be redundant, I  
9 want to go back to the statement I made of the  
10 tension between the potential cost for those that  
11 are required to disclose versus the potential  
12 risk for those who have to come to the table.

13 And I tried to characterize this as  
14 something which would cause individual standards  
15 fora to establish a level that is best for them  
16 to attract their community. I'd like to sort of  
17 take that a next step and point out that there is  
18 a market so to speak of standards development  
19 organizations.

20 If any of us think that W3C and open  
21 group and IETF and ANSI, ISO, IEC, ITU, and you  
22 name it, Oasis and I could go on and on and on

1 are not competing ECMA, okay, are not competing  
2 for standardization activity, we're extremely  
3 naive. These are organizations that want to  
4 retain their position and grow and be sustained  
5 over time.

6 And as such I believe that actually  
7 this whole area that we've been talking about all  
8 morning is an area whereby these organizations  
9 have an opportunity to become more attractive to  
10 their constituencies, because they are all trying  
11 to get us to come to the table with our next  
12 great idea.

13 And if they somehow come up with the  
14 right mix of cost to the discloser and risk to  
15 the people at the table, we're going to go there  
16 instead of somewhere else.

17 GAIL LEVINE: Mark, you had your name  
18 tent up for a while. And I don't know if the air  
19 blew it down or the moment passed.

20 MARK LEMLEY: No.

21 GAIL LEVINE: You're all right then?

22 MARK LEMLEY: Yes.

1           GAIL LEVINE: All right. Then, Don, I  
2 think I'll have given you the last word for our  
3 morning. I want to thank this truly impressive  
4 array of panelists for a very enlightening and  
5 very informative morning for me and for Tor and  
6 for Bob at the PTO. We really appreciate your  
7 efforts. So thank you.

8           (Applause.)

9           GAIL LEVINE: A few final housekeeping  
10 notes. On security, to leave this building and  
11 get out to where you can get some lunch we have  
12 escorts in the back of the room who can walk you  
13 that way. Please don't leave without an escort.  
14 We do need you to go with them.

15           When you leave, take your name tags  
16 off and leave them at the front door. It will  
17 help expedite you as you are trying to get back  
18 in. And please come back at 2:00.

19           Don't be surprised if at 2:00 you find  
20 this room occupied by 300 school children. They  
21 will leave in time for us to begin our 2:00  
22 session. There is going to be a photo op for the

1 school children from out of town with the  
2 Attorney General. But you may need to bring a  
3 little bit of patience back with you after lunch.  
4 Thanks very much.

5 (Lunch recess.)

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1           AFTERNOON SESSION

2                               (2:00 p.m.)

3           CAROLYN GALBREATH: Good afternoon. I

4 think we'll begin if people can take their seats.

5 Good afternoon. My name is Carolyn Galbreath.

6 I'm an attorney with the Antitrust Division in

7 its San Francisco office.

8           I'd like to welcome you back to

9 the afternoon session of the joint DOJ and FTC

10 hearings on intellectual property and antitrust.

11 This afternoon our session on standard setting

12 practices will explore questions about licensing

13 terms.

14           And we will focus our discussion on

15 those particular terms and how they may or may

16 not have anticompetitive consequences. I'd like

17 to introduce my co-moderators here this

18 afternoon.

19           Tor Winston is an economist with the

20 Antitrust Division. And Gail Levine is deputy

21 assistant general counsel for policy studies at

22 the Federal Trade Commission. I'm also joined

1 today by moderator Robert Bahr from the U.S.

2 Patent and Trademark Office.

3 I'd like to take a few moments and

4 introduce our panel members to you. We have a

5 distinguished group that have come to join us

6 today and to explore these issues. And I'll

7 introduce them in alphabetical order and then we

8 will begin the afternoon session.

9 Stanley Besen is vice president

10 of Charles River Associates. Dr. Besen

11 is a consultant and an expert on

12 telecommunications. He is author of Economics

13 of Telecommunications Standards, along with Garth

14 Sloaner, and is an author of a considerable

15 number of articles in this area.

16 Daniel Gifford is the Robins,

17 Kaplan, Miller & Ciresi Professor of Law at the

18 University of Minnesota where for over 25 years

19 he has taught antitrust law, unfair competition,

20 and administrative law. Thank you for being here

21 this afternoon.

22 Richard Holleman is a consultant in



1 industry standards and intellectual property. He  
2 is a former director of standards for IBM, and  
3 he's been developing standards in technology for  
4 25 years. He's also currently the treasurer of  
5 the IEEE Standards Association.

6 Allen Lo is director of intellectual  
7 property for Juniper Networks where he's  
8 responsible for managing patent, trademark,  
9 copyright, and trade secret matters.

10 Prior to joining Juniper Networks  
11 Mr. Lo served as a patent examiner at the  
12 U.S. PTO. And he's taught at the Berkeley Center  
13 for Law and Technology in California.

14 Mark Patterson is an associate  
15 professor of law at Fordham in New York where he  
16 teaches competition and information -- hosts  
17 competition and information seminars and teaches  
18 antitrust law. He is a registered patent  
19 attorney and an electrical engineer.

20 Scott Peterson is corporate counsel  
21 for intellectual property at Hewlett-Packard  
22 Company. Mr. Peterson has practiced as an

1 intellectual property attorney for nearly 20  
2 years and focused on computer related  
3 technologies.

4       Lauren Johnson Stiroh is a  
5 vice president at the National Economics Research  
6 Association. Dr. Stiroh has conducted research  
7 on standard setting and has published articles on  
8 standard setting and market power with Richard  
9 Rapp. Welcome.

10       Daniel Swanson is a partner at Gibson,  
11 Dunn & Crutcher where he is co-chair of the  
12 firm's antitrust practice group. He is vice  
13 chair of the international antitrust committee of  
14 the American Bar Association.

15       Dan Weitzner holds research and  
16 teaching appointments at MIT and is the director  
17 of the World Wide Web Consortium's technology and  
18 society activities. As such he is responsible  
19 for development of technology standards that  
20 enable the web.

21       Andrew Updegrove is a founding partner  
22 of Lucash, Gesmer & Updegrove. He has been

1 responsible for setting up more than 25 worldwide  
2 standard setting consortia. So welcome to all of  
3 our panelists this afternoon, and thank you for  
4 joining us for what we hope will be an  
5 informative and spirited afternoon of discussion.

6         Our focus will continue to be on those  
7 issues that may raise antitrust concerns in the  
8 area of licensing standards. Do economic  
9 efficiencies result from constraints placed upon  
10 consideration of license terms or rates as a part  
11 of the standard setting process?

12         Do practices used for licensing  
13 intellectual property that has been adopted as a  
14 standard create or promote the exercise of market  
15 power in ways that we might view as being  
16 anticompetitive?

17         And do standard licensing activities  
18 involving intellectual property raise section 1  
19 concerns in certain contexts? And if so, what  
20 are those concerns?

21         As we begin today I think it's -- for  
22 those people who were not here this morning, it

1 might be good to recap. Professor Lemley pointed  
2 out the lack of standardization in what standards  
3 organizations call themselves and how they are  
4 organized.

5       And before we delve into the diversity  
6 of practices surrounding licensing of standards,  
7 it's probably good to seek some definitional  
8 clarity about the differences between standard  
9 setting organizations, standard developing  
10 organization, and consortia, and how they may  
11 each approach licensing matters in different  
12 ways.

13       Are there a range of requirements that  
14 are used by all of them? Or are there certain  
15 requirements that just some of these  
16 organizations seek to use? To assist us we've  
17 asked Richard Holleman to give us an overview of  
18 standard setting organizations.

19       And I'm going to turn after that to  
20 Andy Updegrave to talk about consortia, how they  
21 are organized, and particularly focus on their  
22 licensing terms and the way they seek to license

1 intellectual property involving standards.

2 Richard?

3 RICHARD HOLLEMAN: Thank you, Carolyn.

4 I appreciate your inviting me to be part of this

5 panel. Perhaps I should say that first of all

6 I'm not a lawyer. I'm not an economist. I'm

7 just a standards guy who has been involved in

8 standards and patent related matters for many

9 years through many organizations.

10 And I see a lot of familiar faces

11 here in the audience. And I appreciate the

12 opportunity for sharing some of my views and

13 comments on the subject.

14 I've been particularly active in IEEE

15 and the Standards Association and the IEEE SA as

16 we refer to it did file comments on the matter

17 this morning. So those will be part of the

18 record as well. I'm not here as the official

19 IEEE representative, but I was involved in

20 framing those comments.

21 In relation to the question of the

22 licensing arrangements, if you will, in the

1 various standards organizations, I hate to keep  
2 using the words that came up over and over again  
3 this morning which is, if you will, differences,  
4 variety, flexibility.

5 I think perhaps some may view that in  
6 some ways as an attempt to deflect perhaps real  
7 issues and real matters. But I would tell you  
8 that that's really not the case. There is a huge  
9 variety.

10 And while we can group perhaps some of  
11 the licensing arrangement under broad areas of  
12 RAND, reasonable and non-discriminatory terms and  
13 conditions, royalty free, or even perhaps a  
14 patent holder who indicates that they have no  
15 intention of asserting a particular right that  
16 they might have, that's even yet a third  
17 category.

18 Once again there are considerable  
19 differences within those options. This morning  
20 there was discussion about royalty free. Even  
21 royalty free has some variations to it. In some  
22 people's minds royalty free license means you

1 don't have to get a license.

2           But yet there are certainly occasions  
3 where a royalty free license may be free of  
4 royalty, but a license is still needed because of  
5 other terms and conditions associated with that  
6 intellectual property. And I think that's  
7 overlooked sometimes and we gloss over the term  
8 royalty free.

9           So there is more value in these  
10 licenses that derives from disclosure of patents.  
11 There is more value than just the amount of money  
12 that may or may not be associated with a royalty.  
13 So I think that's an important point.

14           To go beyond that I would say that  
15 another distinction that I think is important to  
16 understand is -- and this came up this morning to  
17 a certain extent.

18           In this variety ranging from, if  
19 you will, the formal standards developing  
20 organizations and here in the U.S., let's say,  
21 operating under the ANSI umbrella, meaning the  
22 procedures for accredited standards bodies,

1 whether it be TIA or IEEE.

2           And the list goes on and on. From the  
3 range on the organizations that, if you will, use  
4 the ANSI procedures for patents and disclosure of  
5 patents all the way to what consortia or special  
6 interest groups may do in terms of their  
7 contractual arrangements with members, open  
8 a wide variety of licensing differences.

9           And here again at the risk of  
10 repeating the importance of understanding  
11 diversity and differences, it does really play an  
12 important role because of the way it impacts the  
13 market. And let me now just turn for a minute to  
14 how this is all integrated into the overall  
15 business process.

16           Standard setting for the most part is  
17 just one piece of the bigger business process  
18 that goes on in industry and which ranges all the  
19 way from, let's say, a product determination,  
20 requirements determination, to the design, to  
21 marketing, to implementation, to delivery, and  
22 hopefully to a lot of sales.



1 Standards can play a role in that.  
2 And certainly licensing and licensing  
3 negotiations are a piece of that total business  
4 process.

5 I guess what we hear and I certainly  
6 feel is a concern are the comments that have  
7 appeared as a result of the hearings that suggest  
8 that the standard setting piece of this become  
9 more embroiled -- and I use that word  
10 purposely -- embroiled in aspects that are beyond  
11 standard setting that are really in the licensing  
12 and licensing negotiation aspect of the business  
13 process.

14 And finally because I'm sure we will  
15 have more time to comment on these, just to sort  
16 of set the stage, it is important to keep in mind  
17 that when a patent holder discloses the fact that  
18 there is, let's say, an essential patent that it  
19 appears may be required when the standard is  
20 published, based on the state of the standard  
21 when the disclosure is made, for the most part at  
22 this point the standards committees do not want

1 to have terms and conditions of licensing put  
2 before them in the committee.

3 And I can speak for IEEE standards  
4 activities. That is certainly the case. And  
5 ANSI procedures do not call for that to be done.

6 But again we should keep in mind that  
7 what happens once that disclosure is made, those  
8 who have an interest in the activity certainly  
9 can contact the patent holder outside of the  
10 committee to determine what terms and conditions  
11 might be available. The patent holder can make  
12 these public.

13 And if you go to the websites that are  
14 available, IEEE, ITU, and soon there will be an  
15 ANSI website I believe, typically there's a  
16 contact name there, a name and a number. So  
17 individuals have the ability to call that patent  
18 holder, the company, the patent holder, and to  
19 inquire.

20 If it turns out -- and this usually  
21 happens rather quickly when it happens -- that  
22 it's determined there is not a willingness to be

1 forthcoming here, that the patent holder doesn't  
2 appear to be willing to enter into negotiations  
3 and it's felt that this is being unfairly  
4 withheld, that works its way back in to the  
5 standards committee pretty quickly.

6         And of course the committee has the  
7 option of perhaps seeking other approaches. They  
8 have the option of sort of outside the meeting  
9 entering into some conversations to see what's  
10 going on.

11         But the whole point is the technical  
12 people in the standards committee are the  
13 engineers and the technicians concerned and  
14 involved and qualified to develop the standard.

15         And for the most part these days they  
16 do not involve themselves in activities in the  
17 business process outside of that except for the  
18 standards development. So I think I will  
19 conclude with that. I feel rather strongly that  
20 the issues that are before us today are issues  
21 that are not new to the standards community.

22         They are certainly getting an airing

1 here, and awareness is being generated that  
2 probably there hasn't been before -- it's  
3 certainly not since maybe the late '70s on some  
4 other things -- which is good. But they are not  
5 new issues to the standards developers.

6       And I think that the processes and  
7 the procedures that are used along with the  
8 guidelines that exist, be they ANSI, be they IEEE  
9 and other standards developer guidelines that  
10 exist, provide a very efficient and effective  
11 foundation for the standards development process  
12 as it exists today.

13       So I hope that gives you an idea of  
14 basically a little bit about how the process,  
15 let's say, would normally work for many standards  
16 developing organizations. Thank you.

17       CAROLYN GALBREATH: Thank you very  
18 much. Just a matter of housekeeping for the  
19 panelists; we're hoping to engage in a dialogue  
20 this afternoon and have follow-up questions to  
21 the extent that they occur to people.

22       If you want to be recognized, just

1 please turn your name tent on its side, and we  
2 will recognize you and get those follow-up  
3 questions on the table. Professor Gifford?

4 DANIEL GIFFORD: I was just wondering  
5 if you could clarify from your experience. In  
6 your remarks at least as I -- your written  
7 remarks as I remember them, part of the scenario  
8 that is common is for the -- you say the patent  
9 owner to identify himself.

10 And then the potential licensee might  
11 approach the patent owner and negotiate the terms  
12 of a possible license. Now, how does that work  
13 out in terms of, say, a practice of reasonable  
14 and non-discriminatory license terms when the  
15 first potential licensee -- I know you say that  
16 non-discriminatory doesn't mean identical.

17 But how does that in fact, you know,  
18 roughly play out? The first potential licensee  
19 approaches the patent owner and gets an idea of  
20 their license terms. Can the second potential  
21 licensee anticipate that the license terms will  
22 be pretty much the same if we're in one of those

1 RAND contexts?

2 CAROLYN GALBREATH: Before we go on,  
3 could I ask that we speak into the microphone? I  
4 think we're having trouble hearing in the back.  
5 So you may want to just recap the question  
6 quickly, Richard, before you answer.

7 RICHARD HOLLEMAN: The question that  
8 was asked is when the first potential licensee  
9 approaches the patent holder and, let's say,  
10 is able to come up with reasonable terms and  
11 conditions and then a second or third subsequent  
12 licensee comes along.

13 Will they get the same reasonable?  
14 I hope you're not attempting to ask me to define  
15 reasonable and non-discriminatory.

16 CAROLYN GALBREATH: I think we'll get  
17 there later this afternoon.

18 RICHARD HOLLEMAN: Right, but not now.  
19 Embedded in the question I think is an important  
20 point. And that is that the system works on the  
21 basis that the licensor and the licensee as the  
22 two interested parties negotiate a license.

1           That license is not necessarily going  
2   to be the same from party to party to party. The  
3   objective is that those licenses will still be  
4   within the context of being reasonable,  
5   reasonable terms and conditions.

6           But you'll often hear the term  
7   reasonable sort of narrowly described to me as  
8   the same royalty rate. And that may not be the  
9   case because of all the other values involved in  
10   the exchange between the licensee and the  
11   licensor. Maybe it will be the same, okay?  
12   Maybe it won't.

13           Sometimes a patent holder will say  
14   here's a flat rate. And that's another variation  
15   on these licensing agreements for this patent,  
16   for this standard of flat rate.

17           But I think it's important to  
18   understand there are other items in the licensing  
19   agreement of value: exchange of other rights  
20   between each other, field of use whether narrow  
21   or broad, the term limits of the license.

22           And it's important to keep that in

1 mind. And we tend to narrow down RAND in terms  
2 of, well, that means royalty rates. And there is  
3 a lot more to it than that. Thank you.

4 CAROLYN GALBREATH: Thank you very  
5 much. And I think we are going to spend some  
6 time really going through those distinctions in  
7 greater detail so we can revisit those later on  
8 this afternoon.

9 I would like to turn though to Andy  
10 Updegrove and have him give us a few comments on  
11 how consortia may differ in the way that they  
12 approach licensing terms.

13 ANDREW UPDEGROVE: Let me give you my  
14 frame of reference first because it might be  
15 instructive in where I'm coming from. I've  
16 worked with something like 45 consortia and  
17 helped form most of them. And I almost never got  
18 a question about intellectual property rights  
19 until five or six years ago.

20 As most of you probably know there was  
21 a consent decree entered into by Dell Computer  
22 with the FTC. And at that point all of a sudden



1 everyone became energized to the fact that there  
2 was something going on here even they might not  
3 have necessarily understood it.

4 Not too surprising because it was a  
5 very difficult to understand consent decree.

6 But they knew that they had to start paying  
7 attention. So since that day five or six years  
8 ago the number of questions that I've been  
9 receiving has gone up and up and up.

10 And in the last couple of years I've  
11 helped put together IPR policies for quite a  
12 number of consortia. Now, the thing that is  
13 probably most important for me to observe is that  
14 there is an enormous amount of confusion out  
15 there.

16 You would think maybe after this long  
17 and particularly given the fact that the ANSI  
18 policies have been out there for something like  
19 20 years that there would be a reasonable amount  
20 of agreement on what an intellectual property  
21 policy should be for a standard setting body.

22 In fact that is only true down to a

1 superficial level. Almost all consortia would  
2 agree that don't bother contributing something  
3 unless you're willing to license any intellectual  
4 property rights.

5       Almost all of them would agree that if  
6 you want to be part of the process that you have  
7 to disclose at some point whether or not you have  
8 IPR, intellectual property rights, that might be  
9 infringed by an implementation of the standard.  
10 But when you get beyond that the degree of  
11 agreement falls off remarkably.

12       This is probably for a few principal  
13 reasons. One is that most of the people who are  
14 charged by their companies with starting a  
15 consortia are not lawyers. There is also very  
16 little continuity in the people who form  
17 consortia.

18       Typically they will come out of  
19 the business unit. It might be someone from  
20 marketing. It might be someone from the  
21 technical side.

22       And their acquaintance with

1 intellectual property policies may be slim to  
2 nil. So what they bring into the room when they  
3 begin to discuss something like an intellectual  
4 property policy, if they discuss it at all, is  
5 whatever frame of reference they have outside of  
6 that setting.

7         That frame of reference most  
8 principally is working within a proprietary  
9 company trying to maximize the value of your  
10 intellectual property rights and maximize your  
11 revenue by exploiting them.

12         This I would submit is entirely the  
13 opposite of what standard setting is about.  
14 Standard setting is about gaining by giving away.  
15 What you are trying to give away is ownership of  
16 the standards that are produced by your  
17 consortium.

18         The gain which you wish to achieve  
19 is that most obviously you can make prudent  
20 strategic decisions. You know that you are  
21 betting or you hope you are betting your  
22 corporate future on VHS and not Betamax.

1           If there are two standards out there  
2   or ten standards, how do you know which one to  
3   pick? Well, if the market leaders get together  
4   in a room and set a standard, that standard more  
5   likely than not will succeed and you can make a  
6   safe strategic decision.

7           If you take that intellectual property  
8   and hold it to your breast and charge people for  
9   it and make it look like you are exercising  
10   control, those people that you want to have  
11   implement it will be rightly suspicious and they  
12   won't want to implement your standard.

13          So a very difficult thing for people  
14   to grasp when they walk through the looking glass  
15   from selling proprietary products to setting  
16   non-proprietary standards is that everybody has  
17   changed. You have to change the way your mind is  
18   thinking.

19          No one gives you an orientation when  
20   you walk into that room to have that discussion.  
21   And in fact most people in the room don't get it.  
22   So the first problem you have is that people are

1 setting out on a process which is different than  
2 anything they do in the rest of their lives.

3       The second problem is that the  
4 standard setting organizations and consortia in  
5 particular look very much like commercial joint  
6 ventures. And I'm sure you are all familiar  
7 with them.

8       It might be five or six companies who  
9 get together to bid on a government contract, or  
10 they might get together to come up with a common  
11 solution that they can then sell products.

12       In that kind of a setting there are  
13 all types of behavior that make very good sense  
14 in that setting that are very destructive in a  
15 standard setting context. The best one I can  
16 think of is mandatory cross-licensing.

17       It is very typical in a joint venture  
18 to say that everyone in the joint venture will  
19 cross-license each other and if they go to a  
20 customer that they will demand a cross-license  
21 from their customer as well. And why not?  
22 Everyone's motivated to create whatever the

1 joint venture was created to build.

2 All the customers are motivated to buy  
3 it. So everyone has a joint economic interest to  
4 protect the intellectual property rights in that  
5 deliverable so that they can sell it. You don't  
6 want people suing for infringement.

7 Contrast this with a consortium. You  
8 typically have companies like HP, IBM, Oracle,  
9 big companies, small companies getting together  
10 and saying we want a market to evolve more  
11 quickly. And there are always many examples:  
12 Wireless, smart cards, blue tooth type standards.

13 People can't buy your products until  
14 there is enough confidence in the marketplace  
15 that that suite of products is going to be  
16 successful and become widely implemented. It  
17 doesn't do you much good to be the only person  
18 who owns a phone because it will never ring.

19 So if you get together and come up  
20 with a standard you can advance the marketplace  
21 and you can move into it more swiftly. That's  
22 very different.

1           In that kind of a setting what you  
2 want to do is you want to make it as easy and  
3 possible, as easy as possible for the people with  
4 the lowest economic motives to still adopt your  
5 standard so that standard will become pervasive  
6 in the marketplace.

7           If you walk into that with the same  
8 mind-set as in a joint venture, you won't be  
9 doing the things that are necessary to succeed.

10          Another example, if you were to look at W3C right  
11 now, World Wide Web Consortium, many of you are  
12 aware that they are debating whether or not  
13 royalties should be levied in the case of  
14 anything having to do with the internet.

15          In the case of the internet you're  
16 talking about a global enabling technology used  
17 by billions of people. Everyone will benefit  
18 from the maximum involvement of anyone with  
19 technical skills.

20          To levy a royalty in that kind of  
21 milieu would be insane. In contrast if you are  
22 in a much more narrow commercial setting you

1 might need very badly certain companies to come  
2 into it whose corporate policy was we will not  
3 join a consortium if it's royalty free.

4 Many times I'll deal in a situation  
5 where people are coming out of a W3C meeting and  
6 because that's the only standard setting event  
7 they have been in they assume everything has to  
8 be royalty free.

9 Good answer there, bad answer here.  
10 So not to belabor it or to hold things up, but  
11 the problem that we see out there right now is  
12 that there's great awareness of the issue that  
13 an intellectual property policy is needed.

14 But there's tremendous confusion  
15 about what that policy should be and tremendous  
16 ignorance about what resolutions are appropriate  
17 in what situations.

18 Everyone will benefit if that level of  
19 education can be raised and if on the part of the  
20 government everyone has a clear idea of what you  
21 can do without getting into trouble.

22 CAROLYN GALBREATH: Thank you very



1 much. I think we have confirmed as perhaps we  
2 did this morning that there is no consistency and  
3 certainly that one size does not fit all.

4         And in an attempt to have us talk  
5 about the issues in a reasoned fashion, we  
6 have asked Dr. Stan Besen to put together a  
7 hypothetical. It's within available on the back.  
8 You may have it among the items that you have  
9 picked up this afternoon.

10         I'd like to turn now to Dr. Besen  
11 and to have him walk us through that very nice  
12 hypothetical which explains and really sets up  
13 the complexities involved with what we're going  
14 talking about for the rest of the afternoon.  
15 Thank you.

16         STANLEY BESEN: I think we have heard  
17 from both this morning and sort of the early  
18 part of the afternoon that this is a really  
19 complicated and difficult problem. And I don't  
20 want to suggest by my remarks that I disagree  
21 with that. That's entirely appropriate.

22         However, it's usually the case when

1 you have a really complicated problem it's often  
2 easier to sort of start with the simpler version  
3 of it, at least one that you can try to answer  
4 before sort of adding the complexities as you  
5 go along.

6       And so what I try to do here is to  
7 try to spell out a simple standards licensing  
8 problem, simple enough again so that I think we  
9 might come up with a relatively uncontroversial  
10 conclusion about what the right answer is, and  
11 then to sort of suggest some variations on the  
12 simpler theme as we -- to show what additional  
13 factors -- how additional factors not taking into  
14 account the hypothetical might affect the  
15 conclusion.

16       I want to start off with a number of  
17 very simplifying assumptions. First I'm going to  
18 assume that there are a number of technologies,  
19 each of which is the intellectual property of its  
20 sponsor.

21       All of the technologies are equally  
22 capable of performing the same function, so I

1 don't have to worry about this question of which  
2 is the best technology.

3       And only one of the technologies is  
4 needed to produce a final product. So I avoid  
5 the sort of patent thicket problem that Professor  
6 Lemley talked about this morning.

7       Second, none of the sponsors produces  
8 the product in which the technologies are used.  
9 That is, they are all suppliers of technology to  
10 the producers of that product. Obviously that's  
11 going to make a difference. We have already  
12 heard allusions to the problem.

13       But here I'm going to assume that  
14 they make their money simply by licensing their  
15 technology to people who produce final products.

16 Third, I'm going to assume -- and this is  
17 probably in some ways the least defensible  
18 assumption here or the one that makes the problem  
19 simple in a way that makes it too simple.

20       I'm going to assume that all the  
21 investments in R & D to develop the various  
22 technologies have already been sunk. Fourth,

1 I'm going to assume that that de facto  
2 standardization is not possible for the some  
3 of the same reasons that Mr. Updegrove just  
4 mentioned.

5       One of the possible reasons is perhaps  
6 a multiplicity of competing technologies which  
7 cause so much confusion among consumers that they  
8 would be unwilling to risk being stranded with  
9 the wrong technology.

10       And no single producer of the final  
11 product can start a standards bandwagon on its  
12 own. So you've really got to get everybody to  
13 cooperate to do so. De facto standardization  
14 won't work.

15       Fourth, I'm going to assume that this  
16 is the last round of a standards competition  
17 involving these technologies. There's no  
18 possibility of further refinement. Obviously  
19 that makes things -- life a lot simpler.

20       I've assumed the technologies have --  
21 all the technologies have the same technical  
22 capability. But I have to have some variation

1 among them. I'm just going to assume they have  
2 differences in the manufacturing costs.

3         Some technology -- if you use one  
4 technology, your manufacturing costs are lower  
5 than if you use another, et cetera, et cetera.  
6 So there are some variations across technologies,  
7 the manufacturing costs they imply even though  
8 they end up producing products that have the same  
9 value to consumers.

10         And finally I'm going to assume as an  
11 industry standards body -- and this is of course  
12 very important. The standards body consists only  
13 of producers of the final product and not the  
14 sponsors.

15         And I'm going to try to answer four  
16 questions in this simple hypothetical. Should  
17 the standards body choose a standard? Which  
18 technology should it choose? What rights should  
19 the standards body try to obtain from the winning  
20 sponsor? And what should the license fee be?

21         Those are my four questions, and I  
22 think I can answer them given my simple example.

1 The first question is, yes, the standards body  
2 should pick a standard.

3 In this particular case there would be  
4 no market but for the selection of a standard,  
5 too much confusion among consumers perhaps with  
6 the result that no market would develop.

7 Everybody is better off if there is  
8 a standard or at least no one is any worse off.  
9 Second, which technology should be chosen again  
10 I think is fairly uncontroversial here.

11 The technologies all can do the same  
12 thing. Obviously you want to choose the one with  
13 the lowest manufacturing cost. That's the only  
14 difference among them.

15 It is efficient to choose the  
16 technology that involves the lowest cost of  
17 producing this product that has the same value  
18 to all users regardless of which technology is  
19 employed.

20 What rights should you acquire in the  
21 process, or what rights should the standards body  
22 demand? It should demand the right to use the

1 winning technology -- and this is sort of this  
2 hold-up problem that we have talked about before.

3       The right to use the winning  
4 technology for the term of its intellectual  
5 property protection, presumably the term of the  
6 patent, at a license fee determined at the time  
7 the technology is chosen we can waffle on that a  
8 bit. We can come back later.

9       We can perhaps talk to the way Dick  
10 Holleman described how it might be done after  
11 but somehow taken into account. But in this  
12 particular case you would certainly want the  
13 license fee to be determined up front.

14       And finally the question is what  
15 should the fee be. I'm not sure if there is  
16 reasonable and non-discriminatory. Those are not  
17 terms economists use.

18       But the right answer to the question  
19 of what the standard -- the fee should be is some  
20 amount between zero which is the smallest amount  
21 that anyone will accept since the technologies  
22 are all -- R & D costs are all sunk.

1           Some amount between that amount and  
2 the difference in the manufacturing costs of the  
3 lowest cost, that is the technology you actually  
4 chose, and the second lowest cost technology.

5           So, for example, if the cost of the  
6 lowest cost technology -- manufacturing cost, if  
7 the lowest costs of technology are nine dollars a  
8 unit and the manufacturing costs of the next most  
9 efficient technology are ten dollars a unit, the  
10 fee should be somewhere between zero and a  
11 dollar.

12           That's the answer in this particular  
13 case. Now, what I have described here is a kind  
14 of at least metaphorical auction in which the  
15 various parties bid to be the -- the various  
16 sponsors bid to become the standard and in which  
17 they bid license fees and in which the winner is  
18 chosen based on a combination of the license fee  
19 and the manufacturing costs.

20           And the standard body picks the --  
21 chooses that technology that has the lowest  
22 combined license fee and manufacturing costs.



1 Whether it's zero or the dollar in my example  
2 is really immaterial for the purpose of the  
3 analysis.

4       It might depend on the nature of the  
5 auction process, how good the standards body is  
6 at negotiating, et cetera, et cetera. But in any  
7 event you would want to choose the technology  
8 with the lowest manufacturing cost.

9       At the same time of course you want to  
10 exploit what has been described here before as  
11 the existence of ex ante competition. Before the  
12 standard is chosen there are a number of  
13 alternative technologies.

14       Their existence constrains the license  
15 fee that the successful bidder can obtain. And  
16 the standards body wants to exploit that by --  
17 during this early process when it has  
18 competition.

19       Now, I think -- and I'll be curious  
20 as we go along here to find out whether those  
21 answers are as uncontroversial as I think they  
22 are. But let me try to suggest how one might

1 consider some variations on the theme and see  
2 what sort of complexities they give rise to.

3       The first is what if there are  
4 differences in the technical capabilities of the  
5 various technologies. What if they are not all  
6 the same? What if some of them are capable of  
7 producing better products than others?

8       Now, obviously the auction -- this  
9 metaphorical auction should take that into  
10 account. It doesn't mean they should ignore the  
11 costs. The manufacturing costs are still  
12 important.

13       If you were an economist you would say  
14 that you would want the technology chosen as the  
15 standard that has the largest surplus, the  
16 largest difference between the value of the  
17 product being produced and the cost of  
18 manufacturing it.

19       You would want -- you would certainly  
20 want to take the cost of manufacturing into  
21 account. That might mean by the way that  
22 conceivably you might end up choosing something

1 other than the best technology.

2       A technology only slightly better than  
3 another, but with much higher manufacturing costs  
4 may not be the best technology to choose. But in  
5 any event you would certainly want to take into  
6 account the ex ante competition in that case just  
7 as you would in the case where I assumed that all  
8 the technologies were the same.

9       What if sponsors are members of the  
10 standards body? That makes the world more  
11 difficult. In my initial example I assumed a  
12 kind of homogeneity of interest among all the  
13 standards body's members.

14       That's not necessarily going to be the  
15 case if some of the members of the standards body  
16 are in fact the sponsors. If I am a sponsor  
17 I care -- particularly if I'm a sponsor that  
18 doesn't produce the final product, I don't care  
19 about having the lowest cost technology chosen.

20       I care about having my technology  
21 chosen. And so in this particular case the  
22 producers of the final product are going to have

1 to be concerned about whether a standards body  
2 with this more heterogeneous membership will take  
3 into account their interests.

4 And that will of course depend on  
5 all manner of things including voting rules and  
6 influence and a whole bunch of other things which  
7 affect which standard is chosen.

8 But you don't get the nice, simple  
9 result where you have a congruence of interest  
10 among all the members of the standards body.  
11 What if sponsors produce the final product? This  
12 is a point that I think Mr. Updegrove alluded to  
13 before.

14 In fact if I'm the producer of the  
15 final product I might well be interested in  
16 having my -- I might be so interested in having  
17 my standard adopted I might be actually prepared  
18 to accept an even lower standard than in my  
19 hypothetical.

20 Why? Because maybe there is a  
21 manufacturing advantage that I have that comes  
22 from having my standard selected as opposed to

1 somebody else.

2           That is the bidding -- to be the  
3 standard will reflect in this particular case  
4 the desire on the part of sponsors who are also  
5 manufacturers to have the standard selected not  
6 just for license fees but because of whatever  
7 advantages they may have in their manufacturing  
8 process.

9           That's going to influence the outcome  
10 of the process. What if R & D costs are not  
11 sunk? I said this is the most difficult problem  
12 that one might address here.

13           Obviously if it costs -- if R & D is  
14 expensive as it often is and you're only in the  
15 business of licensing your technology, that's  
16 your only source of revenue, then really, really  
17 low license fees is not really a very good  
18 business to be in.

19           And the next time around you may well  
20 decide that producing technologies for the  
21 standards body that hoses you when you try to  
22 have your standard -- your technology included in

1 the standard is not such a great idea.

2 That might induce a standards body to  
3 become somewhat generous in order to encourage --  
4 to develop a reputation for being an attractive  
5 place to develop technologies because you get  
6 paid a reasonable amount when the standard is --  
7 when your technology is adopted in the standard.

8 I must say however that given all  
9 the other problems that we've talked about, the  
10 various hold-up problems that I've talked about,  
11 that's a kind of -- that's -- you have to worry  
12 about that problem as well.

13 I just want to suggest that the point  
14 that I think may have been sort of lost in the  
15 discussions this morning, which is licensing  
16 technology from somebody else, isn't the only  
17 alternative.

18 One thing you might well decide to do  
19 in fact if you think these other hold-up problems  
20 and others are a serious concern but you still  
21 want to make sure the R & D is in fact performed  
22 is to do it yourself.

1           And so that may explain the sort of --  
2   the combination of R & D development and standard  
3   setting taking place together in which the  
4   industry or the users in this particular case,  
5   the producers of the final product themselves are  
6   involved both in the development of the R & D and  
7   in the standard setting process.

8           They sort of attempt to kind of get  
9   the best of both worlds and encourage R & D but  
10   at the same time not be subject to the hold-up  
11   problem. How are we doing on time? One more  
12   minute? Fine. I knew I could get it.

13          The last point I want to make is what  
14   if de facto standardization is possible. Well,  
15   in the hypothetical unless you submit your  
16   technology for the standards body to consider,  
17   you have no chance at all.

18          But if in fact the standards body --  
19   the fee demanded and obtained -- or the fee  
20   demanded by the standards body is very low and  
21   the option of going the de facto route is  
22   available to you, you may decide to choose that

1 instead.

2 The standard body has to worry about  
3 the participation of sponsors in the standards  
4 process and if in fact they drive too hard a  
5 bargain.

6 Getting back to the question of what  
7 is fair and reasonable, they in fact may find  
8 themselves not having very many standards  
9 contributed to them for consideration. Let me  
10 stop here.

11 CAROLYN GALBREATH: Thank you. I'm  
12 wondering if we have comments from the panelists  
13 about the hypothetical. And if we don't, then we  
14 can continue. Andy?

15 ANDREW UPDEGROVE: Let me start by  
16 talking about how typical the example would be  
17 because that might be very illustrative.

18 Most people who used to game  
19 specifications were people like the client I had  
20 15 years ago that made fire boots and basically  
21 tried to get on the standard setting panel and  
22 write a spec that described their fire boot and



1 their fire boot only.

2           When you're looking at computers and  
3 telecom you're talking more typically about  
4 interoperability or business processes where it's  
5 not as susceptible to the type of gain that your  
6 example is really oriented towards.

7           So people are trying to come up with a  
8 specification that doesn't so much instantiate a  
9 particular product but enables lots of things to  
10 happen in connection with each other.

11           So I guess the first point is very few  
12 submissions to standard setting bodies are of  
13 products by people who intend to charge royalties  
14 in connection with them. The royalty issue turns  
15 up more typically by people who happen to hold  
16 patents that an adopted standard infringes.

17           So the first thing is that most people  
18 who are going to respond to a call aren't people  
19 who want to make that product and collect  
20 royalties on it. They are people who want a head  
21 start from already being at that starting point.

22           They don't want to saddle competitors

1 with royalties because what they want is a big  
2 market for that product. And they're satisfied  
3 with a head start.

4       So the first comment is for better or  
5 worse it would be a rather uncommon setting in my  
6 experience where you had people submitting in  
7 order to reap a royalty upon adoption. The  
8 second thing is when it comes to picking there  
9 are many different criteria that might go  
10 into that.

11       A technology submitted by a nobody as  
12 compared to a technology submitted by a market  
13 leader, for better or worse there might be some  
14 deference given to the submission of the market  
15 leader because they knew that there would be an  
16 enormous number of products coming out very  
17 quickly.

18       They knew that they would be well  
19 marketed gaining credibility for the standard.  
20 They knew that the submitter had wide respect  
21 for their technology. So consciously or  
22 unconsciously if the goal is to get wide adoption

1 of the standard they might favor the gorilla  
2 over -- to mix metaphors, Goliath over David.

3       They might also look at the ease  
4 of implementation as compared to the cost of  
5 implementation. They might look to the degree  
6 to which it would work easily with legacy systems  
7 as compared to requiring expensive secondary  
8 modifications or additional products to go along  
9 with it.

10       So cost is relative and in a broader  
11 cost than manufacture. And when one assumes that  
12 the goal is the wide adoption of the standard,  
13 cost is one factor but not the only factor in  
14 achieving the ultimate goal.

15       As far as rights, I think the clearest  
16 way to say it is you want any right necessary to  
17 allow any player at any point in the chain to be  
18 able to as simply and easily as possible create  
19 and market that product with the fewest  
20 impediments to its normal mode of business.

21       I mean I could belabor it, but it's a  
22 broad range. So whatever it takes to make anyone

1 want to create and sell that product and be able  
2 to use all their normal marketing partners  
3 without them having to go back and individually  
4 get a license, it's a long list.

5       So let me just leave it at that I  
6 think. Should they pick the standard? They  
7 should pick the standard, but only if it  
8 satisfies that wider array of demands in order to  
9 reach the goal. It may be that all of these are  
10 cheap and all of them are unsatisfactory for  
11 reasons beyond cost. They may need more  
12 submissions.

13       CAROLYN GALBREATH: Thank you. Mark  
14 Patterson?

15       MARK PATTERSON: I approach these --  
16 think about these problems more from an ex post  
17 perspective than an ex ante one, thinking of them  
18 after the standard has been selected and then  
19 what do we do when a patentee, say, wants to  
20 demand a high licensing fee.

21       At that point from after the fact  
22 ex post we can sort of try to judge why we think

1 what the patentee is doing is unfair, what, say,  
2 anticompetitive motives the patentee might have  
3 for demanding licensing fees that we think are  
4 unfair or that discriminate unfairly.

5       And I guess what I would wonder --  
6 what I would like to ask is ex ante can you even  
7 anticipate those? Could we even imagine that we  
8 could have an auction? It would be simple enough  
9 I guess if you wanted to demand a simple royalty  
10 fee as a percentage of profits or something  
11 like that.

12       But to the extent that you're going to  
13 allow any discrimination -- and there are good  
14 reasons to allow some discrimination -- I'm not  
15 sure you could specify the circumstances -- the  
16 kinds of discriminations that we would think  
17 would be okay and the kinds that we would think  
18 would be not.

19       So -- and if we can't specify those,  
20 then I wonder if it's even sort of theoretically  
21 possible to conduct an auction.

22       CAROLYN GALBREATH: Dan Weitzner?

1           DANIEL WEITZNER: Thanks. For reasons  
2   that I'll explain more probably later, I was  
3   actually just going to remark on how completely  
4   foreign that hypothetical sounds which is -- I  
5   think just to maybe point out that the internet  
6   and the web are weird.

7           But I think it's just striking that  
8   that sort of calculus which all seems quite  
9   reasonable, if you can use that term, you know,  
10   is very different.

11          I just want to point out two ways in  
12   which I think it's in some sense foreign from the  
13   kind of internet/web interoperability standards  
14   environment that I think Andy started to  
15   allude to.

16          One is that I have a hard time  
17   extrapolating from the simple set of choices that  
18   say you've got four, pick one, here are the known  
19   advantages and disadvantages or the known costs.

20          My experience of internet and web  
21   standards is that they really involve a  
22   negotiation about how to fit a whole bunch of

1 existing products and requirements together.

2       So I guess I'm wondering the degree

3 to which you've taken into account this

4 interoperability factor which is really a

5 multivariant consideration. Lots of different

6 people have lots of different systems.

7       The idea of setting a standard is to

8 get together so they can all work together and do

9 the things they want to be able to do together.

10 I'd be interested in your thoughts about how that

11 gets sorted out at an auction.

12       And I guess the second is this ex post

13 versus ex ante distinction. I do just think

14 it's quite difficult early in the process to

15 understand the full cost implications of these

16 choices.

17       I think you probably could at some

18 point look back and estimate what the costs of

19 different options that weren't chosen would have

20 been. But I'm interested in how you could use

21 this sort of auction model in a practical way

22 when you suffer from that sort of uncertainty

1 which I think often characterizes the choices.

2 CAROLYN GALBREATH: Perhaps we'll let

3 Dr. Besen respond and then we'll go to Richard

4 Holleman. If you could, move closer to the mike.

5 STANLEY BESEN: Yes, the world is more

6 complicated than the model. I'll concede that.

7 I think I agree with many of the things that were

8 said, but not all of them. I'm a little puzzled

9 about this issue that says, well, nobody is

10 really in this to get license fees.

11 If that were the case, I sort of

12 wonder why we're here. And maybe that's the

13 right answer. But I thought people were actually

14 worried about the question of hold-ups and

15 excessive license fees and all the rest. If that

16 never happens, we probably can all go home.

17 ANDREW UPDEGROVE: A very important

18 distinction, the distinction being that

19 submitters typically are not. People submitting

20 technology typically are not.

21 The real debate most often, as I said,

22 relates to a member of the consortium who raises



1 their hand and says that reads on my patent; I  
2 didn't come in here necessarily to see you take  
3 something out of my pocket.

4 So it's a very real issue. But  
5 statistically it doesn't tend to be a submitter  
6 issue. It tends to be an incidental or  
7 unanticipated issue.

8 STANLEY BESEN: Fair enough. The  
9 other question that I think Danny referred to  
10 is sort of the multiple patent problem which  
11 economists think of as the complements problem.  
12 Think of the worst possible example.

13 There are two technologies, both  
14 of which are absolutely essential to the  
15 interoperability of a particular product. And  
16 they are in different people's hands. We really  
17 don't -- what economists can say about that is  
18 that's a really hard problem.

19 Okay. It's nonsense that each of the  
20 entities in effect wants to demand -- in fact  
21 thinks it can demand the entire surplus. But as  
22 somebody suggested earlier, if everybody tries to

1 get the entire surplus it's in nobody's interest

2 to manufacture the product in the first place.

3 And sort of working out the problem of

4 multiple complementary patents I think is -- or

5 intellectual property is actually a much harder

6 problem than the one I described here where in

7 fact the technology are substitutes and off

8 choice of one or another.

9 CAROLYN GALBREATH: Okay. And Richard

10 Holleman.

11 RICHARD HOLLEMAN: Yes. Thank you. I

12 would have a number of questions about Stan's

13 hypothetical. But I would limit it to just a

14 couple of comments.

15 One, what concerns me I think most

16 fundamentally about it is the fact that it's

17 built on an assumption that something other than

18 reasonable terms and conditions has to be done,

19 something other than what is the common practice

20 has to be implemented.

21 And let me give an example. And

22 Carolyn when we had a meeting to prep for this

1 panel said whenever you can give some real live  
2 example kinds of things. Sort of a bake off  
3 approach is not something that's foreign to  
4 standards development.

5 I can recall in the JPEG area where  
6 there were not necessarily exactly similar  
7 technologies, but technologies competing for the  
8 algorithm for coding for a JPEG. And so they had  
9 a technical analysis done.

10 And the competing technologies  
11 were considered and reviewed. And the committee  
12 felt that for the sake of compatibility,  
13 interoperability if they were going to have a  
14 standard they had to make a selection.

15 So they made a selection based on  
16 their -- based on their best technical judgment.  
17 And the selection involved patent rights.

18 And those patent rights were offered  
19 on a reasonable terms and conditions basis which  
20 was acceptable to the committee. It did not  
21 require getting into an auction, certainly much  
22 less in the standards committee, but an auction

1 in terms of royalties.

2 And then my second comment beyond that  
3 is I think there is in existence a fairly good  
4 range of what reasonable means, both based on  
5 common practice in industry plus based on case  
6 law that has taken place.

7 So we get the impression that this is  
8 a completely foreign term that is dangling from  
9 the ether that anybody can interpret it any way  
10 they want. And actually in practice I think it's  
11 really a long ways from that. There are some  
12 ranges that have been accepted.

13 And the idea of seeking ex ante, post,  
14 and these auctions and so forth, my basic  
15 question is -- comment is I don't see any real  
16 compelling need or problems that would drive us  
17 that way since there have not been a lot of  
18 problems where the standards bodies have been  
19 called up and said -- and been presented with the  
20 fact that you have a standard and the patent  
21 holder is attempting to extract unreasonable  
22 terms and conditions for that.

1 I'm not saying it hasn't occurred.

2 But if you take the thousands and thousands of  
3 standards that are out there, to the extent it's  
4 there it's de minimis in my view. Thank you.

5 CAROLYN GALBREATH: Tor?

6 TOR WINSTON: I just wanted to say  
7 thank you to Stan Besen for his hypothetical.  
8 I think it points out a lot of sort of the  
9 complexities that we're dealing with. And it's  
10 definitely a complex issue.

11 Really what I'd like to do is open up  
12 Mr. Holleman's question to the entire panel and  
13 potentially the people that we have from industry  
14 here. Is this a problem? Is a commitment to  
15 these RAND terms and such a problem? And maybe  
16 we could have Stan Besen comment on that as well.

17 STANLEY BESEN: I don't know how  
18 typical these are, but I always keep this little  
19 clipping in my drawer to have a real world  
20 example where something like this seems to have  
21 happened.

22 Somebody actually demanded

1 unreasonable terms, Dick, if you can imagine  
2 this. The article starts -- the head line is IBM  
3 Unisys reduce fees for modem compression. It  
4 says: IBM and Unisys under pressure from modem  
5 manufacturers, a CCITT committee, and the  
6 aggressive licensing policy of British Telecom  
7 have cut their patent fees for a compression  
8 algorithm needed to build a V.42 bis modem, the  
9 next major growth area for that market.

10       The example -- this thing talks about  
11 these guys asking for really high fees, the  
12 committee saying we think they're too high,  
13 and they negotiate lower fees.

14       RICHARD HOLLEMAN: I can respond to  
15 that fairly quickly if you'd like. That happened  
16 to concern a standard called V.42 bis out of the  
17 CCITT. And the activity that's described took  
18 place outside of the standards committee.

19       What was disclosed in the standards  
20 committee was that these three companies had  
21 patents that may be essential, and there was  
22 concern.

1           Outside of the committee and  
2 independent of each other, okay, each of the  
3 companies gave consideration to the importance of  
4 the standard, their own intellectual property,  
5 and what they felt, okay, would be a reasonable  
6 thing for them to do.

7           The result of those considerations by  
8 each of those companies ended up being an offer  
9 of a flat fee. In lieu of the normal current --  
10 then current royalty bearing rates, let's say  
11 one percent and so forth -- and this happens  
12 constantly.

13          A company like IBM has a general  
14 licensing policy in terms of royalty rates.  
15 Given a situation it may offer something royalty  
16 free, a one time charge, a recurring flat fee.

17          And in this particular case as I  
18 recall it was a one time fee of -- I think one of  
19 them said about \$20,000. The other one said  
20 20,000, 20,000. I think that may be close,  
21 right, Stan? No. You and I didn't talk about  
22 this ahead of time, right? Okay.

1           And on that basis I would tell you  
2   that standard became very successful. V.42 bis  
3   has been an extremely successful standard. The  
4   point for me on that, Stan, is that's an example  
5   of the licensing aspects of standards working  
6   in an appropriate way and in this case in an  
7   international arena, in an international arena.

8           And I think it's also important to  
9   keep in mind that what we talk about in the U.S.  
10   has severe consequences internationally since for  
11   the most part the intellectual property involved  
12   in standards is born in the United States.

13          So we do have to be very careful about  
14   that. So I think it's a good example of the  
15   process working effectively. Thank you.

16          TOR WINSTON: Allen?

17          ALLEN LO: Let me share the  
18   perspective of a company that -- or at least a  
19   class of companies I believe that have emerged  
20   in the last few years that are significantly  
21   impacted by RAND terms and this practice of RAND.

22          And just by providing some context,



1 the company that I work for I believe is sort  
2 of a member of a class of emerging companies  
3 that didn't exist ten years ago and came into  
4 existence to provide products or solutions for  
5 the internet.

6 And as has been discussed earlier,  
7 the internet as a global network, as a single  
8 network imposes at least one requirement which is  
9 interoperabilities. In order to be part of that  
10 network you need to have products that comply  
11 with standards so that you can communicate with  
12 all other products within that network.

13 And to me if anything has changed in  
14 the last ten years or so since the internet, that  
15 is a significant point.

16 To paraphrase what I think Professor  
17 Gellhorn said this morning, just because there is  
18 a lack of litigation -- and I'm not sure that is  
19 the case. But just because there might be a lack  
20 of litigation doesn't mean that there isn't a  
21 problem.

22 What RAND does is basically remove the

1 responsibility of determining licensing terms  
2 away from the standards body and provides a  
3 standards body with some comfort level that there  
4 won't be a hold-up problem but then shifts that  
5 burden of determining those fees or those terms  
6 to the parties, and the parties being the patent  
7 holders and the companies that will be  
8 implementing the standards.

9         In the class of companies that I'm  
10 referring to, these emerging companies, one  
11 characteristic is that because they are fairly  
12 young companies they typically have less mature  
13 patent portfolios which means that when it comes  
14 to patent holders wanting to license on RAND  
15 terms, reasonable and non-discriminatory, what  
16 actually happens is in practice is that the  
17 patent holder will approach the company and  
18 provide -- offer a license.

19         And my experience has been that almost  
20 universally they want royalties. So this isn't  
21 a situation where they are looking to do  
22 cross-licensing or any other kind of terms.

1 They want money.

2 And the company that's in the position  
3 of taking the license or being offered the  
4 license really has no leverage to negotiate  
5 anything that's fair and reasonable from the  
6 terms of that company because it doesn't have a  
7 mature patent portfolio and because it has to  
8 implement these standards.

9 What the effect is is two things. One  
10 is the patent holder is in the ultimate position  
11 to dictate what those terms are going to be, what  
12 those RAND terms are going to be.

13 Often times from my experience it is  
14 a percentage of revenue which when you look at  
15 one percent or whatever percentage, that amounts  
16 to quite a bit of money. And because of the  
17 leverage disparity I don't think -- in my opinion  
18 at least by definition you can't reach reasonable  
19 terms.

20 The other effect is that because  
21 standards are complex it is almost always the  
22 case that there will be multiple patents with

1 multiple patent holders that claim to have patent  
2 rights that are essential to practicing that  
3 standard.

4       And one of the things of by shifting  
5 the responsibility of dictating RAND terms away  
6 from a central authority to more of an ad hoc  
7 type of situation, what you end up with is a  
8 situation where RAND terms may appear reasonable  
9 in the context of one particular patent or in the  
10 context of negotiating with one particular patent  
11 holder.

12       But when a company has to deal with  
13 multiple patent holders that may hold -- that  
14 hold multiple patents, the cumulative effect is  
15 that the product -- the company that's taking the  
16 license has to take -- if they accept these terms  
17 they may end up having to pay 20, 30 percent of  
18 revenue just on patents, which I think is not --  
19 certainly from the company's standpoint who's  
20 taking the license is not reasonable by any  
21 means.

22       The ultimate effect I believe is that

1 these companies with the less mature patent  
2 portfolio and the inability to negotiate anything  
3 reasonable have a significant disadvantage to  
4 other companies that may also be implementing  
5 standards that have large patent portfolios who  
6 are able to negotiate either reasonable or  
7 cross-license royalty free.

8         So when I look at RAND and in  
9 particular your comment, Mr. Holleman, about  
10 non-discriminatory not being the same as  
11 identical, it seems to me that if -- I'm not sure  
12 what non-discriminatory would mean if it didn't  
13 mean identical.

14         If large companies have the benefit of  
15 being able to cross-license for free and practice  
16 the standards, shouldn't the small company as  
17 well?

18         CAROLYN GALBREATH: Thank you.

19         RICHARD HOLLEMAN: Should I respond to  
20 just that last point or would you rather I not,  
21 Carolyn?

22         CAROLYN GALBREATH: I think it might

1 be a good idea if we could proceed with a couple  
2 of other people and then do a wrap-up. I'd like  
3 to recognize Scott Peterson next. And then, Dan  
4 Swanson, if you would like to follow that would  
5 be great.

6 SCOTT PETERSON: So curiously  
7 although I -- my experience is in a company quite  
8 different from Allen's, a very large company.  
9 Hewlett-Packard Company is a very large company  
10 with a very large patent portfolio. We  
11 experience much of the same things that he  
12 experiences.

13 So his characterization of this as  
14 being a problem that may be peculiar to young  
15 companies, small companies, companies that don't  
16 have large patent portfolios, I wouldn't restrict  
17 it in that way.

18 We experience some of the very  
19 challenges that he articulates that flow from  
20 the uncertainty of what RAND means and the  
21 expectation that RAND is an appropriately  
22 specific concept that you can then decide

1 what that means in some sort of a  
2 one-on-one-negotiation after the standard  
3 has been adopted.

4 Let me describe a problem -- the  
5 problem in a particular way from a little  
6 different perspective from his. Reasonable and  
7 non-discriminatory is not well defined for lots  
8 of good reasons.

9 It's extremely context dependent. So  
10 we're here with no definition of it for excellent  
11 reasons. It's not something that you want to  
12 write a formula for because it's extraordinarily  
13 context dependent. How do you determine what  
14 RAND is depends on many, many details.

15 One of the details has to do with the  
16 patent, by gosh. And in fact one of the wonders  
17 of the patent law is that the value that is  
18 returned to the inventor is in fact intended to  
19 be scoped according to their invention by this  
20 curious little thing.

21 You give them a monopoly and you allow  
22 them to negotiate whatever terms they might want.

1 And for someone who has a pioneering patent, by  
2 gosh, they get -- they can get a pretty good  
3 deal. That patent is going to be extremely  
4 valuable to people.

5       The majority of patents actually are  
6 not at all like that. The majority of patents  
7 are of much more mundane consequences. Many,  
8 many patents offer very little competitive  
9 advantage. One is maybe slightly better than  
10 others.

11       One may be one of three or four  
12 or more ways of doing a particular thing and  
13 therefore the licensing value of that might  
14 be extremely small.

15       Well, one of the wonders of this  
16 standards world is that when a patent becomes a  
17 patent that is essential to practicing a standard  
18 and you have a group of companies who are often  
19 time the competitors in that marketplace get  
20 together and agree that in order to enlarge the  
21 market in which we're all participating and  
22 something which will be valuable and important



1 for consumers and the producers alike to agree on  
2 the particular way, it's very common for them to  
3 pick one of these little unimportant details.

4       It didn't matter which one it was.  
5 But one of these will get chosen. Well, that  
6 might be covered by a patent, a patent which more  
7 likely than not is a patent whose value prior to  
8 its being anointed in this way was of very small  
9 value because in fact the majority of patents are  
10 of relatively small value.

11       As I say, the number that are the  
12 real gems are a fraction. So now we get back  
13 to figuring out what reasonable and  
14 non-discriminatory means.

15       So we have a negotiation. We have a  
16 negotiation however after this anointed event has  
17 occurred. So now one is negotiating a license  
18 for what has now become effectively a pioneering  
19 patent because it's essentially in an economic  
20 sense the equivalent because you can't  
21 participate in this particular market area.

22       If the standard achieves its goal and

1 is successful, you won't be able to participate  
2 in the products that play and interoperate in  
3 that marketplace without that patent.

4 So that patent has now taken on a  
5 significance far beyond the innovation that it  
6 represented. So what is it that you're  
7 negotiating here?

8 It seems to me that at that point in  
9 time the patent owner is in a very -- is in a  
10 wonderful position because they now have  
11 something, an asset which was of no consequence  
12 the other day, and now is of great consequence.  
13 Should they be rewarded for that? How should  
14 this all play out?

15 If in fact they are rewarded as if it  
16 was a pioneering patent, this seems to me to be a  
17 terrible distortion of the patent system because  
18 in fact the patent system was -- is providing  
19 people with monopolies, but monopolies that are  
20 proportioned in terms of their economic control,  
21 proportioned to the innovation.

22 The value here is not proportioned to

1 the innovation. The value is proportioned to the  
2 importance of the standard, a detail that flows  
3 from the collective action of all these folks.

4 So this is a long way of saying that  
5 I'm very concerned about the challenges of doing  
6 negotiation after the standard has been selected  
7 as a way of determining what was reasonable. I  
8 guess another -- well, let me stop there.

9 CAROLYN GALBREATH: Okay. Thank you.  
10 Dan, do you have a few comments? I was actually  
11 going to call on Dan Swanson, but go right ahead.

12 DANIEL SWANSON: We need some  
13 standardization of the Dans, I think. Let me  
14 first thank Dick Holleman for retrieving my name  
15 tag although I must say Dick whispered to me when  
16 he did that if he held onto it he could lock me  
17 out of any speaking role in the process today.

18 I just want to state for a moment  
19 in defense of Stan -- although Stan needs no  
20 defense. I should disclose although disclosure  
21 was the subject of the earlier panel this morning  
22 that I am both an antitrust lawyer and an

1 economist.

2           And aside from the fact that that is  
3 a recognized disability and proof positive of  
4 economies of scope in boredom -- and the  
5 economists among you can laugh and the rest  
6 of you can laugh when you look it up.

7           But it is two sets of lenses through  
8 which I look at and evaluate all of the empirical  
9 data that we're hearing here today. I hear Stan  
10 talking the way that economists talk about  
11 auctions.

12           And I hear many of the panelists who  
13 have practical industry experience taking some  
14 exception to that and suggesting that that's not  
15 the way the real world works.

16           Now, being confronted with the fact  
17 that the real work doesn't work that way is not a  
18 real effective argument with an economist. And  
19 yet I'm here as I say to defend the proposition  
20 that we still ought to think in the way that Stan  
21 has analyzed this matter very helpfully in his  
22 hypothetical.

1           As an antitrust matter as we think  
2   about enforcement we're typically confronted by  
3   a practice that takes place on the part of a  
4   licensor who has intellectual property that has  
5   been implicated by a standard.

6           And setting aside what that conduct is  
7   and whether or not it satisfies the requirements  
8   for anticompetitiveness and antitrust law, one of  
9   the first questions we like to ask in antitrust  
10   is does that licensor, does that defendant have  
11   market power.

12          And the market power inquiry is a  
13   very formalistic way sometimes it seems. But  
14   it's a very common sense way of asking the  
15   question is the market set up in such a way  
16   that anticompetitive activity is likely to be  
17   self-correcting and transient or long lived  
18   and persistent.

19          And so a defendant, a licensor in  
20   those circumstances is quite possibly going to  
21   be in possession of market power.

22          And if that's all we look at that

1 point in the antitrust sense, if that's all we  
2 look at at that point ex post, after the standard  
3 has been selected, then that's the end of the  
4 analysis. Then we move on to asking whether  
5 or not the conduct is anticompetitive.

6 But typically a licensor at that point  
7 will say, well, hold on; whether or not you think  
8 I have market power now, before I was chosen  
9 there was a whole lot of competition; there were  
10 a whole lot of options; I had to compete in the  
11 standard selection ensued from a very competitive  
12 process.

13 And you need to take that into account  
14 in deciding whether or not to intervene, whether  
15 or not the antitrust laws have a proper role to  
16 play. As economists we tend to think about  
17 ex ante competition of the sort that that  
18 scenario suggests as being in its ultimate  
19 form a kind of auction.

20 In other words, if we expect there to  
21 be effective ex ante competition in the extreme,  
22 we'd like to see it take place in the most

1 heightened circumstances which would be  
2 represented by a kind of Demzets auction where  
3 you auction off the right for this ostensible  
4 market power.

5       As antitrust practitioners we need to  
6 ask ourselves if that is the competitive extreme  
7 that policy ought to favor. What does antitrust  
8 law have to say about the ability of standard  
9 setting organizations and individual players in  
10 the market to attain that auction like extreme of  
11 competition?

12       So I think that although we  
13 acknowledge and realize that auctions don't  
14 necessarily take place, their format may be  
15 constrained by antitrust rules that we're going  
16 to be talking about today at some length  
17 later on.

18       Nonetheless it seems like a reasonable  
19 way to think about it in terms of economics  
20 because that ought to be the objective. It ought  
21 to be the objective of competition to constrain a  
22 technology before it obtains market power.

1           That's the point I think that Scott  
2   is making, that afterwards you're dealing  
3   potentially with a different animal. But if  
4   you're dealing with it after it has been  
5   constrained in an ex ante process, antitrust may  
6   have a whole different view of it.

7           CAROLYN GALBREATH: Thank you very  
8   much. I think that before we get into resolving  
9   what RAND means here this afternoon or why we  
10   just shouldn't have royalty free licenses all the  
11   time, which will be kind of the next two topics,  
12   that it might be appropriate to take about a  
13   ten-minute break.

14           If we could be back here rather  
15   promptly, we have a lot to cover this afternoon.  
16   But I think it might be good to stretch a bit as  
17   well. Thanks.

18           (Recess.)

19           CAROLYN GALBREATH: So I think we'd  
20   like to start the time after the break by just  
21   turning to the question of royalty free and when  
22   royalty free is necessary and why members who



1 would want to practice a standard would think  
2 that royalty free is necessary.

3       This is something that the W3C has  
4 been considering, and we're going to ask Dan  
5 Weitzner to just describe a little bit about the  
6 process that they've been going through debating  
7 the various virtues and vices of royalty free and  
8 the possibility of RAND terms.

9       DANIEL WEITZNER: What I thought I  
10 could usefully do here is just try to walk  
11 through the path that W3C has followed through  
12 this issue. It's been now a relatively long  
13 path. We've been talking about this for almost  
14 four years in one configuration or another.

15       And I guess one caveat that I would  
16 attach to this is that if I've learned anything  
17 about the way I think W3C needs to look at patent  
18 policy issues as against the way they're  
19 considered in other organizations it's that every  
20 situation really is different and that there are  
21 unique attributes of the web technically.

22       There are a unique set of goals that

1 the web seeks to accomplish. And I think there  
2 are unique market conditions when it comes to the  
3 web that really have informed all of our work.

4       So I'll ask that whatever extreme  
5 statements I might make you take them in the  
6 context of the web, notwithstanding what some  
7 people who are really devoted to the web think.  
8 I don't think the web is the whole world.

9       But I think that -- so I just want to  
10 start with what I do think is unique about the  
11 web. As Andrew started to say, the goal of the  
12 web from the beginning really has been to create  
13 a universal worldwide ubiquitously accessible  
14 information space.

15       It has been to create something that  
16 simply hasn't existed before in that way, a way  
17 for computers all around the world regardless of  
18 what operating system they use, regardless of  
19 what part of the world they are in, regardless of  
20 how they happen to connect to the internet, to  
21 have all of these diverse devices connect  
22 together.

1           And I would say that in looking back  
2   at the technological history of the web what's  
3   striking is that I think that to the extent that  
4   the web has achieved any of those goals  
5   partially, the web has achieved the goals of --  
6   or has approached universality by adopting  
7   extraordinarily simple, some would even say  
8   simplistic, technology.

9           HTML which is the way that people  
10   at least initially write web pages is really  
11   simple. And people who know a lot about computer  
12   languages for defining what pages, what documents  
13   ought to look like, look at HTML and say, well,  
14   this is about the dumbest thing you could  
15   possibly imagine; there is much better technology  
16   out there for doing this.

17           But the fact is that -- and the same  
18   actually goes for many parts of the web. Those  
19   who designed it like to say that it's elegant.  
20   And I think they have some basis for saying that.

21           But really what the web is is a set of  
22   very simple standards that can be used widely.

1 And the value of the standards, the quality of  
2 the standards is measured I would say first and  
3 foremost by the degree to which they can be  
4 adopted and implemented on a ubiquitous basis.

5       When we started talking about the  
6 issues of patent policy at W3C, what the  
7 discussion triggered was a kind of retrospective  
8 look at how the web and how the World Wide Web  
9 Consortium actually got to where it is.

10       And this is one of these cases where  
11 you have two groups of people looking at the same  
12 situation and seeing almost opposite sets of  
13 facts as far as they can tell.

14       The people who actually were involved  
15 in the development of the web looked at the  
16 process of developing the initial web standards  
17 and found really -- or saw what they did as  
18 collaborative work, as standards work that was  
19 really standards design, collaborative standards  
20 design starting more or less with blank pieces of  
21 paper or blank screens, if you will, and working  
22 together to develop standards.

1           So when we talk in the kind of  
2   abstract context of IPR and standards about  
3   giving away IPR, people who were involved in the  
4   early days of the web I don't think saw it as  
5   giving away anything. They saw it as building  
6   something together and then giving it to everyone  
7   else.

8           But there was not as there is today  
9   very detailed sets of specifications that have  
10   been worked on for years and then brought to a  
11   standards body. The standards body really  
12   started more or less from scratch.

13          And even when that was not the case --  
14   and certainly today, a lot of the work we do is  
15   based on quite a lot of careful and expensive  
16   technical design work from a number of our  
17   members.

18          Even today a lot of the work that gets  
19   done with that work is a process of integrating  
20   those designs into the existing architecture of  
21   the web, figuring out how to get those basic  
22   designs to work well.

1           So still the environment of W3C  
2 is really an environment of quite a lot of  
3 collaborative technical work done in the working  
4 groups.

5           I think it's different in many ways  
6 from some of the more formal standards bodies  
7 that tend to develop requirements and then take  
8 submissions of different technologies and vote on  
9 them, and whatever they vote on is what they do  
10 and things move on.

11           That really isn't the way that things  
12 happen at W3C. All of this -- the issues of  
13 patents at W3C came to a head after we had a  
14 series of experiences with particular standards  
15 we were developing running into patent questions.

16           Starting in about 1998, a project that  
17 we had been working on for a while called P3P,  
18 the platform for privacy preferences, has been  
19 going along.

20           And in the middle of the process one  
21 of the members of the working group came forward  
22 first privately to other members of the group

1 and then finally publicly and said that they had  
2 patents that they believe were essential for  
3 implementing P3P and were prepared to offer some  
4 sort of reasonable non-discriminatory terms.

5       They never publicly disclosed what  
6 those terms might be. They also interestingly  
7 enough proposed to offer either very low cost or  
8 royalty free licenses, zero dollar licenses,  
9 if implementers would agree to use other  
10 technologies that this particular patent holder  
11 was interested in promoting, technologies that  
12 were not part of the standard.

13       We candidly at W3C had no idea how to  
14 deal with this problem. We had no -- well, we  
15 had ideas, but we had no process in place for  
16 dealing with this problem.

17       What we ended up doing after quite a  
18 lot of conversation with the patent holder to  
19 try to reach some sort of agreement, after  
20 conversations with various members, after  
21 conversations with antitrust lawyers, decided  
22 that what we were going to do in the first

1 instance was have an evaluation done of the  
2 patents in question, see to what extent  
3 implementations of P3P might read on those  
4 patents, and see to what extent those patents --  
5 see to what extent the claims that were of  
6 interest were or were not valid.

7         We ended up after spending a fair  
8 amount of money as you can imagine and a fair  
9 amount of time producing an analysis which we  
10 made public which as far as we could tell gave  
11 most implementers a level of comfort in feeling  
12 that they could proceed in implementing P3P  
13 without being concerned about the licensing  
14 requests from the patent holder.

15         That was about three years ago. Just  
16 two days ago we actually announced that P3P is  
17 now a final web standard. And so far there has  
18 been no more problem from -- or no more -- no one  
19 has heard from that patent holder since.

20         So what this experience and some other  
21 experiences prompted us to do was to -- and  
22 prompted our members to call for really was a



1 comprehensive look at patent policy at W3C, what  
2 was the right policy for us, what would make  
3 sense.

4 We produced a policy back last summer  
5 which was an effort to balance RAND approaches  
6 with royalty free approaches. It said that every  
7 time we would start a new technical activity we  
8 would decide whether it would be a royalty free  
9 activity or a RAND activity.

10 And that proposal actually took quite  
11 a while to get together. Many of the members of  
12 the working group that actually produced the  
13 proposal are here. Bob Holleman was one of the  
14 charter members of the working group.

15 He retired though before he could  
16 finish leaving us in the lurch. But Scott  
17 Peterson and a couple folks in the audience and  
18 on the earlier panels have been involved in the  
19 group. We thought we had produced a, quote,  
20 reasonable proposal.

21 What we heard from members of the  
22 public, the open source community, many

1 independent developers, and many of our members  
2 was, I think to quote Andy again, that we were  
3 insane. Now, Andy said that with a lot more  
4 certainty and authority than I think others might  
5 have been able to muster.

6 But the debate that got set off  
7 when we proposed that there might be some  
8 circumstances in which web standards could  
9 involve RAND technologies I think really was  
10 instructive.

11 And I want to just indicate very  
12 quickly some of the reasons why I think both the  
13 commercial and non-commercial community involved  
14 in the web reacted so strongly. Certainly there  
15 were some ideological objections.

16 There are some people who believe  
17 software ought to be free, period, should never  
18 be patented, think that software patents are some  
19 sort of dramatic mistake. So they looked at this  
20 and said that we were supporting the software  
21 patent regime; we shouldn't do it.

22 I think there were others who felt

1 that the quality of some of the patents that had  
2 been granted over the last few years with respect  
3 to web technology really isn't quite up to par  
4 and that to allow people who have these patents  
5 of questionable validity to interject themselves  
6 into a standards process and possibly gain  
7 royalties from them just really was unfair.

8 I think though that the majority of  
9 the objections from members of the public and  
10 from many, many W3C members really came because  
11 of the uncertainty of what this would mean. It's  
12 relatively striking to me that, you know, as we  
13 talk about RAND on this panel Stan Besen says  
14 it's a term that economists don't use.

15 Bob Holleman is not quite sure he  
16 wants to define it -- Dick Holleman. I'm sorry.  
17 You know, Scott and the fellow from Juniper are  
18 not sure that it's really quite a good term.

19 It is a term -- whether or not it  
20 actually is susceptible to a useful definition,  
21 it is a term that I think raises considerable  
22 anxiety and confusion among people who feel that

1 they will have to depend on it to gain access to  
2 intellectual property on reasonable terms.

3 And I think if nothing else it opens  
4 up the possibility that there will be some long  
5 process that they will have to engage in to  
6 negotiate these reasonable terms.

7 By the time they have done that, their  
8 position in the market may be considerably  
9 disadvantaged. So the timing of this was  
10 difficult -- was seen as difficult.

11 I should also say that a number of our  
12 other members, particularly members who have  
13 histories of working in the traditional standard  
14 setting organizations and are comfortable with  
15 the notion of RAND licensing had quite the other  
16 alternative -- the other response.

17 When we proposed anything having to do  
18 with royalty free standards at all they thought  
19 we were crazy. So the process that we've been in  
20 has been trying to get people who have really  
21 quite different views of this world together on  
22 some sort of policy.

1           I want to -- I have some other remarks  
2   about the specifics of what we mean by royalty  
3   free as we have worked that out with respect to  
4   the web. But maybe there will be time for that  
5   later. I'm happy to either discuss it now or  
6   bring it up later.

7           CAROLYN GALBREATH: Why don't we have  
8   you weave it in as we go along this afternoon.  
9   And I guess your comments point up to -- point us  
10   back to comments that we had before the break.  
11   I think Scott Peterson coined the phrase  
12   negotiation after anointment.

13          You have brought up the fact that for  
14   some people the uncertainty associated with RAND  
15   terms is something that is a disincentive. And  
16   I think what we'd like to turn to now is the  
17   question of when the RAND is sufficient, and is  
18   there some range of understanding as to what  
19   RAND means.

20          And then if it's not sufficient,  
21   what are the other alternatives, and are those  
22   alternatives things that should give us concern

1 as antitrust enforcers or not. So with that if  
2 we have comments from the panel that would be  
3 great. Andy?

4       ANDREW UPDEGROVE: I just wanted to  
5 first of all qualify my insanity. My comment was  
6 more pedagogical rather than ideological. I  
7 don't have an ideological viewpoint about the web  
8 being free.

9       But I try to have a brutally pragmatic  
10 view about what it takes for something to  
11 succeed. And if one were talking about an aspect  
12 of the web that related to licensing by a  
13 comparatively small number of major players, then  
14 the web is no different from anything else.

15       Conversely if it were something that  
16 would touch a million people, from a practical  
17 point of view maybe even free or with a royalty  
18 it would still be an awkward encumbrance to put  
19 upon something that should be like a utility.

20       The one point I did want to make  
21 though that relates to a number of these things  
22 is W3C and IETF and organizations like that can

1 do pretty much what they want and know that what  
2 they do may be controversial but it will be  
3 successful because they are the anointed, you  
4 know, gatekeeper that people look to to do what  
5 needs to be done.

6 But there are many, many, many  
7 consortia that don't occupy that enviable  
8 position. Many consortium movements are by  
9 people who want to pioneer a new technology or a  
10 new service or a group of vendors that want to  
11 promote a particular way of doing things.

12 For most consortia standard setting  
13 is hard work. It's really hard work. It doesn't  
14 fall into your lap. So when you look at these  
15 things you have to kind of herd cats and get  
16 people to agree to things that will allow success  
17 and not hamstring it.

18 You have competitors to worry about.  
19 You may have other consortia, you know, who have  
20 their own competing standards to push. You have  
21 the indifference of the marketplace. You may  
22 credibility.

1           People are always cheap shooting  
2 things that you come out with saying, oh, that  
3 doesn't work; that's just hype; that's just  
4 promotion. There's inertia.

5           So whenever you try to bring about  
6 something new, the people who are trying to  
7 create the standards need to keep in mind that  
8 you really have to make it easy. And sometimes  
9 consortia members are their own worst enemies.

10          So RAND terms are something that you  
11 should be extending yourselves to promote. The  
12 last thing I wanted to say is on the topic of  
13 non-discriminatory licensing. It's important to  
14 remember that one aspect of that means available  
15 not just to people on the same basis or some  
16 relatively free basis, but available to everyone.

17          It may go out saying but it is  
18 important. But what you are committing is to  
19 license everyone including your head to head  
20 competitors and not up the ante for them on a  
21 discriminatory basis. I think everyone agrees  
22 that from that basis it at least means that.



1 After that it may get to be more variable.

2 CAROLYN GALBREATH: I see we have a  
3 lot of comments. Dr. Stiroh, let's go with you  
4 next.

5 LAUREN STIROH: In listening to some  
6 of the comments from industry people about the  
7 confusion over what RAND means and understanding  
8 that it means different things to different  
9 people, and that there may be confusion even  
10 within one standard setting body over what that  
11 means, I think that there maybe could be more  
12 agreement over what it doesn't mean.

13 And I must say that I'm not an  
14 industry person. I'm coming at this from the  
15 point of view of an economist. But my opinion of  
16 what it wouldn't mean is royalty free in all  
17 circumstances.

18 There may be circumstances where that  
19 is reasonable. But to impose it as a blanket  
20 requirement certainly seems to me to be  
21 unreasonable. I think that one of the costs of  
22 having something like that is that we don't know

1 what we don't have.

2           It must be acknowledged that if you  
3 can't be compensated for your innovations you  
4 don't have the same incentive to bring them to  
5 the standard setting body. If you don't bring  
6 them, they don't get incorporated.

7           You said that what we have with the  
8 World Wide Web is something that is easy and  
9 understandable. I don't know if I'm quoting you  
10 directly.

11           But we don't know what we don't have  
12 because -- and it may be that because of the  
13 royalty free nature of it there were things that  
14 were excluded that we could have had. And that's  
15 a cost that is probably immeasurable but one that  
16 we have to acknowledge exists.

17           CAROLYN GALBREATH: Dick Holleman, why  
18 don't we turn to you. And then we'll get back to  
19 Dan Weitzner.

20           RICHARD HOLLEMAN: Just to respond, I  
21 had a couple of comments for Andy. But Lauren's  
22 comment I think is very appropriate in that the

1 royalty free as the requirement in any group does  
2 have the potential of perhaps excluding what  
3 might be the best technology.

4         And if not carefully handled it could  
5 be considered perhaps a legal issue from a  
6 restraint of trade consideration as well. So I  
7 would certainly support that. The one comment I  
8 wanted to make harkening back to Andy's remark,  
9 particularly just before the break about -- I  
10 think it was a little too harsh.

11         The standards people are not into  
12 standards development for the licensing benefit.  
13 I think that's got to be looked at in a little  
14 broader way which is I believe typically  
15 companies, their participants get involved  
16 because it is an activity in which they have a  
17 business interest.

18         And often that relates to either a  
19 present or a future product or service of that  
20 company. There may be intellectual property  
21 associated with that, the overall goal being  
22 let's get a standard that helps promote our

1 business through the sale and promotion of our  
2 products.

3       There are times where intellectual  
4 property becomes a dimension of that. And to the  
5 extent it does then they are interested in the  
6 reasonable licensing revenue that can derive from  
7 that. And I perhaps am clarifying perhaps Andy's  
8 comment really in a broader sense.

9       So people do get involved because they  
10 have a business interest. Part of that business  
11 interest can be, okay, the objective of deriving  
12 reasonable royalty from their intellectual  
13 property.

14       Allen's concern -- and I think this  
15 goes to RAND, a point Carolyn wanted to focus on.  
16 Where you have multiple patents on an individual  
17 standard, there are some real world examples of  
18 where the industry felt this was significant  
19 enough to take some other action, that being  
20 patent pool types of activities.

21       MPEG, the MPEG LA license authority  
22 was sort of born out of that. But I would point

1 out that didn't happen in the standards bodies.

2 That didn't happen in the standards activities.

3 The standards participants in  
4 developing the standard and the disclosure that  
5 took place saw that there was this multiplicity  
6 of patents that was coming forward. Outside of  
7 the ISO standards process they decided to try to  
8 do something.

9 And they independently embarked upon  
10 the patent pool. Same thing happened on 1394,  
11 commonly called Firewire in that regard. So  
12 that's -- I think that's one example.

13 Where you're talking about a concern,  
14 Andy, for a product and the product has to comply  
15 with multiple standards, let's say one from EIA,  
16 one from ISO, one from the ITU, one from IEEE,  
17 that's a difficulty in terms of the cost of doing  
18 business.

19 I mean everyone is faced with that  
20 difficulty because of what the product needs to  
21 succeed in the marketplace. I really get  
22 concerned when I hear the expression of

1 cross-licensing means the parties are getting  
2 everything for free.

3       There is value that is exchanged in  
4 cross-licensing and there's risk. So even for  
5 small companies you shouldn't, you know, feel  
6 that, well, they're giving each other everything  
7 at no cost to themselves because there may not be  
8 money flowing across the boundary.

9       There is an awful lot of IP that's  
10 being put on the table. And sometimes that IP is  
11 used by the other party in more successful ways  
12 than the patent holder has even used it  
13 themselves and to better advantage. So there is  
14 value exchange there even in the so-called large  
15 company portfolios. Thank you.

16       CAROLYN GALBREATH: Dan, would you  
17 like to respond to this.

18       DANIEL WEITZNER: Yeah, two points.  
19 One is to Andy's point about the degree to which  
20 W3C can do what we want or are -- I know you  
21 didn't mean that. But the degree to which we  
22 have flexibility here.

1           And I think it goes back to a point  
2   that Don Deutsch made this morning, that there  
3   is clearly competition among standard setting  
4   organizations. Clearly people who want to  
5   promote a certain technology as a standard have a  
6   wide range of choices.

7           And I believe that the choices that  
8   any standard setting organization makes about its  
9   IPR policy is going to be a differentiator. We  
10   happen to believe that the approach we're heading  
11   towards will differentiate us in a positive way  
12   and will provide value to our members as a whole.

13          But no doubt, you know, I would be  
14   surprised if we didn't have at least one member  
15   who leaves W3C if we in fact adopt a royalty free  
16   policy.

17          And I think we have already seen  
18   suggestions that there is some work that could  
19   have been done at W3C that isn't being done at  
20   W3C because of concerns about licensing policy.

21          And I think that that's an inevitable  
22   result of this. I mean no one has -- no

1 standards body today whether formal or de facto  
2 or consortium or whatever else has any kind of  
3 lock on any particular technology.

4 I think there are certainly startup  
5 advantages that different ones have, but I don't  
6 think that those necessarily last very long. And  
7 I think that the conversation that started in  
8 general in the standards world about what's  
9 royalty free and what's RAND is about different  
10 bodies differentiating themselves in some part.

11 The second point to the question about  
12 we don't know what we don't have in the web, I  
13 think it's hypothetically true that you never  
14 know what you're not going to get if you don't  
15 say you're willing to pay for it.

16 But I actually think in the case of  
17 the web it's not true. I think we actually do  
18 know what we don't have. What we don't have is  
19 a whole bunch of proprietary hypertext systems  
20 which existed before the web which didn't work,  
21 which didn't achieve the universal reach that the  
22 web achieved.



1           Now I'm not going to say that that is  
2   entirely because of licensing terms. But I think  
3   that was a factor. I think the fact that the  
4   basic web protocols were put out at zero cost  
5   with no licensing terms at all was essential to  
6   the development of the web.

7           Sure, there may well have been  
8   features that might have been put on the table.  
9   But I can tell you that I'm really just not aware  
10   of any feature that someone wanted to bring to  
11   the web and came and said, well, we'd really like  
12   to bring this to the web if you would only agree  
13   to a certain licensing term.

14          It just hasn't happened. And the  
15   reason I think that hasn't happened is  
16   essentially because I think patent holders are  
17   smart and understand what people are willing to  
18   pay for and able to pay for and what they  
19   are not.

20          And I think the web is an environment  
21   where at the level of the basic standards it's  
22   hard to pay. Now, I think that there is a lot of

1 licensed technology associated with the web.

2       The audio and the video technology  
3 that everyone loves is licensed technology, is  
4 RAND technology if that. And that's managed to  
5 find its way onto the web certainly. But it  
6 doesn't have the universal reach that the core  
7 web protocols do.

8       GAIL LEVINE: Can I jump in with a  
9 follow-up question for you, Dan?

10       DANIEL WEITZNER: Yeah.

11       GAIL LEVINE: We want to take the  
12 conversation to the universal level. And that  
13 means talking about not just the web but other  
14 markets outside the web. But before we do that,  
15 I wanted to ask you to help us understand what  
16 makes the web special.

17       I remember at the beginning of your  
18 comments you said the web is unique because of  
19 certain market conditions. And maybe those are  
20 the market conditions that make royalty free  
21 licensing work in your context.

22       Can you tell us what those conditions

1 are so that we can distinguish the web world from  
2 the other contexts that we've been talking about  
3 today?

4 DANIEL WEITZNER: Well, I think that  
5 you can distinguish some from just the actual  
6 development history of the web. As I said, the  
7 standards, the protocols initially were very  
8 simple and had no fees attached to them.

9 And the web really only got its start,  
10 if you will, because it was inexpensive and easy  
11 for lots of people all around the world to put up  
12 a website, to run a web server, to have a web  
13 browser.

14 And those were available at no cost,  
15 and in many cases based on more or less either  
16 volunteer labor or in other cases government  
17 subsidized labor. And that's true of lots of  
18 important parts of the internet.

19 I think that what is going to make  
20 the web unique going forward I think is a real  
21 question. I do -- you know, I think the fact  
22 that the web is for the most part only in

1 software is a distinguishing factor, and often  
2 software that doesn't cost any money.

3       You look at some of the key pieces of  
4 web software that everyone depends on, web server  
5 software. The most popular web server is the  
6 Apache web server. It costs no money. You can  
7 download it. You can run it on any computer.

8 And I think that's really different than, say,  
9 the software that makes a telephone switch work.

10       You can't download that for free. You  
11 can't pick up a telephone switch, you know, on  
12 the corner and just hook it up. So those are I  
13 think the kind of things that have certainly made  
14 the web historically different.

15       I think what continues to make the web  
16 different is the development of web technology  
17 continues to rely on very broad implementation  
18 across lots of different platforms so that we can  
19 learn how to build the best technology into  
20 the web.

21       We rely on having lots of independent  
22 developers out there as well as lots of our large

1 members' research organizations testing, trying  
2 things out before they become final standards.  
3 I think that many other technology arenas don't  
4 have that kind of worldwide test lab.

5       It makes the web frustrating often  
6 times because some of it is really still in beta  
7 as people are using it. But I think it also has  
8 contributed to the way that the technology has  
9 developed.

10       It doesn't just kind of emerge out of  
11 a research lab working. It's subject to a very  
12 wide array of testing that is able to happen in  
13 part because of the licensing conditions that  
14 exist on the web.

15       CAROLYN GALBREATH: And if we are  
16 going then back to the question of when is RAND  
17 sufficient, maybe we could talk about this  
18 outside of the web and outside of the internet.  
19 Dan Swanson, you had some comments.

20       DANIEL SWANSON: Thanks, Carolyn.  
21 Just a few observations about RAND and royalty  
22 free licensing. One of the things that antitrust

1 law acknowledges it's not very good at, meaning  
2 antitrust enforcers and antitrust courts, our  
3 court system, and antitrust practitioners, is  
4 figuring out what a reasonable price should be.

5       That was something that people were  
6 very good at in the Middle Ages. You know there  
7 is a great medieval concept of a reasonable  
8 price, a fair price, a just price. But the  
9 insights of modern economics tell us that prices  
10 are determined in markets and are the result of  
11 supply and demand.

12       It's not something that's typically  
13 easy for a Court sitting as a regulatory body to  
14 determine and to effectively administer. Courts  
15 are very, very loath to take the role of markets.  
16 And I would certainly suggest they should have  
17 that attitude.

18       So from the standpoint of imposing  
19 constraints on the possible subsequent  
20 development of market power as the result of  
21 anointment or selection as a part of a standard,  
22 obviously one wants to give incentives to

1 standard setting organizations.

2           One wants to bestow them with the  
3 power to put limits, effective limits that will  
4 restrain that exercise after the technology is  
5 chosen. And the whole trick is doing that in a  
6 way that's consistent with antitrust law.

7           Now, again we're not good at figuring  
8 out ex post when a challenge comes up what the  
9 price should have been. You know, there are  
10 econometric methods to do it. There are a whole  
11 variety of ways to try to do it. But generally  
12 Courts just don't do that for the web.

13           So what I would suggest at least,  
14 what I've suggested in my paper is we look at  
15 objective indicators.

16           We're really best at enforcement  
17 when we have objective market private indicators  
18 of what reasonableness amounts to: actual  
19 transactions between private parties at a time  
20 before the standard has been selected; private  
21 licensing that takes place before standard  
22 selection, before anointment;

1           And as a somewhat secondary  
2   substitute, the actions consistent with antitrust  
3   constraints of standard setting bodies to invite  
4   potential licensors to give meaning to RAND, to  
5   submit model terms, to provide elaboration on  
6   what their intent is as they go out into the  
7   marketplace. Now, those are not perfect.

8           They may be unsatisfactory in many  
9   instances. They are not going to deal with all  
10   the uncertainties. But again when we're thinking  
11   ex post of how we enforce the antitrust laws, if  
12   there is a role for their enforcement, I think  
13   you need to focus on those processes and  
14   procedures to give rise to objective benchmarks.

15           Now, one thing that economists  
16   generally know and antitrust lawyers suspect is  
17   that zero is rarely a reasonable price. You  
18   don't see that popping up in markets too much.

19           You know, that's why economists know  
20   there is no such thing as a free lunch. It's  
21   great to get a zero price if you are a buyer.  
22   But the flip side of that is it's not so great if



1 you are a seller.

2       And in the intellectual property realm  
3 obviously the reason why we have intellectual  
4 property protection is to give those who have  
5 engaged in costly efforts to create intellectual  
6 property sufficient protection to give them the  
7 expectation that they will get a return for that,  
8 some return greater than zero.

9       So from an economic standpoint  
10 reverting to royalty free licensing doesn't seem  
11 like a likely -- necessarily likely approach in a  
12 general range of phenomenon.

13       And as an antitrust lawyer one of the  
14 things that's bred in the bones for us is a great  
15 suspicion of arguments to say, well, we had to  
16 set the price at X because it was really very,  
17 very important to do so, unique circumstances.

18       Of course we have a whole cartel  
19 literature, a whole legal -- set of legal  
20 precedents that rejected the notion early on that  
21 you could justify a price if it's otherwise set  
22 in a naked way in violation of the antitrust

1 laws.

2       My favorite example of that -- and  
3 then I'll finish and let others speak -- is a  
4 case from the European Union where a cartel was  
5 found out, was pursued by the European  
6 authorities, and the case went up through the  
7 legal system.

8       And at one point one of the companies  
9 indicated that their defense was, A, they hadn't  
10 done it, but if they had done it -- this was an  
11 Italian company -- they were compelled to do so  
12 by the circumstances of Italian society at that  
13 time because of the Red Brigades, that things  
14 were so uncontrollable that they actually had to  
15 fix prices, although they denied they had fixed  
16 prices.

17       So the European court of first  
18 instance made short shrift of that as American  
19 courts would. Again I'm using a somewhat  
20 whimsical example here.

21       But it's intended to reflect the  
22 notion that our antitrust sensibilities are -- we

1 don't typically look at justifications if the  
2 pricing system has been interfered with. We  
3 expect to see that process take place.  
4       We look for objective indicators of  
5 what that process yields. We don't expect to see  
6 zero. We don't expect to see fixed prices higher  
7 than zero. But we do like to look at objective  
8 benchmarks that will guide us in antitrust  
9 enforcement that will not be forcing us to revert  
10 back to medieval notions of fair or just prices.

11       CAROLYN GALBREATH: Thank you. Allen  
12 Lo, you had some comments.

13       ALLEN LO: The greatest concern that  
14 I have about RAND terms is the inability or the  
15 unmanageability of being able to fairly and  
16 objectively assess what those RAND terms are.  
17 And you've mentioned perhaps some, suggested some  
18 criteria, some objective criteria for doing that.  
19       But it's been my experience that even  
20 when a patent holder has offered to license a  
21 patent or patents on RAND terms that not only do  
22 the standards bodies and the other companies that

1 want to take -- potentially take that license not  
2 know what that means, but more times than not the  
3 patent owner itself doesn't know what that means.

4 In most cases it's typically the  
5 patent owner that approaches the company that's  
6 implementing the standard to say, okay, you've  
7 been now implementing this; it's time to pay up.

8 In some cases the company looking  
9 to implement the standard in good faith will  
10 approach the patent holder and say, okay, you've  
11 said you're going to offer these on reasonable  
12 and non-discriminatory terms; what does  
13 that mean.

14 In every situation that I'm aware of  
15 the patent holder hasn't really decided what that  
16 means and is unwilling to give anything more  
17 specific than to say it means what it says,  
18 reasonable and non-discriminatory.

19 You can figure that out and you can  
20 wait a year or two until I come knocking on your  
21 door and I'll tell you what that means. But the  
22 position that it places companies in is to have

1 that uncertainty while it's commercializing its  
2 product.

3 And when the patent owner then  
4 approaches the company it's in an exposed  
5 position where it basically has to accept those  
6 terms that the patent holder dictates.

7 Or if it doesn't accept the RAND  
8 terms, then you have the hold-up situation where  
9 if you get sued there are no more reasonable and  
10 non-discriminatory terms. The license was not  
11 accepted.

12 And so now you face potential damages  
13 from a patent infringement standpoint, potential  
14 willful infringement damages, as well as the risk  
15 of an injunction. To me what this all results in  
16 is a couple things. One is it encourages this  
17 type of behavior.

18 And now it has gotten to a point where  
19 every company that participates at least in the  
20 industry that I'm in is madly filing as many  
21 patents as possible on standards or drafting new  
22 claims to older patent applications that they had

1 filed a few years ago to make them read on  
2 standards so that they will have something to  
3 protect themselves with when they get approached.

4 And I don't think that this is the  
5 kind of -- this kind of behavior seems to then  
6 exacerbate the problem and continue it to a point  
7 where eventually the risk is that it becomes  
8 completely debilitating.

9 GAIL LEVINE: Allen, can I ask you a  
10 follow-up question to that? And the point you've  
11 raised is a really perplexing and challenging  
12 problem. It's basically the problem of the  
13 ex post setting of RAND.

14 Given the costs that you face when you  
15 try to do it ex post, what's the solution to your  
16 mind? How would you solve the problem?

17 ALLEN LO: In my mind the simplest  
18 solution would be royalty free. I mean that's  
19 the only way that you have certainty, and that's  
20 the only way that you can know up front and not  
21 have to then deal with a lot of the issues that  
22 were discussed this morning about notice and just

1 the administration of these kinds of policies.

2 I understand that there is --

3 Dick Holleman's point about value in patent  
4 portfolios. In my mind when I look at patents,  
5 patents are really nothing more than the right  
6 to sue. When you take a license, you don't get  
7 access to any more technology than what's already  
8 out there.

9 What you get is the freedom to not  
10 have to worry that this person who has this  
11 patent is going to sue you. And when you talk  
12 about cross-licensing royalty free, the value  
13 that you're returning to somebody else is that  
14 you are also agreeing that you are not going to  
15 sue them back.

16 And so while that is value, I don't  
17 see that as being the kind of value that really  
18 is the same as transferring technology or really  
19 enabling somebody to create a product.

20 It's really just an agreement to say  
21 we're not going to sue each other. And to me  
22 that's the kind of environment that really --

1 that is much more procompetitive than leaving  
2 it to RAND terms.

3 GAIL LEVINE: And I guess if royalty  
4 free is the answer, how would you respond to  
5 Lauren Stiroh's point that if you insist on  
6 royalty free you'll never know what you don't  
7 have; you'll never know what you might have  
8 gotten had you not insisted on royalty free  
9 licenses?

10 ALLEN LO: I should probably qualify  
11 that. It may depend on the industry. It may  
12 depend on the technology and whether there is  
13 absolute market power in having a patent over a  
14 standard, and if the standard is absolutely  
15 necessary to play in a particular area as I  
16 believe it is in the case of perhaps the web and  
17 the internet.

18 Then I don't know that we have any  
19 other choice. It could be though in other areas  
20 that RAND terms make sense. And as Dick Holleman  
21 has said, these have been things that have been  
22 around for a while and they -- if it's not broken



1 don't fix it.

2           What seems to be different today than  
3 perhaps 10, 15, 20 years ago is this notion that  
4 certain standards are really indispensable and we  
5 can't live without them. I believe that there is  
6 adequate motivation to innovate in the areas of  
7 the internet and the web that will naturally  
8 cause people to want to standardize.

9           In the case of -- in the networking  
10 area one of the things that motivates companies  
11 to want to standardize is that customers will  
12 not buy often times product that implements a  
13 protocol unless they know it will be standard,  
14 standardized, and that know that this will become  
15 the standard, because they don't want to have to  
16 then risk implementing, using that product and  
17 then finding out later that that's not the right  
18 product.

19           So there is a lot of pressure by  
20 customers to naturally cause vendors or companies  
21 producing product to standardize around some sort  
22 of specification. And quite frankly they create

1 a lot of the pressure for the companies to  
2 collaborate and to do that.

3       There is another natural reason for  
4 companies who want to do that, which is that  
5 they don't want to be the ones implementing  
6 proprietary protocols later to find out that  
7 someone else has standardized around something  
8 else and now they're competitively behind because  
9 they've implemented something that no one else  
10 has. And in the internet that's something that's  
11 just not going to have any utility.

12       CAROLYN GALBREATH: Thank you. I  
13 don't want to stop the discussion in any way, but  
14 I would like to get from the concept of royalty  
15 free and when RAND may not be sufficient which  
16 we've heard about, to the other possibilities of  
17 perhaps defining RAND up front and whether that  
18 should raise concerns for us as antitrust  
19 enforcers.

20       So if we can go to Professor Gifford  
21 and get comments -- and if you could, maybe weave  
22 your ideas into that question that I've just

1 posed, and then we'll just continue down the row  
2 and hope to get some of those issues out on the  
3 table.

4 DANIEL GIFFORD: Well, I guess I've  
5 got a couple of thoughts in my mind. One, I  
6 think we have just heard -- actually we have  
7 heard several times today that one of the  
8 problems with RAND is it means different things  
9 to different people.

10 And, you know, reasonable and  
11 non-discriminatory terms may work really well  
12 with one set of actors, and may not work as well  
13 with another set of actors because a second set  
14 of actors may have different expectations or  
15 different perspectives. And what's reasonable to  
16 one person may not be reasonable to another.

17 But I think perhaps that all goes to  
18 as we were just saying objective, something  
19 objective. Where can we get something objective?  
20 And maybe we can get something objective by  
21 getting everything -- I mean all of this is  
22 informational problems I think.

1           I mean everything that -- all the  
2 difficulties we're encountering, well, all right,  
3 we say we lack information. We don't know what  
4 the patent owner is going to ask for revenue  
5 tomorrow. There are informational problems, and  
6 those are basically institutional problems.

7           You know, how can we structure our  
8 institutions in such a way as to facilitate  
9 people acting intelligently and seeking their  
10 own interests in a way that induces value for  
11 everyone. And, you know, part of these hearings  
12 I think are so that the antitrust laws don't get  
13 in the way.

14          I mean that was one -- I thought  
15 that was one of the ideas, is that we were going  
16 to see what ways the government enforcement  
17 agencies could find to facilitate resolution  
18 of the problems that people have.

19          And maybe part of that is to, you  
20 know, either, one, get out of the way, or, two,  
21 assure people that when they are taking --  
22 engaging in behavior that is socially beneficial

1 they won't see themselves as risking antitrust

2 liability. I guess those are my current remarks.

3 CAROLYN GALBREATH: Dr. Besen?

4 STANLEY BESEN: We've been talking

5 almost exclusively about the R part of RAND. And

6 I want to say a word about the N-D part.

7 CAROLYN GALBREATH: Thank you.

8 STANLEY BESEN: And I guess just a

9 few points. First of all, I think one should

10 recognize that for economists discrimination is

11 not necessarily a bad thing.

12 In fact there are sort of well

13 known propositions in economics that show the

14 circumstances in which discriminatory pricing is

15 actually efficiency enhancing. So that's sort of

16 point one.

17 Second, we even know there are cases

18 in which certain goods might not be produced at

19 all but for the existence of discrimination. So

20 in fact it may not only be efficiency enhancing

21 but may be actually indispensable to the creation

22 of the product, which brings me to the specific

1 example here.

2 I happen to know of a case in which an  
3 entity, a large entity got a lower license fee  
4 than did subsequent adopters. And it got it  
5 largely because its early adoption was critical  
6 to the evolution of the standard.

7 Once this firm adopted the standard,  
8 other firms followed. Question for the panel:  
9 Is it discriminatory to give that entity a lower  
10 license fee than people who came later when the  
11 risks are smaller and their importance to the  
12 selection of the standard is less?

13 CAROLYN GALBREATH: Would anybody like  
14 to take that? Dr. Stiroh?

15 RICHARD HOLLEMAN: I'll take on any  
16 questions. I think it is an important point that  
17 Stan brings up. And I think the current practice  
18 is -- and I harken back to what I've said  
19 earlier. The whole idea of -- and I use  
20 discriminatory in a different sense.

21 From a standards point of view it's  
22 making a license available to whomever requests

1 a license under reasonable terms and conditions  
2 makes you non-discriminatory.

3 But using it in the context of a  
4 discriminatory license or royalty, I think the  
5 whole premise is it's reasonable if the two  
6 parties agree that it's reasonable.

7 And the fact that I may charge two  
8 dollars for you to cross my bridge because you  
9 are the first one to go across and you wanted to  
10 be first to get across it and I charge everybody  
11 else five dollars who comes later, those people  
12 don't necessarily -- or we cannot assume that the  
13 five dollar per person charge is unfair  
14 discrimination.

15 Let me use that. Unfair  
16 discrimination given Stan's reference to  
17 discriminatory is not necessarily bad if you want  
18 to use discriminatory that way. So it goes back  
19 to this reasonableness.

20 The test is not that it's the same  
21 royalty rate for everybody. And I would agree  
22 with Stan. I think value propositions could be

1 created between the licensor and the licensee  
2 that say we both feel this is reasonable.

3 But the one I negotiate today is going  
4 to be different perhaps than the one I negotiate  
5 tomorrow. But both parties will feel that the  
6 license is reasonable. And that's what I think  
7 is difficult in terms of trying to focus on a  
8 universal guideline or a universal objective.

9 And then if you then take this back to  
10 what we talked about this morning -- and I'm  
11 diverting a little bit in terms of disclosure --  
12 and you apply the whole disclosure concern  
13 against that, particularly applications, not just  
14 issued patents, and you throw that into the mix,  
15 there is even a further uncertainty.

16 And while there are people who would  
17 like to think this is an industrial strength  
18 process and the proposals about, well, we ought  
19 to look at value and maybe determine what's right  
20 or not right, in the back of my head I say they  
21 seem to be talking about the SDOs doing this.

22 And this whole process as I'm using



1 the term, it's not industrial strength. It works  
2 to suit the situation and the objectives of the  
3 group that's involved, the parties that are  
4 involved. And I think that applies to reasonable  
5 and discriminatory the way that Stan asked the  
6 question. Thank you.

7 CAROLYN GALBREATH: I'd like to go to  
8 Lauren Stiroh and Mark Patterson just briefly and  
9 then move on to some of the other questions that  
10 we want to get to this afternoon.

11 LAUREN STIROH: I wanted to address  
12 a comment to some of the points that we heard  
13 earlier about when there are guidelines, pre- and  
14 post guidelines, elements of an actual license  
15 that we can look at, and something that Allen  
16 said about there being uncertainty about what  
17 you expect.

18 And then Dan Gifford mentioned that  
19 there are informational constraints. I think  
20 just one point that I want to make briefly is  
21 that the times when antitrust concerns and market  
22 power matter are, as we heard earlier, the times

1 when there are alternatives.

2       There is more than one equally  
3 valuable alternative. One is chosen. There are  
4 sunk costs, and it becomes the standard. And the  
5 market power of that technology is much greater  
6 than it was before. In those instances we do  
7 have information.

8       We know what the alternative was  
9 because it had to come forward in the standard  
10 setting arena. And so we do have information to  
11 use as a guideline across industries that would  
12 put some bounds on what the R in RAND has to be  
13 or can't exceed.

14       CAROLYN GALBREATH: Thank you. Mark?

15       MARK PATTERSON: I just wanted to  
16 respond to Stan Besen's question. I guess if  
17 you're thinking that one could discriminate on  
18 the basis of the risk taken by the licensee, it  
19 would make -- you would want to ask what are  
20 the risks.

21       If the risks they are taking are  
22 related to whether the standard will be adopted

1 by all the people out there in the world that  
2 are -- you know that are thinking of adopting the  
3 standard, then I don't think that's related to  
4 the patentee at all.

5 I don't know that the patentee should  
6 be able to discriminate on the basis of risks  
7 that are related to the standard adoption which  
8 is something the patentee does not necessarily --  
9 has not necessarily created nor is entitled to.

10 DANIEL WEITZNER: Can I just make one  
11 comment in response to Professor Gifford? This  
12 is on the process question about defining RAND.

13 I just wanted to mention that one of  
14 the actually few items that there was broad  
15 agreement on in our patent policy discussion  
16 is that we did need a venue inside W3C for  
17 discussing issues related to licensing models  
18 at least if not licensing terms precisely.

19 So we have this entity called a patent  
20 advisory group which is a group that is part of  
21 W3C that's comprised of the organization's  
22 members' kind of main representatives to W3C.

1           It's not the technical working group  
2 members because everyone agreed they don't know  
3 how to talk about this stuff or they don't want  
4 to be out -- they are not allowed to talk about  
5 this stuff.

6           But we did come to the conclusion that  
7 there had to be a venue for sorting this out.  
8 How far the discussions in that group go  
9 certainly raised questions that would be -- that  
10 would be relevant here. The group is not the  
11 price advisory group. So we didn't anticipate  
12 that price would be discussed per se.

13          But I think in agreeing that we wanted  
14 to allow our members a venue in which they could  
15 talk about which way to go on an adoption of  
16 certain technology and what the licensing terms  
17 might be, I think it's only natural to assume  
18 that price is going to be a factor at least in  
19 their own consideration.

20          So we've at least taken one step in  
21 the direction of saying there has to be a way to  
22 talk about these in the process.

1 CAROLYN GALBREATH: Thanks, Dan.

2 That actually gets us right where I wanted to be,

3 which is in response to Professor Gifford's

4 question should antitrust get out of the way.

5 If antitrust gets out of the way would

6 negotiations over what RAND terms mean solve the

7 problem that we've been talking about today, or

8 would it raise other problems for the people that

9 would be talking about these issues that should

10 or might give us concerns as antitrust enforcers?

11 And I'll just throw that open to the panel.

12 DANIEL SWANSON: I was going to say

13 the answer to the question is antitrust should

14 get out of the way of my clients. But that may

15 not be --

16 PANELIST: Then they wouldn't be your

17 clients.

18 DANIEL SWANSON: I'd be popular for a

19 while. I think, Gail, the answer I would give

20 is, no, antitrust doesn't need to get out of the

21 way to the point of repealing the law against

22 price fixing.

1           And I think you can glean from my  
2 earlier comments that I think that we can observe  
3 our normal sensibilities here even though there  
4 may be lots of uniqueness in some sectors of  
5 course in antitrust we're fully capable of taking  
6 into account, but that we want to adhere to our  
7 normal sensibilities of avoiding, you know,  
8 collusion on price, on royalty rates, on terms  
9 and the like.

10           Now, how do you accomplish what we've  
11 all talked about, which is to avoid the power  
12 that comes from anointing?

13           Professor Patterson's superb paper  
14 talks about that in some sense from a patent law  
15 perspective. What is the entitlement under the  
16 patent law that flows from the standard selection  
17 itself?

18           In the antitrust sense I don't think  
19 we have an antitrust policy that intellectual  
20 property holders aren't entitled to enhance the  
21 value of their intellectual property if they  
22 happen to be lucky enough to be anointed as a

1 standard without sufficient competition that  
2 otherwise could have taken place.

3       You know, antitrust recognizes  
4 that even monopolies that come about through  
5 happenstance and good fortune are entitled to  
6 exist and in fact to charge a monopoly price.

7       So I think the antitrust policies are  
8 not to deprive a lucky intellectual property  
9 holder of their returns, but certainly not to  
10 stand in the way of the ultimate consumers and  
11 their immediate representatives, the direct  
12 purchasers, licensees of the technologies to keep  
13 the system as competitive as can be with the kind  
14 of polar case being the auction scenario.

15       Now, can you do that in a way that's  
16 consistent with antitrust strictures against  
17 price fixing? And I think the answer is yes.  
18 And certainly I'm sure -- I know a lot of lawyers  
19 who try to advise in this area to try to  
20 accomplish this goal.

21       First of all, although it would be  
22 certainly direct and speedy to have the standard

1 setting organization negotiate on behalf of all  
2 of its members to the extent that there are  
3 putative licensees, that I would say is at one  
4 end which probably poses way too many antitrust  
5 problems.

6         And I don't think that the strictures  
7 that exist that constrain that are likely to be  
8 changing even as a result of these hearings,  
9 although I could be wrong. At the other end of  
10 course is the case that we've heard about where  
11 no one talks about pricing at all.

12         No one talks about terms. No one  
13 talks about royalty rates. No one even solicits  
14 information about those. And that doesn't seem  
15 too sensible at least from an economic standpoint  
16 and from an antitrust policy standpoint. We  
17 always want to see more competition if we can at  
18 least not impede its coming about.

19         So I end up in the middle. Is it  
20 possibly consistent with antitrust to create  
21 incentives for contending technology owners  
22 to supply the economic data that informed



1 individuals would want to have in order to make  
2 a decision, balancing that against all of the  
3 great technical data that standard setting  
4 organizations are superb with no antitrust  
5 risk whatsoever at generating and testing and  
6 comparing and the like, to compare the economic  
7 side of the coin to the technical side of  
8 the coin.

9         And how do you do that consistent with  
10 the antitrust laws? Well, I think you can ask a  
11 candidate technology owner to indicate things  
12 like will you license, commit to licensing on  
13 RAND terms? Will you provide us with what your  
14 model or representative terms are?

15         And I think in some sense to answer  
16 Stan's question, one way from an antitrust  
17 standpoint to provide protection later on if you  
18 want to discriminate is to see here is the range  
19 and here are the factors at that stage.

20         And to essentially get again my theme  
21 of getting objective benchmarks, to get that  
22 information brought out in the process, now what

1 do you do with that? That's where the antitrust  
2 problem comes in.

3 If all of the members take that  
4 information and start chatting with each other  
5 saying it's too high -- typically they are not  
6 going to be saying it's too low. That's what the  
7 other side says. Then that seems to get us back  
8 into the antitrust danger area again.

9 But I'm not sure. I don't think that  
10 you need to talk about it in order to get the  
11 effect that is desired. And that is the kind of  
12 auction environment where the submitters know  
13 that their chances of success, their chances of  
14 being anointed depend upon the individual  
15 evaluation of this economic data.

16 As long as it is presented, available  
17 to the various participants and members they can  
18 make each of them an individual determination.  
19 They may want to talk about it. But they can  
20 always call up the putative licensor.

21 They don't have to talk to each other  
22 about it. Again it may not be a solution that

1 ends up being one that works in all scenarios.

2 I've seen it work. So I do believe it can work.

3 I believe it poses limited antitrust risks.

4 I don't think antitrust chills that

5 type of a process. And it can kind of align the

6 antitrust policies with the economic incentives

7 that, you know, we should want to see take place.

8 CAROLYN GALBREATH: Thank you. We'll

9 go to Lauren Stiroh.

10 LAUREN STIROH: I'm in agreement with

11 what Dan said. And I think that one thing I

12 would like to add to that is that we don't

13 necessarily have to throw antitrust and antitrust

14 lawyers out. But what we might want to do is add

15 economists in.

16 And if we don't want to bring price

17 discussion right into antitrust -- which I don't

18 want to say to throw that out completely because

19 I think as an economist that is the solution.

20 Bring the price discussion right in.

21 But we could get to the same point not

22 by discussing price but by discussing cost. As I

1 mentioned earlier, the cases where this matters  
2 is where you have two alternatives and the bounds  
3 are going to be set by the difference in the  
4 advantage of the chosen over the next best  
5 alternative.

6 Those costs are known or could be  
7 determined. And so the discussion could be over  
8 costs and upper and lower bounds rather than  
9 having an explicit auction although I'm certainly  
10 not opposed to having an explicit auction. I  
11 think as an economist that's an excellent  
12 solution.

13 CAROLYN GALBREATH: Andy Updegrove?

14 ANDREW UPDEGROVE: There are a number  
15 of thoughts I have, but let me just make one very  
16 explicit suggestion because it's right up  
17 your ally.

18 There is a thing called the National  
19 Cooperative Research and Production Act which has  
20 a very rough and variable overlay standard  
21 setting organization to standard setting  
22 organization. It's very easy to comply with,

1 very low barrier to entry.

2 Any consortia can do it at little to  
3 no cost. The suggestion is that I think what  
4 you're hearing is a lot of creative energy about  
5 we all identify a problem. Everyone involved in  
6 the process is nervous and scared.

7 There are clearly some procompetitive  
8 goals to be secured. But there is a lot of  
9 searching about how to go about it. It seems to  
10 me that RAND terms specifically and standard  
11 setting generally are exactly the type of  
12 situation that the NCRPA could cover and  
13 should cover.

14 It just happened to have come along to  
15 answer somewhat different problems rather than  
16 this having been in the cross hairs. I would  
17 think that that would be a splendid thing for the  
18 FTC and the DOJ to promote and while they were at  
19 it to try and do two small corrections.

20 One is that standard setting  
21 organizations by definition are international  
22 when you're in the areas that you're talking

1 about. There is no such thing as an American  
2 telecom issue or an American worldwide web issue.

3       It may be U.S.-centric, but by  
4 definition it extends beyond the borders. That  
5 means that you need to have the rest of the world  
6 involved for U.S. interests to succeed.

7       Doubtless as a result of the political  
8 pressures on the NCRPA when it came out, there is  
9 a provision in there which says that a non-U.S.  
10 member or non-U.S. participant in whatever  
11 process is under review, is only protected if  
12 that -- the country in which they are domiciled  
13 has an equivalent law giving equivalent  
14 protections to American companies engaging  
15 in similar behavior in those countries.

16       Well, we can all think of a few  
17 Senators that might have, you know, suggested  
18 that. But needless to say there couldn't be any  
19 country in the world that happens to relate to.

20       If what we're really trying to do is  
21 try and help U.S. companies succeed and not  
22 having competing standards efforts in other

1 countries, it seems to me that it would be great  
2 to extend this explicitly to standard setting,  
3 remove that restriction.

4       There is one other thing that I think  
5 would be helpful. As currently written there is  
6 a requirement, somewhat vague, but easiest to  
7 interpret as saying that the NCRPA will only  
8 apply if a consortium or standard setting body  
9 begins complying within 90 days of formation.

10       Very frequently organizations get  
11 going on an informal basis as a forum, interest  
12 group, or whatever. They may later incorporate  
13 but it's not at all certain that they haven't  
14 lost the opportunity.

15       It would be great if one could at  
16 least say that you could file with prospective  
17 effect for actions taken prospectively. It's  
18 not obvious to me why that would undermine the  
19 original goals of it.

20       You wouldn't immunize prior conduct,  
21 but you could prospectively. I think that  
22 that -- you know, other than legislative time

1 obviously would be a clear win that would be of  
2 assistance in this situation as well as standard  
3 setting generally.

4 CAROLYN GALBREATH: Thank you. We're  
5 coming very quickly to the close of our time here  
6 today. And I'd like to outline where I think we  
7 should probably go to wrap this up the way we  
8 want to.

9 Typically as antitrust enforcers we do  
10 think about things like market power when we look  
11 at anticompetitive consequences from a particular  
12 set of actions.

13 And so I'd like to turn for a few  
14 moments to that and just to how we should look at  
15 market power after a standard has been set. I  
16 think that Lauren Stiroh and Dan Swanson have a  
17 few ideas for us about that.

18 And then I'd like to turn to Mark  
19 Patterson who has come up with some ideas about  
20 the way we could actually figure out what RAND  
21 means or what pricing means in terms of a  
22 standard. And I'd like him to take the floor



1 and just give us a few moments of his ideas  
2 about that.

3 And then for the end of the day I'd  
4 like Professor Gifford to if he could just wrap  
5 up for us with perhaps a minute or two of  
6 comments about where we've been today and what he  
7 thinks and maybe what the panel thinks as well  
8 are the most interesting and challenging  
9 questions that we've come out of this process  
10 with. So with that perhaps I'll turn it over to  
11 Dr. Stiroh and then Dan Swanson.

12 LAUREN STIROH: I will start by  
13 echoing some things that we heard this morning,  
14 that what I think would be worthwhile is to  
15 distinguish between the market power that comes  
16 from the technology on its own and the market  
17 power that comes just from the standard, the act  
18 of setting a standard that elevates a technology  
19 above the competitors.

20 What might be a useful definition is  
21 to say that the market power that just comes from  
22 the standard is undue market power. And it's the

1 exercise of that market power that the antitrust  
2 authorities might be interested in.

3       What I'd like to emphasize though is  
4 that not all of the market power is necessarily  
5 going to come from the standard.

6       And it's certainly possible that a  
7 technology will have some value outside of the  
8 standard setting arena, and that what we want  
9 to ensure is that what we -- when we have a  
10 reasonable and non-discriminatory license that it  
11 reflects the value of the technology out of the  
12 standard setting body.

13       It doesn't strip it of the value that  
14 it had had it never come into the standard  
15 setting arena, and that whatever RAND rule we end  
16 up with maintains the incentives for people to  
17 bring their technologies into the standard  
18 setting arena.

19       And so where I come out on the issue  
20 of market power is that the market power that's  
21 due to the technology is what the technology  
22 could have earned in a competitive environment if

1 it were going to compete to become a de facto  
2 standard rather than be chosen in whatever time  
3 frame the standard setting body is operating  
4 within.

5 But if it were to compete over the  
6 long run to become a standard, what value would  
7 it attain then, taking into account the costs it  
8 would incur in trying to become the standard but  
9 also the value that it has compared to the  
10 alternatives that eventually make it be the one  
11 chosen alternative.

12 CAROLYN GALBREATH: Thank you. Dan  
13 Swanson?

14 DANIEL SWANSON: This issue of market  
15 power obviously is a theme that is in my paper  
16 and I've returned to it a number of times in my  
17 comments today.

18 The first observation I'd make is that  
19 I think we've reached the point in the evolution  
20 of doctrine where we all agree, without collusion  
21 I might add, that market power does not arise  
22 merely by virtue of the existence of intellectual

1 property protection. That I think is relatively  
2 non-controversial at this point in our history.

3 Maybe a somewhat more controversial  
4 question is whether or not market power that is  
5 protected by a standard or a standard that is  
6 protected by -- I'm sorry -- whether or not  
7 intellectual property that is embedded in a  
8 standard somehow is treated differently in  
9 a sense.

10 In the first instance, is there  
11 any reason why we would want to as a matter of  
12 presumption take a different course than the one  
13 that we take with intellectual property generally  
14 today in the modern antitrust economics world and  
15 be willing to indulge a presumption that if  
16 intellectual property is embedded in a  
17 proprietary standard that in that case we will  
18 assume that there is some measure of market  
19 power. And I think that's not a good idea.

20 It's I suppose an empirical issue.  
21 And certainly if it is or to the extent it is I  
22 don't think that there is a consensus that that

1 assumption or presumption would be warranted by  
2 what we know to date.

3       Andy Updegrove and I were talking  
4 before we started the panel, and Andy was  
5 pointing out -- as he has pointed out today any  
6 number of instances where even what one might  
7 think of as powerful technologies or powerful  
8 patents have been trumped even though they have  
9 been embedded in standard by other standards or  
10 other technologies held perhaps by less notable  
11 or well known licensors.

12       So I don't think we want to change  
13 our view that it's a matter of the factual  
14 circumstances of the individual technology market  
15 at issue. Having said that, I return to the  
16 scenario that I think confronts antitrust  
17 enforcement somewhat vitally.

18       And that is you are always going to be  
19 asking these questions when you are confronted by  
20 a claim of anticompetitive conduct by a licensor  
21 who has been anointed whose intellectual property  
22 is in a standard.

1           And at that point either ex post there  
2 is an argument that that licensor does have  
3 market power or there isn't. Now, if there  
4 isn't, presumably there's no issue at all,  
5 because it usually doesn't go the other way  
6 around.

7           You have market power and you lose it.  
8 Really what happens -- what we're concerned with  
9 is you don't have it but then you gain it. So if  
10 there is market power at the ex post stage, we  
11 might give up and say that's enough to go on and  
12 engage in our analysis of conduct. Some of this  
13 sometimes becomes a bit semantic.

14          But I would still think of this more  
15 properly as a question of analyzing market power.  
16 But if we don't take that tack then we might ask  
17 ourselves was there an earlier phase where before  
18 selection there was competition, sufficient  
19 competition for antitrust purposes for us to  
20 conclude that market power at that point did  
21 not exist.

22          And if we conclude that's the case,

1 under what circumstances ought we to make that  
2 time frame the relevant time frame for making  
3 the legal antitrust assessment, the kind of  
4 jurisdictional assessment of whether or not  
5 market power exists.

6 And it seems to me that one could do  
7 that. And doing so would be consistent with the  
8 case law that is evolving after the Supreme  
9 Court's Kodak decision by reasonable from analogy  
10 to those cases.

11 And examining whether or not there are  
12 private or market constraints that are imposed  
13 during the period of ex ante competition that  
14 have not been transgressed and that therefore  
15 would tell us if that were the case, that  
16 although there might be ex post market power,  
17 it's not an antitrust problem because it has been  
18 constrained in the ex ante world by the private  
19 market system.

20 And therefore what's happening is not  
21 actually an exercise of market power. What are  
22 the circumstances where one can reach the

1 conclusion for purposes of antitrust enforcement  
2 that ex ante institutions have constrained a  
3 licensor sufficiently so as to ignore arguable  
4 ex post market power?

5 Well, one is going to be the type of  
6 Kodak consideration of sophistication and a  
7 relative degree of information and knowledge on  
8 the part of the participants in the process.  
9 Now, one can debate about whether or not perfect  
10 knowledge is required.

11 A lot of very respectable economists  
12 have opined in very persuasive writings at least  
13 that persuade me that perfect information isn't  
14 required. And the courts I think have seemed to  
15 agree with that.

16 The post-Kodak Circuit Court decisions  
17 like PSI and others have seemed to agree with  
18 that. So one condition is sophistication,  
19 knowledge, not perfect knowledge, reasonable  
20 knowledge.

21 The second condition is an actual  
22 constraint, a license that is involved in the



1 particular circumstances, or -- and this is the  
2 question -- a RAND commitment on the part of this  
3 putative defendant.

4         And so if that RAND commitment is  
5 going to suffice to qualify this defendant for  
6 the get out of jail free card that would arise if  
7 he could convince the antitrust enforcer that in  
8 fact a commitment was meaningful enough so as to  
9 deprive him of the ability to exercise any  
10 ex post market power, if we're going to go down  
11 that road, then what we really need to do is look  
12 at whether or not the record exists to show that  
13 there was content to that RAND commitment  
14 ex ante.

15         And that's why to my mind in some  
16 sense this puts it all back in the lap of the  
17 eventual possible defendant. If you're a  
18 licensor, if you want to be anointed, but you  
19 also want to be protected from possible antitrust  
20 enforcement later on, then it should be in your  
21 interest to give contents to RAND.

22         It should be in your interest to

1 supply model terms, to be competitive obviously,  
2 to enter into licenses with those licensees who  
3 want to license before the standard selection  
4 process is at a conclusion.

5 And if you do so, the benefit of that  
6 is it may serve as key evidence later on that  
7 you're not transgressing the limits that were set  
8 at a time when the market was competitive.

9 So if the claim later is you're  
10 charging a license fee that is too high, a  
11 royalty rate that is too high, you can point back  
12 and say, well, look; I provided the standard  
13 setting organization model terms that were in  
14 fact even higher, and those were good enough  
15 back then for me to be selected as the standard;  
16 I must not be exercising market power now.

17 So that at least would be one possible  
18 approach to analyzing the relationship between  
19 ex post and ex ante -- ex ante competition,  
20 ex post market power that's consistent with what  
21 we see in the treatment of franchise contracts  
22 and aftermarket situations and the like, all of

1 which have been very extensively analyzed in  
2 light of the Supreme Court's decision in Kodak.

3 CAROLYN GALBREATH: Thanks very much.

4 And I think we'll turn now to Mark Patterson.

5 Mark, if you could give us the benefit of your  
6 thinking on this and walk us through how you  
7 think that valuation might be done.

8 MARK PATTERSON: I think given the  
9 time I'll just try to give a few comments from  
10 what are in my paper. It may be a little  
11 incoherent, but rest assured the paper is  
12 powerfully compelling. I have a couple of points  
13 in the paper, maybe one conceptual point and two  
14 practical points perhaps.

15 The conceptual point is I think we  
16 could maybe benefit in this area by thinking of  
17 standards as intellectual property themselves.  
18 They are typically not patentable for any of a  
19 variety of reasons.

20 But they have much the same economic  
21 characteristics as traditional intellectual  
22 property and so need maybe protection in the same

1 way they may be expensive to produce but the  
2 value may be easily expropriated by, say, an IP  
3 owner who wants to license at unreasonable terms  
4 perhaps.

5       So I suggest we think about the patent  
6 standard situation similar to a blocking patent  
7 situation where you have a basic patent and then  
8 a follow-on improvement patent. And there can be  
9 bargaining breakdowns there that prevent the  
10 parties from agreeing on terms.

11       And so what I try to do in the paper  
12 is go through some situations where I think  
13 there's some objective evidence that you could  
14 try to ascertain the value of the standard and  
15 the value of the patent in a way that would help  
16 solve the bargaining problem.

17       And my points here are not that  
18 different from those of others on the panel who  
19 have made roughly the same point. I do try to  
20 talk about the situations in which some objective  
21 evidence might be available.

22       For instance, people here made

1 distinctions between standards that reduce the  
2 cost of complying with the -- or patents that  
3 reduce the costs of complying with the standard  
4 and patents or inventions that have independent  
5 technical value.

6       If what the invention does is reduce  
7 the cost of complying with the standard, there is  
8 probably a fairly good objective measure of how  
9 much cost reduction is provided.

10       And there may be fairly good objective  
11 measures of alternatives to the costs of  
12 meeting -- complying with the standard in  
13 alternative ways if those alternatives do exist  
14 or might have existed. If an alternative  
15 standard might have been created, one could use  
16 it as an alternative.

17       And therefore you could compare the  
18 cost reduction in the various situations to  
19 decide on some objective measure of what the  
20 patentee might be entitled to. And this would  
21 give some content to reasonableness.

22       It might in fact overstate what the

1 patentee is entitled to because in a typical  
2 bargaining situation they probably wouldn't get  
3 all that value. In the situation where an  
4 invention provides a technical benefit over and  
5 above the standard, there may also be some  
6 objective measures.

7       As Dan Swanson said a few minutes ago,  
8 you could look at prestandardization licensing  
9 terms. And one court at least, the Townsend  
10 Court in Townsend versus Rockwell has sort of  
11 seems to look at that.

12       It points to licensing terms that had  
13 been offered by the patentee as if that was a  
14 measure of -- before the standardization as if  
15 that was a measure that we might want to look to.  
16 The problem was in that case that those -- and  
17 Dan may actually mention this in his paper too.

18       Those terms were offered to the  
19 standard setting organization. So they  
20 contemplated the standardization. What you would  
21 really need to look at are terms that actual  
22 licensing transactions occurred at before the

1 standardization.

2       Now, often that information isn't  
3 going to be available, but sometimes it will.  
4 There may also be alternative inventions that one  
5 could use to make some measurements of the  
6 relative value.

7       I talked briefly in the paper about  
8 the GIF controversy where the GIF graphics format  
9 turned out to be covered by a patent on an  
10 algorithm for data compression. And there were  
11 efforts to create -- subsequently to create  
12 alternative methods that were only partly  
13 successful.

14       But even if there is only a partial  
15 success you could maybe use that to get some sort  
16 of evidence of the actual technical value  
17 provided by the standard. Then I also talk  
18 about the situation where one might argue that a  
19 patented invention basically enables the creation  
20 of the standard.

21       There are some inventions that are  
22 just directed towards interoperability. And it

1 might then be that the interoperability that the  
2 standard provides is only made possible because  
3 of this invention.

4       And in that case I think you can  
5 make a reasonable argument that the patentee  
6 is entitled to whatever they can get. They are  
7 basically entitled to the value of, you know,  
8 the entire market power created by the standard  
9 because they arguably created it.

10       I talk about two examples of this.  
11 I say, you know, in this case you might want to  
12 look at the claims of the patent and see exactly  
13 what the nature of the invention is. And I talk  
14 about the claims of the Dell patent that was at  
15 issue in the FTC's case.

16       And you could make an argument I  
17 think maybe that those -- that that invention  
18 was directed at something that helped make  
19 interoperability more possible, in which case you  
20 could imagine that Dell might be more entitled to  
21 the returns from the standardization than another  
22 example I give which is the Rambus patent which



1 doesn't seem to relate to the interoperability  
2 that was at issue in the standard in the  
3 Rambus case.

4       Then I talk about -- I talk also in  
5 the paper about de facto standards. And my take  
6 on de facto standards -- and here I do disagree  
7 with some of the people on the panel -- is that  
8 they should be treated just like de jure  
9 standards.

10       There's no particular reason why --  
11 even in a de facto context the market is going to  
12 function to adopt what it thinks is the approach  
13 that provides the best balance of, you know,  
14 technical aspects and cost.

15       But once it does adopt it a lot of the  
16 value of the intellectual property that becomes  
17 the de facto standard is still created by parties  
18 that are not the patentee, created by the parties  
19 that adopt the standard.

20       And they can increase the demand  
21 tremendously. And that's not something that I  
22 believe the patentee or, say, even the copyright

1 owner should be entitled to.

2 Finally I want to say a little  
3 something about lock-in standards. Some of you  
4 may be familiar with the IMS Health case that the  
5 European commission is currently pursuing. It  
6 involves a copyrighted standard maybe.

7 It's unclear exactly whether the value  
8 of this comes from interoperability which might  
9 make it a standard like those we have talked  
10 about today, or whether it just comes from the  
11 fact that a bunch of large users adopted it and  
12 invested in adapting their internal systems to  
13 using it.

14 I think in those cases again the  
15 investment there and the value is created by --  
16 not by the copyright owner in that case but by  
17 those who have invested in training, materials,  
18 and that sort of thing. And so the patentee or  
19 in that case the copyright owner shouldn't be  
20 entitled to that.

21 Now, I do agree with Dan Swanson that  
22 ex ante some of these things could be -- there

1 can be ex ante constraints on the creation of  
2 sort of lock-in or other forms of ex post power.

3 And this comes to my second practical point.

4 I think it only is possible for the  
5 ex ante bargaining, say, to reduce these problems  
6 if people know what the ex post rules are going  
7 to be. Currently because RAND is undefined and  
8 reasonable is undefined no one knows what the  
9 rules are going to be ex post, say, if Allen Lo's  
10 company just wanted to decide to infringe.

11 It's completely unclear what a  
12 court might award as damages. It's very hard to  
13 bargain ex ante if nobody has any idea what the  
14 background legal rules are. So I think it's  
15 important that we get some idea conceptually of  
16 what the damages ought to be.

17 I think that will help enable ex ante  
18 incentives and make bargaining much more likely  
19 and solve some of these problems.

20 I also think that having the patentee  
21 or the IP owner's like prospect of returns  
22 confined to its technical contribution would have

1 another desirable effect, and that is to reduce  
2 the kind of rent seeking behavior and  
3 non-disclosure that currently happens.

4 The reason that there is  
5 non-disclosure is because you think you can sneak  
6 up on somebody and ambush them. If the rules are  
7 that even ex post in an ambush situation you  
8 can't get more than your technical contribution,  
9 there's just no point in non-disclosure. And so  
10 that might promote the standard setting process  
11 as well.

12 CAROLYN GALBREATH: Thank you very  
13 much. In the couple of minutes that we have left  
14 I think we'll turn to Professor Gifford for just  
15 some wrap-ups.

16 DANIEL GIFFORD: Okay, a rapid  
17 wrap-up. Well, let me just touch base with a  
18 number of issues that came up today. At one  
19 point we were asking the question about whether  
20 unfair and discriminatory rates raises an  
21 antitrust concern or whether it raised only  
22 opportunism.

1           And in the process of discussing  
2   that we touched base perhaps largely from  
3   Rich Holleman about all the different kinds of  
4   licenses there might be and different kinds of  
5   terms, for example, a percentage of your  
6   receipts, or maybe even a percentage of profits.

7           Nobody even mentioned that. That's a  
8   really complex one, lump sum licenses, repeated  
9   lump sum licenses. But, you know, maybe we  
10   ultimately got at a point where that earlier  
11   distinction kind of evaporated for purposes of  
12   our discussion when we took up the question of  
13   bargaining.

14          You know, is it possible that we can  
15   bargain ex ante in a way that solves most of  
16   those problems in the sense that when we're  
17   dealing before the fact and if there are  
18   competing technologies then the standards  
19   organization at least in theory -- you know,  
20   when we started working this out it got much  
21   more complex.

22          The standard organization could

1 be -- perhaps it was suggested an agent for the  
2 potential licensees. And does that raise an  
3 antitrust problem? Well, you know, maybe it  
4 does. There are a lot of lawyers that look at  
5 per se rules governing prices, agreements on  
6 prices and discussions of prices.

7 But, you know, I do hasten to point  
8 out that the Sherman Act condemns as interpreted  
9 in 1911 unreasonable restraints. So if in point  
10 of fact people with knowledge are bargaining in  
11 an arm's length way, it's not clear that we're  
12 engaging in any kind of thing that could be  
13 called an unreasonable restraint.

14 Going back to the standards, one of  
15 the problems in standards generally, not pretty  
16 much in the kind of standards that we're talking  
17 about, to the interoperability standards, but in  
18 the older, old fashioned kind of Rust Belt  
19 standards, they were largely permissive.

20 And you'll recall we talked at various  
21 times today about I think it was Allied Tube  
22 where there was a question about the kind of

1 conduits. And the people that were presenting --  
2 urging the technology for polyvinyl chloride  
3 conduits, they were blocked by the standards  
4 organization.

5         And that was a real problem with the  
6 standards organization. I wonder if there is an  
7 analogy to the way, you know, some people may  
8 perhaps even misconceive what the Sherman  
9 Act says.

10         And maybe they will say, well, we want  
11 to do something that will get the information all  
12 on the table and bargain about it in an arm's  
13 length way and this might be the efficient  
14 result; does the Sherman Act prevent us from  
15 doing that?

16         And these are all complex, but I hope  
17 our discussion this afternoon -- indeed I expect  
18 that our discussion this afternoon and all those  
19 other discussions will cause the enforcement  
20 agencies to say, well, look; is there anything  
21 that we can do to facilitate an understanding of  
22 the antitrust laws that is such that it does not

1 deter efficient conduct? So that's my summary.

2 CAROLYN GALBREATH: Thank you very  
3 much. With that I'd like to note that there are  
4 many people in the audience who might have things  
5 to say. And we are still certainly accepting  
6 written comments from members of the audience and  
7 members of the public.

8 The debate on these issues will go on  
9 for some time I'm sure. We will continue to be  
10 enlightened by it. I've found this afternoon's  
11 panel very enlightening and I'd like to thank  
12 every one of the panel members for their stellar  
13 contributions. And we should give them a large  
14 round of applause. Thank you.

15 (Applause.)

16 (Evening recess.)

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