

UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT PUBLIC ADVISORY COMMITTEE MEETING

Alexandria, Virginia

Thursday, April 29, 2010





1 P R O C E E D I N G S

2 MR. MATTEO: Good morning everybody.  
3 I'd like to call this meeting of the PPAC formally  
4 to order. This is the public session. I'd like  
5 to begin with the call of the roll as well. Damon  
6 Matteo from PPAC, Chairman.

7 MR. STOLL: Bob Stoll, Commissioner for  
8 Patents.

9 MR. KIEFF: Scott Kieff. I'm a PPAC  
10 member.

11 MR. BORSON: Ben Borson, PPAC.

12 MR. FOREMAN: Louis Foreman, PPAC.

13 MR. MILLER: Steven Miller, PPAC.

14 MS. KEPPLINGER: Esther Kepplinger,  
15 PPAC.

16 MR. BAHR: I'm Bob Bahr. I'm Acting  
17 Associate Commissioner for Patent Examination and  
18 Policy.

19 MR. OLECHOWSKI: Mark Oleschowski. I'm  
20 the Deputy Chief Financial Officer.

21 MS. TOOHEY: Maureen Toohy, PPAC.

22 MR. PINKOS: Steve Pinkos, PPAC.

1 MR. ADLER: Marc Adler, PPAC.

2 MR. BUDENS: Robert Budens, PPAC.

3 MS. FOCARINO: Peggy Focarino, Deputy  
4 Commissioner for Patents.

5 MR. MATTEO: Welcome everybody. I'll  
6 lead off the conversation this morning with a  
7 familiar tune for many of you. We all come from  
8 various different perspectives and constituencies,  
9 but all of the PPAC agrees to leave those formal  
10 affiliations behind in our capacity at PPAC and  
11 work solely for the benefit of the PTO. So I'll  
12 expect everybody to speak with that voice and to  
13 wear that hat during the conversations this  
14 morning.

15 Without further ado I would like to  
16 introduce Robert Stoll, Commissioner for Patents  
17 who will open with some remarks from the PTO.

18 MR. STOLL: Thank you. Good morning  
19 ladies and gentlemen. It's a pleasure for me to  
20 be here today to be with you. The second half of  
21 2010 is well underway and we're making pretty good  
22 progress. But before I start I want to thank

1 Damon Matteo and the members of the PPAC for their  
2 service here especially the new members Ben  
3 Borson, Esther Keplinger and Steve Miller. We  
4 are very happy to have your addition to our PPAC.  
5 It's great to have you and your help. Your  
6 experience and expertise will help to make the  
7 USPTO a better place and we will all be able serve  
8 our nation better.

9 Let me start with an overview of the  
10 health of the agency today. While the financial  
11 crisis of fiscal year 2009 is well behind us, we  
12 continue to struggle with a fiscal year 2010  
13 budget that leaves the agency somewhat  
14 underfunded. Despite the reduced spending  
15 capacity, we've made some real progress here. You  
16 will hear details of our initiatives from each of  
17 our presenters today. Let me just comment on our  
18 current status. Filings are about even or  
19 slightly up from where they were in 2009. We're  
20 expecting a work hiring and a selection process of  
21 about 250 IP experienced professionals this year.  
22 We've been very aggressively reaching out to all

1 stakeholders to build and expand our working  
2 relationships. I know that Marc Adler and Bob  
3 Bahr will talk about our upcoming quality  
4 roundtable later on.

5 We've created and launched some truly  
6 innovative programs. These programs have proven  
7 to be useful to our examiners and our applicants.  
8 Some of the initiatives we are currently  
9 undertaking are a Green Tech pilot program that  
10 allows special status to green technologies and we  
11 will update that program to probably remove class  
12 and subclass requirements, a reengineering and  
13 classification system with a new project  
14 addressing the effective assignment of  
15 applications for examination and to improve the  
16 system used for locating prior art relevant to  
17 determining patentability, the ombudsman program  
18 which is intended to provide patent applicants,  
19 attorneys and agents assistance with  
20 application-specific issues including concerns  
21 relating to prosecution advancement. The  
22 objective is to quickly resolve issues and thereby

1 to decrease pendency. An ongoing effort to  
2 improve examination efficiency and to use  
3 resources wisely in the work sharing arrangement.  
4 We're also working on PPH and several other  
5 initiatives. Working sharing has evolved as a  
6 significant tool to attack the pendency issues.  
7 We are working to improve the MPEP in an  
8 initiative that has just been launched. We know  
9 we need major rewrite help on the MPEP and so we  
10 have begun gathering information from employees  
11 regarding how and what it should be formatted and  
12 to what content. Director Kappos has announced  
13 the MPEP Rewrite Project on his Director's blog  
14 and comments were collected by the blog's site. I  
15 would just like to point out that this type of  
16 direct and frequent communication is our new  
17 standard for gathering feedback from our  
18 stakeholders. This is just one of the many  
19 outreach efforts we have undertaken.

20 Looking ahead at the next 6 months, we  
21 anticipate a strong finish to the fiscal year.  
22 Already our indicators are showing positive



1 results in many areas including allowance rate,  
2 interview time actions per disposal, and I believe  
3 Peggy Focarino will be talking a lot more about  
4 that. We're hopeful that we can work with DOC,  
5 OMB and Congress to enable the USPTO to get on  
6 better footing. Right now the agency is working  
7 with a financial model that just doesn't work and  
8 without adequate funding we will not be able to  
9 begin to rebuild the USPTO. In the longer-term,  
10 the USPTO needs to restructure its fees and have  
11 additional flexibility to adjust fees, allowing  
12 the agency to perform its mission. While some of  
13 these goals are long-term, we have created a  
14 strong foundation that will guide us as we work  
15 together with our stakeholders to achieve results.  
16 I look forward to working with all of you on these  
17 projects. Thank you very much.

18 MR. MATTEO: Thank you, Bob. Did we  
19 have any questions from the floor. If not, let's  
20 proceed to the next item on the agenda. Dana  
21 Colarulli will provide us with a legislative  
22 update, or perhaps he won't. It would appear Dana

1 is not here. Next on the agenda would be the  
2 financial update, and Mark is here. If you would,  
3 please.

4 MR. OLECHOWSKI: Thanks, Damon. I  
5 appreciate the opportunity to speak to you. As  
6 Bob mentioned, it's been an exciting couple of  
7 years here at the PTO, but I think the future is  
8 bright. I think we have a lot of things underway  
9 with not only our stakeholders but the Department  
10 of Commerce, OMB and the Hill to make sure that  
11 that foundation that Bob talked about is really  
12 cemented and we move ahead and have a sustainable  
13 funding model and get the PTO back on track to do  
14 the things there are supposed to be done in a  
15 timely manner. So I think Bob's comments were  
16 certainly timely and appropriate and took away  
17 some of my thunder, so that's good.

18 So here we are today. As Bob mentioned,  
19 we're midway through the year. In a normal  
20 federal agency we do an extensive midyear review.  
21 That midyear review is in progress. It composes  
22 the CFO's office with the business units reviewing

1 spending to date, spending through the rest of the  
2 year, talking about what's important, what's not  
3 so important, possibly rearranging those  
4 priorities to get us through the end of the year.  
5 As everyone knows, we're limited this year to  
6 spending to our appropriated level which is 1887  
7 and we're on a trajectory to do that while still  
8 trying to accomplish some of the things Bob talked  
9 about like hiring 250 experienced IP hires, so  
10 there's lots of work going on.

11 We've been able to this year fund  
12 overtime, fund PCT outsourcing to the maximum  
13 extent possible and I think Peggy is going to talk  
14 about some of the good things that we have been  
15 able to do with the limited authority we have had.  
16 Bob alluded to as well we are collecting more than  
17 our appropriations. We are currently estimating  
18 that we're going to collect anywhere from \$150 to  
19 \$230 million more than our appropriate level and  
20 I'm sure Dana is going to talk about where we are  
21 in trying to get access to our fees and I can make  
22 some comments on that at the end.

1           I do want to talk about a couple things.  
2       For those of you who have the laptop brief, I'm on  
3       the fee page, so if we all want to turn to it.  
4       It's a very busy slide. What I do is make a  
5       couple comments about our fees and our fee  
6       collections this year. I mentioned that we're  
7       collecting more than our appropriated level.  
8       Those collections fall into two categories. Our  
9       maintenance fees, we're currently collecting  
10      probably \$100 million more than we thought we  
11      would back when we made our initial estimate back  
12      in August of last year. We're seeing a  
13      significant influx of maintenance fees on all  
14      three stages of those fees. The other category of  
15      fees that are more than what we thought they would  
16      be back last August are issue fees and I think  
17      Peggy is going to talk a little bit about what the  
18      corps is doing to improve that. A new thing we've  
19      done this year, instead of trying to tell people  
20      an exact number that we're trying to reach, we now  
21      have a range that we're publishing to the  
22      department, OMB and our Hill stakeholders on a

1 monthly basis. Those two columns are outlined in  
2 green on the sheet, and like I said, we think  
3 we're going to be between \$146 and \$230 million.  
4 We are right in the middle of that range with what  
5 we've done so far. I know that's a very busy  
6 slide, if there are any questions I'd be glad to  
7 answer them, but the cut the categories of fee  
8 collections are both maintenance fees and issue  
9 fees that are above what we had originally  
10 estimated.

11 MR. MATTEO: Mark, if I may, just a  
12 question. You said if you straight-line it; how  
13 valid of an assumption is that in terms of  
14 historic revenue profiles?

15 MR. OLECHOWSKI: We've done some  
16 analysis on that, Damon. At midyear review in  
17 previous years, the estimate that we make at  
18 midyear has been within about a percent and a half  
19 or 2 percent of the final number, so I think we're  
20 very confident of that. But as Bob mentioned  
21 also, it's been kind of an uneasy economy. We're  
22 certainly hopeful that we're past the dip in the

1 economy. I think we're seeing that in the fees  
2 that our applicants are paying. So I think we're  
3 beyond that dip. But we've been very, very  
4 accurate in the past at the midyear review point  
5 in estimating where we end up at the end of the  
6 year.

7 MR. MATTEO: Thank you very much. I  
8 believe Scott also had a question.

9 MR. KIEFF: One of the things that we've  
10 been wrestling with a lot in our discussions of  
11 quality, pendency and finance as well as  
12 legislative activity, several of our  
13 subcommittees, we've been trying to think through  
14 the mechanisms of the decision-making process that  
15 the Patent Office users engage in as they make  
16 decisions about how to do stuff that impacts the  
17 office like filing more paperwork or pay more  
18 money. In this particular setting, one of the  
19 things you're telling us is that they're paying us  
20 more money than we had anticipated and that's not  
21 necessarily a good or bad thing, but to help  
22 understand it more, it would really help each of

1 our subcommittees in these areas if we could get  
2 some thinking from you folks now or later about  
3 the subpopulations that probably make up the  
4 pieces of change that you've identified. One  
5 change you've identified is more maintenance fees  
6 than we expected. No problem, but it would be  
7 really interesting to figure out who are those  
8 folks? Why do we think they're doing that? Are  
9 there informed inferences we could be making about  
10 why that's going on? And then could we sit back  
11 and ask ourselves is this policy good behavior or  
12 policy bad behavior? All other the things being  
13 equal, it sounds good to be getting more money,  
14 but maybe that's taking money from some other  
15 pocket that actually we would prefer to go into et  
16 cetera. We don't have to answer those questions  
17 now, but I just wanted to put them on the table so  
18 that everybody could begin to start the process of  
19 thinking about them. Does that make sense?

20 MR. MATTEO: It does indeed. In fact,  
21 that's a good segue into a conversation that we  
22 all have been waiting to have which is the

1 intersection of finance and budget and how that  
2 supports the strategic plan of the PTO, how  
3 exactly we're going to execute against the  
4 objectives of the PTO with the financial structure  
5 that we're anticipating. Antecedent to that is  
6 the modeling and the forecasting and the  
7 assumptions and the rationales that go into that.  
8 So that's a broader conversation that we all feel  
9 we need to have and I believe and hope that that  
10 will mature over time, but I think this is a good  
11 starting point.

12 MR. OLECHOWSKI: Certainly the CFO's  
13 office will take an action item. I mentioned the  
14 major categories. As you know because you pay the  
15 fees, we have 250 to 300 fee categories and we  
16 have algorithms and modeling for each and every  
17 one of those. We kind of categorize them in  
18 larger, more distinct categories, but we'd be glad  
19 to entertain and engage with you about how we do  
20 that. We've had a lot of questions over this past  
21 year from outside activities. The congressional  
22 folks wanted to know we do it, our IG is in here



1 looking at how we do fees and forecasting. So  
2 absolutely we'd love to engage you on how we do  
3 that and get better at it.

4 MR. MATTEO: Since your words are still  
5 hanging in the air, let me take you at your word.  
6 Why don't we set up a separate meeting to discuss  
7 just that?

8 MR. OLECHOWSKI: Absolutely. I'd be  
9 glad to.

10 MR. MATTEO: Fantastic. Marc, you also  
11 had a question?

12 MR. ADLER: I'd like to follow-up a  
13 moment on Scott's point and pick one category in  
14 particular, when you dig down a little deeper may  
15 be able to provide us with some additional  
16 information about your calculation. Your RCE and  
17 continuation fees seem to be calculated here as a  
18 flat line or a 1-percent decline, where  
19 historically in the last couple of years we've  
20 seen a significant increase of something on the  
21 order of 25 percent, so I'm just not certain how  
22 accurate that number is. And furthermore, our

1 objective would be to try to bring those RCEs  
2 under control to drop that down further in the  
3 future. Therefore, going from \$120 million to  
4 \$100 million I'm not sure is totally justified if  
5 we were able to bring that under control. When we  
6 do a deeper dive into that, that's one item that I  
7 would like to learn more about.

8 MR. MATTEO: Let me suggest as a  
9 preamble to that that PPAC will consider some of  
10 the things that we'd like to discuss both broad  
11 strokes and particulars and we'll get that to you  
12 at least several weeks in advance of the meeting  
13 we might schedule.

14 MR. OLECHOWSKI: The 2011 budget. As  
15 you know, the president submitted his budget to  
16 Congress in February. Some of the highlights of  
17 the undersecretary's submission in order to, like  
18 Bob mentioned again, get our arms around the  
19 backlog in pendency, we have submitted in the  
20 budget to hire 1,000 patent examiners both in 2011  
21 and 2012. We've identified efficiency  
22 improvements in the patent process which I think

1 Peggy and some others are going to talk about.  
2 We've investing heavily in our IT systems to  
3 retool the way we do business and the way we  
4 examine both patents and trademarks and I know  
5 that our CIO is going to talk more about that  
6 later on this afternoon. One of the things from  
7 the CFO's perspective, our previous conversation  
8 on fees and the fluctuations in revenues, that is  
9 important to us is obtaining a sustainable funding  
10 model. We're working on the long-range plans, but  
11 in this budget are some of the short-term steps to  
12 get us there. There's an interim fee increase  
13 that we've talked about before, there's fee  
14 setting authority language in there and then  
  
15 there's the operation of a reserve fund so that we  
16 don't have to collect and spend all the money in  
17 one year, that we can have a multiyear plan, a  
18 multiyear budget that looks out more than just the  
19 1 year, have a 5-year plan for operating the  
20 Patent and Trademark Office. So those are some of  
21 the steps that are in the 2011 budget that are  
22 going to get us a long way to get where we want to

1 be.

2           Even though the 2011 budget process is  
3 on the Hill, the 2012 process is well underway  
4 which is the way the federal government works.  
5 We're always working on 3 years at one time. We  
6 talk about 2010, we talk about 2011, I did want to  
7 give you a quick update on where we are in the  
8 2012 process. The first part of the budget  
9 process is always making sure that your strategic  
10 plan is updated and is accurate and has the vision  
11 of where the office wants to be. That process is  
12 well underway. It does say post a draft by April.  
13 I think we're going to miss that by a few days,  
14 maybe a couple of weeks, but the strategic plan is  
15 well underway being written. In the May timeframe  
16 we are asking all our business units to submit  
17 initiatives in order to support that strategic  
18 plan, what do those business units need to do to  
19 accomplish set out by the undersecretary and the  
20 deputy? Part of that process will be to get input  
21 from our public advisory committees on what those  
22 initiatives are and how well they may or may not

1 support the strategic priorities. We've committed  
2 to the Department of Commerce to have a more  
3 collaborative effort with the department in the  
4 budget process this year. So we'll be briefing  
5 Commerce as well as the secretary throughout the  
6 summer on the status and the priorities of the PTO  
7 budget.

8           The July-August timeframe will see the  
9 strategic plan finalized. We owe a budget to the  
10 Office of Management Budget usually the first week  
11 in September. So all of the summer timeframe will  
12 be evaluating those initiatives, establishing what  
13 our requirements are. What we've done in 2011  
14 we'll do in 2012, we first establish what our  
15 requirement are and then after we establish what  
16 those requirements are we look at the fees we're  
17 going to collect so that we're making sure that  
18 our fees will cover our requirements and if our  
19 fees don't recover our requirements then we're  
20 required by Congress to propose some method in  
21 order to cover what our requirements, so we'll be  
22 looking at that during the summer as well what we

1 think our fees are going to be in 2012 and beyond.  
2 Unless there are any questions, that concludes my  
3 brief.

4 MR. ADLER: I have one. In talking  
5 about the 2012 budget process, the strategic plan  
6 that was provided to us at the last meeting  
7 indicated some goals to be reached during that  
8 period having to do with reducing the backlog and  
9 reducing pendency and a 3-percent efficiency gain  
10 per year. I assume that some of those will be  
11 factored into the budget because they'll have  
12 implications, as well as if patent reform  
13 legislation is passed the PTO may need to have  
14 more people handling postgrant oppositions or  
15 other activities that that bill may require. So I  
16 hope that when you're developing the 2012 budget  
17 you'll factor in both your strategic plan goals as  
18 well as potential legislative requirements that  
19 you may have to operate under.

20 MR. OLECHOWSKI: Yes, sir. That's a  
21 good question. The 2011 budget, even though we  
22 don't have the formal strategic plan out and

1 public, we know what those strategic priorities  
2 are. The undersecretary and deputy have outlined  
3 what those seven or eight strategic priorities  
4 are. And to that effect the 2011 budget was  
5 crafted in order to meet those strategic  
6 priorities. So inside the 2011 budget are  
7 commitments for pendency and backlog reduction and  
8 those efficiency gains are incorporated into the  
9 budget. Certainly the effect on the PTO in terms  
10 of patent reform is not, however, you're right, if  
11 legislation passes we will have to react to that  
12 and make sure we're accomplishing that. So the  
13 2012 process will be another snapshot in time and  
14 if it does pass we'll certainly include those  
15 things in the budget.

16 MR. MATTEO: Steve Miller, please?

17 MR. MILLER: As I read the fiscal 2011,  
18 you included the 15-percent increase into the  
19 budget which I believe if my math is right is  
20 about 300 million. If you look at your  
21 overcollections that you're anticipating this  
22 year, it's about 232 million. Are you still

1       anticipating if we're overcollecting by over \$200  
2       million that you would need the full \$300 million  
3       surcharge?

4               MR. OLECHOWSKI:  In the 2011 budget, the  
5       interim fee adjustment of 15 percent based on our  
6       calculations works out to be about \$224 million  
7       based on the information we knew at the time and  
8       what we think applicant behavior might be.  The  
9       interim fee adjustment is not just in 2011, it's  
10      in 2011, 2012, 2013, et cetera, until fee-setting  
11      authority is approved that we can redo our fee  
12      structure.  So the 2011 budget is a 5-year plan.  
13      If you notice, one of the easiest ways to see that  
14      is in 2011 we'll end up the year with a surplus in  
15      both 2011 and 2012 and we need to generate that  
16      surplus in order to pay our bills in 2013.  When  
17      you hire 1,000 patent examiners in 2011 and 2012,  
18      I don't want to say they're inexpensive, the full  
19      cost of those 2,000 new examiners we really don't  
20      feel until 2013 so we have to generate the dollars  
21      in 2011 and 2012 and carry them over in a reserve  
22      until 2013 in order to pay all our bills in 2013,



1 2014 and 2015. So I guess the short answer to  
2 your question is, yes, we still believe we need  
3 it. Should we receive access to our fees this  
4 year? I think everybody knows we'll take a look  
5 at what we need to do in 2011 and our 2012 budget,  
6 but right now the plan is the budget was based on  
7 not having access to our fees and so that's still  
8 the plan unless something changes. But like I  
9 said, Dana and Bob might to be able to give a  
10 little more insight on where we are on that.

11 MR. MATTEO: Scott?

12 MR. KIEFF: Maybe just a follow-up to  
13 that question, and it takes a different swipe at  
14 it. I get the sense from our prior conversations  
15 that one of the questions that's on everyone's  
16 mind in PPAC and the people we talk with is to put  
17 it in simplest terms, isn't there some way that  
18 the office could do some cut, do something less  
19 expensively? Who knows? Buying something from a  
20 different vendor? Organizing in a different way.  
21 I don't think that people are thinking bad  
22 thoughts about this. I think they're asking in

1 kind of a good-faith way with nothing but an  
2 impression of good faith on the other side of the  
3 question, if society said to itself we'd like the  
4 Patent Office to just do something less  
5 expensively, what would be your recommended  
6 target? What would you say here is something we  
7 could do less expensively and the hit to our  
8 operation would be worth it? Because obviously  
9 you can't take money out without suffering some  
10 hit, so everyone recognizes that too. But I take  
11 it that one basic question is isn't there just  
12 some way you could trim and then what would it be?  
13 Marc and I have had a lot of work on this problem.  
14 We need to be able to understand in the different  
15 goals, in the different models, in the different  
16 legislative requests, sensitivity analysis. If X  
17 changes, what other ripple effects will it have  
18 throughout applicant behavior and office behavior,  
19 et cetera? So with all of that kind of background  
20 in mind, what would be your top one or top two  
21 targets for making a big reduction, not 80  
22 percent, but something more than 1 percent, in

1 overall cost of some component of the operation?

2 MR. OLECHOWSKI: Thanks, Scott. Let me  
3 give you a little bit of context that might help  
4 answer that question. The Patent and Trademark  
5 Office is 70 percent compensation, so 70 percent  
6 of our expenses are compensation. Another 5  
7 percent is our normal travel, training, supplies,  
8 equipment, Blackberries, things like that. So the  
9 remaining 25 percent are contracts, so those are  
10 the contracts that the Patent Office uses to  
11 process the things, to get things out, to get them  
12 printed. It's the contracts we have with foreign  
13 countries to do education and training, it's the  
14 contracts the CFO has to manage those financial  
15 systems. So in the 2009 timeframe during, as Bob  
16 mentioned, the financial crisis we looked at each  
17 and every line item and we did make significant  
18 cuts in some of the easy thing. You only have  
19 your half your supply dollars and we're going to  
20 cut back travel and training and everything else.  
21 And we looked at our contract as well. We took  
22 significant cuts in not only the patent side but

1 in all of the business units.

2 I would just say it's very difficult and  
3 the Patent Office has already done that, not to  
4 say there's not more work to be done. The  
5 undersecretary has asked us to go back and look at  
6 all of our contracts again and we're in the  
7 process of doing that. But with an organization  
8 that's 70 percent compensation, the piece of the  
9 pie that can be looked at it is a smaller chunk  
10 than maybe people realize to begin with.

11 MR. KIEFF: Just a brief follow-up for  
12 you. This makes total sense and I think we get  
13 that. I think that one of the things we in our  
14 last set of calls were wrestling with was  
15 compensation, that big 70-percent chunk, includes  
16 many, many different types of human beings engaged  
17 I many, many different types of activities. So I  
18 seem to remember a big emergency flare going up  
19 about a year ago when the financial model was at  
20 its tightest and a big component of that was  
21 spending on IT I believe. Then the sense was you  
22 can't turn off the computers and expect the Patent

1 Office to still operate, but yet that was just  
2 such a huge number I think that startled a number  
3 of us. My goal is not to put anyone on the spot.  
4 I'm raising this question and we could talk about  
5 it and we can answer it more later. This is not a  
6 gotcha question. It's just we're authentically,  
7 enthusiastically interested in trying to figure  
8 out which components of the compensation could  
9 have which effects.

10 MR. MATTEO: If I may, we've been  
11 talking about the broader issue in sort of counter  
12 parts, the finance and the operational. Again I  
13 just want to circle us back to one of the major  
14 PPAC concerns here, the strategic objectives, the  
15 strategic plan for realizing those, and the  
16 interplay of all of the various vectors that get  
17 folded into that. That would be personnel, IT,  
18 finance. So we have this sort of overarching  
19 concern about the interplay of all these things to  
20 the extent that we even constituted a special  
21 subcommittee to follow that. I was heartened to  
22 see that you have in the finance presentation a

1 solicitation of PPAC input. I'm going to offer it  
2 again. The strategy-finance intersection  
3 subcommittee is chaired by me and right now we  
4 have Scott on as well as I suspect there will be  
5 other members, but please reach out to us. I'll  
6 make the same offer to each and every presenter,  
  
7 IT, the finance, the operations, strategy, because  
8 I think for us to feel comfortable we have to feel  
9 comfortable about the interplay of all of these  
10 mechanisms as opposed to one individually. We  
11 don't want to look at these things in an insular  
12 fashion I think is what we're saying. So while I  
13 fully appreciate the finance presentation, without  
14 sufficient context in and around it, it becomes a  
15 very, very static and insular presentation.

16           So I think going forward what we'd like  
17 to see is more of an integrated approach to the  
18 way we do the reporting. We'll work with you  
19 offline about how that can happen, but I think  
20 from my perspective and probably from many of the  
21 perspectives of the PPAC, that would be a much  
22 better way to present that information. Bob, I

1 believe you had a comment.

2 MR. STOLL: That's very helpful and I  
3 think that's very accurate. You need to look at  
4 this in a context and that context is all of the  
5 different pieces of the Patent and Trademark  
6 Office and I think we've got to be more  
7 transparent with respect to our efforts to provide  
8 that to you. That being said, we are in continual  
9 evaluation of our entire system looking for  
10 savings anywhere we can get it and I think you're  
11 cognizant that we really have 726,000 applications  
12 in backlog and a current processing of about 1.2  
13 million. So any savings we get we're trying to  
14 put toward moving the actual pendency of the  
15 Patent and Trademark Office and improving the  
16 quality. In addition to that, we really do need  
17 substantial input into our IT structure so that we  
18 can actually end up with an end-to-end process  
19 electronically. Those efforts are also eating any  
20 of the expected monies. If any monies can be  
21 found, we are finding them, and let me assure you  
22 we're really trying to do those things, but if we

1 don't apply them to those other two problems,  
2 pendency will continue to increase and quality  
3 will not be where you want it. So we really can't  
4 actually cut funds at this point without putting  
5 them to other things to reduce that backlog that's  
6 sitting there.

7 MR. MATTEO: Fair enough Bob. Perhaps  
8 the spirit of the comment didn't come through and  
9 I'll do a mea culpa there. The comment wasn't  
10 about you profligately wasting all of these funds.  
11 It's about we are here to hopefully help you  
12 optimize, increase efficiency and effectiveness  
13 and overall quality, not necessarily patent  
14 application quality although that's part of this.  
15 So this is an efficacy optimization kind of  
16 concern.

17 MR. STOLL: Relatedly, we're trying to  
18 help you get access to the feedback that you're  
19 asking for because you interact with, if you will  
20 service, a group of stakeholders and if they're  
21 clamoring for vanilla ice cream and you're  
22 spending wonderfully motivated and designed



1 dollars to give them chocolate ice cream, it would  
2 be disappointing for you to learn that that hard  
3 effort to optimize was itself going to waste  
4 because you were optimizing things they didn't  
5 want. Again I'm not suggesting the they should be  
6 Joe average patent applicant who wants his  
7 applicant tomorrow, but the they is the system,  
8 the patent system, the society and we're just  
9 trying to help be that interface to communicate to  
10 them and from them to you.

11 MR. OLECHOWSKI: I guess I'll make one  
12 more offer from the CFO, Scott, on the same sort  
13 of thing. We'll be glad to share with you the  
14 things we've done and the things we're doing at a  
15 greater level of detail offline to maybe help with  
16 the context and the perspective and how we  
17 establish priorities. Certainly the input would  
18 be helpful to guide the office and we'd be glad to  
19 do that, Scott.

20 MR. MATTEO: I very much appreciate  
21 that. I think we have two more questions from the  
22 floor. Steve?

1                   MR. PINKOS: Mark, could you explain the  
2                   statutory requirements for a strategic plan and  
3                   how that fits in with the annual budgeting process  
4                   which also includes 5-year projections?

5                   MR. OLECHOWSKI: The Office of  
6                   Management and Budget requires every federal  
7                   agency to establish a strategic plan once every 5  
8                   years with an update once every 3 years, so that's  
9                   where we are today. We're in the update. It's  
10                  just with the new undersecretary and the new  
11                  deputy it's a more significant update than might  
12                  normally be somewhere in the middle of an  
13                  administration. So we're in the middle of the  
14                  update right now. But as I mentioned, those  
15                  strategic priorities have been set. What we're  
16                  trying to do now is finalize the public document  
17                  to tell people where we're going, but those  
18                  strategic priorities were set and are included in  
19                  the budget. So in a normal, well-oiled machine  
20                  you have a strategic plan, you establish a budget  
21                  to achieve those priorities, you execute the  
22                  budget, you monitor your performance and you make

1 adjustments in the following budget year. So  
2 we're attempting to do that. I think we're well  
3 on our way. We have a new strategic plan that's  
4 in budget. We have a budget to meet those and  
5 some pretty significant commitments on pendency  
6 and backlog. We'll work with Congress to make  
7 sure that that budget gets passed in its entirety  
8 and then we'll start executing it.

9 MR. PINKOS: That's great. That's  
10 helpful and clear. Could I ask another question?

11 MR. MATTEO: Go ahead.

12 MR. PINKOS: This may go a little bit  
13 more towards Bob. Mark mentioned that the  
14 Department of Commerce was taking a closer look or  
15 seeking greater involvement in the budget process.  
16 I know this can be a tricky fine line, but  
17 obviously the intent of Congress, the intent of  
18 the community as embedded in the USPTO's organic  
19 statute is that the PTO has personnel and budget  
20 autonomy and then other activities are subject to  
21 the policy direction of the Secretary of Commerce.  
22 Is this enhanced scrub from the Department of

1 Commerce geared toward the impact of the budget on  
2 policy or is it greater involvement in the actual  
3 budgetary numbers, personnel matters, et cetera,  
4 at the PTO?

5 MR. STOLL: Let me just answer by saying  
6 that the budget does have an effect on the policy.  
7 As you alluded to earlier, there is a legitimate  
8 relationship between having the budget able to  
9 enact the policy that is actually determined in  
10 conjunction with the Department of Commerce. They  
11 have been nothing but more helpful to us in trying  
12 to obtain full funding for the Patent and  
13 Trademark Office and to provide access to our  
14 fees. So with respect to the budgetary  
15 involvement, it's been collaborative, not  
16 didactic, and it's been very helpful with respect  
17 to trying to get access to the fees that we  
18 collect and we welcome their assistance in this  
19 area. And they help is in interfacing as you will  
20 know with OMB and the Hill where they have  
21 resources and relationships that are different and  
22 sometimes better than ours.

1                   MR. OLECHOWSKI: I'll just echo that,  
2                   Steve, that the budget process in the federal  
3                   government is the mechanism to institute policy,  
4                   so Bob is actually correct. Our involvement with  
5                   Commerce has been certainly on a collaborative  
6                   effort to make sure that our priorities are set,  
7                   that the format and the message of the budget is  
8                   what the undersecretary and the secretary want,  
9                   the relationship with them and OMB is critical to  
10                  make sure that the president's budget that's  
11                  submitted has the full support of all of those  
12                  organizations, so it's been a very positive  
13                  engagement. They're not looking over our shoulder  
14                  talking about this many people or that many  
15                  people, it's not that at all. Like I said, it's  
16                  encouraging that everybody is on the same page  
17                  trying to get to the same place.

18                  MR. MATTEO: Esther, please?

19                  MS. KEPPLINGER: Peggy may be going to  
20                  address this with respect to the RCEs, but when I  
21                  look at the numbers and the projections of  
22                  decrease I wonder how you're going to accomplish

1 that. Moreover, while I hear and see that the  
2 attitude with the examiners is much improved and  
3 the examiners are willing to work with us and do  
4 interviews, also there are other instances where  
5 they're not so willing and really are requiring  
6 RCEs still. And even more troubling, I hear of  
7 one examiner saying I don't really want the  
8 applicants to file an RCE. I want them to file a  
9 continuation. How do I get them to file a  
10 continuation? So you may decrease RCEs but I fear  
11 you will increase continuations because of the  
12 differential in counts so that you may not  
13 decrease the overall number and that's something I  
14 think that needs to be looked at.

15 MR. ADLER: Since 70 percent of the  
16 budget is based on people, could you say anything  
17 about what the attrition rate has been during the  
18 first portion of 2010 as it relates to last year  
19 or the year before?

20 MR. OLECHOWSKI: The attrition rate on  
21 patent examiners is extremely low this year. We  
22 had in our 2010 budget estimated that 440

1 examiners would leave. I don't have the number  
2 off the top of my head, but I believe through the  
3 first 6 months of the year only around 125 have  
4 left. So that actually as a purely financial  
5 statement is a good news/bad news thing. It's  
6 good news because our attrition is way down, we're  
7 keeping our very most experienced examiners and  
8 everything else, but they're expensive. The  
9 people we thought they were going to leave and  
10 they didn't so it becomes a budget process and we  
11 have to make sure we have funds. Obviously we're  
12 going to cover the compensation.

13 MR. ADLER: I would expect that during a  
14 down economy, and so what I'm worried about as you  
15 project out into 2012 if as we all hope the  
16 economy improves, what are you going to use as an  
17 attrition rate in those budgets relative to what  
18 it was before versus what it is right now?

19 MR. OLECHOWSKI: In 2011 our attrition  
20 estimate is back into the 400s I believe. I want  
21 to say 428, but it's roughly 400 examiners. We  
22 haven't engaged Patents on what we think it will

1 be in 2012 yet, that will be during the summer,  
2 but certainly where we are through the first part  
3 of 2010 and how that looks, it's another  
4 calculation just like our fees because it's such a  
5 critical part of our budget to know how many  
6 people are going to be on board and everything  
7 else. But I think you're right, I think we're  
8 seeing the effect of a lot of things on our  
9 attrition rate, not just the economy but the  
10 programs we have to retain our examiners I think  
11 are having a great effect as well.

12 MR. ADLER: I hope we keep it at the low  
13 rate even when the economy improves, which I  
14 doubt, but that would be my wish.

15 MR. MATTEO: I think that would be our  
16 fervent wish, all of us. If there are no more  
17 questions, is Dana here?

18 MR. COLARULLI: I snuck in.

19 MR. MATTEO: You did indeed. Welcome.

20 MR. COLARULLI: Thank you.

21 MR. MATTEO: If you would please lead us  
22 through your legislative update.



1                   MR. COLARULLI: I'd be happy to. As  
2                   introduction, I'm Dana Colarulli, the Director of  
3                   Governmental Affairs here at PTO. I actually  
4                   began in December, so this is my first time in  
5                   front of this group.

6                   What I thought I would do is give an  
7                   update on patent reform legislation. I'm going to  
8                   give a high level, talk about it the way that at  
9                   least I approach the group of issues that are  
10                  discussed in the substantive legislation. I want  
11                  to touch on other legislation that's important to  
12                  the PTO and that my office is looking at. And  
13                  then I'm going to circle back and talk a little  
14                  bit about the vehicles for funding and start off a  
15                  little bit where Mark left off with some of his  
16                  presentation in terms of where we're looking for  
17                  additional authority in our funding to come from  
18                  for FY 2011.

19                  With what I want to go back and just  
20                  give an appreciation of the history of the patent  
21                  reform discussion and the issues that are present  
22                  in the current debate. I'm not going to go

1 through these couple slides in a lot of detail.  
2 But really this current set of proposals has been  
3 around at least since 2004. As I look at them, a  
4 lot of the provisions really came out of even  
5 after the last patent reform bill in 1999. Some  
6 of those same issues are being raised here.

7           It's been quite a long debate and  
8 there's been some controversial issues that have  
9 been worked through and I think we're in a very  
10 different place now in terms of the support around  
11 some of these provisions than we were even 2 years  
12 ago certainly when the discussion began. But in  
13 the previous three congresses, the 108th Congress,  
14 the 109th Congress and the 110th, there was  
15 considerable discussion a lot of which began with  
16 major reports from the Federal Trade Commission,  
17 the National Academies of Science and discussions  
18 on the House side actually and the discussion  
19 bounced back and forth I think between the House  
20 and the Senate.

21           So there's been I think what I would  
22 call robust discussion. Not all of the issues

1 that were raised at the beginning of the 108th  
2 Congress when this was discussed are in the  
3 current bill. Some of them have been taken off  
4 the table and addressed in the court. But I think  
5 by and large a lot of the same problems that  
6 patent owners have seen in using the system and  
7 accessing the system are still trying to be  
8 addressed in this group of provisions.

9 That brings us up to the 111th Congress  
10 which we're in right now. When the House and the  
11 Senate came forward and both introduced bills,  
12 nearly identical legislation, the Senate did quite  
13 a bit of action last year. The administration  
14 actually in October last year submitted a views  
15 letter commenting on a number of provisions in the  
16 bill, and then in the beginning of this Congress,  
17 Senator Leahy announced a tentative agreement at  
18 least on the Senate side. That body had come to a  
19 place where both the Republicans and the Democrats  
20 who had been working on this bill thought they had  
21 reached an agreement preserving the core of a  
22 compromise on damages, one of the most

1 controversial issues throughout this discussion.  
2 This current manager's amendment that would be  
3 introduced on the floor if the bill came to the  
4 floor really reflects that compromise and makes a  
5 number of other changes.

6 That's where we are right now. S-515,  
7 there is some hope that there may be floor time as  
8 soon as the next couple weeks. I know Senate  
9 leaders are trying to work to schedule time to  
10 consider the bill amidst a number of other  
11 priorities that the Senate is currently looking  
12 at, financial or Wall Street reform being some of  
13 them, climate change, immigration and other issues  
14 that are coming down the path soon here. There is  
15 some concern that given that the Senate is going  
16 to turn to a Supreme Court nominee soon that  
17 having this discussion and moving the bill to the  
18 floor before Memorial Day is really going to be  
19 critical and that's really where the focus is now.  
20 That's the general history of where patent reform  
21 has gotten from here.

22 I thought that it would be helpful given

1       that it's my first presentation here in front of  
2       the PPAC to give you the framework that I look at  
3       these provisions, and really it's in three  
4       buckets. The series of provisions in the bill go  
5       to simplifying and speeding up the process of  
6       acquiring rights and prosecuting your rights in  
7       front of the Patent and Trademark Office and  
8       getting out into the marketplace quickly. There  
9       is added part of that that the focus should be  
10      helping applicants get to applying for global  
11      rights as well very quickly.

12                 There's a second bucket I would call  
13      generally enhancing patent quality. The third  
14      bucket addresses the litigation concerns that  
15      applicants and owners have seen. These are only  
16      some of the provisions I think that fall into  
17      these buckets, but I think those are the primary  
18      ones. First, the switch to first invention to  
19      file certainly are in the simplifying and speeding  
20      up the process. I also include in this bill  
21      fee-setting authority for the USPTO, allowing the  
22      PTO to be a bit more nimble in setting its fees in

1       consultation with its external partners.

2                   MR. MATTEO: Excuse me, Dana?

3                   MR. COLARULLI: Sure.

4                   MR. MATTEO: If you don't mind, we have  
5 a question from the floor.

6                   MR. COLARULLI: Sure.

7                   MR. BORSON: Thanks. I think that the  
8 way that you're describing all of this makes a lot  
9 of sense for a lot of good reasons and I can see  
10 the ways in which it's good for everybody. One of  
11 the things we're supposed to do on PPAC is give  
12 you what we think are concerns in the hope of  
13 cooperatively airing them so that if the concern  
14 is ill- conceived it could be explained away so  
15 that if the concern is well founded it's raised in  
16 a way that doesn't sandbag you, and so I want to  
17 offer a concern in that spirit. I think that I  
18 can see how first inventor to file is put in the  
19 bucket of simplifying and speeding up the process  
20 and it can have a lot of those effects and those  
21 effects can be generally good. But there are some  
22 bad that comes with the good, and in particular in

1 the last round of debates about first to file  
2 versus first to invent, one of the things the  
3 United States did was create a so-called  
4 provisional application and it was marketed  
5 essentially the way you're marketing this. It was  
6 in a sense sold with the following catch phrase,  
7 you're an inventor. You're really busy but you  
8 slipped and hit your head on the sink and invented  
9 the flex capacitor as in the movie and now is the  
10 time to take that, the piece of toilet paper, the  
11 back of the envelop and sketch out your flex  
12 capacitor and mail it in with your provisional,  
13 and that's what a provisional is. And that story,  
14 that rhetoric was just a huge part of the public  
15 messaging, so much so that not only was a  
16 successfully implemented change in the law where  
17 success is the law was changed, it's been a big  
18 part of the messaging since the law was changed,  
19 and that leads to the following problem. We all  
20 get many, many, many phone calls where people say  
21 I did that and now my patent lawyers are telling  
22 me that there's this disclosure requirement in

1 patent law and that in order to get a filing date  
2 I need to have an original disclosure that  
3 satisfies the disclosure requirements under  
4 Section 121, paragraph 1 as of the original filing  
5 in order to get claims later and I made my initial  
6 disclosure because I thought I could draft it on  
7 the back of an envelop but now I'm told I can't  
8 beef it up, and whoever is giving those people  
9 that advice is totally correct. It is really  
10 important as a matter of public policy that we  
11 have a serious Section 121-1 disclosure  
12 requirement that puts the world on notice of the  
13 scope of the potential rights that can issue. And  
14 that means it's really important as a matter of  
15 public policy that patent applicants take the time  
16 before filing to draft rather rich disclosures,  
17 not rather anemic disclosures. And so to put it  
18 simply, the public messaging on provisional patent  
19 applications was please take this suicide pill  
20 quickly because it will act quickly and people  
21 have taken those suicide pills and they've acted  
22 quickly. They filed public documents with



1 back-of-the-envelop sketches that really got them  
2 either nothing or less than nothing because they  
3 then revealed what they could have maintained as  
4 trade secrets.

5           So I think messaging turns out to be  
6 really important in this area, and while it's  
7 important because you want to achieve the  
8 constructive goals and we want to help you achieve  
9 those goals, I just really, really am nervous  
10 about calling first to file an unalloyed good and  
11 calling it a mere simplification or speeding up.  
12 Sometimes speeding up is rushing and rushing  
13 sometimes is wasting. So there are going to be  
14 serious costs to first to file. I happen to  
15 disagree with it but I will go along because I'm a  
16 member of this society and I want to work  
17 cooperatively with my society. But I think we  
18 should be honest about the identifying the serious  
19 costs and the serious costs are the more society  
20 encourages people to file anemic disclosures the  
21 more we're all going to have to fight later about  
22 either, A, invalidating large swaths of patents

1       because they don't satisfy the Section 121,  
2       paragraph 1 disclosure requirements, or being very  
3       loosey goosey with a broad doctrine of equivalents  
4       or some other equitable remedy that will basically  
5       say to patent applicants we know you filed an  
6       anemic disclosure because you were rushing to be  
7       the first inventor to file or because you filed a  
8       provisional patent application, you did what we  
9       told you could do, and we kind of feel that you  
10      got caught and we feel badly about that so then  
11      we'll give you a little more wiggle room on the  
12      infringement side. But then as we all know that  
13      gives rise to a huge broader set of notice  
14      problems where you have an unpredictable range of  
15      equivalents and so forth.

16                I'll stop there because I know you'll  
17      disagree on the substance of some of those points,  
18      and I think you're a reasonable mind and I hope  
19      you think I'm a reasonable mind and reasonable  
20      minds I hope can disagree. But I just hope we can  
21      also be honest, and I think that calling something  
22      that major a mere simplification or a mere

1 speeding up for purposes of doing the important  
2 work that you do which is legislative affairs,  
3 fine, but let's be really careful that we not sell  
4 it to the public that way.

5 MR. COLARULLI: Certainly I appreciate  
6 your opening comments. I think this body is the  
7 place where we can have this discussion. I think  
8 the comments that you've made reflect a larger  
9 discussion that we've been having considerably  
10 with the outside world. Director Kappos I know in  
11 recent months has also had in a number of places  
12 he's traveled around the country independent  
13 inventor forums where a lot of these concerns come  
14 up and reasonably so. The independent inventor  
15 community will always have access challenges that  
16 large inventors don't.

17 I think a number of things that you said  
18 are absolutely true and we've reflected in our  
19 conversations. You're best protected by making  
20 the best initial filing you can. What the  
21 provisional application allows you to do is to  
22 file a the Patent and Trademark Office and take

1 advantage of trade secret for a period of time  
2 while you're working through your invention. But  
3 to that extent, the better that initial filing is  
4 of course will affect what the ultimate scope of  
5 your patent is. I think none of that goes to what  
6 I was trying to do here which was less marketing  
7 and it was intended to be more organizational, but  
8 I recognize in my line of business that there is  
9 some of both.

10 I think we've been very up front in  
11 saying many of the benefits of first to file come  
12 with setting a foundation for many of the work  
13 sharing efforts that the agency is engaged in. We  
14 see great benefit there. But in addition, the  
15 drafters of this provision did intend as you said  
16 what we think is a good goal which is a disclosure  
17 based system and in that system encouraging  
18 applicants disclose soon in the public domain,  
19 giving notice to others inventing in that same  
20 area and fulfill that goal of the patent system  
21 which is to create more innovation and not less,  
22 encourage folks to design around. So is it a mere

1 simplification in terms of the filing and  
2 acquiring your rights? It's a simplification and  
3 hopefully speeding up the process more generally  
4 and that's certainly how we've talked about it at  
5 a high level and I think that reflects the  
6 conversations that Director Kappos has had in all  
7 these inventor forums and elsewhere.

8 But there is going to be disagreement  
9 and we know there is some disagreement on some of  
10 the provisions. Most of that comes from some of  
11 the independent inventors and a lot of that comes  
12 to as I said traditional access or barriers  
13 because they don't have the legal resources, they  
14 don't have the advice that maybe larger applicants  
15 might have. But what's come out of this process  
16 has tried to address many of those concerns. I'm  
17 not going to say it addresses all of the concerns.  
18 I've had conversations over the last couple of  
19 days with folks who continue to have concerns.  
20 But on whole the administration has supported this  
21 provision and generally it does help the PTO move  
22 forward on its work sharing to encourage and

1 endorse a disclosure based system all of which are  
2 good things.

3 MR. BORSON: Dana, I just wanted to ask  
4 you a question. Patent reform has been around for  
5 most of the decade at this point, almost 10 years,  
6 and I wanted to ask you whether or not your views  
7 of the underpinning societal requirements that  
8 were so heavily discussed back in the early part  
9 of this previous decade are still valid concerns,  
10 how many of them have kind of simply dropped away  
11 not for political reasons or for inability to get  
12 something to move through or getting an agreement  
13 from the Judiciary Committee, but how many of the  
14 fundamental questions that were raised in 2003  
15 have either become mooted because society has  
16 moved on and those are no longer major concerns?  
17 So I guess the broad question is what is the  
18 policy and the philosophical underpinning of the  
19 current patent reform movement?

20 MR. COLARULLI: I think the overall  
21 philosophy has stayed somewhat true and the  
22 provisions that were addressing that have changed

1 and have changed for a couple of reasons. Number  
2 one, the courts have picked up some of the issues  
3 that were in the first discussions back in 2003.  
4 Obviousness has been addressed at least partially  
5 in KSR. Willfulness has been addressed to some  
6 extent in Seagate. Injunctions, which was one of  
7 the primary reasons that a number of players got  
8 into this debate also was taken off the table with  
9 the Merc Exchange case. So I think as a part of a  
10 number of the issues that were raised, as you said  
11 concerns were raised in 2003, some of those have  
12 been taken off the table because of court cases.

13 I would argue that that's actually had a  
14 beneficial effect on the overall discussion about  
15 what we want to have in patent reform legislation.  
16 What remains are some of the issues that weren't  
17 addressed and frankly some of the issues that  
18 can't be addressed just by the courts. The  
19 current legislation creates a postgrant opposition  
20 system. It improves inter partes reexamination.  
21 Those are statutory changes that the court can't  
22 make but supporters of the bill have said will

1 improve the system by ensuring that there's higher  
2 quality and more combined scope patent rights in  
3 the marketplace. So I think many of the concerns  
4 have been addressed.

5 I go back to the elements that the FTC  
6 called subjective elements of litigation and those  
7 the cost drivers. Some of them have not.  
8 Inequitable conduct you don't see, meaningful  
9 inequitable conduct, in this provision. So I  
10 think some of the things have been addressed. I  
11 think the overall framework has been to address  
12 some quality concerns and some litigation cost  
13 concerns, but some of the issues that were  
14 discussed in 2003 are no longer on the table.

15 MR. ADLER: You just mentioned one that  
16 I was thinking about that was originally in this  
17 discussion and that's the inequitable conduct  
18 issue that affects applicants and the PTO  
19 operation. The federal circuit is requesting an  
20 en banc hearing on a case and asked a number of  
21 questions the other day. I hope that we together  
22 with you can address that in some amicus response



1 or some type of response to what our view is about  
2 how the court might help us change the inequitable  
3 conduct current dialogue so that we might be able  
4 to further simplify and speed up the PTO process  
5 while preserving real fairness and prevent real  
6 fraud. So I hope you'll consider that as the PTO  
7 will consider looking into that request in the  
8 next couple of weeks.

9 MR. STOLL: We are well aware of the en  
10 banc case and the six questions that were asked  
11 and we will be formulating some sort of amicus and  
12 hopefully we'll be able to put something forward  
13 with respect to those issues to the court itself  
14 and we'll be sharing it.

15 MR. COLARULLI: It is interesting the  
16 one issue I raised that wasn't addressed in  
17 legislation, it's good that the court is  
18 continuing to look at these issues and it will  
19 continue to have an effect on them.

20 I think I'm pretty much done with my  
21 slide set. These are the three buckets as I think  
22 about this again trying to be more organizational

1       than marketing but there's some of both. The  
2       quality bucket, improvements to inter partes,  
3       establishing a brand new postgrant opposition  
4       system, certainly encouraging third-party  
5       submissions of prior art are helpful. And the  
6       third bucket is really addressing the costs and  
7       some of the subjective elements of litigation.

8                 This is a laundry list of issues. Again  
9       I'm not going to go through all of these, but I'm  
10      happy to talk about any particular issue. I  
11      wanted to get more to the status currently of  
12      where the manager's amendment is. I generally do  
13      two groups. This is some of the larger themes and  
14      then some of the other provisions that were added  
15      into the bill. I think the three that I talked  
16      about a lot are first to file damages and the  
17      postgrant opposition system. In recent months  
18      it's been postgrant opposition, making sure that  
19      the right balances are there, making sure that  
20      there weren't opportunities for harassment and  
21      abuse of these particular reinvented and new  
22      proceedings. I think first to file for reasons

1       that we've already talked about has been one that  
2       there's been considerable discussion about the  
3       effects. Damages has been the traditional issue  
4       but compromise at least in the Senate that was  
5       brokered when the bill was reported out last April  
6       was maintained and is maintained in the current  
7       manager's amendment that we've seen that would  
8       accompany the bill to the floor and then certainly  
9       postgrant, inter partes and threshold and the  
10      estoppel effect.

11                 The process now is that Senate staff and  
12      House staff have been working together over the  
  
13      last few months considerably in an attempt to see  
14      eye to eye on all the provisions. The House  
15      raised a number of concerns and Senate staff were  
16      looking to see what changes they could make to  
17      respond to those while keeping the balance and the  
18      compromise that they believe they have achieved.  
19      A manager's amendment would include some of those  
20      and a manager's amendment accompany the bill to  
21      the floor when the bill is scheduled for Senate  
22      discussion, and as I referred to, that could be in

1 the couple of weeks. Senate staff are working  
2 hard to try to do that. Even in this past week  
3 the Senate staff have done what they call hot line  
4 the bill through the Democratic side and the  
5 Republican side to vet out any additional  
6 concerns, any additional amendments that might be  
7 considered on the floor when the bill comes to the  
8 floor when it is scheduled for floor time. There  
9 are a few and those are still circulating and  
10 those are still actually becoming public even as  
11 of today. So we're trying to keep track of those  
12 and provide technical assistance on those as we  
13 can.

14 That's the substance of patent law  
15 reform. Damon, if you want me to stop and have  
16 more discussion, I wanted to very quickly show the  
17 list of other legislation that we're looking at  
18 beyond patent reform. The IP field is a very  
19 active field. Then I could talk about the  
20 vehicles for funding as well, but I don't want to  
21 delay the agenda too much.

22 MR. MATTEO: I very much appreciate the

1 whirlwind tour as it were. Some of us may have  
2 created a bit more of the whirlwind than we had  
3 anticipated. But if there are no questions from  
4 the floor, we're scheduled for a break. So why  
5 don't we just break for 10 minutes and reconvene  
6 at about 25 after?

7 (Recess)

8 MR. MATTEO: Welcome back everybody.  
9 I'd like to restart the conversations now with a  
10 look toward international efforts and an ongoing  
11 status from Bruce Kisliuk who will be giving us an  
12 update on IP5, among other foundation projects.  
13 Thank you.

14 MR. KISLIUK: Thank you, Damon. For  
15 those of you who don't know me, my name is Bruce  
16 Kisliuk. I'm one of the Assistant Deputy  
17 Commissioners for Patent Operations. We have a  
18 pretty robust team that works on international  
19 efforts. In the past it has been mostly led by  
20 External Affairs with Patent people components.  
21 Our recent focus is to bring Patent operations  
22 more into the integration of some of these

1 international particularly in the work- sharing  
2 efforts. So we have a pretty robust team of  
3 Patents people on the operations side and I'm  
4 going to try to touch mostly on the updates on how  
5 we're trying to integrate some of these  
6 work-sharing efforts into our operations.

7 This is an overview of the key topics.  
8 I'm going to touch briefly on them hoping that  
9 most people understand the programs and focus more  
10 on the actual updates. The Patent Prosecution  
11 Highway of PPH program is one that was started  
12 about 3-1/2 years ago internationally and has been  
13 growing rapidly. We have major efforts to expand  
14 that and I'll touch on those. The share-type  
15 initiatives are a type of work-sharing. PPH is a  
16 subcomponent because it's focused on allowance in  
17 a first office and applicant initiated at the  
18 point of getting that allowable subject matter.  
19 Share-type initiatives are more generic where it's  
20 just the results of the first office, it could be  
21 a rejection, so there are some more complexities  
22 to that and we are starting some pilots and I'll

1 touch on some of those pilots and some of those  
2 efforts as well. Of course, there's PCT and we  
3 have expanded the PPH into PCT which is a pretty  
4 big initiative and I'll talk to that. We have our  
5 IP5 foundation projects and the foundation  
6 projects are really means to increase the trust  
7 and confidence in the work-sharing between the  
8 offices and it's a combination of accessibility of  
9 and awareness to the results. There is  
10 understanding the results, things we're focusing  
11 on sharing. And commonality of some of the  
12 standards. That's really where our IP5 efforts  
13 are. Then we have a number of other kind of  
14 sidetrack collaboration efforts. We have examiner  
15 exchanges and collaborative examination efforts,  
16 again in the pilot phase all working toward  
17 learning what are the best ways to share results  
18 and what are the benefits of those.

19 Just quickly touching on PPH. Again,  
20 the distinction on PPH as a subset of more generic  
21 work-sharing is that the key points of PPH is that  
22 there is an indication of or determination of

1 allowable subject matter in certain claims in the  
2 office of first filing. Entry into PPH is  
3 initiated by the applicant when they get that  
4 allowability into the second office. So it's  
5 applicant initiated and it's focused on allowance.

6 Here roughly are some of the qualifiers.  
7 It's Paris Treaty, the regular 119s, there's PCT  
8 bridge. We've expanded them into what we call  
9 nonbinding work products including the expanded  
10 European search report and again PCT. On the PCT  
11 we launched that recently in the trilateral mode,  
12 so it's a PCT PPA so that you get a positive  
13 opinion in the international or Chapter 1 phase  
14 and then that is picked up in the office of second  
15 filing and the equivalent of that would be the 371  
16 national phrase. We're doing trilateral and we  
17 have just announced we're also going to be adding  
18 Korea to that. About a third or 30 percent of our  
19 PCT filings are coming through Korea so that will  
20 expand the PPH and the PCT side pretty largely.

21 MR. MILLER: Can I ask you a question?

22 MR. KISLIUK: Sure. Yes.



1                   MR. MILLER: I love the program so  
2                   that's my preface. One of the concerns I have is  
3                   there's not equity when you move back and forth.  
4                   So let's say the Japanese patent office for  
5                   example will allow a case that comes to the U.S.,  
6                   90-some percent of those get allowed pretty  
7                   quickly under PPH. When you go the other way, the  
8                   U.S. Allows and we move to Japan, it's a much  
9                   lower allowance rate. Is the office looking into  
10                  that in how we can standardize those procedures so  
11                  that American inventors are not disadvantaged by  
12                  filing first in America and having a low allowance  
13                  rate in the PPH in foreign jurisdictions?

14                  MR. KISLIUK: Yes. That's a good  
15                  question and we are. There are efforts are on a  
16                  more plurilateral basis of all the participating  
17                  PPH countries to start getting more engaged in  
18                  some commonality of practice and I actually have a  
19                  slide that has some bullets on that. So, yes,  
20                  that's a good one.

21                  This is just the rundown of the  
22                  countries that we have PPH exchange with. There

1 are 10, and then the bottom two bullets, one of  
2 the trilateral PPH that was added recently in  
3 January and we don't even have the Korea added to  
4 that yet, and then we're also in discussions with  
5 Rospatent which is the Russian patent office to  
6 add them to PPH as well.

7           This is some of the data. Again this is  
8 kind of a busy slide. I don't like this one as  
9 much. This just shows the date that we started  
10 some of the pilots. Some are actually full and  
11 not actually in the pilot phase and some of the  
12 numbers, but I like the next slide better in terms  
13 of numbers. This is data that is I believe posted  
14 on the JPO website. What it is, and it is a  
15 little busy, but it's the full picture of PPH  
16 activity internationally. If you look at the  
17 USPTO which is the second column from the left,  
18 when we're the office of second filing, this data  
19 is I believe through January of this year, about  
20 2,500, and you see the countries that it's coming  
21 from. You can see that most of our PPH activity  
22 is coming out of JPO and those are the 10. There

1 are 10 boxes of the countries that we have  
2 exchanges with. So you can see that at least the  
3 USPTO and JPO are kind of leading the activity in  
4 most of that and growing.

5 Here's the slide that I will talk about  
6 the growing. The program has been in effect since  
7 about midyear of 2006 so it's been about 3-1/2  
8 years of PPH activity and we have added pilots on  
9 and off, but as you can see, and this graph is in  
10 I think 2-month increments, so this is about 3-1/2  
11 years worth and you can see the pretty steep  
12 incline and getting steeper. Of course, as we  
13 expand PCT PPH, as we add more countries it gets  
14 higher. And I think as we've heard we had a  
15 roundtable not very long ago on work-sharing and  
16 we've heard from others that now that they know  
17 it's there, some of the applications that they  
18 have are originally in the system, had they known  
19 they would have crafted and prosecuted a little  
20 bit differently to enter. So we expect this to  
21 accelerate pretty rapidly. Under Secretary Kappos  
22 has targeted us with trying to reach the

1 cumulative 4,000 mark by the end of this year,  
2 8,000 by the end of next year and 16,000 by the  
3 year after. So we are on what I would say a  
4 marketing campaign on behalf of applicants across  
5 the world to use a system that we think is working  
6 very well and I'll get to some of the statistical  
7 benefits that we're seeing at least in the USPTO.

8 Here's just a breakout, again  
9 statistics, of where they're lying in the  
10 different technology centers. So 1,600 and 1,700  
11 are chemicals, the 21, 24, 26 and 28 the  
12 electricals and then mechanicals. The 26, the  
13 communication area, there's a lot of activity and  
14 again you can see by the color coding again JPO is  
15 the major activity that we're seeing and then  
16 Korea is the yellow. So in 2,600 in their  
17 communications area, a lot of activity coming out  
18 of the Asian countries.

19 Here are the statistics that if you're  
20 an applicant and a user you should be very, very  
21 interested in a program like this. When the U.S.  
22 is the office of second filing meaning that

1       there's been an indication of allowable subject  
2       matter in the office of first filing and you  
3       petition and enter this process, the allowance  
4       rate is roughly 93 percent. That's about double  
5       what our non-PPH allowance rate is. Actions per  
6       disposal are down and again that is the way we  
7       look at it is prosecution costs on an applicant's  
8       side, less actions, less prosecution costs.  
9       Significantly for examination and examiners is  
10      about 20 percent reduction in number of claims and  
11      the reason is that one of the requirements is  
12      there has to be claim correspondence between the  
13      claims that are indicated as allowable in the  
14      first office. So what we typically see is an  
15      amendment coming in in the U.S. case which  
16      actually reduces the claims to those allowable  
17      claims. And again because of the actions per  
18      disposal decrease we're also generally observing a  
19      pendency reduction in those cases as well.

20                Like I said, one of the things we are  
21      trying to do is set some targets and publicize  
22      this more. We think it's a great program. We

1 think that we can have wider use and we're seeing  
2 growth and we want to keep encouraging that  
3 growth. So we do have some internal numerical  
4 targets. We have expanded again aligning PCT with  
5 the PPH is what we have done already. We've  
6 started that on the trilateral. We have just  
7 announced adding Korea. I don't believe we have  
8 an exact implementation date for Korea yet but I'm  
9 hoping within a couple of months we'll be doing  
10 the Korea ones. I believe there's a press release  
11 on the agreement to do so, but I don't believe we  
12 have a start date on that. Then similarly to the  
13 question that Steve asked, we do have some  
14 plurilateral PCT cooperative efforts and we're  
15 trying to streamline procedures and get a little  
16 bit more consistent practices across different  
17 countries because right now it is a series of  
18 collaborative bilateral agreements. Share or at  
19 least the concept of share again is broader than  
20 PPH.

21 MR. MATTEO: Excuse me, Bruce.

22 MR. KISLIUK: I'm sorry. Yes.

1                   MR. MATTEO:  If I can just interrupt for  
2 a second.

3                   MR. KISLIUK:  Yes.

4                   MR. MATTEO:  On PPH I see the  
5 statistics.  I see them ramping up.  These are  
6 sheer numbers of instances.  What would be  
7 interesting to understand is if and to what extent  
8 you've done any work that would indicate savings  
9 of human capital resources or other resources.  
10 What is the net benefit of all this activity?

11                   MR. KISLIUK:  That's a good question.  
12 It depends on what your perspective of net benefit  
13 is.  When I think of examination, I look at the  
14 statistic.  These statistics jump out at me as  
15 efficiency of examination, particularly the  
16 actions per disposal statistic.  So the less  
17 office actions on our end, that's also an  
18 efficiency gain.

19                   MR. MATTEO:  I understand the 1.7 versus  
20 the 2.7.  What I can't do is I can't conjure up  
21 what that means in terms of human hours saved or  
22 dollars saved.  How would you characterize the

1 efficiencies? That's an interesting disparity in  
2 numbers but I don't have any tangible sense of how  
3 to connect with it.

4 MR. KISLIUK: That's a good question.  
5 It is kind of hard to quantify. You can ballpark  
6 what an action per disposal really means. An  
7 amendment in average it's roughly about probably 7  
8 or 8 months between the applicant's response times  
9 so we're probably saving roughly for every office  
10 action we save on our end probably about 7 or 8  
11 months roughly in prosecution time at least.  
12 Another way, and again it's hard to quantify it,  
13 but examiners have a goal so trying to figure out  
14 if they can move a quicker, do they pick up  
15 another case, anecdotally the information is they  
16 probably would because there are an incentives for  
17 them to do more. There are award programs for  
18 them to do more. So we're hoping that in a mix of  
19 a lot of other initiatives that we have that we've  
20 built the right incentives that if we can advance  
21 prosecution, it's kind of the heart of all of our  
22 compact prosecution initiatives. If you can



1 complete prosecution quicker with one case, you  
2 will be picking up another case.

3 MR. MATTEO: Intuitively I understand  
4 what you're saying. I started with a specifically  
5 targeted question. Now I'm going to retreat and  
6 ask a more fundamental question. When I asked  
7 about net benefit you used words like probably and  
8 about and we're thinking and hoping. I guess for  
9 me now the antecedent question is when you  
10 embarked upon this and as you monitor it and  
11 hopefully course correct, what are the metrics and  
12 measures for benefit and the rationale that are  
13 driving this other than these sort of broad  
14 intuitively they feel right.

15 MR. KISLIUK: I think, Damon, the safest  
16 thing is all the things that we measure today to  
17 know whether we've achieving the goals that we've  
18 set. So they are pendency and productivity. We  
19 look closely at actions per disposal particularly  
20 with all our compact prosecution initiatives. We  
21 have a number and I don't know if it's going to  
22 get to you today, but in our QIR data we have a

1 lot of internal data that we look at actions per  
2 disposal in a very fine minutia number of section  
3 action nonfinals, things like that. That data as  
4 it improves, we've also done a lot of other  
5 things. What's hard to measure is the systemic  
6 impact because we have so many things we're  
7 changing and trying to improve.

8 MR. MATTEO: I understand how these  
9 things are interrelated. I think what I'm asking  
10 is more sort of a management 101 question. What  
11 is this effort costing us and what kind of a  
12 benefit tangibly and intangibly do we think that  
13 we're getting from it? I don't want to deep end  
14 on that but it feels like a fundamental kind of a  
15 question that we should have an answer to. I  
16 didn't mean to belabor it, but I would very much  
17 like to circle back to that at some point.  
18 Esther?

19 MS. KEPPLINGER: I have one question.  
20 Of course particularly coming from Japan the  
21 claims are going to be fewer and narrower and so  
22 that's one of the reasons I think probably for the

1       disparity in allowance rate.  But additionally,  
2       what I have heard is that this is a program that  
3       could be used to get a narrower patent fast but  
4       there would likely be a follow-on continuation for  
5       the broader concept.  So in totality I just wonder  
6       what the impact -- so we get one of them done fast  
7       but we'll get a second case that follows on.

8               MR. MATTEO:  That's exactly to the point  
9       of what I was asking.  Again I get the impression  
10      you don't have those stats.

11              MR. KISLIUK:  I don't have those  
12      statistics.

13              MR. MATTEO:  I would be very interesting  
14      to circle back to that.  My apologies.  We do have  
15      a bit of a time crunch with this presentation so I  
16      apologize for the questions.

17              MR. KISLIUK:  Going back to touching on  
18      generally the share concept.  Beyond the PPH which  
19      again is narrowly focused on the allowance and  
20      applicant initiated, we're trying to find efforts  
21      in which is can be office initiated meaning it's  
22      the timing of the filings that trigger it and

1 where we can use the first office action and/or  
2 first search, share that aspect. So that's kind  
3 of the fundamental thing about share, and we're  
4 doing a number of things. One of them that we're  
5 doing is a pilot with Korea where we have 326  
6 cross-filed applications. They're in two specific  
7 technology areas that are narrowed and what we're  
8 doing is we're waiting for the first office to do  
9 a search and sharing those searches before they  
10 move forward, so that's a small part. We don't  
11 have the results yet. We have some people in the  
12 room that have worked on that specific pilot so if  
13 there are specific questions they can answer that.  
14 But my understanding is it's going pretty well.  
15 We think it's a good pilot. We think we're going  
16 to learn a lot about both the timing and  
17 understanding.

18 MS. KEPPLINGER: My question with  
19 respect to share since I see here it's not a  
20 voluntary program, one of the issues that came up  
21 in the roundtable on work-sharing was the question  
22 of patent adjustment for those people where you're

1 waiting for an action from the office of first  
2 filing, the case that's sitting here is  
3 potentially earning patent term and how you're  
4 going to handle that.

5 MR. KISLIUK: That's looking into the  
6 future. At this point these cases the delay is  
7 probably minimal. Correct?

8 MR. CABECA: For the purposes of the  
9 pilot, we tried to dictate -- pretty much on track  
10 with the current pendency, so we weren't really  
11 pulling cases out of turn and making cases wait  
12 for an inordinate period of time to really have an  
13 impact because we didn't want the patent --

14 MR. KISLIUK: Thank you, Jon. Another  
15 program that we are just about to start is one  
16 with the U.K. Again this is probably going to be  
17 a little bit more robust than the Korea pilot.  
18 Again it's going to be focused on how do we use  
19 their first actions which are most of the time a  
20 search because they do separate their search and  
21 examination and it's really we're just starting  
22 those meetings. We have a meeting next week with

1 the U.K. Officials. Again for these types of  
2 pilots right now, I don't believe we are looking  
3 at necessarily delaying as an office of second.  
4 What we're really looking at is what is the timing  
5 and really digging into the details. What is the  
6 timing today because there is a delay when you're  
7 second office anyway. What is the timing? How  
8 many can we do without moving any out of turn  
9 today? And those are the numbers and data we're  
10 trying to exchange. And then if we can move some  
11 up quicker as a first office, how many that would  
12 be. That's what we're really looking at right  
13 now.

14 What's interesting and a little bit  
15 challenging right now with these types of ones  
16 that are on PPH, remember PPH is applicant  
17 initiated so we know right away which one to grab,  
18 when it's an office initiated, the exchange of  
19 information becomes critical as well as things  
20 that have been published, what can be released.  
21 There's a lot of information and hurdles we need  
22 to get over and that's why we need to work through

1 the logistics with them. We believe there's a  
2 good percent that we can probably exchange  
3 information, share results that we don't have to  
4 take out of turn at all and we're hoping that  
5 that's the result. So we'll find much more as we  
6 ramp up our efforts with the U.K.

7 MR. MATTEO: Bruce, just a logistical  
8 note.

9 MR. KISLIUK: Yes, Damon.

10 MR. MATTEO: If we can wrap up in about  
11 5 minutes.

12 MR. KISLIUK: Okay.

13 MR. MATTEO: I do actually have one  
14 question from the public since I've already  
15 interrupted you which follows on the heels of  
16 Esther's very good question. That is how many of  
17 the issued PPH cases have continuations filed, if  
18 you have a percentage or raw number.

19 MR. KISLIUK: I don't have a number, but  
20 I believe, and I know Mark Powell -- the last time  
21 we checked I don't believe that there was a  
22 significant high number.

1                   MR. POWELL: There have not been a  
2 significant number of continuations.

3                   MR. MATTEO: If you would please come to  
4 the table. No one can hear you myself included.

5                   MR. POWELL: Thank you, Mark. I don't  
6 have the specific numbers with me. There has not  
7 been a significant increase. One thing to note  
8 though particularly with the JPO cross-filings  
9 which is our largest cross-filer and also our  
10 largest PPH participant or collaborator, in  
11 general for every JPO first filing or rather  
12 cross-filing here, there is one other continuation  
13 anyway and that historically has been a fact. For  
14 example, if you look at our gross filings from  
15 Japan versus our original first filings from  
16 Japan, it's been double for decades. We have not  
17 done a specific study of what exact percentage of  
18 the PPH cases which have been allowed have had  
19 subsequent continuations, but that data would be  
20 easy to put together in a short time and we can  
21 get that back to you.

22                   One other thing if I have a second. As



1 far as the benefits to the office for PPH, I think  
2 it would be interesting to also collaborate with  
3 some of our user groups to see what the benefits  
4 to applicants have been in PPH because there  
5 clearly must be significant savings from the  
6 attorney standpoint with less actions and so on.  
7 So I think that's something we're going to be  
8 looking into in the future.

9 MR. MATTEO: That's good news.

10 MR. KISLIUK: In an effort to kind of  
11 stay on time, the next big point I probably want  
12 to address is probably the IP5 foundation projects  
13 and I'm going to jump through some of these other  
14 things. I already talked about PCT, PPH and the  
15 foundation projects. I'm not going to get into  
16 the details of what they are. I will want to  
17 address the fact that at a recent IP5 heads  
18 meeting in April, the USPTO had made a suggestion  
19 to try to accelerate a number of those projects.  
20 They're on a pretty long timeline. And while our  
21 specific acceleration plan wasn't accepted as we  
22 suggested, there was an agreement to look at and

1 consider exploring ways to accelerate, keeping an  
2 eye on the resources necessary to do that. So  
3 again we're looking at ways to enhance and speed  
4 up the acceleration projects, I mean the IP5  
5 projects as a foundation for building toward  
6 work-sharing. So the further and faster we can  
7 move on those fronts, some of these other efforts  
8 about being consistent and standardized we'll make  
9 a lot of progress on. And that's probably the key  
10 things for now. I'll just talk on some other  
11 things, some general staff exchanges and those I  
12 can talk about at another time.

13 MR. MATTEO: Thank you very much, Bruce.  
14 Are there any questions from the floor? Thank you  
15 very much.

16 Next up on the agenda is Peggy Focarino,  
17 Deputy Commissioner for Patents, and she'll be  
18 walking us through an operations update. Peggy?

19 MS. FOCARINO: I think at the last  
20 meeting we had I introduced the concept of a  
21 dashboard and I realize you still haven't seen it  
22 on our intranet yet so we're trying to work

1 internally to determine what pieces of data that  
2 we want to show you and that we've heard from you  
3 that you'd like to see on a regular basis. So  
4 I'll just walk through some of the stats for you.

5           What you're seeing here is a monthly  
6 look at various areas including some of the  
7 big-ticket items like the number of filings and  
8 RCE filings. So you can see in the yellow  
9 highlighted portion you're getting the quarterly  
10 look at this data. We think it will help you see  
11 what the trends are over a period of time and  
12 these are things that we're keeping a really close  
13 look at also, and some of the changes that we've  
14 made in the count system also we've heard concerns  
15 that there could be some unintended consequences  
16 in areas like the movement of RCEs and how quickly  
17 we're acting on them. So some of that you'll see  
18 in here.

19           Some of the things that are noteworthy  
20 that I'm going to get into that in more detail,  
21 and just stop me if you have any questions on any  
22 of the data on this, but there are two slides so

1 I'll show you this one and then the other part of  
2 the dashboard. We've giving you a look at the  
3 inventory as well as pendency. In green there you  
4 can see our green tech petitions data and I think  
5 it was mentioned that we're contemplating, I've  
6 been talking with Robert Budens, on expanding the  
7 petitions to all classes of invention but keeping  
8 that 3,000 case limit because currently we aren't  
9 at the volume that we said we would stop at which  
10 is 3,000 cases. Most of the denials of these  
11 petitions are for the reason that the application  
12 is not in the designated class so we hope that by  
13 expanding that we'll be able to take in a lot more  
14 of these petitions.

15 I gave you the sheer staffing number up  
16 there but I'll show you a little bit about the  
17 trend in our attrition rate and the backlog and  
18 design filings also and then the amendment  
19 processing time which I'm going to give you a  
20 little closer look. So here's the actions per  
21 disposal just to show you the trend over the last  
22 several years, about 9 years worth of data, and

1       you can see it's varied a bit, but certainly for a  
2       period of time from about 2005 to sometime in  
3       2008, early 2009, we were at a pretty high level.  
4       Some of that I guess one could say there's a lot  
5       of things that go into actions per disposal, but  
6       we were on a massive hiring effort and our new  
7       hires typically don't dispose of applications  
8       right from the beginning but certainly we've  
9       discussed this before that perhaps some of the  
10      quality initiatives that we had in place impacted  
11      this also. Esther?

12               MS. KEPPLINGER: Just one comment. In  
13      the past the actions per disposal were not  
14      affected by the hires, and in other years, 1998  
15      and 1999, there was a greater percentage of people  
16      that were hired and there was no impact on actions  
17      per disposal.

18               MS. FOCARINO: I think the good news is  
19      that actions per disposal are down and so that's  
20      one of the things that you see on the dashboard  
21      that we're tracking monthly and you can get a  
22      pretty good look at that and how that's doing.

1                   RCE filings. What we're seeing right  
2 now is kind of a leveling off in the RCE filings  
3 and we hope that that leveling off as the next  
  
4 trend will be sort of a downward trend in the  
5 volume of filings. We've put a lot of initiatives  
6 in place to hopefully stem the tide of the filings  
7 and encourage our examiners to dispose of  
8 applications in the first original filing if it's  
9 appropriate. As you know, in the count system  
10 changes there are some disincentives I think both  
11 internally and externally. The internal change  
12 was to reduce the credit for these types of  
13 filings for examiners and now the RCEs are placed  
14 on the special new case docket rather than an  
15 examiner's amended docket. But as you can see, on  
16 the dashboard the time that an examiner is taking  
17 to pick up these cases has not really varied much  
18 from a little over 2 months so that's staying  
19 pretty steady.

20                   MR. MATTEO: Peggy, can I just rewind  
21 you one slide to actions per disposal? In 10/09  
22 you have a drop of what's on the order of 20

1 percent. To what does that correlate?

2 MS. FOCARINO: That's the end of the  
3 fiscal year, I guess the beginning. There's a lot  
4 of cleanup that goes on at the end of the fiscal  
5 year in terms of an examiner's docket so they're  
6 typically making a big push to dispose of  
7 applications. There's a lot of interviews going  
8 on and things like that. It's cyclical.

9 MR. MATTEO: So this is a pattern you  
10 see anyway?

11 MS. FOCARINO: Typically, yes, we do.

12 MR. MATTEO: Thank you.

13 MS. FOCARINO: Another thing that we're  
14 looking at closely is our amendment processing  
15 time and as our technical support staff has  
16 diminished in size and we as an examining corps  
17 have grown, obviously we've had some challenges  
18 with our processing times. So we've been focused  
19 on being more efficient in that area and some of  
20 the tasks that our technical support staff have  
21 been doing have been automated so we've been able  
22 to drive the timeframe down. Actually right now

1 we're at about 22 to 23 days to process an  
2 amendment. We were in the summer up to a high of  
3 the high 40s in terms of number of days. So it's  
4 coming down again so hopefully we are in more of a  
5 steady state. We hope to drive that down even  
6 further. Do you have a question, Marc?

7 MR. ADLER: Yes. I'm looking at the  
8 data and listening to what you said and I'm having  
9 a little disconnect. It looks like it's going up  
10 and you're saying it's going --

11 MS. FOCARINO: Currently, and you don't  
12 see it on that slide, but right now and almost  
13 toward the end of April we're at about 22 to 23  
14 days so the slide ends before that. But yes in  
15 the summer you can see there was a spike. In  
16 August and September of 2009 we were pretty high  
17 in that area.

18 MS. TOOHEY: Also in February the  
19 government was closed for a week.

20 MS. FOCARINO: Yes. We were having to  
21 recover from 4 days of a government shutdown which  
22 you'll probably see the curve going back up. It



1 doesn't go out far enough to what I mentioned, the  
2 22- to 23-day rate that we're seeing right now.

3 MR. ADLER: That's all.

4 MS. FOCARINO: But it's something that I  
5 think we mentioned the last time, I mentioned the  
6 last time, and I know we've gotten some feedback  
7 from our applicants that we were taking a long  
8 time to enter amendments. So it's trending in the  
9 right direction.

10 SPEAKER: May I ask, Peggy, on that  
11 because I don't understand the data? March was 29  
12 and you're saying it's 22 for April? What would  
13 account for that big of a switch in just one  
14 month?

15 MS. FOCARINO: I'll let Gary Jones if he  
16 wants to give you the details. Gary is in charge  
17 of our tech support operations and has been  
18 focused on this. He spends a good part of his  
19 time tracking this.

20 MR. JONES: We redistributed the  
21 workload in a way to truly work first in, first  
22 out for all document entry and we have had full

1 overtime plus. We've been allowing our tech  
2 support staff to work up to 40 hours overtime. So  
3 we're steadily chipping away at the documents and  
4 getting them entered. We've been making about a  
5 2- to 3-day reduction per pay period and, yes, we  
6 did get a setback by having the office closed for  
7 4 days, but I must say that the LIEs who are  
8 hoteling worked through that snowstorm so we did  
9 get some work done.

10 MS. FOCARINO: And we have about 100  
11 LIEs or 80- something hoteling?

12 MR. JONES: We have about 130 hoteling  
13 now and by the end of the fiscal year we'll be  
14 adding another 100 and that's most of our LIE  
15 support staff. We have about 240 total.

16 MS. FOCARINO: That's a great point that  
17 during the closure we were able to continue to  
18 process work because we now have a significant  
19 number of our technical support staff that work  
20 from home full-time.

21 SPEAKER: Is the redistribution all in  
22 April? Is that how you're counting, going from 29

1 to 23 in 1 month or is it all overtime?

2 MR. JONES: I would say it's mostly due  
3 to overtime. The redistributing of the work  
4 allows us to be more consistent to where all the  
5 tech centers are processing work that's about 3 to  
6 4 weeks old, whereas before some tech centers were  
7 building up a backlog and some were chewing them  
8 off faster so there was a big discrepancy in the  
9 amendment times.

10 MS. FOCARINO: That's a good point. We  
11 had some wide swings in the days depending on what  
12 technology center you were in, so now we've  
13 leveled that out which is good.

14 Marc you touched on this morning or  
15 earlier this morning in terms of the attrition  
16 rate. This is a 12-month average, but currently  
17 we're less than 5 percent attrition rate. And the  
18 dashboard data shows you the exact numbers, but  
19 obviously we have a very low attrition rate now  
20 and we are mindful of what you mentioned in terms  
21 of the rate going up as the economy goes up.

22 MR. MATTEO: What have the exit

1 interviews revealed from those exiting?

2 MS. FOCARINO: The exit interviews, last  
3 year the majority of people that responded said  
4 the number one reason that they left was because  
5 of the nature of the job, and for the first time  
6 this year that reason was no longer the number one  
7 reason, it was for other reasons, personal  
8 reasons, people moved away with their families or  
9 they continued their education. The nature of the  
10 job has now moved down to second place in terms of  
11 the number one reason so it's good.

12 MR. MATTEO: Robert, you had a question?

13 MR. ADLER: It's very good that it's  
14 gone down. I'm still concerned that it's still  
15 too high. There's a lot of churn in any  
16 organization when it loses 5 percent of its  
17 workforce. So I think we need to look at the exit  
18 interviews even more carefully and try to dig into  
19 that a little bit to understand what the issues  
20 are and try to resolve some of those.

21 MS. FOCARINO: That's a good point you  
22 raise. I'm not sure what a healthy attrition rate

1 is for a business like what we have with highly  
2 skilled technical people. I can guarantee you  
3 that the group directors are focused. They know  
4 exactly how many people they're attritting every  
5 month and the reason why and they are very  
6 proactive when someone is even giving hints that  
7 they may be thinking about leaving. If it's  
8 someone that we want to keep we're really making a  
9 lot of effort and putting a lot of focus on trying  
10 to find out why they would like to leave and why  
11 perhaps we could convince them that maybe they can  
12 stay. So we're very focused on it. I'm sure some  
13 typically it's some people just aren't cut out for  
14 the job.

15 MR. FOREMAN: Peggy, I know we've talked  
16 about attrition in almost every PPAC meeting that  
17 we have. Is there any effort underway to  
18 benchmark against either other offices to see on  
19 an international scale what sort of attrition  
20 they're experiencing and also in the real world,  
21 companies that do have highly technical employees,  
22 what kind of attrition they're experiencing. Then

1 to follow that up, if there is a trend here where  
2 the Patent Office is much higher than others,  
3 working with best practices in the HR field to  
4 figure out what can done to address it and why is  
5 it that it's higher here than we're experiencing  
6 either on an international or in similar  
7 industries.

8 MS. FOCARINO: We have done a lot of  
9 benchmarking, OHR has a lot of data on not only  
10 within the federal government where you have  
11 technical skills that are necessary but also in  
12 the general population in terms of private  
13 industry that have skilled people and our  
14 attrition rate is quite a bit lower.

15 MR. BORSON: Peggy, what's the overall  
16 budgetary impact of attrition? There's the cost  
17 of rehiring and retaining?

18 MS. FOCARINO: Right. I know there have  
19 been various numbers thrown around for how much it  
20 costs every time you lose someone to bring a  
21 lower-graded newer employee on board and by the  
22 time they get up to speed to be able to produce

1 the same amount of work, obviously there's a cost  
2 to that, but there is a point in time where you  
3 break even if you have someone that's here that  
4 really isn't a good fit for the job and they're  
5 not putting out the level of work that we need  
6 them to. So obviously there's a cost anytime you  
7 lose an employee. There's a significant amount of  
8 training that goes into them.

9 MR. BORSON: I understand that. The  
10 question is can we provide a metric to that? We  
11 talked about the budget and then the differences  
12 between projected income and actual revenues and  
13 all of that, it would help us I think if we could  
14 quantify the actual cost to the office.

15 MS. FOCARINO: You're talking in terms  
16 of if an examiner traded the work that they would  
17 have otherwise done and the fees that that work  
18 would have generated, what's that loss?

19 MR. BORSON: That's part of it, but also  
20 what is the additional cost of training somebody  
21 else to get them up to speed? What's the net  
22 loss?

1                   MS. FOCARINO: We have data like that.  
2                   Obviously we have a lot of assumptions built in,  
3                   but we could provide you with that data.

4                   MS. KEPPLINGER: One thing, I'll echo  
5                   what Peggy said, I know we had looked at some of  
6                   the statistics before when I was in the Patent  
7                   Office, in particular getting some of the  
8                   increases in pay. In the engineering sector which  
9                   is what the Patent Office models itself after, the  
10                  attrition rate is much higher than the rate that  
11                  you're seeing here. This is quite an improvement  
12                  and it's a good first step. I think when you  
13                  compare to the other offices, the JPO and the EPO,  
14                  theirs is lower, but I think there are a lot of  
15                  things that factor into that. One, their pay is  
16                  higher. And two, one of the things that I think  
17                  is a significant part of it is that in Europe and  
18                  Japan federal employment is seen as a very  
19                  sought-after position and unfortunately in this  
20                  country we bash federal employees and I really  
21                  think that that factors into people's choice of  
22                  work. So one of the things that I think as a



1 society we could do is try to change that image.

2 MR. MATTEO: That's actually very true.  
3 Very true. Last question, Robert?

4 MR. BUDENS: I have two questions,  
5 Peggy. One, these attrition numbers are using  
6 fewer transfers and retirees. Historically, when  
7 we've reported out attrition statistics we've  
8 included transfers and retirees. One question I  
9 would have is what's been the trend in the  
10 transfers and retirees? For example, right now I  
11 suspect we don't have as many transfers because we  
12 haven't been hiring supervisors. Transfers would  
13 be they left the examining corps and went into a  
14 management position, so they're still in the  
15 agency but they're not examining anymore. So the  
16 first question would be how would that affect  
17 these numbers and are they still relative in time  
18 to historical statistics? I'll let you answer  
19 that one.

20 MS. FOCARINO: What is the exact number?  
21 Is it 5-point-something, Dave? They track the  
22 same. I believe that we've experienced fewer

1 retirements in the last year. Part of that is  
2 also because of the economy and people's  
3 retirement investment portfolio. And part of it  
4 has to do with our hoteling program that examiners  
5 that would otherwise retire have the ability to  
6 work from home and they're staying longer. But  
7 delta is not much different from historical  
8 levels.

9 MR. BUDENS: My second question went to  
10 the exit interviews because the nature of the job  
11 is a rollup question and it's broken down further  
12 in the exit interviews. Do you have any  
13 statistics as to the various reason that we use in  
14 the rollup to the nature of the job like  
15 production requirements? Do you have any feel of  
16 what the number one subheading was under nature of  
17 the job for people leaving the office?

18 MS. FOCARINO: I'm not sure what that  
19 is, but I certainly can get that data. You're  
20 right. There are a number of factors that go into  
21 that answer.

22 MR. ADLER: I don't want to dive too

1 deep here. There's a difference attrition and  
2 performance management and sometimes you want to  
3 get rid of people who aren't performing well and  
4 that's a positive thing, but it's good for the  
5 organization and morale if you weed out the people  
6 who are the worst performers. So it would be good  
7 to match the people who are leaving with their  
8 performance history and if they are the ones that  
9 are leaving, I'd say that's a good thing.

10 MS. FOCARINO: Agreed.

11 MR. ADLER: But if the high performers  
12 are leaving, that's not a good thing. So it would  
13 be good to be able to match the attrition with  
14 their performance history.

15 MR. MATTEO: That speaks to I think what  
16 Ben was talking about in terms of impact of people  
17 transitioning out.

18 MS. FOCARINO: We do keep an eye on  
19 that. We can't track it exactly because a lot of  
20 times employees resign that are having performance  
21 problems so it's difficult to go and look at the  
22 records.

1                   MR. MATTEO: Thank you very much, Peggy.  
2                   Next up we have a quality update from Marc Adler  
3                   and Bob Bahr.

4                   MR. BAHR: I can go through some of the  
5                   mechanics.

6                   MR. MATTEO: Just a logistical note  
7                   before you get started. If possible, Bob, if we  
8                   can keep this to about 15 minutes. We're already  
9                   starting to run behind.

10                  MR. BAHR: We published a notice  
11                  announcing two roundtables. The first will be in  
12                  Los Angeles on May 10. The second is here at the  
13                  PTO on May 18. We also invited public comment on  
14                  issues pertaining to patent quality and we will  
15                  soon we posting on our website what I would call  
16                  proposed quality metrics. They're not proposed in  
17                  that they are the only thing we want comment on.  
18                  They're proposed in that they're some of our  
19                  ideas. We're interested in stakeholder input on  
20                  those ideas and we're also interested in other  
21                  ideas that people might have with respect to  
22                  quality. We've also prepared some summaries of

1 the comments we've gotten to date and we'll post  
2 them as well. As for request for comments, I  
3 believe the comment period closes on I think it's  
4 June 18, but it's somewhere in the middle of June.  
5 Did you have anything to add, Marc?

6 MR. ADLER: Those are the logistics. I  
7 thought I would do a little bit of a broader where  
8 are we and what's been happening. The public  
9 notice for comments solicited a number of  
10 suggestions with regard to possible changes that  
11 could affect the definition of quality which would  
12 be to improve both the validity of the patents  
13 that are granted as well as make certain that the  
14 right patents are rejected, both false positives  
15 and false negatives. As well as to look at things  
16 that could improve pendency, in other words,  
17 reduce pendency and backlogs. We received a lot  
18 of comments and now we're going to have these  
19 roundtable discussions to try to narrow this down  
20 a little bit since we got so many suggestions.  
21 Many of those suggestions probably can't be done  
22 right away, some of them might not be able to be

1 done at all. Most of them relate to process  
2 efficiencies and not statutory changes, not rule  
3 making. They are doable things. Which ones  
4 should we do and how will we measure their impact  
5 will be the focus of the roundtables. We need to  
6 have the right metrics to measure the changes so  
7 that when we make the changes we can see whether  
8 we're getting the results that we want or not.

9           There is a related aspect to this which  
10 is that the office will also be at some point  
11 doing a pendency roundtable to get feedback  
12 specific to issues relating to pendency. I think  
13 that makes a lot of sense. This is not a one-shot  
14 deal. I think that one shot on quality and one  
15 shot on pendency is a continuous improvement  
16 activity. This is not an attempt to say that the  
17 Patent Office is doing a good job or a bad job and  
18 it really isn't related necessarily only to the  
19 Patent Office. A lot of these things have to do  
20 with applicant behavior and changing the way  
21 people operate in terms of conducting interviews  
22 with the Patent Office or how to file a response

1 or how to do a search or when to do a search. So  
2 we hope that everyone here will take this in a  
3 collaborate way and that's what we've been  
4 intending it to be. The Patent Office task force  
5 has been very cooperative with PPAC members on  
6 this up to now and we hope that that will be  
7 continuing. May 10 in L.A.?

8 MR. BAHR: Yes, it's May 10 in L.A.

9 MR. ADLER: And May 18 here for the  
10 roundtables on quality focusing on new  
11 suggestions. Hopefully people can focus down when  
12 they get the information that's already been  
13 collected on one or two top things that they think  
14 are the best ideas as well as the best metrics  
15 that they think we should be using to measure the  
16 improvements. Then we'll continue it either  
17 September I assume or early in the fall on the  
18 pendency roundtable. That's what I wanted to add.

19 MR. MATTEO: A logistical note. Is  
20 there a place where people can go to find out more  
21 information about timing, venue, pre-read  
22 materials, et cetera, to facilitate people

1 attending and participating?

2 MR. BAHR: Yes. It's in our website  
3 under patents. If you go to the patent policy  
4 area and you click into that there's a button bar  
5 for initiatives, the patent quality initiative,  
6 you can click into that. All the information  
7 about the Federal Register notice, all the  
8 comments and all the information I've mentioned  
9 you could find there.

10 MR. ADLER: I assume that you will be  
11 positing the PTO summary of the comments. You're  
12 waiting for some clearance on that?

13 MR. BAHR: Right. They are currently in  
14 the internal clearance process, and as soon as  
15 that's done they'll be posted.

16 MR. ADLER: Speaking out of turn, since  
17 all I was doing was summarizing the comments and  
18 providing what PPAC thought were some suggestions,  
19 I don't particularly understand the solicitor  
20 needs to look at that.

21 MR. BAHR: Welcome to the PTO.

22 MR. ADLER: Hopefully the solicitor will



1 and he'll be able to clear that. There's no rule  
2 of law in those. They're just proposals.

3 MR. BAHR: Thank you. I'm subject to  
4 the same requirements, Marc.

5 MR. BORSON: I wanted to point out that  
6 I think the real two key issues are that we try to  
7 define objective metrics. These are things that  
8 are based on hard evidence, hard data as opposed  
9 to conflating a good idea for improving quality  
10 without having a good metric. I think that it's  
11 one thing to have a desire and an implementation  
12 for a way of improving quality, but without a real  
13 metric it would be very hard to know whether  
14 you've gone there.

15 MR. ADLER: I totally agree. My intent  
16 as a co-moderator of those roundtables as well as  
17 reviewing the comments is to not accept  
18 complaining per se. Unless somebody has a  
19 specific suggestion for an improvement and a way  
20 to measure the improvement, I don't think I want  
21 to hear about it. That's pretty blunt, this is  
22 not a gripe session. This is a collaborative

1 attempt to improve our system.

2 MR. MATTEO: Well spoken. Are there any  
3 other comments from the floor? I think we're  
4 prepared now to move to the OCIO update which will  
5 be led by John Owens who was here. I think we  
6 need just a minute to transition. John Owens,  
7 Chief Information Officer.

8 MR. OWENS: My apologies for that. My  
9 wife is actually in Italy in my daughter, and I  
10 only get a call once a day and it happened to be  
11 just now.

12 Of course everyone is interested to know  
13 how we're going with developing the new 21st  
14 century technology that will help push this  
15 organization forward. After discussions with Mr.  
16 Kappos and other parts of the organization, I  
17 wanted to talk to you a little bit about how we're  
18 going about building that system.

19 First we're looking at using a couple of  
20 general tenets in developing our plan. The first  
21 is stop, look and listen. I think all too often  
22 we don't listen here at the USPTO to our customers

1       whether they be the outside customers that we have  
2       or the internal customers or the examiners. The  
3       next thing we're going to do is we're to build  
  
4       smart and we're going to build fast and we're  
5       going to own the design. In the past as I had  
6       talked about before, the USPTO had allowed the  
7       contractors to own the design, had allowed the  
8       design to go and be beyond the control of the  
9       office. That is never a good thing particularly  
10      because it allows someone else to control your  
11      destiny. Last we're going to take the stakeholder  
12      needs and put them in the lead. You're going to  
13      be hearing from Marty Hurst in a little bit about  
14      how we're forming two councils and each one of  
15      those councils will be used to solicit input from  
16      both the outside world, the public as well as the  
17      internal examiners.

18                 A couple of the main ideas at least as  
19      far as the technology goes, we would like to  
20      accept open standards. We want the system to be  
21      maintainable and scalable beyond which it is not  
22      today. A lot of people tell me, John, we'd like

1 the system to be available 24 by 7. I have a  
2 little bit of a higher goal. I would like  
3 maintenance to be able to be done 24 by 7 without  
4 the system going down. Today we lose a number of  
5 hours every day plus weekends when I have to bring  
6 the systems down for maintenance because they are  
7 not resilient or redundant enough to stay up and  
8 available. Many folks in the public comment about  
9 how frustrating it is particularly on the west  
10 coast when the system is down for maintenance. I  
11 understand that. Certainly in the outside world  
12 when you talk about major industries using IT,  
13 they don't have those down times. Maintenance can  
14 be done 24 by 7 with no impact to the system and  
15 that is goal of where we are going to.

16 We want to make sure that the  
17 information we have here at the USPTO that's  
18 publicly available is visible. we want to make  
19 sure that the user interfaces we have are world  
20 class and that we use state-of-the-art tools both  
21 for collaboration between the examiner and the  
22 attorney or the applicant as well as

1 state-of-the-art search and search tools.

2 I'm going to ask Erin-Michael Gill who  
3 is a former examiner here in the office and now  
4 joins the under secretary's organization to talk  
5 to you a little bit about some of the things that  
6 examiners go through today and how we are looking  
7 at making that work better.

8 MR. GILL: Thank you very much, John.  
9 The purpose of these next couple of slides is not  
10 to bore you into submission but more to show some  
11 of the more frustrating and almost embarrassing  
12 things that examiners today need to do given the  
13 tools that are presently available and things that  
14 could be helping examiners with some of the things  
15 that are literally the most frustrating parts of  
16 their jobs.

17 We're starting by looking at an  
18 application that comes in and what's one of the  
19 first things an examiner has to check for. Are  
20 there proper dependencies in the claims? They  
21 will today literally have to draw a picture as you  
22 see on the right showing independent claim one has

1 proper dependences and claim 10 and so on and so  
2 forth. This is one of those things where tools  
3 and technologies exist today which can help  
4 examiners immediately check when there are 250  
5 claims making sure that these things aren't having  
6 to be literally drawn out in pen and ink.

7           Similarly, when you're reading through  
8 the specification and making sure you're doing the  
9 checks saying is every single element in the  
10 figure represented and described in the text?  
11 Think about how excruciating that is when you have  
12 a 250-page document and you're literally by hand  
13 going through one by one. This is what an  
14 examiner has to deal with right now. Again, there  
15 are tools existing today when can provide this  
16 kind of functionality. We just internally aren't  
17 able to take advantage of them.

18           Lastly, and some of the things that  
19 probably resonate the most with the applicant  
20 community is the understanding of breathing life  
21 and meaning into terms in the claims. When you  
22 look at a term, where is it found in the

1 specification? What did they mean? How were they  
2 using this term? What are the examples that allow  
3 me to better understand what the applicant is  
4 saying? You literally have to flip and forth  
5 going through and looking through these  
6 specifications. Is it referenced on page 5 or is  
7 it referenced on page 25? Going through and  
8 matching term by term is one of the things that's  
9 among the most important but also the time  
10 consuming. And when you're developing your  
11 search, when you're understanding the invention,  
12 you're developing the strategy, doing this  
13 function is critical. Again there are tools which  
14 can really advance examination and help  
15 examination move forward.

16           Lastly, and you'd almost call this you  
17 can't believe that things like this happen today,  
18 every single little action, every decision that  
19 was made, everything that you've already done  
20 previously, once you're finished you have to go  
21 back and repopulate another form with excruciating  
22 detail. Here you see on the right you literally

1 have to go back and say these claims are rejected.  
2 These claims are objected to. It's an ex parte  
3 Quayle action. You have to go back and redo it.  
4 Again you would think that today that populating  
5 data in two, three, four or five places should not  
6 be, but unfortunately that's the situation in the  
7 environment we live in today.

8 The goal from the perspective of the  
9 team is to reduce these frustrations making sure  
10 that these things that shouldn't be happening we  
11 shouldn't be having to go back and do that are not  
12 done and that we look to these things and allow  
13 the tools to help catch errors and make the  
14 examination process more livable as it were. So  
15 this is a simple graph representation of saying  
16 let's make sure that before it gets to the  
17 examiner's desk the things that can be checked for  
18 them and the tools that can be made available to  
19 them are so. Now we're going to talk about the  
20 methodology to implement this strategy.

21 MR. OWENS: Just so everyone knows,  
22 Erin-Michael sits as a member of our core



1 management team on the Next Generation projects  
2 along with folks from SERA (?), Fred, Marty Hurst,  
3 Patrick Kelly and others, including our  
4 procurement office to help make sure that the  
5 transition for what we want to build, to building  
6 it, to the receiving of the goods and services is  
7 all on target. Of course I chair that committee  
8 and am intimately involved as well. We are  
9 meeting to everyone's chagrin at least for an hour  
10 a day on average, sometimes more.

11 One of the things that's new  
12 particularly to the federal government for those  
13 of you who have been in industry in the last 10  
14 years that's not so new is the type of development  
15 methodology that we're going to be employing here  
16 in this systems engineering effort. Vivek Kundra  
17 our federal CIO and his staff over at OMB, that's  
18 the Office of Management and Budget, are taking an  
19 active role in helping us figure out the best way  
20 to bring this methodology that I have used in my  
21 previous life outside of the USPTO here and that's  
22 called the Agile Development Methodology. There

1 are several interpretations of this methodology  
2 which I will not get to. What it speaks to is the  
3 selection from driving a prototype which can be  
4 looked at and viewed and played with had commented  
5 on to very rapidly iteratively making small  
6 changes to it to get to the product that you want.  
7 Software development in the past which is the  
8 common methodology used by the federal government  
9 today is called the waterfall method. You build  
10 up this great big momentum, this huge amount of  
11 documentation, you document the entire system end  
12 to end and then you push it over the waterfall and  
13 hope by the time it hits the ground it's done.  
14 That sometimes works, sometimes doesn't.

15           Unfortunately, halfway through the fall  
16 you realize it is or is not going to work and by  
17 that time you've spent so much time and so much  
18 money it's hard to correct the course if something  
19 is wrong with the project. Industry figured this  
20 out about 10 to 15 years ago and started  
21 developing other models. The agile model has been  
22 in wide use particularly in the last 10 years.

1       What it says is instead of trying to do this huge  
2       thing at once, why don't we break it apart into  
3       smaller chunks? So instead of one big project  
4       you're doing, maybe you're doing 50 small projects  
5       and if two of those don't work to make the system  
6       then you don't lose the whole, you only lose a  
7       small part. It manages your risk better, it  
8       provides a higher level of quality and it provides  
9       the opportunities for both customers inside and  
10      outside of our organization to make comment on the  
11      project so that we can more dynamically adapt.  
12      Because no longer are you waiting for this big  
13      push and features and functions you can get only  
14      once a year, but you can get iterative development  
15      to happen on a monthly cycle or bimonthly cycle.  
16      The system will evolve over time through these  
17      rapid iterations. I'd be happy to go on a little  
18      more about it, but it is one of the things that we  
19      are looking to reduce our risk here at the agency  
20      while making these very large changes to our  
21      systems.

22                   I'd like to talk a little bit about

1 other ongoing activities. The PALM system which  
2 as you know I've stated in the past is the hub of  
3 our current system. It also contains how we count  
4 examiners' work. Through the new count system  
5 changes we have majorly evolved this system to  
6 accept those changes and even when we find buds we  
7 very rapidly fix them. So I believe the count  
8 system has gone very well considering the amount  
9 of time a change like this would have the  
10 government in previous years.

11 Patent term adjustment which I'm sure  
12 you've all talked about. There was a recent  
13 decision that came down from the court that made  
14 us take a look at how we're allocating that patent  
15 term timeframe. Of course we use the same  
16 methodology. What things could we do really,  
17 really fast that we knew we could easily fix and  
18 automate? We pushed those out and through a  
19 series of releases are going to find the patent  
20 term adjustment to get it as close as we can while  
21 still meeting the speed and the desire of both  
22 ourselves internally but also the quality level

1 for the public.

2           The good news is again we have made all  
3 of our dates on this and are looking to have  
4 additional refinements for all the nuances that  
5 you could possibly get a term adjustment for which  
6 are quite varied some of which we didn't even  
7 track as the system moves forward. So this was  
8 another example of using that methodology that  
9 works well for right now.

10           A couple of highlights. EFS-Web which  
11 is one of the most unstable projects that I  
12 believe we have here not by its nature. EFS-Web  
13 is actually more stable than you might expect.  
14 It's the surrounding systems that are connected to  
15 it that are less than stable which bring EFS- Web  
16 down. This is that web, that glue that I spoke to  
17 you about in the past where systems are connected  
18 to one another and the weakest chain in the breaks  
19 and they all collapse. We are in the midst of  
20 deploying right now a separate EFS-Web, what we  
21 call in the industry instance that will allow you  
22 to submit even if the main instance goes down,

1 adding a little bit of redundancy for a very  
2 little cost. We don't want to make huge  
3 investments in the current system, but the system  
4 fails so often and rights could be lost which is a  
5 serious concern for the whole office including the  
6 OCIO. So the separate instance will be able to  
7 take those submissions appropriate and that will  
8 be going live here shortly. You'll be seeing an  
9 announcement. It is in production and in test,  
10 and as soon as we are satisfied with it we're  
11 going to stand it up and announce that it's  
12 available.

13 The MPEP. I was originally going to  
14 pronounce it MPEP but people me told me that's not  
15 right. Engineers, at least computer scientists,  
16 like to make words up, but it's the MPEP. I  
17 understand that. We are going to reformulate the  
18 MPEP in an XML tagged format so that we can put up  
19 on the web in a little more easier than it's  
20 encoding today because we do understand that  
21 format matters and allow it to be not only used  
22 inside of our applications more dynamically so

1       manipulating the text is a little easier rather  
2       than seeing just the images of the document, but  
3       also being able to post it on the web as well as  
4       accept comment on it which I know is Mr. Kappos's  
5       goal through a wiki or blog or a discussion form  
6       type environment.

7                   MR. ADLER:  Are you doing this in  
8       conjunction with the MPEP rewrite project or are  
9       you going to have to do it again?  Do you  
10      understand?  We heard earlier about an MPEP  
11      rewrite.

12                   MR. OWENS:  I believe it's the same  
13      thing.  Some of you may have heard about the no  
14      cost dissemination contract.  There are actually  
15      two of them.  I had spoken about it before.  The  
16      first one, the interim contract, we fulfilled with  
17      the sole source selection of Google.  The other  
18      one is about to be rereleased in RFI form because  
19      we did not have the funds this year to host all of  
20      our data in bulk and that was a directive by the  
21      President to Mr. Kappos.  We found an interim  
22      solution of hosting all of our bulk data.  I have

1 good news. All of our bulk data that we currently  
2 well has been received by Google. They have  
3 posted it. We are testing it. And they are going  
4 to host that bulk downloaded data for free for  
5 anyone in the world who wants it. So that's good  
6 news.

7 MR. KIEFF: Just a quick follow-up.  
8 Free is always a funny term and everybody's big  
9 boys and girls doing stuff for their best  
10 interests. Then I start to think to myself why  
11 would Google do this? What Google's business  
12 model is in other segments of the economy is it  
13 wants to know what people want to look at and when  
14 and why so that it can then sell the information  
15 about who's looking at what and when and why to  
16 other people, advertisers. In this setting it  
17 strikes me that there would be really useful ways  
18 to get competitive intelligence about who's  
19 interested in what technical information or who's  
20 interested in what business information by simply  
21 knowing search patterns for bulk data. Who tracks  
22 those search patterns in this relationship and who



1 gets access to that search pattern data and under  
2 what terms?

3 MR. OWENS: The content that we are  
4 providing to Goggle who is going to host for us  
5 the distribution of that bulk data because we do  
6 not have the technical facility neither in our  
7 outside network bandwidth nor in our hosting  
8 capability here on-site to do that is the same  
9 bulk data everyone has purchased to date. So the  
10 data is already out there.

11 MR. KIEFF: I get that.

12 MR. OWENS: I understand what you're  
13 saying, if you'd just give me a moment. Google in  
14 our agreement has agreed once it's up and  
15 available to release as they obtain the  
16 information within a very small window, we're  
17 talking a week to 2 weeks, everything to the  
18 general public. The amount of time that would be  
19 necessary for us to put it on a disk or other  
20 media, ship it to them, them upload it, test it  
21 and put it out there is a very small window. What  
22 any individual company does with that data just as

1       they would be purchasing it today whether they're  
2       searching it or not, how they're loading it, how  
3       they're manipulating it, whatever patterns they  
4       find off of it is up to the companies that decide  
5       to download the data. We do not track what people  
6       do with the data.

7               MR. KIEFF: But they do.

8               MR. OWENS: The data is free.

9               MR. KIEFF: Right. But Google does.

10              MR. OWENS: They may. I do not know.

11              MR. KIEFF: I'm sorry. That's like  
12       being surprised the sun is going to rise tomorrow.

13              MR. OWENS: I'm not surprised at all.

14              MR. KIEFF: I'm just saying the whole  
15       reason they're doing this is because they want to  
16       drive as much search traffic through them so that  
17       then they can search the search traffic.

18              MR. OWENS: Sir, please, if I might, I  
19       don't believe that I said there wasn't an ulterior  
20       motive. The service to host it for us for the  
21       public for free which is quite a substantial thing  
22       for me because I do not have the internet

1 bandwidth to do so to meet the President's  
2 requirement is free to me. They are hosting it  
3 for me. What they do with the data or if someone  
4 else hosts it in the future or if they wanted to  
5 take the data and post it and manipulate it is  
6 what they could have done by purchasing the data  
7 from me.

8 MR. MATTEO: I think, John, if I may,  
9 the question isn't to what Google will do with the  
10 data. It's all searches or inquiries that come  
11 through Google to the data how they will get  
12 mapped. So is IBM searching this or that or is  
13 there is a bulk download of all information.

14 MR. KIEFF: You have a serious problem  
15 and they've solve it for you and bravo and that's  
16 great and I know that you're engaging in good  
17 faith and lots of other human beings are engaging  
18 in good faith and well reasoned. I totally get  
19 that. But I just think it's important for society  
20 to understand that our government has taken  
21 something that's really, really going to be  
22 attractive for a lot of people to look at and let

1       it be in the hands of somebody whose entire  
2       expertise and business model is at keeping track  
3       of how people look at stuff in order to get  
4       competitive intelligence about that looking and  
5       that that will be as a matter of U.S. national  
6       innovation policy hugely important to our national  
7       interest and as a matter of relative competitive  
8       policy among commercial players in our society of  
9       deep interest to them. I hope some thought is  
10      going maybe not by you but if this is a directive  
11      of the President then I hope that this wasn't to  
12      help Google. I hope that this was important for  
13      our society with an open consideration of the  
14      complicated costs and benefits that will flow from  
15      this although I totally recognize an authentic  
16      benefit is it makes the information storage costs  
17      of the Patent Office drastically less expensive.  
18      That I get and that's a really important good  
19      thing and that's your mission and we get that.

20                   MR. OWENS: I'd like to clarify a couple  
21      of points. The desire to get out bulk data, bulk  
22      data files, large many megabyte-gigabyte files

1 available to the public was the order from the  
2 President to Mr. Kappos. The manner in which we  
3 did that is well documented in the selection that  
4 we made. The President did not ask for Google or  
5 Google alone to obtain it. That is the method by  
6 which my office and our Office of Procurement  
7 found is the method to make it available.

8 Second, the data that I'm talking about  
9 is bulk so anyone can take the bulk data if they  
10 so desire, bring it internal to their own services  
11 or system and manipulate it themselves and do  
12 their own searches and queries would never fully  
13 understand or know about at all.

14 MR. MATTEO: John, if I may, it feels as  
15 though you may be talking past each other. I  
16 think the fundamental question here is when you  
17 talk about bulk data, is it all data in toto lump  
18 sum moved from Google to some organization and  
19 they manipulate it internally completely invisible  
20 to Google or are these targeted searches, company  
21 A searches for botonics patents, et cetera?

22 MR. OWENS: No targeted searches

1       whatsoever. The bulk data that we provide today  
2       in packages with no manipulation as the  
3       requirement then hosted for download by anyone.

4               MR. KIEFF: I totally get what you're  
5       saying. Maybe let me make a different comment and  
6       this is not at all directed at you.

7               MR. OWENS: I don't take anything  
8       personally. I'm just trying to figure out how  
9       Google is tracking something that people are  
10      downloading in bulk.

11              MR. KIEFF: I hope that we in the  
12      PPAC-Patent Office universe make sure that we take  
13      seriously our obligation to the public to remind  
14      the public that it may be advantageous to them to  
15      get their own copy of this and that if they look  
16      to Google for this copy, yes, that will save them  
17      the cost of getting it and crunching it and it  
18      saves us the cost of maintaining it. All of those  
19      are good. But if the net overall systemic effect  
20      is that all searching or large quantities of the  
21      overall searching that society has done gets done  
22      through this portal, the Google portal, then the

1 effect will be a massive database that will be  
2 developed about who is looking for what  
3 competitive information about what and on whom and  
4 there are going to be a lot of social benefits  
5 that come from that. By the way, if you're a  
6 social planner and you want to understand  
7 innovation policy in America then one great place  
8 to go will be going to Google and saying tell us  
9 who's searching for what. By the way, there could  
10 be real benefits. I'm not against this. I'm not  
11 suggesting cronyism. I'm not suggesting  
12 corruption. But I am suggesting a massive focal  
13 point for search traffic on what most people in  
14 America consider to be industrial secrets.

15 MR. OWENS: I thank you very much for  
16 the comment. I would like to make a clarification  
17 though that I think I just have not been able to  
18 articulate here. When someone goes to the website  
19 and downloads the data in bulk, they are not using  
20 Google's search engine to manipulate the data. If  
21 you order the data from the United States Patent  
22 and Trademark Office today it comes packaged on a

1 media. Let's call it a hard drive for this  
2 purpose. To save us and the consumer base the  
3 money that they would normally spend, the same  
4 package of data in a gigantic compressed file  
5 that's been appropriately tagged and check-marked,  
6 it's been certified, is what Google will be  
7 hosting for us. The manipulation of the data does  
8 not happen through Google. Google is hosting the  
9 file for download and download only. It is not  
10 changed or modified in any way by Google. Their  
11 agreement is really just as a hosting mechanism  
12 for the package for download where I don't have to  
13 put it on a hard drive or other media at expense  
14 to the consumer thus providing it for free, and I  
15 charge up to \$3 million a year for this data today  
16 because I have an organization that puts it on  
17 media, builds it and manipulates it. We want to  
18 get to a point under the presidential directive to  
19 give it away to the consumer base for no fee  
20 whatsoever, and that's all that it does. The data  
21 is never touched or manipulated at all by Google.

22 Separately, each and every individual



1       company including Google that decides to download  
2       the data or use the data can use it as they fit  
3       but the initial package itself is nontrackable.  
4       Let's say the former organization I worked for,  
5       AOL, wanted to download the data. They could  
6       download it themselves, take it apart, put it on a  
7       computer system internally and do all the searches  
8       they want in the world on it and Google would  
9       never know because the data is not indexed by  
10      Google search. It is not touched by Google. It  
11      is just hosted by Google as an enclosed certified  
12      package. Is that clear now? I just wanted to  
13      make sure. And it really is a favor.

14                 MR. MATTEO: So that's the distinction  
15      between the -- that I was trying to make. Thank  
16      you, John. So on the margin, and please correct  
17      me if I'm wrong, there would be no difference and  
18      no visibility to Google between downloading it  
19      from the PTO versus hosting the downloading?

20                 MR. OWENS: None whatsoever. We are  
21      working very hard as part of the second part of  
22      this to finish putting out the RFI to offer to

1 anyone to help us build the final system that  
2 hosts this data here which is the zero dollar RFI  
3 you will see coming very soon to host the data  
4 because as soon as this system is up and stood up  
5 if we get the assistance that we're requesting by  
6 any company, the Google relationship will end and  
7 then Google can attain the data the same way  
8 everyone else does. Sorry about that. I didn't  
9 know that it was going to take so long. But I  
10 wanted to make sure it was clear because it is  
11 important.

12 MR. MATTEO: It's an important  
13 distinction. Maybe I'll do a mea culpa as well  
14 since we've talked about this before. I already  
15 had the context so I knew what you were saying.  
16 So sorry for not jumping in and calibrating  
17 sooner.

18 MR. BUDENS: Hang on because I want to  
19 get a little clarification on two things here.  
20 One is when you're talking about the bulk data,  
21 what is included in there. Maybe I missed that.  
22 I'm envisioning the patent's database as being

1 probably the single biggest piece of that puzzle.  
2 Are there other things included? That goes to the  
3 issue because maybe I'm not understanding Scott's  
4 issue too much because Google has had the patent  
5 database out there for a long time and people have  
6 been searching it for a while and they could have  
7 been collecting all this data for a long time.

8 MR. OWENS: They have collected the data  
9 for a long time. You're right the bulk of the  
10 data is the patent's data, the public patent's  
11 data, and only the published public patent's data  
12 is available. It is the same projects and  
13 services I sell. It does include trademark data  
14 as well. Everything on the list if you looked at  
15 the inventory that you can order from me today, it  
16 is that same list. There's nothing else there and  
17 it is all publicly available data.

18 Let's talk a little bit about migrating  
19 the desktop platform forward. Many you have heard  
20 from me before when I talked about the  
21 improvements to the infrastructure that the  
22 environment here, particularly the desktop, PCs

1 and laptops that are used by our examiners and  
2 employees are very old actually beyond their  
3 useful lifespan. After discussions with Mr.  
4 Kappos I do believe that we are both in agreement  
5 that migrating to a facility that brings the best  
6 products available today to consumers to the desk  
7 of the examiner and the support staff that allows  
8 teleworking as necessary particularly due events  
9 like the snowstorm is where we're going. So we  
10 are going to move to a laptop environment. Many  
11 other agencies are doing this. The laptops will  
12 meet all federal security standards. They will  
13 have docking stations, the dual monitors, the  
14 setups, the keyboards, the monitors, everything an  
15 employee would have today as well as if necessary  
16 at home. But the machine itself will be available  
17 for transport when the individual wants to take it  
18 from work to home or office to office as they move  
19 which will also reduce that cost. Most  
20 importantly, it will take the 25,000 unit  
21 inventory I have today to support a 10,000  
22 employee workplace plus contractors which is over

1 1.2 approximately computers per individual and  
2 reduce them to one computer. You might say that's  
3 interesting but is it going to save a lot of  
4 money? Today the cost of the licenses for the  
5 software on the desktop for a patent examiner is  
6 worth more money per year than the computer they  
7 use is worth. So when you're talking about  
8 reducing by half the cost of the licenses of the  
9 various pieces of software, it is significant  
10 savings for the agency because all licenses for  
11 the agency come out of my budget and this is a  
12 particular concern of mine because I have 2.5  
13 times the number of licenses that I should need  
14 and as we grow at 1,200 a year or whatever it will  
15 be, examiners, this amount builds and it builds  
16 greatly.

17 MR. KIEFF: Just a quick follow-up on  
18 that. I'm sure you've thought about this but I'm  
19 just curious as to what the thinking is. That  
20 sounds like a wonderful improvement.

21 MR. OWENS: It is in my opinion.

22 MR. KIEFF: But what I understand to be

1 a further improvement might be, might, so I'm  
2 curious, going to a purely virtual machine  
3 solution under which you could essentially have  
4 every user buy their own laptop or you could  
5 simply give them a cash allocation and a set of  
6 specs and then using some secure tunneling  
7 software over a network login to a web-based  
8 interface and then have the virtual machine that  
9 you would provide which then would allow because  
10 then that virtual machine is running on your  
11 systems only and not on theirs, it's only being  
12 accessed by theirs, you would be able to of course  
13 tweak and maintain without having to go touch them  
14 and the actual licensing costs could be lower but  
15 certainly then the hardware costs could be lower.

16 MR. OWENS: Actually we use what's  
17 called a virtual private network or VPN for the  
18 tunneling scenario you're talking about today  
19 through a web-style connection today that exists  
20 today. For PHP folks, patent's hoteling folks we  
21 serve them out of virtual machines in our data  
22 center. Unfortunately, due to the complexity and

1 the age of the software used on the desktop,  
2 hosting it in a virtual environment costs me over  
3 \$14,000 per unit. I can buy a lot of laptops for  
4 14 grand. So as we look at patents next-gen we  
5 are certainly looking at reducing that footprint.  
6 We are heavily embracing modern web-style  
7 technologies though I do believe that there will  
8 be desktop components for the product for ease of  
9 use and to make sure that if people were taken  
10 offline for whatever reason whether they're in the  
11 middle of a snowstorm or their cable is cut or  
12 whatever that they could continue to work which is  
13 important. There will be some desktop presence.

14 We are looking at the short term and the  
15 short term is we have aged computer equipment  
16 beyond the 3 to 5 years useful life and we need to  
17 bring something to help the examiner do their job.  
18 So these laptops will be modern. We are looking  
19 to take what we have and run it on Windows 7. We  
20 are looking at quad core computers-laptops. We  
21 are looking at 8 gig of RAM. We're looking at  
22 good solid machines that will carry us forward

1       into the next evolution of the system. But you  
2       also have to remember that normal companies  
3       outside of the federal government usually  
4       depreciate these assets at about the 3- to 7-year  
5       mark. I set our mark at 5 years. So I assure you  
6       we did take all of that into account. I am well  
7       aware of that. We use some of that technology  
8       today but the cost is extraordinarily high for our  
9       current environment.

10               Lastly, a fantastic set of new. The PTO  
11       Net upgrade which brings gigabit LAN to our entire  
12       environment here in a full fiber backbone is a  
13       month ahead of schedule. That's big news  
14       considering where we were with copper and our  
15       aging network. Also in the budget I'd like to  
16       remind everyone next year is the expanding of our  
17       bandwidth in and out of our facility from a T-1  
18       and an OC3 to dual-path gigabit right to the  
19       internet which will certainly alleviate a lot of  
20       the constraints we have on speed and performance  
21       today for the examiner. So both of these things  
22       are on track as part of the infrastructure



1 improvement plan that I've talked to you about  
2 before as well as others and those programs that  
3 we have continued are all on track and I think the  
4 examiner will start seeing that improvement  
5 particularly once we get the hardware deployed to  
6 them. I'm open to questions.

7 MR. MATTEO: Questions from the floor?  
8 It looks like Esther is ready.

9 MS. KEPPLINGER: I had one question,  
10 thank you, about the homepage and any plans to  
11 modify that. When it was changed it has become  
12 much less user friendly particularly the outside  
13 trying to find things. I google to find it  
14 because I can't find it on the homepage. There  
15 was a session after one of the roundtables to ask  
16 for input from the public and I wonder what the  
17 status of that was.

18 MR. OWENS: Actually, design aside, it  
19 was a big thing to move from a completely  
20 hand-done website to one that's built in a  
21 content-management system. You didn't notice that  
22 on the back end, but I can tell you that the

1 environment is much more flexible now. I know Mr.  
2 Papas, Mr. Kappos's I think chief communications  
3 officer, is that his title?

4 MR. GILL: Senior adviser.

5 MR. OWENS: Senior adviser to Mr. Kappos  
6 is looking at redoing the UI. The UI that you see  
7 there was a product of the previous  
8 administration. It is much easier to manipulate  
9 in the content-management system. In fact, the  
10 content of that site itself just the content has  
11 been totally turned over to Mr. Papas, the Patent  
12 Office and everything. The CIO no longer sits in  
13 the middle of any of the content. The CIO's  
14 office as I have constructed and that already  
15 existed actually is in charge of all the  
16 infrastructure and making sure that it's properly  
17 supported but not the content, look and feel.  
18 Though I will help facilitate it, it is flexible  
19 and ready to change and I know Mr. Papas is  
20 looking at making it more user friendly. The good  
21 news is though what you pointed on, and thank you  
22 very much for that, is our old site was not

1 regularly scanned by Google. In fact, we  
2 prevented it. In this new infrastructure on our  
3 modern hosted environment using all the latest  
4 open-source technologies on a very standard  
5 scalable platform with the content management  
6 system, we have opened ourselves up so that Google  
7 can come in and crawl is nightly which was it  
8 seemed like an archaic achievement given where the  
9 rest of the world was, but given just a year ago  
10 that was not possible here at the USPTO. Everyone  
11 else, Microsoft, Yahoo, Google, all of them can  
12 crawl the site, AOL and so on.

13 MR. ADLER: I was following along,  
14 Erin-Michael, your concerns about these  
15 inabilities of the office to do some basic what I  
16 think would be very effect cost-saving things.  
17 But after that I lost track of what are we doing  
18 to get to those, to be able to create claim trees  
19 or use the outside software that's available to  
20 other people -- for examiners? Did I miss  
21 something?

22 MR. GILL: Because there are some

1 scheduling things, a little more of the specifics  
2 are going to be covered in the executive session  
3 later. These are terrible problems. You're  
4 right. This is terrible. Doesn't that suck?

5 MR. ADLER: It's terrible.

6 MR. GILL: The fundamental thing is what  
7 is the leading driver? Why are we doing all this  
8 work? The key thing is what we're hoping to  
9 address is that at the very least the  
10 lowest-hanging fruit will be that we were going to  
11 be addressing these issues because there is no  
12 invention here and that the whole Patents  
13 end-to-end project is going to be focused on  
14 improving these examiners' experience and that we  
15 don't want them having to struggle.

16 MR. ADLER: So this is part of a bigger  
17 project that has the redesign of the entire IT  
18 system?

19 MR. GILL: Absolutely.

20 MR. ADLER: Thank you.

21 MR. KIEFF: Just a quick follow-up.  
22 You're probably on top of this but just in case,

1 please at least consider but maybe even achieve an  
2 implementation that would not only avoid all the  
3 problems you identified inside the office but that  
4 might in fact facilitate initial keystroke entry  
5 on the front end by the applicant. For example,  
6 if the applicant knows that all the checking that  
7 you're asking that the examining corps wants done  
8 the applicant would want done and the applicant  
9 the very first time she's sitting at her computer  
10 and writing all this stuff she could be coding it  
11 into the right fields and her management team  
12 could be checking all of that and so forth.

13 MR. GILL: I agree with you. I would  
14 take a step back. I don't want them having to  
15 code in anything because I agree with you 100  
16 percent that one of our key elements is going to  
17 be implementing or allowing for a better use of  
18 tools that are currently commercially available.  
19 Right now you can buy tools off the shelf that do  
20 these checks for you, that do the validation for  
21 you. The problem is right now we just turn them  
22 into dumb images and just process them. And these

1 tools, there are studies done that they can save  
2 between 5 and 7 hours in some cases per case. So  
3 for small inventors, for especially independent  
4 inventors are saying we can reduce, multiply that  
5 by \$500 per hour, we're looking at significant  
6 savings in implementing tools. The key question  
7 is getting those in the door and making sure that  
8 the data that we're dealing with is intelligent.  
9 Critical to that and a separate project is  
10 regarding the updating of our XML standard in  
11 terms of what standard are we going to use to get  
12 in the door? The key leading factor here just as  
13 we saw the pain for the examiners, the key thing  
14 is what is going to make it easiest for the  
15 applicant community to migrate over to a solution  
16 so that when we throw the switch and when we start  
17 migrating over that they don't have to be hard  
18 coding anything, they're not going to have to  
19 change much. There might be some small changes  
20 and we'll hand hold all the way through it, but  
21 the concept of a bunch of wizards and templates, I  
22 think that's one of the critical reasons we failed

1 in the past when we tried this back in 2001, for  
2 that perspective.

3 MR. MATTEO: Are there any other  
4 questions from the floor? Thank you very much.

5 MR. OWENS: Thank you.

6 MR. MATTEO: We'll circle back for a  
7 broader conversation later in the executive  
8 session.

9 Next on the agenda is CPIO Chief Process  
10 Improvement Officer update. I think we can move  
11 that past fairly quickly. The current situation  
12 is that that is an open position being  
13 contemplated and pursued by the PTO and I think  
14 according to the PTO they'll be in a position to  
15 discuss that and its status more fully at our next  
16 meeting or at perhaps some interim stage. I think  
17 we can move forward. If Esther and Jack are ready  
18 we can begin discussing the peer review.

19 MR. HARVEY: Good morning. My name is  
20 Jack Harvey and I'm the Technology Center Director  
21 for Technology Center 2400.

22 Today I'm going to give you a real quick

1 background and update as to where we are with the  
2 peer review pilot also known as peer-to-patent.  
3 You may know or recall that in 2005, New York Law  
4 School along with a number of companies approached  
5 the United States Patent Office with the peer  
6 review concept along with a number of other  
7 concepts, and between 2005 and 2007 the office  
8 worked with New York Law School to come up with a  
9 pilot where volunteered applications in certain  
10 technologies would post on a public website for  
11 submission of prior art. The prior art would then  
12 be vetted by the peers, the up to 10 top pieces of  
13 prior art would then be given to the examiner for  
14 use in normal examination. The 1-year pilot  
15 started in the computer hardware and software area  
16 which is where I was the director so all the  
17 applications in computer hardware and software.  
18 The reason we selected that is a result of some  
19 feedback from the community that we weren't  
20 finding the best nonpatent literature, so that's  
21 we started there. After 1 year we opted to  
22 continue the pilot in another area that receives a



1 lot of nonpatent literature and that's business  
2 methods, so it turned out to be a 2-year pilot.  
3 Funding for the pilot came from donations from  
4 corporations and nonprofit organizations. So the  
5 USPTO in the 2-year pilot didn't put out any cash,  
6 so to speak. We just had to put in some time here  
7 at the office.

8 Here are the results in a very brief  
9 nutshell or a very small nutshell. In the 2 years  
10 we received 428 consents. It did require consent  
11 from an applicant to participate. Of those 428,  
12 however, approximately 200 were not qualified.  
13 They either weren't published on time, they  
14 weren't going to publish on time, or they were in  
15 the wrong technology. They had to be in specific  
16 technology areas. Of the 226, only 189 received  
17 prior art, so only 189 applications were moved up  
18 and were part of the pilot. As part of this  
19 pilot, if an application did not receive any prior  
20 art from the public we removed it from the pilot.  
21 That's how we operated.

22 We did have over 600 pieces of prior art

1 the majority of which were nonpatent literature  
2 submitted in these 189 applications. Just to give  
3 you a little background on how we did this and  
4 tried to make it a pure process is we had the  
5 examiner with the exception of maybe cases do  
6 their job up until preparing the first office  
7 action. So the examiner prepared the first office  
8 action in normal course. They did their own  
9 searching and they prepared the office action.  
10 After they submitted that office action to their  
11 supervisor, then they were handed what the peer  
12 reviewers found. So the examiner then had to go  
13 back, evaluate what the peer review process  
14 located and then reevaluate their position whether  
15 to keep it where it is or to change their office  
16 action in view of the new art that they came  
17 across. The results were in 15 of the 189  
18 applications the examiner actually changed their  
19 office action to art submitted by peer reviews.  
20 So in essence the peer reviews found art that the  
21 examiner determined was better than what they had  
22 applied. In those 15 applications, however, none

1 of them were allowed and then the examiner  
2 rejected them. Just so you know, there was a  
3 rejection, the examiner opted to change their  
4 rejected to include the art that the peers found.

5 Because of the process, in another 15  
6 cases the examiners had already found that art and  
7 the peers found the exact same art so that there  
8 was an overlap, the peer found art the examiner  
9 had already found. So in 15 applications that  
10 took place. So there were 30 applications where  
11 the examiner ultimately used peer reviewed prior  
12 art.

13 Some of the things we found doing this  
14 is that participation in the pilot had a lot to do  
15 with the USPTO's publicity. The peer review pilot  
16 did hit some major media sources, the "Washington  
17 Post," the "New York Times" and the "Wall Street  
18 Journal." A number of large publications did  
19 articles and numerous blogs, et cetera. But what  
20 we found is that when we mailed out 33,000 letters  
21 to attorneys who had applications that would  
22 qualify, we immediately got 100 consents within

1       about a month to a month and a half. So there was  
2       a one-to-one correspondence with publicity by the  
3       office, direct publicity by the office, and  
4       participation. That we found.

5                    Again we did survey the examiners  
6       because we set it up so that the examiner was  
7       impacted very little at least I thought and the  
8       time that the examiner was compensated with time  
9       other than examining time. But all, and I don't  
10      have the details of the survey, but the examiners  
11      in general the majority thought this was a very  
12      good process. They made the comments that they  
13      thought that the art cited by the public in this  
14      peer process, the IDS submissions were slightly  
15      better quality. That was their word. Better  
16      quality IDSes. In other words, the art cited was  
17      more focused on the invention as opposed to in a  
18      normal IDS. The examiners thought they would be  
19      in favor of doing this again. Very few didn't  
20      want to do it again, but most wanted to do it  
21      again.

22                   MR. KIEFF: Just as a quick follow-up,

1 do you think that's just because they're coming  
2 from third parties? If I'm engaged in the  
3 application process, I have the whole inequitable  
4 conduct Damocles hanging over my head so I know  
5 what I think is most important and I'd like to  
6 tell you what I think is most important but I know  
7 I get very little benefit for saying that and the  
8 cost of me isolating or recommending is massive  
9 risk so I'm going to give you an encyclopedia of  
10 information and hit you with an information  
11 overload problem. Whereas if I'm a third party  
12 there's really no benefit to me to overdisclosing,  
13 quite the opposite. The whole reason I'm engaging  
14 in this process is because I'm trying to solve  
15 your information overload problem and I have no  
16 penalty, so it's simply because I happen to be a  
17 third party I'm actually contributing potentially  
18 helpful information.

19 MR. HARVEY: I would say most likely  
20 that's the case. It was anecdotal from the  
21 examiner's position, a very honest opinion of the  
22 examiner that they noticed. In addition, we are

1 going to be conducting an external stakeholder  
2 survey as well, just a general survey. That's in  
3 process right now. It's taking a little time to  
4 get that approved.

5           There are other considerations. As I've  
6 already mentioned, the USPTO gained considerable  
7 positive media attention and I think in general  
8 I've read a number of blogs over the last 2 to 3  
9 years on this process and I've been involved the  
10 whole time and very few negative. I would say  
11 neutral to positive have been the responses that  
12 I've seen in the blogs and in any news media,  
13 skeptical, if you want. It was on whitehouse.gov  
14 highlighted and the government initiative website  
15 so there was a nice piece on the website at the  
16 White House. In addition, JPL and IP Australia  
17 are currently conducting their own pilot. IP  
18 Australia is right in the middle of their pilot.  
19 I think they've accepted 31 applications into  
20 their pilot. They're now into the process of the  
21 second half. JPL I'm not sure they've launched.  
22 Just as a side note, they did their own pilot,

1 their own version of the peer review pilot. They  
2 didn't use the same interface that we had used.  
3 They conducted their own pilot, very small scale.  
4 They've now gone back to New York Law School and  
5 they are going to do another pilot very similar to  
6 what we did, same structure, same website, same  
7 software. So there is some foreign attention.  
8 The U.K. Patent Office was about to launch theirs  
9 and then they got hit with the same budget as the  
10 rest of the world so they had to back out.

11 In addition, there is pending  
12 legislation. The Senate version of 515 does  
13 encourage submission of prior art with annotation.  
14 I think there's a 6-month window to submit prior  
15 art, but it also includes annotation which is a  
16 big part of this pilot, allowing the peers to not  
17 only submit prior art but also submit annotation  
18 as to why they're submitting the prior art and the  
19 relevance, so that bill has that in there.

20 MR. ADLER: Did you track the number of  
21 different entities that provided third-party  
22 submissions?

1 MR. HARVEY: Yes.

2 MR. ADLER: What could you say about  
3 that? How widespread was this used? Or was this  
4 primarily used by a few folks who have the  
5 capability to search other people's --

6 MR. HARVEY: Going into it I would have  
7 thought that it would have been focused in certain  
8 areas, large corporations for example, but what we  
9 found is the sources of the prior art came from a  
10 number of people.

11 MR. ADLER: I asking what the sources of  
12 the prior art was. I was talking about the  
13 submitters.

14 MR. HARVEY: That's what I meant. Those  
15 that participated as a peer and actually turned in  
16 prior art, they represented a broad spectrum of  
17 folks from academia. Some were students. Some  
18 were professors. Some were members of large  
19 corporations. This website allowed anyone to  
20 anonymously submit and no one did that. And most  
21 put their bios onto the website. So we could  
22 track that very easily and we found that it was a



1 very nice spread of people who had submitted. It  
2 wasn't one particular area.

3 MR. ADLER: That's encouraging. That's  
4 better than if it were all done by the company  
5 that might have been behind this.

6 MR. KIEFF: What would you say in a  
7 colloquial way would be the top two or three  
8 benefits and top two or three costs all in net-net  
9 of this.

10 MR. HARVEY: Benefits to the USPTO, not  
11 to the applicants?

12 MR. KIEFF: To both maybe. In simple  
13 English, like do you think this is a good thing or  
14 a bad thing and why.

15 MR. HARVEY: Better-quality patents,  
16 number one, because the best art is being cited,  
17 the public is being engaged and encouraged and  
18 challenged.

19 MR. KIEFF: But let me jut push back on  
20 that a little so that I understand. In what way?  
21 It sounds to me like you just told me that for all  
22 but, what was it, 7 percent? So all but 7.9

1 percent it was actually having no change in the  
2 mechanism. And then for the 7.9 percent it was  
3 changing the mechanism but not the outcome. These  
4 were as you said going to be rejected anyway based  
5 on other art. All they did was switch the art.

6 MS. KEPPLINGER: Yes. In fact they were  
7 already rejected. They weren't allowed.

8 MR. KIEFF: I hear the rhetoric. Please  
9 don't hear me as being an attacker or a skeptic.  
10 I want to be educated about what exactly is the  
11 mechanism by which you're getting better.

12 MR. HARVEY: I was answering as the  
13 pilot, not the results. I was answering as the  
14 pilot in general not the participation levels or  
15 how it was used. That's how I was answering.

16 MR. KIEFF: I see. So you're saying the  
17 concept.

18 MR. HARVEY: The concept.

19 MR. KIEFF: The mechanism.

20 MR. HARVEY: Yes, I'm sorry. I was  
21 answering as the concept. Concept-wise this would  
22 had everyone played --

1           MR. KIEFF: Phone calls were getting  
2 through and things like that.

3           MR. HARVEY: Right.

4           MR. KIEFF: I get that.

5           MR. ADLER: But you didn't find any case  
6 where the third party submitted prior art that  
7 resulted in the rejection of an application that  
8 would have otherwise been allowed?

9           MR. HARVEY: Correct.

10          MR. ADLER: I rest my case.

11          MR. KIEFF: Basically the chief  
12 contribution to the system would be if the answer  
13 to Marc's question were different.

14          MR. HARVEY: I guess other than the  
15 results, I would say this is the one positive  
16 thing if you want to look at the results, just the  
17 notion that applicants were willing to post their  
18 applications for public scrutiny which is  
19 good-faith gesture.

20          MR. MATTEO: Let me ask you a question  
21 if I may. How many people or how many  
22 applications were in this sample size?

1 MR. HARVEY: 189.

2 MR. MATTEO: 189?

3 MR. HARVEY: Right.

4 MR. MATTEO: It's unclear to me that  
5 that is in and of itself statistically  
6 significant, and the fact that people are  
7 willingly putting their applications up suggests  
8 to me perhaps that people are self-selecting with  
9 a certain disposition to the application. So  
10 while I fully hear what you're saying and if that  
11 is the ultimate outcome then I agree with your  
12 conclusion, it's unclear to me whether we have in  
13 fact reached that outcome.

14 MR. KIEFF: And let's ask a follow-up  
15 question. What do you see as the overall costs of  
16 doing this? Maybe if there are no benefits but  
17 there are no costs we still keeping doing it. But  
18 I'm just curious. To you and to the applicants?

19 MR. BUDENS: You need to go further than  
20 that, Scott, because there is an overall cost.  
21 There was a cost to the pilot. There's going to  
22 be a cost going forward with this even more. In

1 the pilot from my understanding, it was fairly  
2 heavily subsidized by some of the companies and by  
3 New York Law School. They wanted to participate  
4 so they did. And even to the PTO, even the  
5 investment of time by itself, time is mine, that's  
6 costing the agency something. We had to do  
7 according to this a lot of advertising in order to  
8 get participation. Advertising doesn't come  
9 cheap. I guess my question is going even deeper  
10 than yours which is how much did we spend as an  
11 agency in the first pilot? And if we're going to  
12 expand this, how much are we planning to expand it  
13 because I don't see the bang for the buck of this  
14 pilot at all.

15 MR. KIEFF: Then just to follow-up, and  
16 again I feel badly piling on.

17 MR. HARVEY: That's all right. I'll be  
18 okay.

19 MR. KIEFF: This is not an attack on you  
20 folks. It was well worth trying. But an amazing  
21 amount of popular discussion has occurred about  
22 this. It happens on the Hill, it happens in

1 academic debates, it happens internationally and  
2 it's all talked about as though this is a really  
3 big success story in the patent system. I'm all  
4 in favor of academics getting academic kudos and  
5 kudos to this academic for getting kudos for  
6 herself and her school. But do we really want to  
7 bend the minds of the patent operators around  
8 pumping PR into a couple of NGOs and law schools  
9 who have a particular message to grind or, worse,  
10 just their own kind of need for advertising? We  
11 just gave an amazing amount of free advertising to  
12 those people and that organization. We gave an  
13 amazing amount of free advertising to the "open  
14 source patent movement." Why are we doing that?  
15 If we're doing that on purpose, fine, but we  
16 should then evaluate that, and if we're doing it  
17 by accident then maybe now would be a time to  
18 stop.

19 MR. ADLER: I don't have any problem  
20 with the idea of allowing third-party submissions  
21 as part of the patent reform bill. I think that's  
22 perfectly fine. I just don't know that the

1 peer-to-peer pilot has necessarily demonstrated  
2 anything.

3 MR. KIEFF: Agreed.

4 MR. ADLER: Those are two different  
5 things. This slide here where it says, "Pending  
6 legislation encouraged submission of prior art  
7 with annotation," I think that's fine. I think  
8 that's good. I think that certain people will use  
9 it. But the peer-to-peer, there's not a data  
10 point that really supports that.

11 MR. BUDENS: I think going along with  
12 that just from an examiner point of view, we don't  
13 have a problem with third-party submission either  
14 as part of becoming a process as long as examiners  
15 are given enough time to deal with it. But my  
16 issues actually at this point are almost global to  
17 the agency which is, all things considered I'd  
18 rather take the money going to be spend for doing  
19 this and I'd rather spend it on the examiners  
20 somewhere else.

21 MR. STOLL: I'm not as certain as you  
22 guys are at this point, and let me give you a

1 couple of reasons. I will acknowledge as most  
2 people can evidently see there didn't seem to be  
3 any case that was rejected that would not have  
4 been rejected already and that is a telling  
5 statistic. I will acknowledge that. But I am not  
6 as ready to abandon the concept yet as some of the  
7 other voices around the table seem to say for  
8 several reasons. One is it seems to me that in  
9 some of the very hot areas of art there's a lot of  
10 competing companies that do review applications of  
11 their competitors and are possibly aware of prior  
12 art because they are competitors that the PTO may  
13 not have as ready access to. So conceptually I  
14 think there is a possibility that this is a tool  
15 that could have utility in some very, very hot  
16 areas.

17 The second point I would like to make is  
18 I understand that while there were only about  
19 7-point-some percent that were found, references  
20 that were found, I'm not sure that the references  
21 were not better, that the rejections that were  
22 proffered by the references cited were not better.



1 And I also believe that we could do a little more  
2 in analyzing what we were getting and being more  
3 objective with respect to the analysis of the  
4 comparison. So I think it's worthwhile because of  
5 those reasons to take a broader look at this to  
6 see whether or not in fact there is a benefit and  
7 maybe expanding it out to some other hot areas of  
8 subject matter and seeing whether companies are  
9 interested to proffer references that might be  
10 valid. I don't want to give up on it right away,  
11 but I again see your point that it has not shown  
12 itself yet to have significant utility.

13 MR. FOREMAN: I want to jump in and  
14 first off reinforce what Bob said. I think the  
15 data that was obtained isn't statistically valid.  
16 You're looking at a very few number of cases. And  
17 Robert, to your point, the cost. What if we're  
18 looking at this from a completely different  
19 perspective? What if the cost of this is neutral  
20 and that the cost of submissions when you find  
21 prior art is actually paid for by the company that  
22 finds this reference? It would make sense for a

1 competitor to submit art to the examiner that  
2 would prevent a patent from issuing because there  
3 would be a lower cost to the office and that  
4 competitor to try challenging that patent after it  
5 issues later when they come and say look at this,  
6 we knew that this existed prior to examination. I  
7 think we should look at this from other  
8 perspectives and gain outside feedback and find  
9 out maybe there is a cost when you submit the, the  
10 first art that you submit is free but then you're  
11 submitting additional art there's a cost to it and  
12 so it doesn't burden the office but it does  
13 provide the best art for the examiner when they're  
14 examining that application.

15 MR. BUDENS: It's an interesting  
16 question, Louis. If it were truly cost neutral I  
17 would have a lot less of a concern about it. I  
18 don't necessarily think it's ever going to be  
19 exactly cost neutral because I think at some point  
20 you're going to have to account for examiner time  
21 to deal with third-party submissions. Going to  
22 Bob's first point, I think if these companies that

1 are tracking other competitors' work, they're  
2 already motivated to do that. So the question is  
3 do we have to spend any money advertising to  
4 convince them to do what they're already doing and  
5 if we're spending money there I don't see that  
6 that's necessarily money well spent. I do agree  
7 with you if it's cost neutral it becomes much more  
8 reasonable to sit there and expand it out more and  
9 see where it's going, that it may have other  
10 benefits. I'm just having a hard time right now  
11 seeing that this one is going to go anywhere that  
12 improving third-party submission wouldn't take us  
13 anyhow.

14 MR. KIEFF: Remember there are a couple  
15 of other things you can do. You can say to  
16 yourself I know my competitor is doing work in X  
17 area. They're probably filing patent  
18 applications. So I'm going to post on my webpage  
19 in a way that I know an examiner would easily find  
20 when she goes out on the net and does a search.  
21 So I'll have tags on my webpage. I'll have  
22 incentives and technologies that fully enable me

1 as the competitor to do this outside of the  
2 office. The question is what is the marginal  
3 benefit of this program over that?

4 MR. ADLER: The other way is you wait.  
5 You see what happens during the examination. If  
6 they didn't find it and you got a killer  
7 reference, then you submit it. There are plenty  
8 of ways that this could play out. It's a question  
9 about the sample size.

10 MR. MATTEO: For me I'm back to the same  
11 question. I think this was an interesting  
12 experiment. It's unclear to me whether there is  
13 any meaningful result from it. There is some  
14 anecdotal information. One of the things that you  
15 learn for example in research because it's an  
16 uncertain proposition is you want to fail fast and  
17 you want to learn from it. It has to be a  
18 constructive exercise. It's unclear to me that  
19 this exercise was framed in a fashion where you  
20 could go through it with specific goals and  
21 objectives, what measures needed to happen for  
22 there to be a telling result. So from my

1 perspective if we were to do this again, it should  
2 be under the auspices of a plan that has laid out  
3 for it what is a meaningful result and how do we  
4 get there? And to Robert's point, understand the  
5 attendant costs for reaching that. I don't feel  
6 like we have that. We're talking in very vague  
7 and intuitive terms which is fine, but this kind  
8 of an exercise I think needs to be better  
9 grounded.

10 MS. KEPPLINGER: This are excellent  
11 comments. I think the PPAC is going to be working  
12 with the office to look at this project to see  
13 about whether or not we can expand, to see what  
14 interest outside in expanding it and whether it's  
15 scalable. But I think a part of that what I'm  
16 hearing here is we also need to look at -- I  
17 already thought we need to look at the assessment  
18 of the value, the cost, the efficiency of the  
19 program. But additionally you make excellent  
20 points that there needs to be a more structured  
21 plan of what the objectives are with attendant  
22 metrics to be able to know whether or not it is

1 something that's worthwhile doing because there  
2 are costs.

3 MR. MATTEO: Very much so. This is an  
4 exploration so it's kind of like experiment design  
5 if you want to harken back to that analogy.

6 MR. PINKOS: I'm sorry. I'm just a  
7 little bit confused what we're talking about as  
8 far as the office taking the next step. Is that  
9 if the legislation is not passed? Because if the  
10 legislation passes then third-party submissions  
11 are allowed and the office must at least accept  
12 them. So are we talking about a path to take if  
13 the legislation doesn't pass which is a further  
14 study and pilot, et cetera? Secondly I guess or  
15 are we also planning if it does pass then there  
16 might be some implementation issues?

17 MR. STOLL: That's a very good point,  
18 but we actually don't know what the final  
19 formulation of any passed bill is going to have in  
20 it, so I don't think we abandon improvements that  
21 we can make to the system waiting for legislation.  
22 I do share your belief that something is about to

1       come out of S 515 possibly before Memorial Day but  
2       that still has to go through the House and I don't  
3       know what the final formulation is going to have  
4       in it. So I think that it's incumbent upon us to  
5       do what we can to move the ball forward even while  
6       that's going forward.

7               MR. KIEFF: But at the same time, again  
8       now I'm really going to sound like a skeptic so  
9       here it goes, we are a bunch of human beings  
10       sitting in the room of the United States Patent  
11       Office and the United States Patent Advisory  
12       Committee, supposedly the government experts on  
13       this question, and while part of our government is  
14       apparently very close to writing a law on this and  
15       apparently so close to writing a law that we may  
16       have to adapt to it and yet we don't know what  
17       results we have, we don't know what the law is  
18       going to be, and that means that there's no  
19       possible way they could know whether it's even a  
20       good thing and yet it's all going to happen. What  
21       a tragedy for society. You don't want law to be  
22       made when you're shooting in the dark with

1       everybody wearing blindfolds. This is just really  
2       an embarrassment for our patent system. We should  
3       be able to give intelligent advice as the expert  
4       agency to the branch of our government that makes  
5       laws to explain to them the ways in which these  
6       laws could help us or hurt us. We just learned  
7       that we don't know so how could they know?

8               MR. ADLER: Anything that eliminates  
9       invalid patents from being granted is a plus. So,  
10       frankly, if you have 8 percent of the cases that  
11       would have otherwise been granted be rejected or  
12       better rejected because they found better art, I  
13       think that's a plus.

14              MR. KIEFF: But we don't know that it's  
15       a net plus.

16              MR. ADLER: It may not be a net plus and  
17       I don't think the data is actually clear.

18              MR. MATTEO: I think we have agreed that  
19       the next step would be determining exactly that.

20              MR. ADLER: Right, but we need to get a  
21       better handle on that.

22              MR. KIEFF: But our message out of this



1 meeting to the Hill should be slow down, folks.  
2 Let us find out some answers before you start  
3 making some laws. It would be dishonest if the  
4 message out of the office by our legislative  
5 affairs person were the office supports this  
6 because if the message out of the office to  
7 legislative affairs is the office supports this  
8 then the office is supporting something without  
9 even knowing why. Surely an intelligence office  
10 wouldn't support something unless it knew why. So  
11 all I'm trying to say is when we collectively  
12 devote all this effort then it is appropriate for  
13 the legislative affairs conversations to be, look,  
14 the office is totally focusing on this and we're  
15 making great progress on this and then it's  
16 totally appropriate for the legislative listeners  
17 to then hear the message as then this sounds like  
18 a net good thing so we should net push to  
19 implement it. All I'm saying is those message  
20 would be inaccurate based on this conversation.

21 MR. BORSON: I'd provide a comment that  
22 in a sense there is a timing issue, there are two

1 parallel tracks going on. One of them is the  
2 pilot that we've just talked about and the other  
3 is this whole independent legislative push. It's  
4 not a bad idea to have two experiments done to try  
5 to find the same result if you can. We understand  
6 the limitations of this peer-to-pilot program with  
7 the PTO. We've spent the last half hour  
8 discussing it. We don't know what the  
9 implications ultimately will be, but why not have  
10 another experiment as well so we don't need to  
11 either say yes or no to this?

12 MR. MATTEO: If I may, and I'm going to  
13 speak for Scott and feel free to correct me. I  
14 know you feel free even though I've given you  
15 leave. I think we're distinguishing between a  
16 guided intention which feels like the trajectory  
17 of legislation versus an experiment to divine the  
18 guidance for the intention. I'm the latter side.  
19 I think that's where we need to go. I don't feel  
20 like we've done that. I would amplify what Scott  
21 said. The message from the Hill to us should be  
22 where is my grounded guidance on this?

1                   MR. KIEFF: The only reason I'm saying  
2 what I'm saying is I'm hearing the opposite  
3 message. When I go to academic meetings and when  
4 I hear conversations, everything I'm hearing is  
5 peer-to-patent is up and running. It's already  
6 working. This is a really important public policy  
7 change. I got to think that the good-natured  
8 folks in our legislative community who took the  
9 time out of their busy schedules to draft this  
10 legislation did so precisely because they thought  
11 someone out there in the world had already shown  
12 that it worked and they wouldn't have chosen to  
13 invest their limited resources and political  
14 capital unless someone had got them to that view.  
15 All I'm saying is that wasn't us because what I  
16 just heard us say is we can't make a  
17 recommendation yea or nay, we don't actually feel  
18 confident in our data, we're still tinkering.  
19 Maybe we should tinker more. Maybe we should try  
20 experiments in parallel. I'm not trying to  
21 attack. All I'm trying to do is say the train may  
22 have already have left the station and the chief

1 engineers on that train who were steering it  
2 thought we sent them off with a really good cargo.  
3 The cargo train is empty. There's no net anything  
4 we can say on this is what I'm hearing.

5 MR. MATTEO: Comments? Responses?

6 MR. MILLER: I'll say something. I'm  
7 sorry, Scott, but I think you're a bit naïve on  
8 the legislative process and what goes on up there.  
9 I think most of us believe that having an open  
10 ability to submit prior art to the Patent Office  
11 is a good thing and right now we are prevented  
12 from submitting prior art that we would like the  
13 examiner to consider during the examination  
14 process. This peer-to-peer was a narrow study  
15 that we tried in a particular art area. We  
16 haven't tried it in Group 330. We haven't tried  
17 it in 1200. We haven't tried it in a lot of other  
18 areas that are very competitive, narrow art fields  
19 where competition knows what the art is and likely  
20 to cite it early to prevent the patent from ever  
21 issuing. So, yes, we don't have the data, but  
22 intuitively those of us who are living within the

1 system believe that any opportunity we have to  
2 submit new information to the office and have an  
3 open, transparent process is of benefit. So I  
4 think we're talking two different things.  
5 Peer-to-peer is one thing. The ability to submit  
6 key prior art to the office during the process is  
7 a wholly second issue.

8 MR. MATTEO: I want to take a moment to  
9 reduce our guest speaker Craig Opperman. Without  
10 further ado, please take it away, Craig.

11 MR. OPPERMAN: Thank you everyone. It's  
12 a real pleasure and actually a real honor to be  
13 here.

14 Damon I think invited me because he  
15 wanted me to be controversial, so I'll just start  
16 off by saying something about this peer-to-peer  
17 review process. Everyone missed the main point of  
18 it. It's the most fantastic marketing tool you  
19 could possibly have. It cuts out all the whining  
20 about prior art that doesn't get picked up by the  
21 examiners. If you think about it, a maximum of 8  
22 percent of the cases had prior art that examiners

1 didn't find, and we don't even know what the  
2 relevance of that is. On top of that, I've been  
3 in the software business for a long time, the  
4 patent business for a long time, there are a lot  
5 of people out there who are complaining about  
6 prior art that doesn't get submitted. Now you  
7 have a perfect mechanism to do that. I just  
8 thought I'd add my 2 cents to that.

9 I hope to chat a little bit about patent  
10 quality and I hope to take a slightly different  
11 view from what a lot of folks have taken over the  
12 years relative to the Patent Office. We call this  
13 the elephant in the room because I think there's a  
14 elephant in the room from patent quality that no  
15 one is really talking about and I'm hoping that  
16 today's discussion can -- what I'm about to say  
17 today will hopefully further that debate.

18 When I was a little boy one of my  
19 favorite stories was "The Three Little Pigs." I  
20 think "The Three Little Pigs" apart of course from  
21 the wolf falling into the pot right at the end  
22 really illustrates what we're talking about over

1 here. Most of us know that patents and patent  
2 rights particularly can be thought of similar to  
3 houses, real estate. The walls of the house that  
4 keep out the bad guys so to speak, the strength of  
5 those walls, that's what we talk about as patent  
6 quality. I think we're all very much aligned when  
7 it comes to patent quality. We could have houses  
8 of straw and we know what happens to those when it  
9 comes to patents. We could have houses of sticks.  
10 Of course, we could have houses of bricks. The  
11 important thing about this is it's the  
12 construction of the house that leads to patent  
13 quality and that's what I'd like to spend a little  
14 bit of time on today.

15           Patent quality is very hard to define.  
16 It's a bit like the famous Supreme Court decision  
17 about pornography, it's hard to define but you  
18 know it when you see it. I'm not going to spend a  
19 huge amount of time trying to define that because  
20 we can go for an hour on that one, but I'm going  
21 to try and look at some of the techniques we could  
22 use to improve it.

1           Mr. Adler, thank you very much for this  
2           comment from the PPAC meeting last year. I think  
3           the most takeaway from this comment is garbage in,  
4           garbage out. With the garbage in, garbage out,  
5           there's the garbage out side which is the Patent  
6           Office control, examination primarily. Garbage in  
7           is the applicant's control, not just the inventors  
8           but the companies that are driving the patent  
9           filing program. It turns out that we're going to  
10          speak a little bit about PTO control and much,  
11          much more about applicants' control.

12                 Just very quickly about PTO's control.  
13          What we are finding as applicants and those who  
14          represent applicants is that there's almost a  
15          desperate cry from help from patent examiners who  
16          are becoming what I call almost process pedantic  
17          and we can't work out whether that's something  
18          from inside the Patent Office or whether that's  
19          because of the massive backlogs where we get  
20          rejections like this or obviousness rejections  
21          like this which are really basically saying it's  
22          obvious because I say it's obvious. I'm not going



1 to comment on the merits of this except to say  
2 that this seems to me to be a cry for help from  
3 examiners, so the question that we have got to  
4 deal with is how do we solve this backlog problem.

5 This is a PTO statistic so I'm not going  
6 to query it. I'm just going to work with it. In  
7 the last 8 to 9 years we've seen a drop from a 72  
8 percent allowance rate to a 44.2 percent allowance  
9 rate. I'm not going to for one minute suggest  
10 that quality is proportional to rejection rate.  
11 Indeed, I would think that if you look at the  
12 appeal statistics, applicants don't think so at  
13 all. This is what's happening to appeals. We're  
14 seeing a massive ramp- up in the number of  
15 appeals. Percentage-wise it's just frightening.  
16 What I think we're hearing from applicants is that  
17 at least for the good quality cases because  
18 appeals are quite expensive. People are not  
19 agreeing necessarily with the high rejection rate  
20 that they are seeing. People are really beginning  
21 to put their money where their mouth is. By the  
22 way, for those of us who care about the 20-year

1 term if someone wins on appeal, that gets added on  
2 the back end of the patent so for some of us who  
3 represent applicants with valuable patents isn't a  
4 bad technique so this pendency is actually going  
5 to create a bigger problem from the point of view  
6 of troublesome patents many years down the line.

7 Back to what I was trying to say.  
8 Quality has two parts. It has USPTO output side,  
9 but it's the input side that I'm really interested  
10 in today. I think more importantly, is there a  
11 role for the USPTO on trying to control, regulate,  
12 influence the input side? So I'd like to spend a  
13 little bit of time on the garbage in side, the  
14 stuff that applicants can control and what can the  
15 USPTO say about it. By the way, we're a fairly  
16 small group at least in this room. I'd welcome  
17 any input, comments, thoughts as I go along. So  
18 please, there we are. I've got one already.

19 MR. STOLL: I noticed you were talking  
20 about the number of applications that are being  
21 appealed, and they have significantly gone up.  
22 But the affirmed or affirmed in part ratio is

1 still where it usually is, maybe even slightly  
2 better at around 72 percent. If that's the case,  
3 how does that factor into the situation?

4 MR. OPPERMAN: I have two comments about  
5 that. Firstly, the affirmed rate, if it remains  
6 constant, the number of cases not percentage, the  
7 number of cases that are going to come out  
8 unscathed after appeal or slightly changed after  
9 appeal is still going to go up. If you look,  
10 statistically the percentage increase there is  
11 dramatic. That's worse than the property market  
12 in 2006. The other thing is that the affirmed  
13 rate at the moment is based on appeals that were  
14 filed 2, 2-1/2 to 3 years ago, not 2009 appeals.  
15 So 2009 type of appeals I think we're trying to  
16 see a pushback on the it's obvious because I say  
17 it's obvious type of examiner techniques which are  
18 based on KSR as opposed to the old teaching  
19 suggestion. But I don't want to go into that  
20 whole discussion because that's the PTO's and I'm  
21 going to leave the PTO's management to themselves  
22 and not to me.

1           However, on the applicant's side I have  
2           some thoughts. This comes from Mark Lemley. I  
3           think he hits it exactly right. There is a  
4           massive mass-production business in the patent  
5           world and I don't care what mass-production,  
6           particularly when you have professional services  
7           associated with it is going to lead to lower  
8           quality and we're going to take a look at what  
9           that's about. My first question is, we've seen  
10          this rejection rate or lack of allowance rate or  
11          whatever you want to call it graph from 72 percent  
12          down to 44.2 percent. The question on that is how  
13          much of that is applicant garbage driven? We  
14          can't tell that by looking from the outside. I  
15          don't think you can even tell that from looking  
16          from the inside. But there are a number of  
17          statistical data points that suggest there is  
18          quite a large percentage of that that is applicant  
19          driven.

20                 MS. KEPPLINGER: I would beg to differ  
21                 because a significant amount of that is the  
22                 increase in RCEs which added to the apparent drop

1 in allowance rate because it artificially raised  
2 the abandonments which are part of the disposal.

3 MR. OLECHOWSKI: Your number drops right  
4 around 2000, and other than RCEs I can't think of  
5 anything that was done that would have caused  
6 this.

7 MS. KEPPLINGER: It's RCEs and the fact  
8 that the examiners were not allowing. They just  
9 kept rejecting.

10 MR. OLECHOWSKI: That was in 2000?

11 MS. KEPPLINGER: No.

12 MR. OLECHOWSKI: Yes. I was going to  
13 say the drop starts in 2000 and the only thing I  
14 can correlate that to is RCEs.

15 MR. OPPERMAN: Let me just make two  
16 comments about that. Firstly, the PTO's own  
17 message is not telling us as applicants or  
18 applicants' representatives that that's the case.  
19 Secondly at least under the former administration  
20 of the PTO they were citing this statistic as  
21 improving quality.

22 MR. STOLL: Not this one.

1                   MR. OPPERMAN: I didn't say this one.  
2 I'm not arguing with the previous administration.  
3 I'm taking the data that I'm given and I'm drawing  
4 conclusions from it. So if that's all RCE driven  
5 then why don't we say that? But my guess is that  
6 this is not the case.

7                   What we are seeing from the applicant's  
8 side is a massive push to have more patent  
9 applications which are on lower quality  
10 innovations, and on top of that applicants are  
11 spending less money in building those houses so  
12 that we get a lot more houses of straw. So even  
13 if the house remains standing post-PTO procedures,  
14 it really is a house of straw. I was waiting for  
15 you to start pushing back.

16                  MR. KIEFF: If you're saying that what  
17 is happening is that the world of patent  
18 applicants are saying to themselves it is worth it  
19 to us to file large numbers of low quality patents  
20 and get them issued, at least I've been predicting  
21 that in all of my published work for a long time  
22 and I don't think I'm the smartest guy in the

1 room. I think lots of other people have been  
2 predicting that too. If you make patents not very  
3 enforceable in the courts, then it becomes very  
4 worthwhile for companies not think of their  
5 patents as really the tools that the kind of  
6 small- and medium-sized players bet their  
7 companies on, but instead to be tools that the  
8 large players use to swap tranches of their  
9 companies with each other or to engage in  
10 essentially collusive behavior, behavior that  
11 actually we see throughout the Japanese patent  
12 system, a system of large numbers of low-value  
13 patents but the U.S. patent system used to be  
14 somewhat distinguished in the world as having a  
15 large number of low-value patents but also a small  
16 number of high-value patents. I think the story  
17 you're telling us which is a story I happen to  
18 agree with is that the U.S. patent system has  
19 become like many others in the world and patents  
20 are not just kind of not tools for protecting your  
21 space or for building different business models  
22 that allow small- or medium-sized players to trade

1 with each other or to be acquired by others.

2 Instead, patents are just tools for very, very  
3 large players to collude with each other.

4 MS. KEPPLINGER: But I think it varies  
5 by technology.

6 MR. KIEFF: I agree with that.

7 MS. KEPPLINGER: I think you have real  
8 differences in the technology.

9 MR. KIEFF: I very much agree with that,  
10 but I think that the trend generally among even  
11 all is toward this kind of bastardization of the  
12 system. But we'll see. We'll see where you take  
13 the story.

14 MR. OPPERMAN: I absolutely agree with  
15 you. That's exactly my point so I wouldn't agree  
16 more, that we are at the big corporate filing  
17 level just doing this what I call blizzard filing,  
18 masses and masses of low-quality patents. The  
19 question we are trying to address here is how do  
20 we improve quality of patents. If we're not  
21 interested in improving the quality of patents, I  
22 should just sit down and people can enjoy the rest



1 of their lunch. But if we are interested in  
2 improving quality of patents, are there things  
3 that we can do as a profession or as the Patent  
4 Office that could maybe change that? I agree.  
5 People point to the Japanese system. I'm not a  
6 Japanese patent attorney so I don't want to  
7 comment too much on that system, but the European  
8 system for instance does produce high-quality  
9 patents and what do they do that we could do as  
10 well?

11           There is one other thing, that right now  
12 most companies are talking about the number of  
13 patents they have as an indication of how much  
14 innovation they're doing. I think that's good CEO  
15 speak but I think that CEOs aren't realizing as  
16 they're building up these piles and piles of by  
17 the way very expensive assets that in fact aren't  
18 really assets. We've done lots of studies on how  
19 these mass patent filings start costing companies  
20 huge amounts of money.

21           And there's a societal benefit that we  
22 should think about here as well. What is

1       happening with a lot of these mass filings that  
2       companies have been doing is they're starting to  
3       offload them. So when you find that you've been  
4       attacked by a portfolio that's been licensed  
5       against you, you'd be amazed at how many large  
6       companies' patents names are on the outside. That  
7       would suggest a bunch of not very valuable patents  
8       to that company.

9               MR. ADLER: Let me jump in a little.  
10       The discussion around nonpracticing entities and  
11       their lawsuits against others is related to that  
12       in the sense that you don't see that as much.  
13       They have nothing to lose. The nonpracticing  
14       entities are not manufacturing anything so  
15       therefore -- let me explain it a little  
16       differently. There are industries where certain  
17       numbers, the attempt to gain a lot of patents, is  
18       there to do some type of cross-licensing with  
19       other manufacturers but it doesn't necessarily do  
20       them any good against a nonpracticing entity.  
21       Right?

22               MR. OPPERMAN: Clearly not because the

1 nonpracticing entity doesn't have any products.

2 MR. ADLER: You need to break this out  
3 as Esther said by industry because that isn't  
4 happening across the board. That's happening in  
5 certain areas. Business methods, electrical,  
6 computers, software, you can't throw a broad brush  
7 around this question in that way without getting  
8 into what's really going on in the game. Certain  
9 large manufacturers don't look at the quality of  
10 what their patent departments are doing by the  
11 numbers of patents that they're filing and those  
12 that do frankly are missing the boat. You're  
13 speaking to a few people who are converted to what  
14 you're saying, but you're throwing a bit of a  
15 broad brush without -- we know a little bit more  
16 about what's driving some of this than you may  
17 realize.

18 MR. OPPERMAN: I'm not suggesting anyone  
19 here doesn't know what I'm talking about. What  
20 I'm saying is what we can do as a group and I just  
21 want to set the stage somewhat.

22 Let me just comment on NPEs. I presume

1       you mean people other than universities, research  
2       organizations, people who have invented the  
3       technology themselves, you're talking about people  
4       who buy patents merely to go and get licenses. So  
5       if we're talking about that group of NPEs,  
6       firstly, they need a source of patents. One of  
7       the sources of those patents are the companies  
8       that have produced large volumes of chaff. The  
9       other thing is the companies that are moaning the  
10      most about NPEs who keep on saying and have in  
11      fact started driving some of the patent reform  
12      keep on saying that there are too many patents for  
13      them to look at to do product clearance searches  
14      are in fact exactly the companies that are doing  
15      this so that they are the biggest cause of the  
16      problem.

17                   MR. ADLER: No disagreement here.

18                   MR. OPPERMAN: I agree it's a  
19      complicated story.

20                   MR. MILLER: May I ask you one thing?  
21      You threw out a statement and I want to see if you  
22      have any data to support it. You said that

1 European patents are higher quality than U.S.  
2 patents. What's your basis for that statement?

3 MR. OPPERMAN: Sorry, that is not  
4 exactly what I want to say. What I want to say is  
5 there are far fewer patents that come through the  
6 European system and those patents go through a  
7 much greater and much more rigorous patent  
8 examination system. Because European patents are  
9 so expensive to get, applicants are only filing  
10 inventions that are worth spending that kind of  
11 money on. They are not filing for every  
12 willy-nilly small --

13 MR. MILLER: Let me challenge you on  
14 that. The Europeans won't allow software patents.

15 MR. ADLER: There you go.

16 MR. MILLER: That's 20 percent of the  
17 total in the U.S. versus Europe.

18 MR. OPPERMAN: I'm actually going to  
19 take the position that I think Europe is easier to  
20 get a software patent than in the U.S. right now.

21 MS. KEPPLINGER: And the EPO admitted to  
22 me that their error rate even though they don't

1 publish it was about the same as the USPTO's. It  
2 was about 5 percent. That's what they admitted to  
3 me.

4 MR. OPPERMAN: That's the garbage out  
5 side of the equation. I am not going to discuss  
6 the garbage out side of the equation because I  
7 can't. What I'm saying is the garbage in side, we  
8 have to look at how we control the inflow of bad  
9 patents.

10 MS. KEPPLINGER: I wouldn't call that  
11 garbage.

12 MR. OPPERMAN: I'm sorry.

13 MS. KEPPLINGER: There's a certain error  
14 rate that it's too costly to get below.

15 MR. OPPERMAN: Agreed. By the way, when  
16 I have 8 percent, I was just really impressed. I  
17 was really impressed. What I'm saying here is  
18 let's assume for whatever the patent system is a  
19 given error rate. How do we improve the quality  
20 by dealing with what comes in on the inside or  
21 comes in from the applicant side, not what's  
22 coming out at the back end of the Patent Office.

1           MR. BORSON: There's one thing that is  
2 really I think very important to understand, that  
3 a lot of the conversation about quality is in an  
4 issued patent and I think the business reality is  
5 that there are many different aspects of value  
6 created. In some cases such as the mass filers,  
7 they understand their business model is I have  
8 1,000 pounds of patents, you have 800. That's a 5  
9 to 4 cross-license revenue. There is no  
10 diligence. It doesn't matter what the quality is  
11 of the patent. All I'm trying to suggest is that  
12 there are many different reasons for people to  
13 file an application let alone prosecute it, let  
14 alone obtain a valid patent, let alone license it,  
15 let alone assert it, and that for people like the  
16 mass filers, their business model is not really  
17 about the intellectual property portfolio  
18 necessarily at all. It's about advertising, the  
19 CEO goes to the meeting and says we filed 1,000  
20 patents last year. Yes, well, we filed 5,000. So  
21 there's that kind of contest at that level of  
22 having nothing whatever to do with patent quality

1 or the level of innovation. Then the decision to  
2 prosecute is a whole different matter. The  
3 decision to file a utility application, to file a  
4 PCT and so on. All I'm suggesting is that there  
5 may be valid reasons why somebody would want to  
6 file a large number of patents or weak patents or  
7 something simply to make an advertising pitch,  
8 yes, we do have a filed patent application. We've  
9 got five or ten. That's my only comment, that not  
10 everybody is in it for the same reasons.

11 MR. OPPERMAN: I don't take issue with  
12 that at all. What I'm saying is the question is  
13 how do we get better quality patents? Not how do  
14 I disincentivize the mass filers.

15 Let me just look at some of the national  
16 statistics, this by the way from 1996 to 2007.  
17 You can see the curve for number of patent  
18 applications filed or at least it's kind of  
19 straight line with some bar graphs underneath.  
20 Then R&D dollars that are spent. These are U.S.  
21 companies. U.S. filings, U.S. companies. You can  
22 see that the number of applications, the slope of



1 the line of the number of applications being  
2 filed, far exceeds the slope of the line of the  
3 R&D. There's another way of putting this. Take a  
4 look at this. Increases of R&D filings which is  
5 the blue line to increases in patent filings. We  
6 actually have increases in patent filings when R&D  
7 budgets decrease. Damon?

8 MR. MATTEO: Wouldn't you attribute that  
9 at least intuitively to exogenous events like in  
10 an economic downturn or as the industry matures  
11 people tend to do more incremental work, hence  
12 more patents per research hour, for example those  
13 kinds of effects?

14 MR. OPPERMAN: Damon, that's a good  
15 point. Your mike wasn't on so I'll just repeat  
16 what he said. He said wouldn't that be  
17 attributable to the fact that during downturns  
18 there's more incremental innovation? I think  
19 that's true and that certainly could change the  
20 status somewhat. The one thing that I would say  
21 though is that this is national data in every  
22 single industry and if we assume that what we're

1 looking at here is that the U.S. is only moving  
2 toward incremental improvements when we have a  
3 real problem from a technology development point  
4 of view. Inside this there is a lot of bigger  
5 than incremental improvement in innovation. We  
6 can just see it happening in the U.S. all the  
7 time.

8 MS. KEPPLINGER: There's a 3-year lag.  
9 I think it's a 3-year lag for R&D and patent  
10 filing.

11 MR. OPPERMAN: In life sciences but not  
12 in computers.

13 MS. KEPPLINGER: Maybe technology-wise.  
14 I thought it was for all of them. From looking at  
15 the economics that were done in the Patent Office  
16 years ago when I was here I thought that's what  
17 they said.

18 Anyway, the other thing is the filings  
19 where you have RCEs being filed went up incredibly  
20 in this decade. Many of those may be the same  
21 invention but people feel that they really want a  
22 patent on it so they had to file multiple times.

1                   MR. ADLER: Plus you got a year delay.  
2 I don't know what you're counting here, between a  
3 provisional and a regular and you say you got a  
4 time shift issue too.

5                   MR. KIEFF: That's where you're going.

6                   MR. ADLER: Thank you.

7                   MR. OPPERMAN: All I'm just trying to  
8 show you is that the total amount of innovation in  
9 each patent, every piece of data that I look at  
10 shows that the total amount of innovation that  
11 goes into each patent is getting smaller and  
12 smaller. And on top of that, we'll get there in a  
13 minute, every single patent application's total  
14 number of lawyer hours going into that is also  
15 decreasing.

16                   MR. KIEFF: My guess is everyone in the  
17 room is going to say, yes, that's part of what we  
18 mean by massive numbers of low-value patents and I  
19 think many of us have long been talking about  
20 wouldn't it be nice if you had a patent system  
21 where applicants took their time to write deep,  
22 detailed-rich disclosures and then focused on

1 those and then the office gave them meaningful  
2 claim scope and then there were allowances and  
3 then they took those patents to courts and then  
4 they are enforced and the enforcement basically  
5 was fairly predictable because you could tell what  
6 was infringing and what was not, you could tell  
7 what captured prior art and what didn't and you  
8 then basically didn't worry about the doctrine of  
9 equivalents and you were kind of done with your  
10 analysis. That was the patent system we had from  
11 around the mid 1980s to the mid 1990s. But today  
12 you would be ill advised to tell your client to  
13 file one of those disclosures because your client  
14 would look at Rochester and Ariad and say those  
15 patents will be tossed under 121-1. Or you look  
16 at Bilski and remember back to Deer and  
17 Chackobardy and the twinning that went on in the  
18 debates about patentable subject matter between  
19 the electronic arts and the biological arts and  
20 say as one falls the other falls too and say if we  
21 managed to survive Rochester and Ariad we'll get  
22 eaten alive in Lab Corp II or Bilski or what have

1       you. And by that way, that assumes we get out of  
2       the office. The office is not going to allow any  
3       of these broad claims it will say it's too hard to  
4       examine, as Esther keeps pointing out, you're  
5       going to have to refile 80,000 times so that we  
6       can chew on this massive application. And again  
7       in good faith the examining corps will say massive  
8       applications take up lots of time so if you pay us  
9       massive amounts then we can handle it. All I'm  
10      saying is all of the changes we've been talking  
11      about in the system have I think created the  
12      behavior you're talking about but it seems to me  
13      that that's the system has meaningfully changed.

14               MR. OPPERMAN: So you're suggesting we  
15      should encourage people to file large numbers of  
16      patents?

17               MR. KIEFF: I'm saying we just did. I'm  
18      saying that if you want a system like we had from  
19      the mid 1980s to the mid 1990s, you want the law  
20      that we had in the mid 1980s to the mid 1990s, but  
21      we've gotten rid of that law.

22               MR. OPPERMAN: I'm saying what do we do

1 as an organization or a group of professionals,  
2 people who care about patent quality, what can we  
3 do to change this trend? I'm defining the trend.

4 MR. MILLER: We don't need to know the  
5 trend. We got trends. Tell us what we're going  
6 to do.

7 MR. OPPERMAN: Total U.S. R&D dollars  
8 per patent application. I don't know what  
9 percentage of this is RCE. I'm using PTO  
10 statistics on the number of filings. The PTO is  
11 saying they're getting a lot more filings and  
12 those filings are all RCEs, then the PTO is giving  
13 a slightly different message from what I should  
14 have been hearing.

15 The other thing that companies are doing  
16 is they are paying their attorneys less. This is  
17 not a pitch for us in the legal profession.

18 MR. KIEFF: We hear where you're going,  
19 but tell us then what should business firms do or  
20 legal firms do.

21 MR. MILLER: I don't think we're paying  
22 anybody any less.

1 MR. OPPERMAN: Take a look at this.

2 These are AIPLA statistics.

3 MR. MILLER: That's per application.

4 MR. OPPERMAN: Thirty percent less time  
5 is being spent on an application today than what  
6 was done in 2000.

7 MR. MILLER: How many are they cranking  
8 out? Is each person doing more or less would you  
9 say?

10 MR. OPPERMAN: It doesn't make any  
11 difference. Total number of hours into an  
12 application. If you put in 30 percent less time  
13 into a patent application, trust me, you're  
14 getting worse quality I don't care how bright  
15 attorneys think they are today.

16 MR. MILLER: No, you're not, because of  
17 your efficiency in how you write things. I can  
18 cut and paste an application and add a paragraph  
19 with my new feature in 10 minutes. It's not that  
20 hard.

21 MR. KIEFF: Go ahead.

22 MR. OPPERMAN: Here is what I would like

1 us to see if we could talk about. One, we need to  
2 try and work on changing executive mentality. I  
3 think there's a message for the PTO. The PTO can  
4 be a bully pulpit on this one. Most of you laugh  
5 and for those of you who like to see large  
6 companies filing 5,000 applications or 1,000  
7 applications a year, you're probably not going to  
8 like to do that. But I think if the Patent Office  
9 for a start started saying focus on filing quality  
10 inventions and really started talking about  
11 quality, I think we would change things. I think  
12 CEOs would go to their patent counsels and they  
13 would say to their patent counsel what is this  
14 junk that you're filing? Why do we have so much  
15 stuff? Please explain to me the relevance.  
16 There's not a patent counsel today in the large  
17 companies that can easily point out, particularly  
18 not the high-tech companies, the relevance of  
19 their patents.

20 MR. MILLER: That's a pretty broad  
21 statement.

22 MR. ADLER: That may be. We're part of



1 the problem. You're a patent attorney who has  
2 clients. So when you meet with your client and  
3 they give you a junky invention, do you say to  
4 them you really shouldn't be filing this thing?  
5 This is a piece of garbage. Or do you say,  
6 \$1,000, get it in there and we'll see what  
7 happens? Where are you in this? I did that with  
8 my company and I told them, no, we're not filing  
9 on this. It's stupid. It's not worth filing. So  
10 I feel very comfortable, if it's junk we don't  
11 file on it, but if I'm in private practice and I'm  
12 making a certain amount of money an hour, maybe  
13 you just file the damn thing and keep the client  
14 happy.

15 MR. OPPERMAN: The issue from a quality  
16 control point of view has got to come in part from  
17 the companies. Certainly if you have a large  
18 company as a client and they say we want 17 patent  
19 applications filed in the next 2 months and  
20 they're a large, important client, obviously you  
21 as an outside service provider are going to  
22 respect that client's wishes.

1           MR. ADLER: I don't think you're serving  
2 your client properly. I think you're actually  
3 just doing -- it's not correct. You're not  
4 providing good legal service to your client it  
5 you're just saying you want 17 cases? I'll file  
6 17 cases. I think the goal should be what's your  
7 strategy? How are you going to make money on this  
8 stuff? Is this really an invention? Have you  
9 done a search? Do you know what your prior art  
10 is? And let's do that work up front and decide  
11 whether or not we have a patentable invention  
12 before I go and spend your money filing these  
13 crappy ideas.

14           MR. OPPERMAN: If all IP attorneys would  
15 do that I think we'd also increase our patent  
16 quality significantly so that I would absolutely  
17 agree with that.

18           MR. KIEFF: Time out. I think that Marc  
19 and I have had lots of conversations about this.  
20 We see totally eye to eye on this. And yet I  
21 don't know that the people who are filing these  
22 applications today are not loyal agents to their

1 principals and I also think that their principals  
2 are not stupid. So in the literature that talks  
3 about patents are a waste of money for companies  
4 and they're worth less than what they cost,  
5 whenever somebody tells me that smart human beings  
6 backed up by millions of dollars in resources able  
7 to hire good advisers, when someone tells me those  
8 people are going something that's not in their  
9 self-interest, I generally think that that's  
10 because we have missed what's really in their  
11 interest. It's not that they're stupid. It's  
12 that our model isn't accurately capturing their  
13 behavior. So I think that these large entities  
14 that are filing large numbers of low-value patents  
15 and then not enforcing them, they're getting some  
16 other value out of it. The value I think they're  
17 getting out of it is what we would traditionally  
18 call an antitrust problem. The value they're  
19 getting out of it is, number one, being able to  
20 say to antitrust authorities when they get pinched  
21 by the antitrust authorities just like you did in  
22 the old IBM settlement, you ought to let me price

1 a certain amount above marginal costs per patent I  
2 have in which case it's a rational strategy for me  
3 to tell my patent application team if the office  
4 wants you to divide then divide and multiply  
5 because that only helps me. Then I get to say to  
6 the antitrust authorities let me price higher. So  
7 I think that's one of their strategies.

8 I think that another of their strategies  
9 is if very large players get caught in a deal  
10 where they are directly having conversations with  
11 each other about dividing markets or setting  
12 prices or anything like that, they have two  
13 serious problems. One, they have a hard time  
14 trusting each other in those conversations. And  
15 two, the antitrust authorities in most countries  
16 of the world will throw them in jail for having  
17 those conversations. But if instead they have  
18 huge patent portfolios and they engage in the  
19 types of swaps that Ben was just talking about  
20 before, then in fact they can swap massive  
21 quantities of information in a very high bandwidth  
22 transmission that solves their trust problem.

1 They do it all in front of federal judges tried  
2 and true which drastically mitigates their  
3 antitrust problem so they have no mens rea, their  
4 CEOs don't go to jail and their shareholders don't  
5 pay treble damages. So I think that the  
6 businesses that are doing this know exactly what  
7 they're doing, they're deriving huge benefit from  
8 it, but it has nothing to do with the traditional  
9 story we talk when we talk about patents and  
10 innovation. It's a very different story.

11 MR. ADLER: Putting aside for a minute  
12 the antitrust issues, unless you are actually  
13 looking at your return on investment from the  
14 inventions that you're patenting, you do not know  
15 what you're doing. In other words, if you're  
16 filing applications on things that you want to  
17 manufacture and sell and do not look at the total  
18 cost of the patent against the gross profit or the  
19 market share that you're obtaining for that  
20 patent, you're playing in the dark. So what we  
21 should be telling executives and financial people  
22 who run companies is what's your return on your

1 investment on your patent activity? If you can  
2 point to them and say I'm getting a 35 percent  
3 gross profit on my patented products and I'm  
4 getting a 20 percent return on my commodity  
5 products, then they know exactly what they're  
6 getting from their patent attorneys and what it's  
7 worth.

8 If you're not talking financials in that  
9 way then you're not providing good strategic  
10 advice to your client. That's the game. If we  
11 want to change the mentality, put aside the  
12 nefarious antitrust collusions that may or may not  
13 be going on, unless we're actually out there  
14 talking to executives about do you really know  
15 what your return on your investment is or what  
16 you're paying for these patents? Unless you have  
17 that conversation then the numbers war is better.  
18 Give me more patents. It must be good.

19 MR. OPPERMAN: I would love to see that  
20 conversation occur all the time. My question is  
21 how do we as this organization force people to  
22 think that way? I absolutely would never suggest

1       that a chief patent counsel in a large company or  
2       a CEO is either stupid or doesn't know what  
3       they're doing. They know precisely what they're  
4       doing.

5                   MR. ADLER: I'm not sure that you should  
6       draw that conclusion.

7                   MR. OPPERMAN: I'm not going to get into  
8       that debate, but what I am going to say is that  
9       let's assume they know what they're doing. How do  
10      we change that behavior?

11                   I just want to make a comment about long  
12      pendency. Everyone is focused on short pendency  
13      as increasing quality. That is not correct and  
14      I'll show you why in one minute.

15                   MR. ADLER: Do you know what percentage  
16      of chief patent counsels actually are patent  
17      attorneys versus litigating patent attorneys? And  
18      do you know that a lot of them have never prepared  
19      or prosecuted a patent application and that  
20      they're recruited into these companies because  
21      they work at a law firm that may have helped that  
22      company in a defense of a patent infringement

1 case? Those folks may be very good at managing  
2 litigation, but they may not have any clue -- so I  
3 wasn't being facetious before when I said that  
4 they may not be so intelligent. They may not have  
5 any clue about why their company is getting the  
6 patents that they're getting.

7 MR. OPPERMAN: Actually, could I make  
8 one comment on that because this touches on I  
9 think a bigger subject? I know "IP" magazine has  
10 had this discussion a number of times. The  
11 biggest mistake the patent profession has done is  
12 not to have its patent qualified people become  
13 good managers. I truly believe that some of the  
14 IP professionals are not necessarily either  
15 lawyers, engineers or patent professionals. There  
16 are enough examples with CEOs who aren't  
17 technologists running technology companies and  
18 very successful ones.

19 MR. ADLER: They are good managers and  
20 they do understand the full dynamic of the  
21 process. That may be what we need to be educating  
22 the public about and I think frankly there's a lot



1 of that that goes on. It may not be appropriate  
2 for the Patent Office to provide that education,  
3 but it certainly is my obligation as a practicing  
4 attorney to do that. Other associations that I  
5 belong to, I believe that's been the message that  
6 I've tried to -- and not always very popular  
7 either suggest. So I think you're right but I  
8 don't think the PTO is the place to do that.  
9 They're receiving the stuff and they have to deal  
10 with trying to do the best they can with what  
11 they're getting. It's our job, all of our jobs,  
12 to help our clients do the right thing and help  
13 them manage their businesses properly.

14 MR. OPPERMAN: Agreed. Let's go back to  
15 what the PTO can do. How do we change executive  
16 mentality? Start focusing on the numbers. Talk  
17 to the press and tell the press to stop talking  
18 about numbers. Who is better in this entire  
19 country to start this stop talking about numbers  
20 discussion? The USPTO.

21 MR. ADLER: I wrote a letter to the  
22 editor. There's this thing called CHI. The "Wall

1 Street Journal" used -- I don't know they're still  
2 doing it. They used to have this thing where they  
3 would put out who is number one, number two and  
4 number three and I would read that and I would say  
5 it was biased toward bigger companies over smaller  
6 companies and that's just bogus, and of course  
7 they don't care. That's good PR. If you want to  
8 write an op-ed piece for the "Wall Street Journal"  
9 that says companies should be focusing on managing  
10 their IP in a proactive way rather than a reactive  
11 way and to be looking at this as a business, I'll  
12 help you on that article, but I don't know that  
13 the Patent Office is the place that should be  
14 doing that.

15 MR. OPPERMAN: I'm not saying focus on  
16 business. The Patent Office can stop talking  
17 about numbers or start the discussion that numbers  
18 isn't what counts. I truly believe this is the  
19 best place for that discussion to start.

20 By the way, long pendency. Everyone is  
21 freaked about long pendency. Long pendency is the  
22 best possible thing for patent quality and I'll

1 show you why in one minute. By the way, if you  
2 want to increase quality and decrease quantity,  
3 change the fee structures.

4 MR. ADLER: So that people will file  
5 fewer is what you're saying?

6 MR. OPPERMAN: I'll show you why.

7 MR. ADLER: Everybody who files not just  
8 the large filers unless you want to opt out the  
9 micro entities and the small inventors so that  
10 they get a free ride and everybody else doesn't.  
11 I don't know about that.

12 MR. OPPERMAN: We for years have had a  
13 history of a differentiated fee structure for  
14 so-called small entities and large entities. But  
15 the biggest big filer problem here isn't the small  
16 inventors. We should know that.

17 Why is pendency not a bad thing? Take a  
18 look at this. This is a classic timeline for  
19 getting patents. We can argue about 10 percent  
20 here or there, 10 months there, a year or two  
21 depending on the technology or whatever. This is  
22 a typical electronic product cycle. It takes you

1       about 30 months and you're at the top of your  
2       cycle and you go down and you go into your next  
3       cycle and if you look at the blue curve  
4       underneath, that is your enforceable patent  
5       rights. From a patent applicant point of view,  
6       delaying examination makes a huge amount of sense  
7       from a quality point of view? Why? Because when  
8       I'm over here I know what the marketplace is  
9       telling me what is valuable in my patents, my  
10      patent applications. I can therefore change the  
11      claims assuming there's support to cover what's  
12      valuable. When I file up front here and if I've  
13      got an 18 month pendency, I don't have enough time  
14      to determine what's going to be a valuable  
15      invention. I don't have enough time to build  
16      patent claims because I can't see forward. I can  
17      see backwards but I can't see forward, at least I  
18      can't see forward. So over here I'm in the  
19      crystal ball gazing mode. If we all push  
20      everything to an 18 month turnaround or 18 month  
21      to issuance we're decreasing quality. Remember,  
22      the reason why we're interested in quality is to

1 protect our innovations.

2 MR. ADLER: What is your definition of  
3 quality?

4 MR. OPPERMAN: It's good that you asked  
5 that.

6 MR. ADLER: You used it just now in a  
7 very interesting way.

8 MR. OPPERMAN: There are multiple facets  
9 to quality, the level of innovation inside, how  
10 much prior art, examination, clarity,  
11 enforceability. But there is one thing that  
12 affects both quality and value of a patent and  
13 that is whether it protects the marketplace.

14 MR. ADLER: You're saying that's the  
15 quality of the patent or the quality of the  
16 innovation?

17 MR. OPPERMAN: It's the quality of the  
18 patent claim which defines the innovation.

19 MR. ADLER: The claim is the claim and  
20 the claim is either valid or it's not valid. It  
21 either should be granted or not be granted.  
22 Whether or not the product is successful that that

1 claim covers is whether or not there's a good  
2 invention that people want to buy, it has nothing  
3 to do with the quality of the patent.

4 MR. OPPERMAN: What I'm saying is that  
5 once you know you have a successful product, then  
6 you ask what are the features of that product that  
7 are making it successful. Then you craft your  
8 claim to cover those. You can only do that if  
9 you've got long pendency.

10 MR. KIEFF: Just to be clear, I think  
11 there are probably a bunch of us in this room who  
12 are generally congenially disposed toward that  
13 view, but that is not the dominant view today.  
14 The dominant view today is the exact opposite  
15 which is to call that submarine patent, shakedown,  
16 holdout, trawl, you name it, and that's exactly  
17 what was motivating the attack on patents in the  
18 Rambus case and in others is the notion that  
19 you're kind of filing, camping out in the Patent  
20 Office waiting for the competitive landscape in  
21 the marketplace to shift to a particular area and  
22 then springing up above the surface and attacking

1 the people who have then invested millions in  
2 dollars in building FABs or production facilities  
3 or distribution channels or customer  
4 relationships. I think that's exactly what's  
5 motivating the players in cases like the Tivo-  
6 Echostar litigation to delay the remedy or to give  
7 very, very broad due process rights to the  
8 infringer to design around or in Pace v. Toyota to  
9 impose a license nonvoluntarily dropping a  
10 footnote to call it not a compulsory license and  
11 so on and so forth. We're all sensitive to what  
12 you're saying, but that's not where the patent  
13 system is today. The patent system is in the  
14 opposite direction.

15 MR. MILLER: If I take your theory to  
16 the extreme, isn't 20 years then the highest  
17 quality patent if my patent is pending for 20  
18 years?

19 MR. OPPERMAN: Not quite. It's going to  
20 be about years before 20. Yes, the value of that  
21 patent goes up.

22 A good quality patent, the value will go

1 up all the way through to 15 years, not this after  
2 6 years the patent has got no more value.

3 MR. MILLER: So you're really not  
4 talking quality of patent, you're talking the  
5 value in the marketplace.

6 MR. OPPERMAN: I am talking about both  
7 quality and value because there is a point where  
8 the two intersect and you cannot separate quality  
9 and value at that point. There are sections to do  
10 with quality that have got nothing to do with  
11 value or very little to do with value.

12 I want to comment on Tivo-Echostar.  
13 Understand that Tivo was the innovator of that  
14 technology and Echostar came afterwards. If we're  
15 interested in protecting U.S. Innovation, who do  
16 we protect, Charlie Ergen at Echostar or the folks  
17 at Tivo, if we're interested in protecting  
18 innovation?

19 MR. BUDENS: I have a question on this  
20 too because it seems to me I'm not anywhere near  
21 on the business acumen side like these guys are,  
22 but it seems to me that this also would have to be



1 very technology driven. If I wait for 6 years if  
2 I'm in some of the electrical areas and I wait for  
3 6 years to get a patent, I might already be past  
4 the useful life of my invention. I'm in biotech  
5 personally and I can see where there's a meaning  
6 here in biotech for a number of reasons. One is  
7 it's going to take me most of that time just to  
8 get through the FDA if I've got something anyhow.  
9 But I have a hard time thinking that this is --  
10 it's got to be a technology driver in here  
11 somewhere.

12 MR. MATTEO: If I may, Craig, just a  
13 logistical note. I think we need to wrap up in  
14 about 5 minutes.

15 MR. OPPERMAN: I'll comment on that last  
16 slide coming up. As far as the technology goes,  
17 remember we're looking for quality. If we as the  
18 patent organization, the Patent Office, the people  
19 who are about the patents, are prepared to say to  
20 the world long pendency is not a bad thing because  
21 you can work with long pendency, you could change  
22 the way people file patent applications even in

1 the fast-moving areas like software and  
2 electronics because then people will start  
3 thinking wait a minute, I should put a lot more  
4 technical disclosure, much more enablement which  
5 by the way is good for quality into my patent  
6 applications so that down the line I can move my  
7 claims to cover the innovation which is in my  
8 product which the marketplace is telling me is  
9 valuable.

10 MR. ADLER: I'm just going to challenge  
11 a concept here. When you file a patent  
12 application, the inventor is supposed to identify  
13 what he believes his invention is and he's  
14 supposed to claim that invention. He's not  
15 supposed to be waiting to see what his invention  
16 is 4 or 5 years later. That's part of the whole  
17 problem with the way certain -- and you're  
18 describing that. I'm not saying you do it, but  
19 you are describing that. I don't think that meets  
20 your requirements under Rule 56. I think that's  
21 just not an ethical practice.

22 MR. OPPERMAN: I couldn't disagree with

1       you less.

2                   MR. ADLER:  You should claim your  
3       invention at the time you file it.  And if you  
4       don't know what your invention is then because you  
5       haven't spent the time to figure it out, then you  
6       shouldn't be filing a patent application.

7                   MR. OPPERMAN:  In the last 2 days I've  
8       had a series of extremely pleasant, and I say that  
9       with all sincerity, examiner interviews on a  
10      patent application that was filed in 1993, and it  
11      was a very, very rich technical disclosure and the  
12      folks who filed it were true innovators, pioneers  
13      in their fields.  It's an electronic software site  
14      to answer your question.  It took some of us years  
15      to work out some of the innovations that those  
16      people had come up with.  They didn't necessarily  
17      know that this is going to take off.  Sometimes  
18      inventors themselves are their own worst critics.  
19      They say this is obvious.

20                   MR. ADLER:  Did they claim the  
21      invention?  You keep getting -- between the  
22      innovation and the product and what is the patent

1 claim.

2 MR. OPPERMAN: This is a patent  
3 application that had at least 20 different  
4 inventions in it.

5 Time is running out. Last comment and  
6 I'm going to make this as a reasonably  
7 controversial comment. I think the USPTO's patent  
8 fees are the biggest giveaway. I know that the  
9 big applicants are going to hate me for saying  
10 this and I come from a big law firm and we  
11 represent large companies, and all I'm going to  
12 say is if you want to change the backlog in this  
13 Patent Office, if you want to increase the  
14 quality, if we want to increase the quality on the  
15 input side, and by the way I'll get to output side  
16 in a minute, change the fees to make them look  
17 like the European fees. Why should our patents be  
18 so cheap compared to the European system's? Our  
19 GDP is about the same give or take 10 to 15  
20 percent differences. Populations are about the  
21 same. Why are we so cheap? The reason why we  
22 have so many patents and so much garbage and why

1 companies can accumulate large piles of patents is  
2 because we make it too cheap for applicants on the  
3 input side. By the way, from an examination point  
4 of view, this means you can pay examiners more,  
5 this means you can have a longer time for  
6 examiners to look at applications.

7 MS. KEPPLINGER: You can't pay them more  
8 because you got --

9 MR. OPPERMAN: I'm not going to go  
10 there. That's federal legislation. I'd just run  
11 this thing like a business. I'll leave you with  
12 this quote, our system is perfectly designed to  
13 produce the results we're getting," right to your  
14 point. So I believe we're aligned. By the way,  
15 the wolf that fell through the chimney there and  
16 got cooked, I checked, it didn't get served for  
17 lunch. That's it. Than you very much.

18 MR. MATTEO: Thank you, Craig.

19 MR. STOLL: I would just like to make  
20 one comment. I do a lot of luncheon addresses.  
21 That was the most interesting luncheon address  
22 I've heard in a long, long time. I know it seemed

1 somewhat contentious, but I actually loved the  
2 exchange and it left me with a lot of ideas.  
3 Thank you very much. I really appreciated that.

4 MR. OPPERMAN: You're very welcome. You  
5 were actually a great audience too. Just one  
6 comment. My accent is South African, I guess I've  
7 lived in the U.S. Since 1991. When I first came  
8 here I heard this word interesting and so I went  
9 back and told my parents there's this great  
10 American word, interesting, because it's a  
11 fantastic word. You can just say interesting  
12 whether you agree, whether you disagree or whether  
13 you think it's good or whether you think it's bad.  
14 Interesting is the best American word.

15 MR. STOLL: Let me reiterate that was  
16 interesting.

17 MR. MATTEO: Thank you, Craig, for being  
18 such a good sport. I warned Craig. I told him to  
19 wear his Kevlar long johns and I think he needed  
20 to be bulletproof today. We have no more  
21 comments.

22 MR. OPPERMAN: Long johns. By the way,

1 I only discovered that it was an invention about 4  
2 years later.

3 MR. MATTEO: I've just checked. We  
4 don't have any other further questions or comments  
5 from the public. So what I'd like to do is open  
6 it up to any summary remarks or questions from the  
7 panel here at the committee. If not, I'll make a  
8 motion for us to adjourn to the executive session.  
9 Does anyone have anything further?

10 MS. FAINT: I wanted to return to a  
11 comment that Esther made very early on about  
12 public service. I helped to design and run a  
13 program at the Council for Excellence in  
14 Government in the 1980s with just that in mind,  
15 how do we get people interested in public service.  
16 The things that I learned, I'd say there were two  
17 things I learned. One is it really does need to  
18 come from the top such as our President making  
19 that effort. And the other thing I learned is  
20 that we have a tremendous resource that we don't  
21 really seem to use very much, the people who work  
22 in the government and the people who have worked

1 in the government who can go out and tell people  
2 what it really means to be the person on the  
3 frontline delivering that service. I think that  
4 for instance patents and trademarks are not the  
5 most glamorous and certainly people don't think of  
6 examiners as perhaps performing a public service  
7 or one that they can understand, but there are  
8 other public services that people can understand  
9 that could improve that whole atmosphere. I would  
10 certainly encourage anyone to get behind that both  
11 as an organization and a group and as individuals  
12 to encourage people to really look at public  
13 service and treat it with respect.

14 MR. MATTEO: Thank you very much. With  
15 that I'd like to move that we adjourn the public  
16 session and retire to the executive session. Are  
17 there any dissenting votes? Very well. With that  
18 I'll close the public session.

19 (Whereupon, the HEARING was  
20 adjourned.)

21 \* \* \* \* \*

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