UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT PUBLIC ADVISORY COMMITTEE MEETING

Alexandria, Virginia
Thursday, April 29, 2010
AGENDA

Call to Order
DAMON C. MATTEO
Chairman

General Remarks and Impressions
ROBERT STOLL
Commissioner for Patents

Financial Update
MARK OLECHOWSKI
Deputy Chief Finance Officer

Legislative Update
DANA COLARULLI
Office of Governmental Affairs

International: Work-Sharing Update and Status of Foundation Projects
BRUCE KISLIUK
Assistant Deputy Commissioner for Patents

Patent Operations Update
PEGGY FOCARINO
Deputy Commissioner for Patents

Quality: Update and Initiatives Including Federal Register Notice
MARC ADLER
PPAC Member

BOB BAHR
Acting Associate Commissioner for Patent Examination Policy
AGENDA (CON'D)

OCIO Updates

JOHN OWENS
Chief Information Officer

ERIN-MICHAEL GILL
Adviser to the Under Secretary
Peer-to-Patent: PPAC Initiative

ESTHER KEPPLINGER
PPAC Member

JACK HARVEY
Director, TC 2400
Luncheon Speaker and Discussion

CRAIG OPPERMAN

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

MR. STOLL:  Bob Stoll, Commissioner for 
Patents. 

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

MR. BORSON:  Ben Borson, PPAC. 

MR. FOREMAN:  Louis Foreman, PPAC. 

MR. MILLER:  Steven Miller, PPAC. 

MS. KEPPLINGER:  Esther Kepplinger, 
PPAC. 

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

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

MS. TOOHEY:  Maureen Toohey, PPAC. 

MR. PINKOS:  Steve Pinkos, PPAC.
MR. ADLER: Marc Adler, PPAC.

MR. BUDENS: Robert Budens, PPAC.

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

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

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

MR. STOLL: Thank you. Good morning ladies and gentlemen. It's a pleasure for me to be here today to be with you. The second half of 2010 is well underway and we're making pretty good progress. But before I start I want to thank
Damon Matteo and the members of the PPAC for their service here especially the new members Ben Borson, Esther Keplinger and Steve Miller. We are very happy to have your addition to our PPAC. It's great to have you and your help. Your experience and expertise will help to make the USPTO a better place and we will all be able serve our nation better.

Let me start with an overview of the health of the agency today. While the financial crisis of fiscal year 2009 is well behind us, we continue to struggle with a fiscal year 2010 budget that leaves the agency somewhat underfunded. Despite the reduced spending capacity, we've made some real progress here. You will hear details of our initiatives from each of our presenters today. Let me just comment on our current status. Filings are about even or slightly up from where they were in 2009. We're expecting a work hiring and a selection process of about 250 IP experienced professionals this year. We've been very aggressively reaching out to all
stakeholders to build and expand our working
relationships. I know that Marc Adler and Bob
Bahr will talk about our upcoming quality
roundtable later on.

We've created and launched some truly
innovative programs. These programs have proven
to be useful to our examiners and our applicants.
Some of the initiatives we are currently
undertaking are a Green Tech pilot program that
allows special status to green technologies and we
will update that program to probably remove class
and subclass requirements, a reengineering and
classification system with a new project
addressing the effective assignment of
applications for examination and to improve the
system used for locating prior art relevant to
determining patentability, the ombudsman program
which is intended to provide patent applicants,
attorneys and agents assistance with
application-specific issues including concerns
relating to prosecution advancement. The
objective is to quickly resolve issues and thereby
to decrease pendency. An ongoing effort to improve examination efficiency and to use resources wisely in the work sharing arrangement. We're also working on PPH and several other initiatives. Working sharing has evolved as a significant tool to attack the pendency issues. We are working to improve the MPEP in an initiative that has just been launched. We know we need major rewrite help on the MPEP and so we have begun gathering information from employees regarding how and what it should be formatted and to what content. Director Kappos has announced the MPEP Rewrite Project on his Director's blog and comments were collected by the blog's site. I would just like to point out that this type of direct and frequent communication is our new standard for gathering feedback from our stakeholders. This is just one of the many outreach efforts we have undertaken.

Looking ahead at the next 6 months, we anticipate a strong finish to the fiscal year. Already our indicators are showing positive
results in many areas including allowance rate, interview time actions per disposal, and I believe Peggy Focarino will be talking a lot more about that. We're hopeful that we can work with DOC, OMB and Congress to enable the USPTO to get on better footing. Right now the agency is working with a financial model that just doesn't work and without adequate funding we will not be able to begin to rebuild the USPTO. In the longer-term, the USPTO needs to restructure its fees and have additional flexibility to adjust fees, allowing the agency to perform its mission. While some of these goals are long-term, we have created a strong foundation that will guide us as we work together with our stakeholders to achieve results. I look forward to working with all of you on these projects. Thank you very much.

MR. MATTEO: Thank you, Bob. Did we have any questions from the floor. If not, let's proceed to the next item on the agenda. Dana Colarulli will provide us with a legislative update, or perhaps he won't. It would appear Dana
is not here. Next on the agenda would be the financial update, and Mark is here. If you would, please.

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

So here we are today. As Bob mentioned, we're midway through the year. In a normal federal agency we do an extensive midyear review. That midyear review is in progress. It composes the CFO's office with the business units reviewing
spending to date, spending through the rest of the year, talking about what's important, what's not so important, possibly rearranging those priorities to get us through the end of the year.

As everyone knows, we're limited this year to spending to our appropriated level which is 1887 and we're on a trajectory to do that while still trying to accomplish some of the things Bob talked about like hiring 250 experienced IP hires, so there's lots of work going on.

We've been able to this year fund overtime, fund PCT outsourcing to the maximum extent possible and I think Peggy is going to talk about some of the good things that we have been able to do with the limited authority we have had. Bob alluded to as well we are collecting more than our appropriations. We are currently estimating that we're going to collect anywhere from $150 to $230 million more than our appropriate level and I'm sure Dana is going to talk about where we are in trying to get access to our fees and I can make some comments on that at the end.
I do want to talk about a couple things. For those of you who have the laptop brief, I'm on the fee page, so if we all want to turn to it. It's a very busy slide. What I do is make a couple comments about our fees and our fee collections this year. I mentioned that we're collecting more than our appropriated level. Those collections fall into two categories. Our maintenance fees, we're currently collecting probably $100 million more than we thought we would back when we made our initial estimate back in August of last year. We're seeing a significant influx of maintenance fees on all three stages of those fees. The other category of fees that are more than what we thought they would be back last August are issue fees and I think Peggy is going to talk a little bit about what the corps is doing to improve that. A new thing we've done this year, instead of trying to tell people an exact number that we're trying to reach, we now have a range that we're publishing to the department, OMB and our Hill stakeholders on a
monthly basis. Those two columns are outlined in green on the sheet, and like I said, we think we're going to be between $146 and $230 million. We are right in the middle of that range with what we've done so far. I know that's a very busy slide, if there are any questions I'd be glad to answer them, but the cut the categories of fee collections are both maintenance fees and issue fees that are above what we had originally estimated.

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

MR. OLECHOWSKI: We've done some analysis on that, Damon. At midyear review in previous years, the estimate that we make at midyear has been within about a percent and a half or 2 percent of the final number, so I think we're very confident of that. But as Bob mentioned also, it's been kind of an uneasy economy. We're certainly hopeful that we're past the dip in the
economy. I think we're seeing that in the fees
that our applicants are paying. So I think we're
beyond that dip. But we've been very, very
accurate in the past at the midyear review point
in estimating where we end up at the end of the
year.

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

MR. KIEFF: One of the things that we've
been wrestling with a lot in our discussions of
quality, pendency and finance as well as
legislative activity, several of our
subcommittees, we've been trying to think through
the mechanisms of the decision-making process that
the Patent Office users engage in as they make
decisions about how to do stuff that impacts the
office like filing more paperwork or pay more
money. In this particular setting, one of the
things you're telling us is that they're paying us
more money than we had anticipated and that's not
necessarily a good or bad thing, but to help
understand it more, it would really help each of
our subcommittees in these areas if we could get
some thinking from you folks now or later about
the subpopulations that probably make up the
pieces of change that you've identified. One
change you've identified is more maintenance fees
than we expected. No problem, but it would be
really interesting to figure out who are those
folks? Why do we think they're doing that? Are
there informed inferences we could be making about
why that's going on? And then could we sit back
and ask ourselves is this policy good behavior or
policy bad behavior? All other the things being
equal, it sounds good to be getting more money,
but maybe that's taking money from some other
pocket that actually we would prefer to go into et
cetera. We don't have to answer those questions
now, but I just wanted to put them on the table so
that everybody could begin to start the process of
thinking about them. Does that make sense?

MR. MATTEO: It does indeed. In fact,
that's a good segue into a conversation that we
all have been waiting to have which is the
intersection of finance and budget and how that supports the strategic plan of the PTO, how exactly we're going to execute against the objectives of the PTO with the financial structure that we're anticipating. Antecedent to that is the modeling and the forecasting and the assumptions and the rationales that go into that. So that's a broader conversation that we all feel we need to have and I believe and hope that that will mature over time, but I think this is a good starting point.

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

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

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

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

MR. ADLER: I'd like to follow-up a moment on Scott's point and pick one category in particular, when you dig down a little deeper may be able to provide us with some additional information about your calculation. Your RCE and continuation fees seem to be calculated here as a flat line or a 1-percent decline, where historically in the last couple of years we've seen a significant increase of something on the order of 25 percent, so I'm just not certain how accurate that number is. And furthermore, our
objective would be to try to bring those RCEs under control to drop that down further in the future. Therefore, going from $120 million to $100 million I'm not sure is totally justified if we were able to bring that under control. When we do a deeper dive into that, that's one item that I would like to learn more about.

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

MR. OLECHOWSKI: The 2011 budget. As you know, the president submitted his budget to Congress in February. Some of the highlights of the undersecretary's submission in order to, like Bob mentioned again, get our arms around the backlog in pendency, we have submitted in the budget to hire 1,000 patent examiners both in 2011 and 2012. We've identified efficiency improvements in the patent process which I think
Peggy and some others are going to talk about. We've investing heavily in our IT systems to retool the way we do business and the way we examine both patents and trademarks and I know that our CIO is going to talk more about that later on this afternoon. One of the things from the CFO's perspective, our previous conversation on fees and the fluctuations in revenues, that is important to us is obtaining a sustainable funding model. We're working on the long-range plans, but in this budget are some of the short-term steps to get us there. There's an interim fee increase that we've talked about before, there's fee setting authority language in there and then there's the operation of a reserve fund so that we don't have to collect and spend all the money in one year, that we can have a multiyear plan, a multiyear budget that looks out more than just the 1 year, have a 5-year plan for operating the Patent and Trademark Office. So those are some of the steps that are in the 2011 budget that are going to get us a long way to get where we want to
Even though the 2011 budget process is on the Hill, the 2012 process is well underway which is the way the federal government works. We're always working on 3 years at one time. We talk about 2010, we talk about 2011, I did want to give you a quick update on where we are in the 2012 process. The first part of the budget process is always making sure that your strategic plan is updated and is accurate and has the vision of where the office wants to be. That process is well underway. It does say post a draft by April. I think we're going to miss that by a few days, maybe a couple of weeks, but the strategic plan is well underway being written. In the May timeframe we are asking all our business units to submit initiatives in order to support that strategic plan, what do those business units need to do to accomplish set out by the undersecretary and the deputy? Part of that process will be to get input from our public advisory committees on what those initiatives are and how well they may or may not
support the strategic priorities. We've committed
to the Department of Commerce to have a more
collaborative effort with the department in the
budget process this year. So we'll be briefing
Commerce as well as the secretary throughout the
summer on the status and the priorities of the PTO
budget.

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

Unless there are any questions, that concludes my brief.

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

MR. OLECHOWSKI: Yes, sir. That's a good question. The 2011 budget, even though we don't have the formal strategic plan out and
public, we know what those strategic priorities are. The undersecretary and deputy have outlined what those seven or eight strategic priorities are. And to that effect the 2011 budget was crafted in order to meet those strategic priorities. So inside the 2011 budget are commitments for pendency and backlog reduction and those efficiency gains are incorporated into the budget. Certainly the effect on the PTO in terms of patent reform is not, however, you're right, if legislation passes we will have to react to that and make sure we're accomplishing that. So the 2012 process will be another snapshot in time and if it does pass we'll certainly include those things in the budget.

MR. MATTEO: Steve Miller, please?

MR. MILLER: As I read the fiscal 2011, you included the 15-percent increase into the budget which I believe if my math is right is about 300 million. If you look at your overcollections that you're anticipating this year, it's about 232 million. Are you still
anticipating if we're overcollecting by over $200 million that you would need the full $300 million surcharge?

MR. OLECHOWSKI: In the 2011 budget, the interim fee adjustment of 15 percent based on our calculations works out to be about $224 million based on the information we knew at the time and what we think applicant behavior might be. The interim fee adjustment is not just in 2011, it's in 2011, 2012, 2013, et cetera, until fee-setting authority is approved that we can redo our fee structure. So the 2011 budget is a 5-year plan. If you notice, one of the easiest ways to see that is in 2011 we'll end up the year with a surplus in both 2011 and 2012 and we need to generate that surplus in order to pay our bills in 2013. When you hire 1,000 patent examiners in 2011 and 2012, I don't want to say they're inexpensive, the full cost of those 2,000 new examiners we really don't feel until 2013 so we have to generate the dollars in 2011 and 2012 and carry them over in a reserve until 2013 in order to pay all our bills in 2013,
2014 and 2015. So I guess the short answer to your question is, yes, we still believe we need it. Should we receive access to our fees this year? I think everybody knows we'll take a look at what we need to do in 2011 and our 2012 budget, but right now the plan is the budget was based on not having access to our fees and so that's still the plan unless something changes. But like I said, Dana and Bob might to be able to give a little more insight on where we are on that.

MR. MATTEO: Scott?

MR. KIEFF: Maybe just a follow-up to that question, and it takes a different swipe at it. I get the sense from our prior conversations that one of the questions that's on everyone's mind in PPAC and the people we talk with is to put it in simplest terms, isn't there some way that the office could do some cut, do something less expensively? Who knows? Buying something from a different vendor? Organizing in a different way. I don't think that people are thinking bad thoughts about this. I think they're asking in
kind of a good-faith way with nothing but an
impression of good faith on the other side of the
question, if society said to itself we'd like the
Patent Office to just do something less
expensively, what would be your recommended
target? What would you say here is something we
could do less expensively and the hit to our
operation would be worth it? Because obviously
you can't take money out without suffering some
hit, so everyone recognizes that too. But I take
it that one basic question is isn't there just
some way you could trim and then what would it be?
Marc and I have had a lot of work on this problem.
We need to be able to understand in the different
goals, in the different models, in the different
legislative requests, sensitivity analysis. If X
changes, what other ripple effects will it have
throughout applicant behavior and office behavior,
et cetera? So with all of that kind of background
in mind, what would be your top one or top two
targets for making a big reduction, not 80
percent, but something more than 1 percent, in
overall cost of some component of the operation?

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

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

MR. KIEFF: Just a brief follow-up for you. This makes total sense and I think we get that. I think that one of the things we in our last set of calls were wrestling with was compensation, that big 70-percent chunk, includes many, many different types of human beings engaged I many, many different types of activities. So I seem to remember a big emergency flare going up about a year ago when the financial model was at its tightest and a big component of that was spending on IT I believe. Then the sense was you can't turn off the computers and expect the Patent
Office to still operate, but yet that was just such a huge number I think that startled a number of us. My goal is not to put anyone on the spot. I'm raising this question and we could talk about it and we can answer it more later. This is not a gotcha question. It's just we're authentically, enthusiastically interested in trying to figure out which components of the compensation could have which effects.

MR. MATTEO: If I may, we've been talking about the broader issue in sort of counter parts, the finance and the operational. Again I just want to circle us back to one of the major PPAC concerns here, the strategic objectives, the strategic plan for realizing those, and the interplay of all of the various vectors that get folded into that. That would be personnel, IT, finance. So we have this sort of overarching concern about the interplay of all these things to the extent that we even constituted a special subcommittee to follow that. I was heartened to see that you have in the finance presentation a
solicitation of PPAC input. I'm going to offer it again. The strategy-finance intersection subcommittee is chaired by me and right now we have Scott on as well as I suspect there will be other members, but please reach out to us. I'll make the same offer to each and every presenter, IT, the finance, the operations, strategy, because I think for us to feel comfortable we have to feel comfortable about the interplay of all of these mechanisms as opposed to one individually. We don't want to look at these things in an insular fashion I think is what we're saying. So while I fully appreciate the finance presentation, without sufficient context in and around it, it becomes a very, very static and insular presentation.

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

MR. STOLL: That's very helpful and I think that's very accurate. You need to look at this in a context and that context is all of the different pieces of the Patent and Trademark Office and I think we've got to be more transparent with respect to our efforts to provide that to you. That being said, we are in continual evaluation of our entire system looking for savings anywhere we can get it and I think you're cognizant that we really have 726,000 applications in backlog and a current processing of about 1.2 million. So any savings we get we're trying to put toward moving the actual pendency of the Patent and Trademark Office and improving the quality. In addition to that, we really do need substantial input into our IT structure so that we can actually end up with an end-to-end process electronically. Those efforts are also eating any of the expected monies. If any monies can be found, we are finding them, and let me assure you we're really trying to do those things, but if we
don't apply them to those other two problems,
pendency will continue to increase and quality
will not be where you want it. So we really can't
actually cut funds at this point without putting
them to other things to reduce that backlog that's
sitting there.

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

MR. STOLL: Relatedly, we're trying to
help you get access to the feedback that you're
asking for because you interact with, if you will
service, a group of stakeholders and if they're
clamoring for vanilla ice cream and you're
spending wonderfully motivated and designed
dollars to give them chocolate ice cream, it would be disappointing for you to learn that that hard effort to optimize was itself going to waste because you were optimizing things they didn't want. Again I'm not suggesting the they should be Joe average patent applicant who wants his applicant tomorrow, but the they is the system, the patent system, the society and we're just trying to help be that interface to communicate to them and from them to you.

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

MR. MATTEO: I very much appreciate that. I think we have two more questions from the floor. Steve?
MR. PINKOS: Mark, could you explain the statutory requirements for a strategic plan and how that fits in with the annual budgeting process which also includes 5-year projections?

MR. OLECHOWSKI: The Office of Management and Budget requires every federal agency to establish a strategic plan once every 5 years with an update once every 3 years, so that's where we are today. We're in the update. It's just with the new undersecretary and the new deputy it's a more significant update than might normally be somewhere in the middle of an administration. So we're in the middle of the update right now. But as I mentioned, those strategic priorities have been set. What we're trying to do now is finalize the public document to tell people where we're going, but those strategic priorities were set and are included in the budget. So in a normal, well-oiled machine you have a strategic plan, you establish a budget to achieve those priorities, you execute the budget, you monitor your performance and you make
adjustments in the following budget year. So
we're attempting to do that. I think we're well
on our way. We have a new strategic plan that's
in budget. We have a budget to meet those and
some pretty significant commitments on pendency
and backlog. We'll work with Congress to make
sure that that budget gets passed in its entirety
and then we'll start executing it.

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

MR. MATTEO: Go ahead.

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

Is this enhanced scrub from the Department of
Commerce geared toward the impact of the budget on policy or is it greater involvement in the actual budgetary numbers, personnel matters, et cetera, at the PTO?

MR. STOLL: Let me just answer by saying that the budget does have an effect on the policy. As you alluded to earlier, there is a legitimate relationship between having the budget able to enact the policy that is actually determined in conjunction with the Department of Commerce. They have been nothing but more helpful to us in trying to obtain full funding for the Patent and Trademark Office and to provide access to our fees. So with respect to the budgetary involvement, it's been collaborative, not didactic, and it's been very helpful with respect to trying to get access to the fees that we collect and we welcome their assistance in this area. And they help is in interfacing as you will know with OMB and the Hill where they have resources and relationships that are different and sometimes better than ours.
MR. OLECHOWSKI: I'll just echo that, Steve, that the budget process in the federal
government is the mechanism to institute policy, so Bob is actually correct. Our involvement with
Commerce has been certainly on a collaborative
effort to make sure that our priorities are set, that the format and the message of the budget is
what the undersecretary and the secretary want, the relationship with them and OMB is critical to
make sure that the president's budget that's submitted has the full support of all of those
organizations, so it's been a very positive engagement. They're not looking over our shoulder
talking about this many people or that many people, it's not that at all. Like I said, it's
encouraging that everybody is on the same page trying to get to the same place.

MR. MATTEO: Esther, please?

MS. KEPPLINGER: Peggy may be going to address this with respect to the RCEs, but when I
look at the numbers and the projections of decrease I wonder how you're going to accomplish
that. Moreover, while I hear and see that the
to the examiners is much improved and
to work with us and do
interviews, also there are other instances where
they're not so willing and really are requiring
RCEs still. And even more troubling, I hear of
one examiner saying I don't really want the
applicants to file an RCE. I want them to file a
continuation. How do I get them to file a
continuation? So you may decrease RCEs but I fear
you will increase continuations because of the
differential in counts so that you may not
decrease the overall number and that's something I
think that needs to be looked at.

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

MR. OLECHOWSKI: The attrition rate on
patent examiners is extremely low this year. We
had in our 2010 budget estimated that 440
examiners would leave. I don't have the number
off the top of my head, but I believe through the
first 6 months of the year only around 125 have
left. So that actually as a purely financial
statement is a good news/bad news thing. It's
good news because our attrition is way down, we're
keeping our very most experienced examiners and
everything else, but they're expensive. The
people we thought they were going to leave and
they didn't so it becomes a budget process and we
have to make sure we have funds. Obviously we're
going to cover the compensation.

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

MR. OLECHOWSKI: In 2011 our attrition
estimate is back into the 400s I believe. I want
to say 428, but it's roughly 400 examiners. We
haven't engaged Patents on what we think it will
be in 2012 yet, that will be during the summer,
but certainly where we are through the first part
of 2010 and how that looks, it's another
calculation just like our fees because it's such a
critical part of our budget to know how many
people are going to be on board and everything
else. But I think you're right, I think we're
seeing the effect of a lot of things on our
attrition rate, not just the economy but the
programs we have to retain our examiners I think
are having a great effect as well.

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

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

MR. COLARULLI: I snuck in.

MR. MATTEO: You did indeed. Welcome.

MR. COLARULLI: Thank you.

MR. MATTEO: If you would please lead us
through your legislative update.
MR. COLARULLI: I'd be happy to. As introduction, I'm Dana Colarulli, the Director of Governmental Affairs here at PTO. I actually began in December, so this is my first time in front of this group.

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

With what I want to go back and just give an appreciation of the history of the patent reform discussion and the issues that are present in the current debate. I'm not going to go
through these couple slides in a lot of detail.

But really this current set of proposals has been around at least since 2004. As I look at them, a lot of the provisions really came out of even after the last patent reform bill in 1999. Some of those same issues are being raised here.

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

So there's been I think what I would call robust discussion. Not all of the issues
that were raised at the beginning of the 108th Congress when this was discussed are in the current bill. Some of them have been taken off the table and addressed in the court. But I think by and large a lot of the same problems that patent owners have seen in using the system and accessing the system are still trying to be addressed in this group of provisions.

That brings us up to the 111th Congress which we're in right now. When the House and the Senate came forward and both introduced bills, nearly identical legislation, the Senate did quite a bit of action last year. The administration actually in October last year submitted a views letter commenting on a number of provisions in the bill, and then in the beginning of this Congress, Senator Leahy announced a tentative agreement at least on the Senate side. That body had come to a place where both the Republicans and the Democrats who had been working on this bill thought they had reached an agreement preserving the core of a compromise on damages, one of the most
controversial issues throughout this discussion. This current manager's amendment that would be introduced on the floor if the bill came to the floor really reflects that compromise and makes a number of other changes.

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

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

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

MR. MATTEO: Excuse me, Dana?

MR. COLARULLI: Sure.

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

MR. COLARULLI: Sure.

MR. BORSON: Thanks. I think that the way that you're describing all of this makes a lot of sense for a lot of good reasons and I can see the ways in which it's good for everybody. One of the things we're supposed to do on PPAC is give you what we think are concerns in the hope of cooperatively airing them so that if the concern is ill-conceived it could be explained away so that if the concern is well-founded it's raised in a way that doesn't sandbag you, and so I want to offer a concern in that spirit. I think that I can see how first inventor to file is put in the bucket of simplifying and speeding up the process and it can have a lot of those effects and those effects can be generally good. But there are some bad that comes with the good, and in particular in
the last round of debates about first to file
versus first to invent, one of the things the
United States did was create a so-called
provisional application and it was marketed
essentially the way you're marketing this. It was
in a sense sold with the following catch phrase,
you're an inventor. You're really busy but you
slipped and hit your head on the sink and invented
the flex capacitor as in the movie and now is the
time to take that, the piece of toilet paper, the
back of the envelop and sketch out your flex
capacitor and mail it in with your provisional,
and that's what a provisional is. And that story,
that rhetoric was just a huge part of the public
messaging, so much so that not only was a
successfully implemented change in the law where
success is the law was changed, it's been a big
part of the messaging since the law was changed,
and that leads to the following problem. We all
get many, many, many phone calls where people say
I did that and now my patent lawyers are telling
me that there's this disclosure requirement in
patent law and that in order to get a filing date
I need to have an original disclosure that
satisfies the disclosure requirements under
Section 121, paragraph 1 as of the original filing
in order to get claims later and I made my initial
disclosure because I thought I could draft it on
the back of an envelop but now I'm told I can't
beef it up, and whoever is giving those people
that advice is totally correct. It is really
important as a matter of public policy that we
have a serious Section 121-1 disclosure
requirement that puts the world on notice of the
scope of the potential rights that can issue. And
that means it's really important as a matter of
public policy that patent applicants take the time
before filing to draft rather rich disclosures,
not rather anemic disclosures. And so to put it
simply, the public messaging on provisional patent
applications was please take this suicide pill
quickly because it will act quickly and people
have taken those suicide pills and they've acted
quickly. They filed public documents with
back-of-the-envelop sketches that really got them
either nothing or less than nothing because they
then revealed what they could have maintained as
trade secrets.

So I think messaging turns out to be
really important in this area, and while it's
important because you want to achieve the
constructive goals and we want to help you achieve
those goals, I just really, really an nervous
about calling first to file an unalloyed good and
calling it a mere simplification or speeding up.
Sometimes speeding up is rushing and rushing
sometimes is wasting. So there are going to be
serious costs to first to file. I happen to
disagree with it but I will go along because I'm a
member of this society and I want to work
cooperatively with my society. But I think we
should be honest about the identifying the serious
costs and the serious costs are the more society
encourages people to file anemic disclosures the
more we're all going to have to fight later about
either, A, invaliding large swaths of patents
because they don't satisfy the Section 121, paragraph 1 disclosure requirements, or being very loosey goosey with a broad doctrine of equivalents or some other equitable remedy that will basically say to patent applicants we know you filed an anemic disclosure because you were rushing to be the first inventor to file or because you filed a provisional patent application, you did what we told you could do, and we kind of feel that you got caught and we feel badly about that so then we'll give you a little more wiggle room on the infringement side. But then as we all know that gives rise to a huge broader set of notice problems where you have an unpredictable range of equivalents and so forth.

I'll stop there because I know you'll disagree on the substance of some of those points, and I think you're a reasonable mind and I hope you think I'm a reasonable mind and reasonable minds I hope can disagree. But I just hope we can also be honest, and I think that calling something that major a mere simplification or a mere
speeding up for purposes of doing the important
work that you do which is legislative affairs,
fine, but let's be really careful that we not sell
it to the public that way.

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

I think a number of things that you said
are absolutely true and we've reflected in our
conversations. You're best protected by making
the best initial filing you can. What the
provisional application allows you to do is to
file a the Patent and Trademark Office and take
advantage of trade secret for a period of time while you're working through your invention. But to that extent, the better that initial filing is of course will affect what the ultimate scope of your patent is. I think none of that goes to what I was trying to do here which was less marketing and it was intended to be more organizational, but I recognize in my line of business that there is some of both.

I think we've been very up front in saying many of the benefits of first to file come with setting a foundation for many of the work sharing efforts that the agency is engaged in. We see great benefit there. But in addition, the drafters of this provision did intend as you said what we think is a good goal which is a disclosure based system and in that system encouraging applicants disclose soon in the public domain, giving notice to others inventing in that same area and fulfill that goal of the patent system which is to create more innovation and not less, encourage folks to design around. So is it a mere
simplification in terms of the filing and
acquiring your rights? It's a simplification and
hopefully speeding up the process more generally
and that's certainly how we've talked about it at
a high level and I think that reflects the
conversations that Director Kappos has had in all
these inventor forums and elsewhere.

But there is going to be disagreement
and we know there is some disagreement on some of
the provisions. Most of that comes from some of
the independent inventors and a lot of that comes
to as I said traditional access or barriers
because they don't have the legal resources, they
don't have the advice that maybe larger applicants
might have. But what's come out of this process
has tried to address many of those concerns. I'm
not going to say it addresses all of the concerns.
I've had conversations over the last couple of
days with folks who continue to have concerns.
But on whole the administration has supported this
provision and generally it does help the PTO move
forward on its work sharing to encourage and
endorse a disclosure based system all of which are
good things.

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

MR. COLARULLI: I think the overall
philosophy has stayed somewhat true and the
provisions that were addressing that have changed
and have changed for a couple of reasons. Number
one, the courts have picked up some of the issues
that were in the first discussions back in 2003.
Obviousness has been addressed at least partially
in KSR. Willfulness has been addressed to some
extent in Seagate. Injunctions, which was one of
the primary reasons that a number of players got
into this debate also was taken off the table with
the Merc Exchange case. So I think as a part of a
number of the issues that were raised, as you said
concerns were raised in 2003, some of those have
been taken off the table because of court cases.

I would argue that that's actually had a
beneficial effect on the overall discussion about
what we want to have in patent reform legislation.
What remains are some of the issues that weren't
addressed and frankly some of the issues that
can't be addressed just by the courts. The
current legislation creates a postgrant opposition
system. It improves inter partes reexamination.
Those are statutory changes that the court can't
make but supporters of the bill have said will
improve the system by ensuring that there's higher quality and more combined scope patent rights in the marketplace. So I think many of the concerns have been addressed.

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

MR. ADLER: You just mentioned one that I was thinking about that was originally in this discussion and that's the inequitable conduct issue that affects applicants and the PTO operation. The federal circuit is requesting an en banc hearing on a case and asked a number of questions the other day. I hope that we together with you can address that in some amicus response
or some type of response to what our view is about
how the court might help us change the inequitable
conduct current dialogue so that we might be able
to further simplify and speed up the PTO process
while preserving real fairness and prevent real
fraud. So I hope you'll consider that as the PTO
will consider looking into that request in the
next couple of weeks.

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

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

I think I'm pretty much done with my
slide set. These are the three buckets as I think
about this again trying to be more organizational
than marketing but there's some of both. The quality bucket, improvements to inter partes, establishing a brand new postgrant opposition system, certainly encouraging third-party submissions of prior art are helpful. And the third bucket is really addressing the costs and some of the subjective elements of litigation.

This is a laundry list of issues. Again I'm not going to go through all of these, but I'm happy to talk about any particular issue. I wanted to get more to the status currently of where the manager's amendment is. I generally do two groups. This is some of the larger themes and then some of the other provisions that were added into the bill. I think the three that I talked about a lot are first to file damages and the postgrant opposition system. In recent months it's been postgrant opposition, making sure that the right balances are there, making sure that there weren't opportunities for harassment and abuse of these particular reinvented and new proceedings. I think first to file for reasons
that we've already talked about has been one that
there's been considerable discussion about the
effects. Damages has been the traditional issue
but compromise at least in the Senate that was
brokered when the bill was reported out last April
was maintained and is maintained in the current
manager's amendment that we've seen that would
accompany the bill to the floor and then certainly
postgrant, inter partes and threshold and the
estoppel effect.

The process now is that Senate staff and
House staff have been working together over the
last few months considerably in an attempt to see
eye to eye on all the provisions. The House
raised a number of concerns and Senate staff were
looking to see what changes they could make to
respond to those while keeping the balance and the
compromise that they believe they have achieved.
A manager's amendment would include some of those
and a manager's amendment accompany the bill to
the floor when the bill is scheduled for Senate
discussion, and as I referred to, that could be in
the couple of weeks. Senate staff are working
hard to try to do that. Even in this past week
the Senate staff have done what they call hot line
the bill through the Democratic side and the
Republican side to vet out any additional
concerns, any additional amendments that might be
considered on the floor when the bill comes to the
floor when it is scheduled for floor time. There
are a few and those are still circulating and
those are still actually becoming public even as
of today. So we're trying to keep track of those
and provide technical assistance on those as we
can.

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

MR. MATTEO: I very much appreciate the
whirlwind tour as it were. Some of us may have
created a bit more of the whirlwind than we had
anticipated. But if there are no questions from
the floor, we're scheduled for a break. So why
don't we just break for 10 minutes and reconvene
at about 25 after?

(Recess)

MR. MATTEO: Welcome back everybody.

I'd like to restart the conversations now with a
look toward international efforts and an ongoing
status from Bruce Kisliuk who will be giving us an
update on IP5, among other foundation projects.

Thank you.

MR. KISLIUK: Thank you, Damon. For

those of you who don't know me, my name is Bruce
Kisliuk. I'm one of the Assistant Deputy
Commissioners for Patent Operations. We have a
pretty robust team that works on international
efforts. In the past it has been mostly led by
External Affairs with Patent people components.
Our recent focus is to bring Patent operations
more into the integration of some of these
international particularly in the work-sharing efforts. So we have a pretty robust team of Patents people on the operations side and I'm going to try to touch mostly on the updates on how we're trying to integrate some of these work-sharing efforts into our operations.

This is an overview of the key topics. I'm going to touch briefly on them hoping that most people understand the programs and focus more on the actual updates. The Patent Prosecution Highway of PPH program is one that was started about 3-1/2 years ago internationally and has been growing rapidly. We have major efforts to expand that and I'll touch on those. The share-type initiatives are a type of work-sharing. PPH is a subcomponent because it's focused on allowance in a first office and applicant initiated at the point of getting that allowable subject matter. Share-type initiatives are more generic where it's just the results of the first office, it could be a rejection, so there are some more complexities to that and we are starting some pilots and I'll
touch on some of those pilots and some of those efforts as well. Of course, there's PCT and we have expanded the PPH into PCT which is a pretty big initiative and I'll talk to that. We have our IP5 foundation projects and the foundation projects are really means to increase the trust and confidence in the work-sharing between the offices and it's a combination of accessibility of and awareness to the results. There is understanding the results, things we're focusing on sharing. And commonality of some of the standards. That's really where our IP5 efforts are. Then we have a number of other kind of sidetrack collaboration efforts. We have examiner exchanges and collaborative examination efforts, again in the pilot phase all working toward learning what are the best ways to share results and what are the benefits of those.

Just quickly touching on PPH. Again, the distinction on PPH as a subset of more generic work-sharing is that the key points of PPH is that there is an indication of or determination of
allowable subject matter in certain claims in the
office of first filing. Entry into PPH is
initiated by the applicant when they get that
allowability into the second office. So it's
applicant initiated and it's focused on allowance.

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

MR. MILLER: Can I ask you a question?

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

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

This is just the rundown of the
countries that we have PPH exchange with. There
are 10, and then the bottom two bullets, one of
the trilateral PPH that was added recently in
January and we don't even have the Korea added to
that yet, and then we're also in discussions with
Rospatent which is the Russian patent office to
add them to PPH as well.

This is some of the data. Again this is
kind of a busy slide. I don't like this one as
much. This just shows the date that we started
some of the pilots. Some are actually full and
not actually in the pilot phase and some of the
numbers, but I like the next slide better in terms
of numbers. This is data that is I believe posted
on the JPO website. What it is, and it is a
little busy, but it's the full picture of PPH
activity internationally. If you look at the
USPTO which is the second column from the left,
when we're the office of second filing, this data
is I believe through January of this year, about
2,500, and you see the countries that it's coming
from. You can see that most of our PPH activity
is coming out of JPO and those are the 10. There
are 10 boxes of the countries that we have exchanges with. So you can see that at least the USPTO and JPO are kind of leading the activity in most of that and growing.

Here's the slide that I will talk about the growing. The program has been in effect since about midyear of 2006 so it's been about 3-1/2 years of PPH activity and we have added pilots on and off, but as you can see, and this graph is in I think 2-month increments, so this is about 3-1/2 years worth and you can see the pretty steep incline and getting steeper. Of course, as we expand PCT PPH, as we add more countries it gets higher. And I think as we've heard we had a roundtable not very long ago on work-sharing and we've heard from others that now that they know it's there, some of the applications that they have are originally in the system, had they known they would have crafted and prosecuted a little bit differently to enter. So we expect this to accelerate pretty rapidly. Under Secretary Kappos has targeted us with trying to reach the
cumulative 4,000 mark by the end of this year,
8,000 by the end of next year and 16,000 by the
year after. So we are on what I would say a
marketing campaign on behalf of applicants across
the world to use a system that we think is working
very well and I'll get to some of the statistical
benefits that we're seeing at least in the USPTO.

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

Here are the statistics that if you're
an applicant and a user you should be very, very
interested in a program like this. When the U.S.
is the office of second filing meaning that
there's been an indication of allowable subject matter in the office of first filing and you petition and enter this process, the allowance rate is roughly 93 percent. That's about double what our non-PPH allowance rate is. Actions per disposal are down and again that is the way we look at it is prosecution costs on an applicant's side, less actions, less prosecution costs. Significantly for examination and examiners is about 20 percent reduction in number of claims and the reason is that one of the requirements is there has to be claim correspondence between the claims that are indicated as allowable in the first office. So what we typically see is an amendment coming in in the U.S. case which actually reduces the claims to those allowable claims. And again because of the actions per disposal decrease we're also generally observing a pendency reduction in those cases as well.

Like I said, one of the things we are trying to do is set some targets and publicize this more. We think it's a great program. We
think that we can have wider use and we're seeing
growth and we want to keep encouraging that
growth. So we do have some internal numerical
targets. We have expanded again aligning PCT with
the PPH is what we have done already. We've
started that on the trilateral. We have just
announced adding Korea. I don't believe we have
an exact implementation date for Korea yet but I'm
hoping within a couple of months we'll be doing
the Korea ones. I believe there's a press release
on the agreement to do so, but I don't believe we
have a start date on that. Then similarly to the
question that Steve asked, we do have some
plurilateral PCT cooperative efforts and we're
trying to streamline procedures and get a little
bit more consistent practices across different
countries because right now it is a series of
collaborative bilateral agreements. Share or at
least the concept of share again is broader than
PPH.

MR. MATTEO: Excuse me, Bruce.

MR. KISLIUK: I'm sorry. Yes.
MR. MATTEO: If I can just interrupt for a second.

MR. KISLIUK: Yes.

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

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

MR. MATTEO: I understand the 1.7 versus the 2.7. What I can't do is I can't conjure up what that means in terms of human hours saved or dollars saved. How would you characterize the
efficiencies? That's an interesting disparity in numbers but I don't have any tangible sense of how to connect with it.

MR. KISLIUK: That's a good question. It is kind of hard to quantify. You can ballpark what an action per disposal really means. An amendment in average it's roughly about probably 7 or 8 months between the applicant's response times so we're probably saving roughly for every office action we save on our end probably about 7 or 8 months roughly in prosecution time at least.

Another way, and again it's hard to quantify it, but examiners have a goal so trying to figure out if they can move a quicker, do they pick up another case, anecdotally the information is they probably would because there are an incentives for them to do more. There are award programs for them to do more. So we're hoping that in a mix of a lot of other initiatives that we have that we've built the right incentives that if we can advance prosecution, it's kind of the heart of all of our compact prosecution initiatives. If you can
complete prosecution quicker with one case, you will be picking up another case.

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

MR. KISLIUK: I think, Damon, the safest thing is all the things that we measure today to know whether we've achieving the goals that we've set. So they are pendency and productivity. We look closely at actions per disposal particularly with all our compact prosecution initiatives. We have a number and I don't know if it's going to get to you today, but in our QIR data we have a
lot of internal data that we look at actions per
disposal in a very fine minutia number of section
action nonfinals, things like that. That data as
it improves, we've also done a lot of other
things. What's hard to measure is the systemic
impact because we have so many things we're
changing and trying to improve.

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

Esther?

MS. KEPPLINGER: I have one question.

Of course particularly coming from Japan the
claims are going to be fewer and narrower and so
that's one of the reasons I think probably for the
disparity in allowance rate. But additionally, what I have heard is that this is a program that could be used to get a narrower patent fast but there would likely be a follow-on continuation for the broader concept. So in totality I just wonder what the impact -- so we get one of them done fast but we'll get a second case that follows on.

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

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

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

MR. KISLIUK: Going back to touching on generally the share concept. Beyond the PPH which again is narrowly focused on the allowance and applicant initiated, we're trying to find efforts in which is can be office initiated meaning it's the timing of the filings that trigger it and
where we can use the first office action and/or first search, share that aspect. So that's kind of the fundamental thing about share, and we're doing a number of things. One of them that we're doing is a pilot with Korea where we have 326 cross-filed applications. They're in two specific technology areas that are narrowed and what we're doing is we're waiting for the first office to do a search and sharing those searches before they move forward, so that's a small part. We don't have the results yet. We have some people in the room that have worked on that specific pilot so if there are specific questions they can answer that. But my understanding is it's going pretty well. We think it's a good pilot. We think we're going to learn a lot about both the timing and understanding.

MS. KEPPLINGER: My question with respect to share since I see here it's not a voluntary program, one of the issues that came up in the roundtable on work-sharing was the question of patent adjustment for those people where you're
waiting for an action from the office of first filing, the case that's sitting here is potentially earning patent term and how you're going to handle that.

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

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

MR. KISLIUK: Thank you, Jon. Another program that we are just about to start is one with the U.K. Again this is probably going to be a little bit more robust than the Korea pilot. Again it's going to be focused on how do we use their first actions which are most of the time a search because they do separate their search and examination and it's really we're just starting those meetings. We have a meeting next week with
the U.K. Officials. Again for these types of pilots right now, I don't believe we are looking at necessarily delaying as an office of second. What we're really looking at is what is the timing and really digging into the details. What is the timing today because there is a delay when you're second office anyway. What is the timing? How many can we do without moving any out of turn today? And those are the numbers and data we're trying to exchange. And then if we can move some up quicker as a first office, how many that would be. That's what we're really looking at right now.

What's interesting and a little bit challenging right now with these types of ones that are on PPH, remember PPH is applicant initiated so we know right away which one to grab, when it's an office initiated, the exchange of information becomes critical as well as things that have been published, what can be released. There's a lot of information and hurdles we need to get over and that's why we need to work through
the logistics with them. We believe there’s a good percent that we can probably exchange information, share results that we don’t have to take out of turn at all and we’re hoping that that’s the result. So we’ll find much more as we ramp up our efforts with the U.K.

MR. MATTEO: Bruce, just a logistical note.

MR. KISLIUK: Yes, Damon.

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

MR. KISLIUK: Okay.

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

MR. KISLIUK: I don’t have a number, but I believe, and I know Mark Powell -- the last time we checked I don’t believe that there was a significant high number.
MR. POWELL: There have not been a significant number of continuations.

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

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

One other thing if I have a second. As
far as the benefits to the office for PPH, I think it would be interesting to also collaborate with some of our user groups to see what the benefits to applicants have been in PPH because there clearly must be significant savings from the attorney standpoint with less actions and so on. So I think that's something we're going to be looking into in the future.

MR. MATTEO: That's good news.

MR. KISLIUK: In an effort to kind of stay on time, the next big point I probably want to address is probably the IP5 foundation projects and I'm going to jump through some of these other things. I already talked about PCT, PPH and the foundation projects. I'm not going to get into the details of what they are. I will want to address the fact that at a recent IP5 heads meeting in April, the USPTO had made a suggestion to try to accelerate a number of those projects. They're on a pretty long timeline. And while our specific acceleration plan wasn't accepted as we suggested, there was an agreement to look at and
consider exploring ways to accelerate, keeping an
eye on the resources necessary to do that. So
again we're looking at ways to enhance and speed
up the acceleration projects, I mean the IP5
projects as a foundation for building toward
work-sharing. So the further and faster we can
move on those fronts, some of these other efforts
about being consistent and standardized we'll make
a lot of progress on. And that's probably the key
things for now. I'll just talk on some other
things, some general staff exchanges and those I
can talk about at another time.

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

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

MS. FOCARINO: I think at the last
meeting we had I introduced the concept of a
dashboard and I realize you still haven't seen it
on our intranet yet so we're trying to work
internally to determine what pieces of data that we want to show you and that we've heard from you that you'd like to see on a regular basis. So I'll just walk through some of the stats for you.

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

Some of the things that are noteworthy that I'm going to get into that in more detail, and just stop me if you have any questions on any of the data on this, but there are two slides so
I'll show you this one and then the other part of the dashboard. We've giving you a look at the inventory as well as pendency. In green there you can see our green tech petitions data and I think it was mentioned that we're contemplating, I've been talking with Robert Budens, on expanding the petitions to all classes of invention but keeping that 3,000 case limit because currently we aren't at the volume that we said we would stop at which is 3,000 cases. Most of the denials of these petitions are for the reason that the application is not in the designated class so we hope that by expanding that we'll be able to take in a lot more of these petitions.

I gave you the sheer staffing number up there but I'll show you a little bit about the trend in our attrition rate and the backlog and design filings also and then the amendment processing time which I'm going to give you a little closer look. So here's the actions per disposal just to show you the trend over the last several years, about 9 years worth of data, and
you can see it's varied a bit, but certainly for a
period of time from about 2005 to sometime in
2008, early 2009, we were at a pretty high level.
Some of that I guess one could say there's a lot
of things that go into actions per disposal, but
we were on a massive hiring effort and our new
hires typically don't dispose of applications
right from the beginning but certainly we've
discussed this before that perhaps some of the
quality initiatives that we had in place impacted
this also. Esther?

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

  MS. FOCARINO: I think the good news is
that actions per disposal are down and so that's
one of the things that you see on the dashboard
that we're tracking monthly and you can get a
pretty good look at that and how that's doing.
RCE filings. What we're seeing right
now is kind of a leveling off in the RCE filings
and we hope that that leveling off as the next
trend will be sort of a downward trend in the
volume of filings. We've put a lot of initiatives
in place to hopefully stem the tide of the filings
and encourage our examiners to dispose of
applications in the first original filing if it's
appropriate. As you know, in the count system
changes there are some disincentives I think both
internally and externally. The internal change
was to reduce the credit for these types of
filings for examiners and now the RCEs are placed
on the special new case docket rather than an
examiner's amended docket. But as you can see, on
the dashboard the time that an examiner is taking
to pick up these cases has not really varied much
from a little over 2 months so that's staying
pretty steady.

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

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

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

MS. FOCARINO: Typically, yes, we do.

MR. MATTEO: Thank you.

MS. FOCARINO: Another thing that we're looking at closely is our amendment processing time and as our technical support staff has diminished in size and we as an examining corps have grown, obviously we've had some challenges with our processing times. So we've been focused on being more efficient in that area and some of the tasks that our technical support staff have been doing have been automated so we've been able to drive the timeframe down. Actually right now
we're at about 22 to 23 days to process an amendment. We were in the summer up to a high of the high 40s in terms of number of days. So it's coming down again so hopefully we are in more of a steady state. We hope to drive that down even further. Do you have a question, Marc?

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

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

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

MS. FOCARINO: Yes. We were having to recover from 4 days of a government shutdown which you'll probably see the curve going back up. It
doesn't go out far enough to what I mentioned, the
22- to 23-day rate that we're seeing right now.

MR. ADLER: That's all.

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

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

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

MR. JONES: We redistributed the
workload in a way to truly work first in, first
out for all document entry and we have had full
overtime plus. We've been allowing our tech
support staff to work up to 40 hours overtime. So
we're steadily chipping away at the documents and
going them entered. We've been making about a
2- to 3-day reduction per pay period and, yes, we
did get a setback by having the office closed for
4 days, but I must say that the LIEs who are
hoteling worked through that snowstorm so we did
get some work done.

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

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

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

SPEAKER: Is the redistribution all in
April? Is that how you're counting, going from 29
to 23 in 1 month or is it all overtime?

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

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

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

MR. MATTEO: What have the exit
interviews revealed from those exiting?

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

MR. MATTEO: Robert, you had a question?

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

MS. FOCARINO: That's a good point you
raise. I'm not sure what a healthy attrition rate
is for a business like what we have with highly skilled technical people. I can guarantee you that the group directors are focused. They know exactly how many people they're attritting every month and the reason why and they are very proactive when someone is even giving hints that they may be thinking about leaving. If it's someone that we want to keep we're really making a lot of effort and putting a lot of focus on trying to find out why they would like to leave and why perhaps we could convince them that maybe they can stay. So we're very focused on it. I'm sure some typically it's some people just aren't cut out for the job.

MR. FOREMAN: Peggy, I know we've talked about attrition in almost every PPAC meeting that we have. Is there any effort underway to benchmark against either other offices to see on an international scale what sort of attrition they're experiencing and also in the real world, companies that do have highly technical employees, what kind of attrition they're experiencing. Then
to follow that up, if there is a trend here where
the Patent Office is much higher than others,
working with best practices in the HR field to
figure out what can done to address it and why is
it that it's higher here than we're experiencing
either on an international or in similar
industries.

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

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

MS. FOCARINO: Right. I know there have
been various numbers thrown around for how much it
costs every time you lose someone to bring a
lower-graded newer employee on board and by the
time they get up to speed to be able to produce
the same amount of work, obviously there's a cost
to that, but there is a point in time where you
break even if you have someone that's here that
really isn't a good fit for the job and they're
not putting out the level of work that we need
them to. So obviously there's a cost anytime you
lose an employee. There's a significant amount of
training that goes into them.

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

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

MR. BORSON: That's part of it, but also
what is the additional cost of training somebody
else to get them up to speed? What's the net
loss?
MS. FOCARINO: We have data like that. Obviously we have a lot of assumptions built in, but we could provide you with that data.

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

MR. MATTEO: That's actually very true.

Very true. Last question, Robert?

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

MS. FOCARINO: What is the exact number? Is it 5-point-something, Dave? They track the same. I believe that we've experienced fewer
retirements in the last year. Part of that is also because of the economy and people's retirement investment portfolio. And part of it has to do with our hoteling program that examiners that would otherwise retire have the ability to work from home and they're staying longer. But delta is not much different from historical levels.

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

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

MR. ADLER: I don't want to dive too
deep here. There's a difference attrition and
performance management and sometimes you want to
get rid of people who aren't performing well and
that's a positive thing, but it's good for the
organization and morale if you weed out the people
who are the worst performers. So it would be good
to match the people who are leaving with their
performance history and if they are the ones that
are leaving, I'd say that's a good thing.

MS. FOCARINO: Agreed.

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

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

MS. FOCARINO: We do keep an eye on
that. We can't track it exactly because a lot of
times employees resign that are having performance
problems so it's difficult to go and look at the
records.
MR. MATTEO: Thank you very much, Peggy.

Next up we have a quality update from Marc Adler and Bob Bahr.

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

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

MR. BAHR: We published a notice announcing two roundtables. The first will be in Los Angeles on May 10. The second is here at the PTO on May 18. We also invited public comment on issues pertaining to patent quality and we will soon we posting on our website what I would call proposed quality metrics. They're not proposed in that they are the only thing we want comment on. They're proposed in that they're some of our ideas. We're interested in stakeholder input on those ideas and we're also interested in other ideas that people might have with respect to quality. We've also prepared some summaries of
the comments we've gotten to date and we'll post them as well. As for request for comments, I believe the comment period closes on I think it's June 18, but it's somewhere in the middle of June. Did you have anything to add, Marc?

MR. ADLER: Those are the logistics. I thought I would do a little bit of a broader where are we and what's been happening. The public notice for comments solicited a number of suggestions with regard to possible changes that could affect the definition of quality which would be to improve both the validity of the patents that are granted as well as make certain that the right patents are rejected, both false positives and false negatives. As well as to look at things that could improve pendency, in other words, reduce pendency and backlogs. We received a lot of comments and now we're going to have these roundtable discussions to try to narrow this down a little bit since we got so many suggestions. Many of those suggestions probably can't be done right away, some of them might not be able to be
done at all. Most of them relate to process
efficiencies and not statutory changes, not rule
making. They are doable things. Which ones
should we do and how will we measure their impact
will be the focus of the roundtables. We need to
have the right metrics to measure the changes so
that when we make the changes we can see whether
we're getting the results that we want or not.

There is a related aspect to this which
is that the office will also be at some point
doing a pendency roundtable to get feedback
specific to issues relating to pendency. I think
that makes a lot of sense. This is not a one-shot
deal. I think that one shot on quality and one
shot on pendency is a continuous improvement
activity. This is not an attempt to say that the
Patent Office is doing a good job or a bad job and
it really isn't related necessarily only to the
Patent Office. A lot of these things have to do
with applicant behavior and changing the way
people operate in terms of conducting interviews
with the Patent Office or how to file a response
or how to do a search or when to do a search. So we hope that everyone here will take this in a
collaborate way and that's what we've been
intending it to be. The Patent Office task force
has been very cooperative with PPAC members on
this up to now and we hope that that will be
continuing. May 10 in L.A.?

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

MR. MATTEO: A logistical note. Is there a place where people can go to find out more
information about timing, venue, pre-read
materials, et cetera, to facilitate people
attending and participating?

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

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

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

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

MR. Bahr: Welcome to the PTO.

MR. Adler: Hopefully the solicitor will
and he'll be able to clear that. There's no rule of law in those. They're just proposals.

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

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

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

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

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

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

First we're looking at using a couple of general tenets in developing our plan. The first is stop, look and listen. I think all too often we don't listen here at the USPTO to our customers
whether they be the outside customers that we have or the internal customers or the examiners. The next thing we're going to do is we're to build smart and we're going to build fast and we're going to own the design. In the past as I had talked about before, the USPTO had allowed the contractors to own the design, had allowed the design to go and be beyond the control of the office. That is never a good thing particularly because it allows someone else to control your destiny. Last we're going to take the stakeholder needs and put them in the lead. You're going to be hearing from Marty Hurst in a little bit about how we're forming two councils and each one of those councils will be used to solicit input from both the outside world, the public as well as the internal examiners.

A couple of the main ideas at least as far as the technology goes, we would like to accept open standards. We want the system to be maintainable and scalable beyond which it is not today. A lot of people tell me, John, we'd like
the system to be available 24 by 7. I have a little bit of a higher goal. I would like maintenance to be able to be done 24 by 7 without the system going down. Today we lose a number of hours every day plus weekends when I have to bring the systems down for maintenance because they are not resilient or redundant enough to stay up and available. Many folks in the public comment about how frustrating it is particularly on the west coast when the system is down for maintenance. I understand that. Certainly in the outside world when you talk about major industries using IT, they don't have those down times. Maintenance can be done 24 by 7 with no impact to the system and that is goal of where we are going to.

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

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

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

We're starting by looking at an application that comes in and what's one of the first things an examiner has to check for. Are there proper dependencies in the claims? They will today literally have to draw a picture as you see on the right showing independent claim one has
proper dependences and claim 10 and so on and so forth. This is one of those things where tools and technologies exist today which can help examiners immediately check when there are 250 claims making sure that these things aren’t having to be literally drawn out in pen and ink.

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

Lastly, and some of the things that probably resonate the most with the applicant community is the understanding of breathing life and meaning into terms in the claims. When you look at a term, where is it found in the
specification? What did they mean? How were they using this term? What are the examples that allow me to better understand what the applicant is saying? You literally have to flip and forth going through and looking through these specifications. Is it referenced on page 5 or is it referenced on page 25? Going through and matching term by term is one of the things that's among the most important but also the time consuming. And when you're developing your search, when you're understanding the invention, you're developing the strategy, doing this function is critical. Again there are tools which can really advance examination and help examination move forward.

Lastly, and you'd almost call this you can't believe that things like this happen today, every single little action, every decision that was made, everything that you've already done previously, once you're finished you have to go back and repopulate another form with excruciating detail. Here you see on the right you literally
have to go back and say these claims are rejected. These claims are objected to. It's an ex parte Quayle action. You have to go back and redo it. Again you would think that today that populating data in two, three, four or five places should not be, but unfortunately that's the situation in the environment we live in today.

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

MR. OWENS: Just so everyone knows,

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

One of the things that's new particularly to the federal government for those of you who have been in industry in the last 10 years that's not so new is the type of development methodology that we're going to be employing here in this systems engineering effort. Vivek Kundra our federal CIO and his staff over at OMB, that's the Office of Management and Budget, are taking an active role in helping us figure out the best way to bring this methodology that I have used in my previous life outside of the USPTO here and that's called the Agile Development Methodology. There
are several interpretations of this methodology which I will not get to. What it speaks to is the selection from driving a prototype which can be looked at and viewed and played with had commented on to very rapidly iteratively making small changes to it to get to the product that you want. Software development in the past which is the common methodology used by the federal government today is called the waterfall method. You build up this great big momentum, this huge amount of documentation, you document the entire system end to end and then you push it over the waterfall and hope by the time it hits the ground it's done. That sometimes works, sometimes doesn't.

Unfortunately, halfway through the fall you realize it is or is not going to work and by that time you've spent so much time and so much money it's hard to correct the course if something is wrong with the project. Industry figured this out about 10 to 15 years ago and started developing other models. The agile model has been in wide use particularly in the last 10 years.
What it says is instead of trying to do this huge thing at once, why don't we break it apart into smaller chunks? So instead of one big project you're doing, maybe you're doing 50 small projects and if two of those don't work to make the system then you don't lose the whole, you only lose a small part. It manages your risk better, it provides a higher level of quality and it provides the opportunities for both customers inside and outside of our organization to make comment on the project so that we can more dynamically adapt. Because no longer are you waiting for this big push and features and functions you can get only once a year, but you can get iterative development to happen on a monthly cycle or bimonthly cycle. The system will evolve over time through these rapid iterations. I'd be happy to go on a little more about it, but it is one of the things that we are looking to reduce our risk here at the agency while making these very large changes to our systems.

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

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

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

A couple of highlights. EFS-Web which is one of the most unstable projects that I believe we have here not by its nature. EFS-Web is actually more stable than you might expect. It's the surrounding systems that are connected to it that are less than stable which bring EFS-Web down. This is that web, that glue that I spoke to you about in the past where systems are connected to one another and the weakest chain in the breaks and they all collapse. We are in the midst of deploying right now a separate EFS-Web, what we call in the industry instance that will allow you to submit even if the main instance goes down,
adding a little bit of redundancy for a very little cost. We don't want to make huge investments in the current system, but the system fails so often and rights could be lost which is a serious concern for the whole office including the OCIO. So the separate instance will be able to take those submissions appropriate and that will be going live here shortly. You'll be seeing an announcement. It is in production and in test, and as soon as we are satisfied with it we're going to stand it up and announce that it's available.

The MPEP. I was originally going to pronounce it MPEP but people me told me that's not right. Engineers, at least computer scientists, like to make words up, but it's the MPEP. I understand that. We are going to reformulate the MPEP in an XML tagged format so that we can put up on the web in a little more easier than it's encoding today because we do understand that format matters and allow it to be not only used inside of our applications more dynamically so
manipulating the text is a little easier rather than seeing just the images of the document, but also being able to post it on the web as well as accept comment on it which I know is Mr. Kappos's goal through a wiki or blog or a discussion form type environment.

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

MR. OWENS: I believe it's the same thing. Some of you may have heard about the no cost dissemination contract. There are actually two of them. I had spoken about it before. The first one, the interim contract, we fulfilled with the sole source selection of Google. The other one is about to be rereleased in RFI form because we did not have the funds this year to host all of our data in bulk and that was a directive by the President to Mr. Kappos. We found an interim solution of hosting all of our bulk data. I have
good news. All of our bulk data that we currently
well has been received by Google. They have
posted it. We are testing it. And they are going
to host that bulk downloaded data for free for
anyone in the world who wants it. So that's good
news.

MR. KIEFF: Just a quick follow-up.

Free is always a funny term and everybody's big
boys and girls doing stuff for their best
interests. Then I start to think to myself why
would Google do this? What Google's business
model is in other segments of the economy is it
wants to know what people want to look at and when
and why so that it can then sell the information
about who's looking at what and when and why to
other people, advertisers. In this setting it
strikes me that there would be really useful ways
to get competitive intelligence about who's
interested in what technical information or who's
interested in what business information by simply
knowing search patterns for bulk data. Who tracks
those search patterns in this relationship and who
gets access to that search pattern data and under what terms?

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

MR. KIEFF: I get that.

MR. OWENS: I understand what you're saying, if you'd just give me a moment. Google in our agreement has agreed once it's up and available to release as they obtain the information within a very small window, we're talking a week to 2 weeks, everything to the general public. The amount of time that would be necessary for us to put it on a disk or other media, ship it to them, them upload it, test it and put it out there is a very small window. What any individual company does with that data just as
they would be purchasing it today whether they're searching it or not, how they're loading it, how they're manipulating it, whatever patterns they find off of it is up to the companies that decide to download the data. We do not track what people do with the data.

MR. KIEFF: But they do.

MR. OWENS: The data is free.

MR. KIEFF: Right. But Google does.

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

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

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

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

MR. OWENS: Sir, please, if I might, I don't believe that I said there wasn't an ulterior motive. The service to host it for us for the public for free which is quite a substantial thing for me because I do not have the internet
bandwidth to do so to meet the President's requirement is free to me. They are hosting it for me. What they do with the data or if someone else hosts it in the future or if they wanted to take the data and post it and manipulate it is what they could have done by purchasing the data from me.

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

MR. KIEFF: You have a serious problem and they've solve it for you and bravo and that's great and I know that you're engaging in good faith and lots of other human beings are engaging in good faith and well reasoned. I totally get that. But I just think it's important for society to understand that our government has taken something that's really, really going to be attractive for a lot of people to look at and let
it be in the hands of somebody whose entire expertise and business model is at keeping track of how people look at stuff in order to get competitive intelligence about that looking and that that will be as a matter of U.S. national innovation policy hugely important to our national interest and as a matter of relative competitive policy among commercial players in our society of deep interest to them. I hope some thought is going maybe not by you but if this is a directive of the President then I hope that this wasn't to help Google. I hope that this was important for our society with an open consideration of the complicated costs and benefits that will flow from this although I totally recognize an authentic benefit is it makes the information storage costs of the Patent Office drastically less expensive. That I get and that's a really important good thing and that's your mission and we get that.

MR. OWENS: I'd like to clarify a couple of points. The desire to get out bulk data, bulk data files, large many megabyte-gigabyte files
available to the public was the order from the
President to Mr. Kappos. The manner in which we
did that is well documented in the selection that
we made. The President did not ask for Google or
Google alone to obtain it. That is the method by
which my office and our Office of Procurement
found is the method to make it available.

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

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

MR. OWENS: No targeted searches
whatsoever. The bulk data that we provide today in packages with no manipulation as the requirement then hosted for download by anyone.

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

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

MR. KIEFF: I hope that we in the PPAC-Patent Office universe make sure that we take seriously our obligation to the public to remind the public that it may be advantageous to them to get their own copy of this and that if they look to Google for this copy, yes, that will save them the cost of getting it and crunching it and it saves us the cost of maintaining it. All of those are good. But if the net overall systemic effect is that all searching or large quantities of the overall searching that society has done gets done through this portal, the Google portal, then the
effect will be a massive database that will be
developed about who is looking for what
competitive information about what and on whom and
there are going to be a lot of social benefits
that come from that. By the way, if you're a
social planner and you want to understand
innovation policy in America then one great place
to go will be going to Google and saying tell us
who's searching for what. By the way, there could
be real benefits. I'm not against this. I'm not
suggesting cronyism. I'm not suggesting
corruption. But I am suggesting a massive focal
point for search traffic on what most people in
America consider to be industrial secrets.

MR. OWENS: I thank you very much for
the comment. I would like to make a clarification
though that I think I just have not been able to
articulate here. When someone goes to the website
and downloads the data in bulk, they are not using
Google's search engine to manipulate the data. If
you order the data from the United States Patent
and Trademark Office today it comes packaged on a
media. Let's call it a hard drive for this purpose. To save us and the consumer base the money that they would normally spend, the same package of data in a gigantic compressed file that's been appropriately tagged and check-marked, it's been certified, is what Google will be hosting for us. The manipulation of the data does not happen through Google. Google is hosting the file for download and download only. It is not changed or modified in any way by Google. Their agreement is really just as a hosting mechanism for the package for download where I don't have to put it on a hard drive or other media at expense to the consumer thus providing it for free, and I charge up to $3 million a year for this data today because I have an organization that puts it on media, builds it and manipulates it. We want to get to a point under the presidential directive to give it away to the consumer base for no fee whatsoever, and that's all that it does. The data is never touched or manipulated at all by Google.

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

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

MR. OWENS: None whatsoever. We are
working very hard as part of the second part of
this to finish putting out the RFI to offer to
anyone to help us build the final system that hosts this data here which is the zero dollar RFI you will see coming very soon to host the data because as soon as this system is up and stood up if we get the assistance that we're requesting by any company, the Google relationship will end and then Google can attain the data the same way everyone else does. Sorry about that. I didn't know that it was going to take so long. But I wanted to make sure it was clear because it is important.

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

MR. BUDENS: Hang on because I want to get a little clarification on two things here. One is when you're talking about the bulk data, what is included in there. Maybe I missed that. I'm envisioning the patent's database as being
probably the single biggest piece of that puzzle.

Are there other things included? That goes to the issue because maybe I'm not understanding Scott's issue too much because Google has had the patent database out there for a long time and people have been searching it for a while and they could have been collecting all this data for a long time.

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

Let's talk a little bit about migrating the desktop platform forward. Many you have heard from me before when I talked about the improvements to the infrastructure that the environment here, particularly the desktop, PCs
and laptops that are used by our examiners and employees are very old actually beyond their useful lifespan. After discussions with Mr. Kappos I do believe that we are both in agreement that migrating to a facility that brings the best products available today to consumers to the desk of the examiner and the support staff that allows teleworking as necessary particularly due events like the snowstorm is where we're going. So we are going to move to a laptop environment. Many other agencies are doing this. The laptops will meet all federal security standards. They will have docking stations, the dual monitors, the setups, the keyboards, the monitors, everything an employee would have today as well as if necessary at home. But the machine itself will be available for transport when the individual wants to take it from work to home or office to office as they move which will also reduce that cost. Most importantly, it will take the 25,000 unit inventory I have today to support a 10,000 employee workplace plus contractors which is over
1.2 approximately computers per individual and reduce them to one computer. You might say that's interesting but is it going to save a lot of money? Today the cost of the licenses for the software on the desktop for a patent examiner is worth more money per year than the computer they use is worth. So when you're talking about reducing by half the cost of the licenses of the various pieces of software, it is significant savings for the agency because all licenses for the agency come out of my budget and this is a particular concern of mine because I have 2.5 times the number of licenses that I should need and as we grow at 1,200 a year or whatever it will be, examiners, this amount builds and it builds greatly.

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

MR. OWENS: It is in my opinion.

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

MR. OWENS: Actually we use what's called a virtual private network or VPN for the tunneling scenario you're talking about today through a web-style connection today that exists today. For PHP folks, patent's hoteling folks we serve them out of virtual machines in our data center. Unfortunately, due to the complexity and
the age of the software used on the desktop,
hosting it in a virtual environment costs me over
$14,000 per unit. I can buy a lot of laptops for
14 grand. So as we look at patents next-gen we
are certainly looking at reducing that footprint.
We are heavily embracing modern web-style
technologies though I do believe that there will
be desktop components for the product for ease of
use and to make sure that if people were taken
offline for whatever reason whether they're in the
middle of a snowstorm or their cable is cut or
whatever that they could continue to work which is
important. There will be some desktop presence.

We are looking at the short term and the
short term is we have aged computer equipment
beyond the 3 to 5 years useful life and we need to
bring something to help the examiner do their job.
So these laptops will be modern. We are looking
to take what we have and run it on Windows 7. We
are looking at quad core computers-laptops. We
are looking at 8 gig of RAM. We're looking at
good solid machines that will carry us forward
into the next evolution of the system. But you also have to remember that normal companies outside of the federal government usually depreciate these assets at about the 3- to 7-year mark. I set our mark at 5 years. So I assure you we did take all of that into account. I am well aware of that. We use some of that technology today but the cost is extraordinarily high for our current environment.

Lastly, a fantastic set of new. The PTO Net upgrade which brings gigabit LAN to our entire environment here in a full fiber backbone is a month ahead of schedule. That's big news considering where we were with copper and our aging network. Also in the budget I'd like to remind everyone next year is the expanding of our bandwidth in and out of our facility from a T-1 and an OC3 to dual-path gigabit right to the internet which will certainly alleviate a lot of the constraints we have on speed and performance today for the examiner. So both of these things are on track as part of the infrastructure
improvement plan that I've talked to you about before as well as others and those programs that we have continued are all on track and I think the examiner will start seeing that improvement particularly once we get the hardware deployed to them. I'm open to questions.

MR. MATTEO: Questions from the floor?

It looks like Esther is ready.

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

MR. OWENS: Actually, design aside, it was a big thing to move from a completely hand-done website to one that's built in a content-management system. You didn't notice that on the back end, but I can tell you that the
environment is much more flexible now. I know Mr. Papas, Mr. Kappos's I think chief communications officer, is that his title?

MR. GILL: Senior adviser.

MR. OWENS: Senior adviser to Mr. Kappos is looking at redoing the UI. The UI that you see there was a product of the previous administration. It is much easier to manipulate in the content-management system. In fact, the content of that site itself just the content has been totally turned over to Mr. Papas, the Patent Office and everything. The CIO no longer sits in the middle of any of the content. The CIO's office as I have constructed and that already existed actually is in charge of all the infrastructure and making sure that it's properly supported but not the content, look and feel. Though I will help facilitate it, it is flexible and ready to change and I know Mr. Papas is looking at making it more user friendly. The good news is though what you pointed on, and thank you very much for that, is our old site was not
regularly scanned by Google. In fact, we
prevented it. In this new infrastructure on our
modern hosted environment using all the latest
open-source technologies on a very standard
scalable platform with the content management
system, we have opened ourselves up so that Google
can come in and crawl is nightly which was it
seemed like an archaic achievement given where the
rest of the world was, but given just a year ago
that was not possible here at the USPTO. Everyone
else, Microsoft, Yahoo, Google, all of them can
crawl the site, AOL and so on.

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

MR. GILL: Because there are some
scheduling things, a little more of the specifics
are going to be covered in the executive session
later. These are terrible problems. You're
right. This is terrible. Doesn't that suck?

MR. ADLER: It's terrible.

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

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

MR. GILL: Absolutely.

MR. ADLER: Thank you.

MR. KIEFF: Just a quick follow-up.

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

MR. GILL: I agree with you. I would
take a step back. I don't want them having to
code in anything because I agree with you 100
percent that one of our key elements is going to
be implementing or allowing for a better use of
tools that are currently commercially available.
Right now you can buy tools off the shelf that do
these checks for you, that do the validation for
you. The problem is right now we just turn them
into dumb images and just process them. And these
tools, there are studies done that they can save
between 5 and 7 hours in some cases per case. So
for small inventors, for especially independent
inventors are saying we can reduce, multiply that
by $500 per hour, we're looking at significant
savings in implementing tools. The key question
is getting those in the door and making sure that
the data that we're dealing with is intelligent.
Critical to that and a separate project is
regarding the updating of our XML standard in
terms of what standard are we going to use to get
in the door? The key leading factor here just as
we saw the pain for the examiners, the key thing
is what is going to make it easiest for the
applicant community to migrate over to a solution
so that when we throw the switch and when we start
migrating over that they don't have to be hard
coding anything, they're not going to have to
change much. There might be some small changes
and we'll hand hold all the way through it, but
the concept of a bunch of wizards and templates, I
think that's one of the critical reasons we failed
in the past when we tried this back in 2001, for
that perspective.

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

MR. OWENS: Thank you.

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

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

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

Today I'm going to give you a real quick
background and update as to where we are with the peer review pilot also known as peer-to-patent. You may know or recall that in 2005, New York Law School along with a number of companies approached the United States Patent Office with the peer review concept along with a number of other concepts, and between 2005 and 2007 the office worked with New York Law School to come up with a pilot where volunteered applications in certain technologies would post on a public website for submission of prior art. The prior art would then be vetted by the peers, the up to 10 top pieces of prior art would then be given to the examiner for use in normal examination. The 1-year pilot started in the computer hardware and software area which is where I was the director so all the applications in computer hardware and software. The reason we selected that is a result of some feedback from the community that we weren't finding the best nonpatent literature, so that's we started there. After 1 year we opted to continue the pilot in another area that receives a
lot of nonpatent literature and that's business methods, so it turned out to be a 2-year pilot. Funding for the pilot came from donations from corporations and nonprofit organizations. So the USPTO in the 2-year pilot didn't put out any cash, so to speak. We just had to put in some time here at the office.

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

We did have over 600 pieces of prior art
the majority of which were nonpatent literature submitted in these 189 applications. Just to give you a little background on how we did this and tried to make it a pure process is we had the examiner with the exception of maybe cases do their job up until preparing the first office action. So the examiner prepared the first office action in normal course. They did their own searching and they prepared the office action. After they submitted that office action to their supervisor, then they were handed what the peer reviewers found. So the examiner then had to go back, evaluate what the peer review process located and then reevaluate their position whether to keep it where it is or to change their office action in view of the new art that they came across. The results were in 15 of the 189 applications the examiner actually changed their office action to art submitted by peer reviews. So in essence the peer reviews found art that the examiner determined was better than what they had applied. In those 15 applications, however, none
of them were allowed and then the examiner rejected them. Just so you know, there was a rejection, the examiner opted to change their rejected to include the art that the peers found. Because of the process, in another 15 cases the examiners had already found that art and the peers found the exact same art so that there was an overlap, the peer found art the examiner had already found. So in 15 applications that took place. So there were 30 applications where the examiner ultimately used peer reviewed prior art.

Some of the things we found doing this is that participation in the pilot had a lot to do with the USPTO's publicity. The peer review pilot did hit some major media sources, the "Washington Post," the "New York Times" and the "Wall Street Journal." A number of large publications did articles and numerous blogs, et cetera. But what we found is that when we mailed out 33,000 letters to attorneys who had applications that would qualify, we immediately got 100 consents within
about a month to a month and a half. So there was
a one-to-one correspondence with publicity by the
office, direct publicity by the office, and
participation. That we found.

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

MR. KIEFF: Just as a quick follow-up,
do you think that's just because they're coming from third parties? If I'm engaged in the application process, I have the whole inequitable conduct Damocles hanging over my head so I know what I think is most important and I'd like to tell you what I think is most important but I know I get very little benefit for saying that and the cost of me isolating or recommending is massive risk so I'm going to give you an encyclopedia of information and hit you with an information overload problem. Whereas if I'm a third party there's really no benefit to me to overdisclosing, quite the opposite. The whole reason I'm engaging in this process is because I'm trying to solve your information overload problem and I have no penalty, so it's simply because I happen to be a third party I'm actually contributing potentially helpful information.

MR. HARVEY: I would say most likely that's the case. It was anecdotal from the examiner's position, a very honest opinion of the examiner that they noticed. In addition, we are
going to be conducting an external stakeholder
survey as well, just a general survey. That's in
process right now. It's taking a little time to
get that approved.

There are other considerations. As I've
already mentioned, the USPTO gained considerable
positive media attention and I think in general
I've read a number of blogs over the last 2 to 3
years on this process and I've been involved the
whole time and very few negative. I would say
neutral to positive have been the responses that
I've seen in the blogs and in any news media,
skeptical, if you want. It was on whitehouse.gov
highlighted and the government initiative website
so there was a nice piece on the website at the
White House. In addition, JPL and IP Australia
are currently conducting their own pilot. IP
Australia is right in the middle of their pilot.
I think they've accepted 31 applications into
their pilot. They're now into the process of the
second half. JPL I'm not sure they've launched.
Just as a side note, they did their own pilot,
their own version of the peer review pilot. They didn't use the same interface that we had used. They conducted their own pilot, very small scale. They've now gone back to New York Law School and they are going to do another pilot very similar to what we did, same structure, same website, same software. So there is some foreign attention. The U.K. Patent Office was about to launch theirs and then they got hit with the same budget as the rest of the world so they had to back out.

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

MR. ADLER: Did you track the number of different entities that provided third-party submissions?
MR. HARVEY: Yes.

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

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

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

MR. HARVEY: That's what I meant. Those that participated as a peer and actually turned in prior art, they represented a broad spectrum of folks from academia. Some were students. Some were professors. Some were members of large corporations. This website allowed anyone to anonymously submit and no one did that. And most put their bios onto the website. So we could track that very easily and we found that it was a
very nice spread of people who had submitted. It
wasn't one particular area.

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

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

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

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

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

MR. KIEFF: But let me just push back on
that a little so that I understand. In what way?
It sounds to me like you just told me that for all
but, what was it, 7 percent? So all but 7.9
percent it was actually having no change in the
mechanism. And then for the 7.9 percent it was
changing the mechanism but not the outcome. These
were as you said going to be rejected anyway based
on other art. All they did was switch the art.

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

MR. KIEFF: I hear the rhetoric. Please
don't hear me as being an attacker or a skeptic.

I want to be educated about what exactly is the
mechanism by which you're getting better.

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

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

MR. HARVEY: The concept.

MR. KIEFF: The mechanism.

MR. HARVEY: Yes, I'm sorry. I was
answering as the concept. Concept-wise this would

had everyone played --
MR. KIEFF: Phone calls were getting through and things like that.

MR. HARVEY: Right.

MR. KIEFF: I get that.

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

MR. HARVEY: Correct.

MR. ADLER: I rest my case.

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

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

MR. MATTEO: Let me ask you a question if I may. How many people or how many applications were in this sample size?
MR. HARVEY: 189.

MR. MATTEO: 189?

MR. HARVEY: Right.

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

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

MR. BUDENS: You need to go further than that, Scott, because there is an overall cost. There was a cost to the pilot. There's going to be a cost going forward with this even more. In
the pilot from my understanding, it was fairly heavily subsidized by some of the companies and by New York Law School. They wanted to participate so they did. And even to the PTO, even the investment of time by itself, time is mine, that's costing the agency something. We had to do according to this a lot of advertising in order to get participation. Advertising doesn't come cheap. I guess my question is going even deeper than yours which is how much did we spend as an agency in the first pilot? And if we're going to expand this, how much are we planning to expand it because I don't see the bang for the buck of this pilot at all.

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

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

MR. KIEFF: This is not an attack on you folks. It was well worth trying. But an amazing amount of popular discussion has occurred about this. It happens on the Hill, it happens in
academic debates, it happens internationally and it's all talked about as though this is a really big success story in the patent system. I'm all in favor of academics getting academic kudos and kudos to this academic for getting kudos for herself and her school. But do we really want to bend the minds of the patent operators around pumping PR into a couple of NGOs and law schools who have a particular message to grind or, worse, just their own kind of need for advertising? We just gave an amazing amount of free advertising to those people and that organization. We gave an amazing amount of free advertising to the "open source patent movement." Why are we doing that? If we're doing that on purpose, fine, but we should then evaluate that, and if we're doing it by accident then maybe now would be a time to stop.

MR. ADLER: I don't have any problem with the idea of allowing third-party submissions as part of the patent reform bill. I think that's perfectly fine. I just don't know that the
peer-to-peer pilot has necessarily demonstrated anything.

MR. KIEFF: Agreed.

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

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

MR. STOLL: I'm not as certain as you guys are at this point, and let me give you a
couple of reasons. I will acknowledge as most
people can evidently see there didn't seem to be
any case that was rejected that would not have
been rejected already and that is a telling
statistic. I will acknowledge that. But I am not
as ready to abandon the concept yet as some of the
other voices around the table seem to say for
several reasons. One is it seems to me that in
some of the very hot areas of art there's a lot of
competing companies that do review applications of
their competitors and are possibly aware of prior
art because they are competitors that the PTO may
not have as ready access to. So conceptually I
think there is a possibility that this is a tool
that could have utility in some very, very hot
areas.

The second point I would like to make is
I understand that while there were only about
7-point-some percent that were found, references
that were found, I'm not sure that the references
were not better, that the rejections that were
proffered by the references cited were not better.
And I also believe that we could do a little more
in analyzing what we were getting and being more
objective with respect to the analysis of the
comparison. So I think it's worthwhile because of
those reasons to take a broader look at this to
see whether or not in fact there is a benefit and
maybe expanding it out to some other hot areas of
subject matter and seeing whether companies are
interested to proffer references that might be
valid. I don't want to give up on it right away,
but I again see your point that it has not shown
itself yet to have significant utility.

MR. FOREMAN: I want to jump in and
first off reinforce what Bob said. I think the
data that was obtained isn't statistically valid.
You're looking at a very few number of cases. And
Robert, to your point, the cost. What if we're
looking at this from a completely different
perspective? What if the cost of this is neutral
and that the cost of submissions when you find
prior art is actually paid for by the company that
finds this reference? It would make sense for a
competitor to submit art to the examiner that
would prevent a patent from issuing because there
would be a lower cost to the office and that
competitor to try challenging that patent after it
issues later when they come and say look at this,
we knew that this existed prior to examination. I
think we should look at this from other
perspectives and gain outside feedback and find
out maybe there is a cost when you submit the, the
first art that you submit is free but then you're
submitting additional art there's a cost to it and
so it doesn't burden the office but it does
provide the best art for the examiner when they're
examining that application.

MR. BUDENS: It's an interesting
question, Louis. If it were truly cost neutral I
would have a lot less of a concern about it. I
don't necessarily think it's ever going to be
exactly cost neutral because I think at some point
you're going to have to account for examiner time
to deal with third-party submissions. Going to
Bob's first point, I think if these companies that
are tracking other competitors' work, they're already motivated to do that. So the question is do we have to spend any money advertising to convince them to do what they're already doing and if we're spending money there I don't see that that's necessarily money well spent. I do agree with you if it's cost neutral it becomes much more reasonable to sit there and expand it out more and see where it's going, that it may have other benefits. I'm just having a hard time right now seeing that this one is going to go anywhere that improving third-party submission wouldn't take us anyhow.

MR. KIEFF: Remember there are a couple of other things you can do. You can say to yourself I know my competitor is doing work in X area. They're probably filing patent applications. So I'm going to post on my webpage in a way that I know an examiner would easily find when she goes out on the net and does a search. So I'll have tags on my webpage. I'll have incentives and technologies that fully enable me
as the competitor to do this outside of the office. The question is what is the marginal benefit of this program over that?

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

MR. MATTEO: For me I'm back to the same question. I think this was an interesting experiment. It's unclear to me whether there is any meaningful result from it. There is some anecdotal information. One of the things that you learn for example in research because it's an uncertain proposition is you want to fail fast and you want to learn from it. It has to be a constructive exercise. It's unclear to me that this exercise was framed in a fashion where you could go through it with specific goals and objectives, what measures needed to happen for there to be a telling result. So from my
perspective if we were to do this again, it should
be under the auspices of a plan that has laid out
for it what is a meaningful result and how do we
get there? And to Robert's point, understand the
attendant costs for reaching that. I don't feel
like we have that. We're talking in very vague
and intuitive terms which is fine, but this kind
of an exercise I think needs to be better
grounded.

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

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

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

MR. STOLL: That's a very good point, but we actually don't know what the final formulation of any passed bill is going to have in it, so I don't think we abandon improvements that we can make to the system waiting for legislation. I do share your belief that something is about to
come out of S 515 possibly before Memorial Day but
that still has to go through the House and I don't
know what the final formulation is going to have
in it. So I think that it's incumbent upon us to
do what we can to move the ball forward even while
that's going forward.

MR. KIEFF: But at the same time, again
now I'm really going to sound like a skeptic so
here it goes, we are a bunch of human beings
sitting in the room of the United States Patent
Office and the United States Patent Advisory
Committee, supposedly the government experts on
this question, and while part of our government is
apparently very close to writing a law on this and
apparently so close to writing a law that we may
have to adapt to it and yet we don't know what
results we have, we don't know what the law is
going to be, and that means that there's no
possible way they could know whether it's even a
good thing and yet it's all going to happen. What
a tragedy for society. You don't want law to be
made when you're shooting in the dark with
everybody wearing blindfolds. This is just really
an embarrassment for our patent system. We should
be able to give intelligent advice as the expert
government that makes
laws could help us or hurt us. We just learned
that we don't know so how could they know?

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

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

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

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

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

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

MR. BORSON: I'd provide a comment that in a sense there is a timing issue, there are two
parallel tracks going on. One of them is the
pilot that we've just talked about and the other
is this whole independent legislative push. It's
not a bad idea to have two experiments done to try
to find the same result if you can. We understand
the limitations of this peer-to-pilot program with
the PTO. We've spent the last half hour
discussing it. We don't know what the
implications ultimately will be, but why not have
another experiment as well so we don't need to
either say yes or no to this?

MR. MATTEO: If I may, and I'm going to
speak for Scott and feel free to correct me. I
know you feel free even though I've given you
leave. I think we're distinguishing between a
guided intention which feels like the trajectory
of legislation versus an experiment to divine the
guidance for the intention. I'm the latter side.
I think that's where we need to go. I don't feel
like we've done that. I would amplify what Scott
said. The message from the Hill to us should be
where is my grounded guidance on this?
MR. KIEFF: The only reason I'm saying what I'm saying is I'm hearing the opposite message. When I go to academic meetings and when I hear conversations, everything I'm hearing is peer-to-patent is up and running. It's already working. This is a really important public policy change. I got to think that the good-natured folks in our legislative community who took the time out of their busy schedules to draft this legislation did so precisely because they thought someone out there in the world had already shown that it worked and they wouldn't have chosen to invest their limited resources and political capital unless someone had got them to that view. All I'm saying is that wasn't us because what I just heard us say is we can't make a recommendation yea or nay, we don't actually feel confident in our data, we're still tinkering. Maybe we should tinker more. Maybe we should try experiments in parallel. I'm not trying to attack. All I'm trying to do is say the train may have already have left the station and the chief
engineers on that train who were steering it
thought we sent them off with a really good cargo.
The cargo train is empty. There's no net anything
we can say on this is what I'm hearing.

MR. MATTEO: Comments? Responses?

MR. MILLER: I'll say something. I'm sorry, Scott, but I think you're a bit naïve on the legislative process and what goes on up there.
I think most of us believe that having an open ability to submit prior art to the Patent Office is a good thing and right now we are prevented from submitting prior art that we would like the examiner to consider during the examination process. This peer-to-peer was a narrow study that we tried in a particular art area. We haven't tried it in Group 330. We haven't tried it in 1200. We haven't tried it in a lot of other areas that are very competitive, narrow art fields where competition knows what the art is and likely to cite it early to prevent the patent from ever issuing. So, yes, we don't have the data, but intuitively those of us who are living within the
system believe that any opportunity we have to
submit new information to the office and have an
open, transparent process is of benefit. So I
think we're talking two different things.

Peer-to-peer is one thing. The ability to submit
key prior art to the office during the process is
a wholly second issue.

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

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

Damon I think invited me because he
wanted me to be controversial, so I'll just start
off by saying something about this peer-to-peer
review process. Everyone missed the main point of
it. It's the most fantastic marketing tool you
could possibly have. It cuts out all the whining
about prior art that doesn't get picked up by the
examiners. If you think about it, a maximum of 8
percent of the cases had prior art that examiners
didn't find, and we don't even know what the
relevance of that is. On top of that, I've been
in the software business for a long time, the
patent business for a long time, there are a lot
of people out there who are complaining about
prior art that doesn't get submitted. Now you
have a perfect mechanism to do that. I just
thought I'd add my 2 cents to that.

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

When I was a little boy one of my
favorite stories was "The Three Little Pigs." I
think "The Three Little Pigs" apart of course from
the wolf falling into the pot right at the end
really illustrates what we're talking about over
Here. Most of us know that patents and patent rights particularly can be thought of similar to houses, real estate. The walls of the house that keep out the bad guys so to speak, the strength of those walls, that's what we talk about as patent quality. I think we're all very much aligned when it comes to patent quality. We could have houses of straw and we know what happens to those when it comes to patents. We could have houses of sticks. Of course, we could have houses of bricks. The important thing about this is it's the construction of the house that leads to patent quality and that's what I'd like to spend a little bit of time on today.

Patent quality is very hard to define. It's a bit like the famous Supreme Court decision about pornography, it's hard to define but you know it when you see it. I'm not going to spend a huge amount of time trying to define that because we can go for an hour on that one, but I'm going to try and look at some of the techniques we could use to improve it.
Mr. Adler, thank you very much for this comment from the PPAC meeting last year. I think the most takeaway from this comment is garbage in, garbage out. With the garbage in, garbage out, there's the garbage out side which is the Patent Office control, examination primarily. Garbage in is the applicant's control, not just the inventors but the companies that are driving the patent filing program. It turns out that we're going to speak a little bit about PTO control and much, much more about applicants' control.

Just very quickly about PTO's control. What we are finding as applicants and those who represent applicants is that there's almost a desperate cry from help from patent examiners who are becoming what I call almost process pedantic and we can't work out whether that's something from inside the Patent Office or whether that's because of the massive backlogs where we get rejections like this or obviousness rejections like this which are really basically saying it's obvious because I say it's obvious. I'm not going
to comment on the merits of this except to say
that this seems to me to be a cry for help from
examiners, so the question that we have got to
deal with is how do we solve this backlog problem.

This is a PTO statistic so I'm not going
to query it. I'm just going to work with it. In
the last 8 to 9 years we've seen a drop from a 72
percent allowance rate to a 44.2 percent allowance
rate. I'm not going to for one minute suggest
that quality is proportional to rejection rate.
Indeed, I would think that if you look at the
appeal statistics, applicants don't think so at
all. This is what's happening to appeals. We're
seeing a massive ramp-up in the number of
appeals. Percentage-wise it's just frightening.
What I think we're hearing from applicants is that
at least for the good quality cases because
appeals are quite expensive. People are not
agreeing necessarily with the high rejection rate
that they are seeing. People are really beginning
to put their money where their mouth is. By the
way, for those of us who care about the 20-year
term if someone wins on appeal, that gets added on
the back end of the patent so for some of us who
represent applicants with valuable patents isn't a
bad technique so this pendency is actually going
to create a bigger problem from the point of view
of troublesome patents many years down the line.

Back to what I was trying to say.

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

MR. STOLL: I noticed you were talking
about the number of applications that are being
appealed, and they have significantly gone up.

But the affirmed or affirmed in part ratio is
still where it usually is, maybe even slightly
better at around 72 percent. If that's the case,
how does that factor into the situation?

MR. OPPERMANN: I have two comments about
that. Firstly, the affirmed rate, if it remains
constant, the number of cases not percentage, the
number of cases that are going to come out
unscathed after appeal or slightly changed after
appeal is still going to go up. If you look,
statistically the percentage increase there is
dramatic. That's worse than the property market
in 2006. The other thing is that the affirmed
rate at the moment is based on appeals that were
filed 2, 2-1/2 to 3 years ago, not 2009 appeals.
So 2009 type of appeals I think we're trying to
see a pushback on the it's obvious because I say
it's obvious type of examiner techniques which are
based on KSR as opposed to the old teaching
suggestion. But I don't want to go into that
whole discussion because that's the PTO's and I'm
going to leave the PTO's management to themselves
and not to me.
However, on the applicant's side I have some thoughts. This comes from Mark Lemley. I think he hits it exactly right. There is a massive mass-production business in the patent world and I don't care what mass-production, particularly when you have professional services associated with it is going to lead to lower quality and we're going to take a look at what that's about. My first question is, we've seen this rejection rate or lack of allowance rate or whatever you want to call it graph from 72 percent down to 44.2 percent. The question on that is how much of that is applicant garbage driven? We can't tell that by looking from the outside. I don't think you can even tell that from looking from the inside. But there are a number of statistical data points that suggest there is quite a large percentage of that that is applicant driven.

MS. KEPPLINGER: I would beg to differ because a significant amount of that is the increase in RCEs which added to the apparent drop
in allowance rate because it artificially raised
the abandonments which are part of the disposal.

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

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

MR. OLECHOWSKI: That was in 2000?

MS. KEPPLINGER: No.

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

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

MR. STOLL: Not this one.
MR. OPPERMAN: I didn't say this one.

I'm not arguing with the previous administration.

I'm taking the data that I'm given and I'm drawing conclusions from it. So if that's all RCE driven then why don't we say that? But my guess is that this is not the case.

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

MR. KIEFF: If you're saying that what is happening is that the world of patent applicants are saying to themselves it is worth it to us to file large numbers of low quality patents and get them issued, at least I've been predicting that in all of my published work for a long time and I don't think I'm the smartest guy in the
room. I think lots of other people have been predicting that too. If you make patents not very enforceable in the courts, then it becomes very worthwhile for companies not think of their patents as really the tools that the kind of small- and medium-sized players bet their companies on, but instead to be tools that the large players use to swap traunches of their companies with each other or to engage in essentially collusive behavior, behavior that actually we see throughout the Japanese patent system, a system of large numbers of low-value patents but the U.S. patent system used to be somewhat distinguished in the world as having a large number of low-value patents but also a small number of high-value patents. I think the story you're telling us which is a story I happen to agree with is that the U.S. patent system has become like many others in the world and patents are not just kind of not tools for protecting your space or for building different business models that allow small- or medium-sized players to trade
with each other or to be acquired by others. Instead, patents are just tools for very, very large players to collude with each other.

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

MR. KIEFF: I agree with that.

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

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

MR. OPPERMANN: I absolutely agree with you. That's exactly my point so I wouldn't agree more, that we are at the big corporate filing level just doing this what I call blizzard filing, masses and masses of low-quality patents. The question we are trying to address here is how do we improve quality of patents. If we're not interested in improving the quality of patents, I should just sit down and people can enjoy the rest
of their lunch. But if we are interested in improving quality of patents, are there things that we can do as a profession or as the Patent Office that could maybe change that? I agree. People point to the Japanese system. I'm not a Japanese patent attorney so I don't want to comment too much on that system, but the European system for instance does produce high-quality patents and what do they do that we could do as well?

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

And there's a societal benefit that we should think about here as well. What is
happening with a lot of these mass filings that companies have been doing is they're starting to offload them. So when you find that you've been attacked by a portfolio that's been licensed against you, you'd be amazed at how many large companies' patents names are on the outside. That would suggest a bunch of not very valuable patents to that company.

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

Right?

MR. OPPERMANN: Clearly not because the
nonpracticing entity doesn't have any products.

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

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

Let me just comment on NPEs. I presume
you mean people other than universities, research
organizations, people who have invented the
technology themselves, you're talking about people
who buy patents merely to go and get licenses. So
if we're talking about that group of NPEs,
firstly, they need a source of patents. One of
the sources of those patents are the companies
that have produced large volumes of chaff. The
other thing is the companies that are moaning the
most about NPEs who keep on saying and have in
fact started driving some of the patent reform
keep on saying that there are too many patents for
them to look at to do product clearance searches
are in fact exactly the companies that are doing
this so that they are the biggest cause of the
problem.

MR. ADLER: No disagreement here.

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

MR. MILLER: May I ask you one thing?

You threw out a statement and I want to see if you
have any data to support it. You said that
European patents are higher quality than U.S. patents. What's your basis for that statement?

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

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

MR. ADLER: There you go.

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

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

MS. KEPPLINGER: And the EPO admitted to me that their error rate even though they don't
publish it was about the same as the USPTO's. It
was about 5 percent. That's what they admitted to
me.

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

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

MR. OPPERMAN: I'm sorry.

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

MR. OPPERMAN: Agreed. By the way, when
I have 8 percent, I was just really impressed. I
was really impressed. What I'm saying here is
let's assume for whatever the patent system is a
given error rate. How do we improve the quality
by dealing with what comes in on the inside or
comes in from the applicant side, not what's
coming out at the back end of the Patent Office.
MR. BORSON: There's one thing that is really I think very important to understand, that a lot of the conversation about quality is in an issued patent and I think the business reality is that there are many different aspects of value created. In some cases such as the mass filers, they understand their business model is I have 1,000 pounds of patents, you have 800. That's a 5 to 4 cross-license revenue. There is no diligence. It doesn't matter what the quality is of the patent. All I'm trying to suggest is that there are many different reasons for people to file an application let alone prosecute it, let alone obtain a valid patent, let alone license it, let alone assert it, and that for people like the mass filers, their business model is not really about the intellectual property portfolio necessarily at all. It's about advertising, the CEO goes to the meeting and says we filed 1,000 patents last year. Yes, well, we filed 5,000. So there's that kind of contest at that level of having nothing whatever to do with patent quality
or the level of innovation. Then the decision to 
prosecute is a whole different matter. The 
decision to file a utility application, to file a 
PCT and so on. All I'm suggesting is that there 
may be valid reasons why somebody would want to 
file a large number of patents or weak patents or 
something simply to make an advertising pitch, 
yes, we do have a filed patent application. We've 
got five or ten. That's my only comment, that not 
everybody is in it for the same reasons.

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

Let me just look at some of the national 
statistics, this by the way from 1996 to 2007. 
You can see the curve for number of patent 
applications filed or at least it's kind of 
straight line with some bar graphs underneath. 
Then R&D dollars that are spent. These are U.S. 
companies. U.S. filings, U.S. companies. You can 
see that the number of applications, the slope of
the line of the number of applications being filed, far exceeds the slope of the line of the R&D. There's another way of putting this. Take a look at this. Increases of R&D filings which is the blue line to increases in patent filings. We actually have increases in patent filings when R&D budgets decrease. Damon?

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

MR. OPPERMAN: Damon, that's a good point. Your mike wasn't on so I'll just repeat what he said. He said wouldn't that be attributable to the fact that during downturns there's more incremental innovation? I think that's true and that certainly could change the status somewhat. The one thing that I would say though is that this is national data in every single industry and if we assume that what we're
looking at here is that the U.S. is only moving
toward incremental improvements when we have a
real problem from a technology development point
of view. Inside this there is a lot of bigger
than incremental improvement in innovation. We
can just see it happening in the U.S. all the
time.

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

MR. OPPERMANN: In life sciences but not
in computers.

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

Anyway, the other thing is the filings
where you have RCEs being filed went up incredibly
in this decade. Many of those may be the same
invention but people feel that they really want a
patent on it so they had to file multiple times.
MR. ADLER: Plus you got a year delay.
I don't know what you're counting here, between a
provisional and a regular and you say you got a
time shift issue too.

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

MR. ADLER: Thank you.

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

MR. KIEFF: My guess is everyone in the
room is going to say, yes, that's part of what we
mean by massive numbers of low-value patents and I
think many of us have long been talking about
wouldn't it be nice if you had a patent system
where applicants took their time to write deep,
detailed-rich disclosures and then focused on
those and then the office gave them meaningful claim scope and then there were allowances and then they took those patents to courts and then they are enforced and the enforcement basically was fairly predictable because you could tell what was infringing and what was not, you could tell what captured prior art and what didn't and you then basically didn't worry about the doctrine of equivalents and you were kind of done with your analysis. That was the patent system we had from around the mid 1980s to the mid 1990s. But today you would be ill advised to tell your client to file one of those disclosures because your client would look at Rochester and Ariad and say those patents will be tossed under 121-1. Or you look at Bilski and remember back to Deer and Chackobardy and the twinning that went on in the debates about patentable subject matter between the electronic arts and the biological arts and say as one falls the other falls too and say if we managed to survive Rochester and Ariad we'll get eaten alive in Lab Corp II or Bilski or what have
you. And by that way, that assumes we get out of the office. The office is not going to allow any of these broad claims it will say it's too hard to examine, as Esther keeps pointing out, you're going to have to refile 80,000 times so that we can chew on this massive application. And again in good faith the examining corps will say massive applications take up lots of time so if you pay us massive amounts then we can handle it. All I'm saying is all of the changes we've been talking about in the system have I think created the behavior you're talking about but it seems to me that that's the system has meaningfully changed.

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

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

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

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

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

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

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

MR. MILLER: I don't think we're paying anybody any less.
MR. OPPERMAN: Take a look at this.
These are AIPLA statistics.
MR. MILLER: That's per application.
MR. OPPERMAN: Thirty percent less time
is being spent on an application today than what
was done in 2000.
MR. MILLER: How many are they cranking
out? Is each person doing more or less would you
say?
MR. OPPERMAN: It doesn't make any
difference. Total number of hours into an
application. If you put in 30 percent less time
into a patent application, trust me, you're
getting worse quality I don't care how bright
attorneys think they are today.
MR. MILLER: No, you're not, because of
your efficiency in how you write things. I can
cut and paste an application and add a paragraph
with my new feature in 10 minutes. It's not that
hard.
MR. KIEFF: Go ahead.
MR. OPPERMAN: Here is what I would like
us to see if we could talk about. One, we need to
try and work on changing executive mentality. I
think there's a message for the PTO. The PTO can
be a bully pulpit on this one. Most of you laugh
and for those of you who like to see large
companies filing 5,000 applications or 1,000
applications a year, you're probably not going to
like to do that. But I think if the Patent Office
for a start started saying focus on filing quality
inventions and really started talking about
quality, I think we would change things. I think
CEOs would go to their patent counsels and they
would say to their patent counsel what is this
junk that you're filing? Why do we have so much
stuff? Please explain to me the relevance.
There's not a patent counsel today in the large
companies that can easily point out, particularly
not the high-tech companies, the relevance of
their patents.

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

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

MR. OPPERMANN: The issue from a quality
control point of view has got to come in part from
the companies. Certainly if you have a large
company as a client and they say we want 17 patent
applications filed in the next 2 months and
they're a large, important client, obviously you
as an outside service provider are going to
respect that client's wishes.
MR. ADLER: I don't think you're serving your client properly. I think you're actually just doing -- it's not correct. You're not providing good legal service to your client it you're just saying you want 17 cases? I'll file 17 cases. I think the goal should be what's your strategy? How are you going to make money on this stuff? Is this really an invention? Have you done a search? Do you know what your prior art is? And let's do that work up front and decide whether or not we have a patentable invention before I go and spend your money filing these crappy ideas.

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

MR. KIEFF: Time out. I think that Marc and I have had lots of conversations about this. We see totally eye to eye on this. And yet I don't know that the people who are filing these applications today are not loyal agents to their
principals and I also think that their principals are not stupid. So in the literature that talks about patents are a waste of money for companies and they're worth less than what they cost, whenever somebody tells me that smart human beings backed up by millions of dollars in resources able to hire good advisers, when someone tells me those people are going something that's not in their self-interest, I generally think that that's because we have missed what's really in their interest. It's not that they're stupid. It's that our model isn't accurately capturing their behavior. So I think that these large entities that are filing large numbers of low-value patents and then not enforcing them, they're getting some other value out of it. The value I think they're getting out of it is what we would traditionally call an antitrust problem. The value they're getting out of it is, number one, being able to say to antitrust authorities when they get pinched by the antitrust authorities just like you did in the old IBM settlement, you ought to let me price
a certain amount above marginal costs per patent I have in which case it's a rational strategy for me to tell my patent application team if the office wants you to divide then divide and multiply because that only helps me. Then I get to say to the antitrust authorities let me price higher. So I think that's one of their strategies.

I think that another of their strategies is if very large players get caught in a deal where they are directly having conversations with each other about dividing markets or setting prices or anything like that, they have two serious problems. One, they have a hard time trusting each other in those conversations. And two, the antitrust authorities in most countries of the world will throw them in jail for having those conversations. But if instead they have huge patent portfolios and they engage in the types of swaps that Ben was just talking about before, then in fact they can swap massive quantities of information in a very high bandwidth transmission that solves their trust problem.
They do it all in front of federal judges tried and true which drastically mitigates their antitrust problem so they have no mens rea, their CEOs don't go to jail and their shareholders don't pay treble damages. So I think that the businesses that are doing this know exactly what they're doing, they're deriving huge benefit from it, but it has nothing to do with the traditional story we talk when we talk about patents and innovation. It's a very different story.

MR. ADLER: Putting aside for a minute the antitrust issues, unless you are actually looking at your return on investment from the inventions that you're patenting, you do not know what you're doing. In other words, if you're filing applications on things that you want to manufacture and sell and do not look at the total cost of the patent against the gross profit or the market share that you're obtaining for that patent, you're playing in the dark. So what we should be telling executives and financial people who run companies is what's your return on your
investment on your patent activity? If you can point to them and say I'm getting a 35 percent gross profit on my patented products and I'm getting a 20 percent return on my commodity products, then they know exactly what they're getting from their patent attorneys and what it's worth.

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

MR. OPPERMANN: I would love to see that conversation occur all the time. My question is how do we as this organization force people to think that way? I absolutely would never suggest
that a chief patent counsel in a large company or a CEO is either stupid or doesn't know what they're doing. They know precisely what they're doing.

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

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

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

MR. ADLER: Do you know what percentage of chief patent counsels actually are patent attorneys versus litigating patent attorneys? And do you know that a lot of them have never prepared or prosecuted a patent application and that they're recruited into these companies because they work at a law firm that may have helped that company in a defense of a patent infringement
case? Those folks may be very good at managing
litigation, but they may not have any clue -- so I
wasn't being facetious before when I said that
they may not be so intelligent. They may not have
any clue about why their company is getting the
patents that they're getting.

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

MR. ADLER: They are good managers and
they do understand the full dynamic of the
process. That may be what we need to be educating
the public about and I think frankly there's a lot
of that that goes on. It may not be appropriate for the Patent Office to provide that education, but it certainly is my obligation as a practicing attorney to do that. Other associations that I belong to, I believe that's been the message that I've tried to -- and not always very popular either suggest. So I think you're right but I don't think the PTO is the place to do that. They're receiving the stuff and they have to deal with trying to do the best they can with what they're getting. It's our job, all of our jobs, to help our clients do the right thing and help them manage their businesses properly.

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

MR. ADLER: I wrote a letter to the editor. There's this thing called CHI. The "Wall
Street Journal" used -- I don't know they're still
doing it. They used to have this thing where they
would put out who is number one, number two and
number three and I would read that and I would say
it was biased toward bigger companies over smaller
companies and that's just bogus, and of course
they don't care. That's good PR. If you want to
write an op-ed piece for the "Wall Street Journal"
that says companies should be focusing on managing
their IP in a proactive way rather than a reactive
way and to be looking at this as a business, I'll
help you on that article, but I don't know that
the Patent Office is the place that should be
doing that.

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

By the way, long pendency. Everyone is
freaked about long pendency. Long pendency is the
best possible thing for patent quality and I'll
show you why in one minute. By the way, if you
want to increase quality and decrease quantity,
change the fee structures.

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

MR. OPPERMAN: I'll show you why.

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

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

Why is pendency not a bad thing? Take a
look at this. This is a classic timeline for
getting patents. We can argue about 10 percent
here or there, 10 months there, a year or two
depending on the technology or whatever. This is
a typical electronic product cycle. It takes you
about 30 months and you're at the top of your
cycle and you go down and you go into your next
cycle and if you look at the blue curve
underneath, that is your enforceable patent
rights. From a patent applicant point of view,
delaying examination makes a huge amount of sense
from a quality point of view? Why? Because when
I'm over here I know what the marketplace is
telling me what is valuable in my patents, my
patent applications. I can therefore change the
claims assuming there's support to cover what's
valuable. When I file up front here and if I've
got an 18 month pendency, I don't have enough time
to determine what's going to be a valuable
invention. I don't have enough time to build
patent claims because I can't see forward. I can
see backwards but I can't see forward, at least I
can't see forward. So over here I'm in the
crystal ball gazing mode. If we all push
everything to an 18 month turnaround or 18 month
to issuance we're decreasing quality. Remember,
the reason why we're interested in quality is to
MR. OPPERMANN: What is your definition of quality?

MR. OPPERMANN: It's good that you asked that.

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

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

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

MR. OPPERMANN: It's the quality of the patent claim which defines the innovation.

MR. ADLER: The claim is the claim and the claim is either valid or it's not valid. It either should be granted or not be granted.

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

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

MR. KIEFF: Just to be clear, I think there are probably a bunch of us in this room who are generally congenially disposed toward that view, but that is not the dominant view today. The dominant view today is the exact opposite which is to call that submarine patent, shakedown, holdout, trawl, you name it, and that's exactly what was motivating the attack on patents in the Rambus case and in others is the notion that you're kind of filing, camping out in the Patent Office waiting for the competitive landscape in the marketplace to shift to a particular area and then springing up above the surface and attacking
the people who have then invested millions in
dollars in building FABs or production facilities
or distribution channels or customer
relationships. I think that's exactly what's
motivating the players in cases like the Tivo-
Echostar litigation to delay the remedy or to give
very, very broad due process rights to the
infringer to design around or in Pace v. Toyota to
impose a license nonvoluntarily dropping a
footnote to call it not a compulsory license and
so on and so forth. We're all sensitive to what
you're saying, but that's not where the patent
system is today. The patent system is in the
opposite direction.

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

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

A good quality patent, the value will go
up all the way through to 15 years, not this after 6 years the patent has got no more value.

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

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

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

MR. BUDENS: I have a question on this too because it seems to me I'm not anywhere near on the business acumen side like these guys are, but it seems to me that this also would have to be
very technology driven. If I wait for 6 years if
I'm in some of the electrical areas and I wait for
6 years to get a patent, I might already be past
the useful life of my invention. I'm in biotech
personally and I can see where there's a meaning
here in biotech for a number of reasons. One is
it's going to take me most of that time just to
get through the FDA if I've got something anyhow.
But I have a hard time thinking that this is --
it's got to be a technology driver in here
somewhere.

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

MR. OPPERMANN: I'll comment on that last
slide coming up. As far as the technology goes,
remember we're looking for quality. If we as the
patent organization, the Patent Office, the people
who are about the patents, are prepared to say to
the world long pendency is not a bad thing because
you can work with long pendency, you could change
the way people file patent applications even in
the fast-moving areas like software and electronics because then people will start thinking wait a minute, I should put a lot more technical disclosure, much more enablement which by the way is good for quality into my patent applications so that down the line I can move my claims to cover the innovation which is in my product which the marketplace is telling me is valuable.

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

MR. OPPERMANN: I couldn't disagree with
MR. ADLER: You should claim your invention at the time you file it. And if you don't know what your invention is then because you haven't spent the time to figure it out, then you shouldn't be filing a patent application.

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

MR. ADLER: Did they claim the invention? You keep getting -- between the innovation and the product and what is the patent
MR. OPPERMAN: This is a patent application that had at least 20 different inventions in it.

Time is running out. Last comment and I'm going to make this as a reasonably controversial comment. I think the USPTO's patent fees are the biggest giveaway. I know that the big applicants are going to hate me for saying this and I come from a big law firm and we represent large companies, and all I'm going to say is if you want to change the backlog in this Patent Office, if you want to increase the quality, if we want to increase the quality on the input side, and by the way I'll get to output side in a minute, change the fees to make them look like the European fees. Why should our patents be so cheap compared to the European system's? Our GDP is about the same give or take 10 to 15 percent differences. Populations are about the same. Why are we so cheap? The reason why we have so many patents and so much garbage and why
companies can accumulate large piles of patents is
because we make it too cheap for applicants on the
input side. By the way, from an examination point
of view, this means you can pay examiners more,
this means you can have a longer time for
examiners to look at applications.

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

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

MR. MATTEO: Thank you, Craig.

MR. STOLL: I would just like to make
one comment. I do a lot of luncheon addresses.
That was the most interesting luncheon address
I've heard in a long, long time. I know it seemed
somewhat contentious, but I actually loved the 
exchange and it left me with a lot of ideas.
Thank you very much. I really appreciated that.

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

MR. STOLL: Let me reiterate that was
interesting.

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

MR. OPPERMAN: Long johns. By the way,
I only discovered that it was an invention about 4 years later.

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

MS. FAINT: I wanted to return to a comment that Esther made very early on about public service. I helped to design and run a program at the Council for Excellence in Government in the 1980s with just that in mind, how do we get people interested in public service. The things that I learned, I'd say there were two things I learned. One is it really does need to come from the top such as our President making that effort. And the other thing I learned is that we have a tremendous resource that we don't really seem to use very much, the people who work in the government and the people who have worked
in the government who can go out and tell people
what it really means to be the person on the
frontline delivering that service. I think that
for instance patents and trademarks are not the
most glamorous and certainly people don't think of
examiners as perhaps performing a public service
or one that they can understand, but there are
other public services that people can understand
that could improve that whole atmosphere. I would
certainly encourage anyone to get behind that both
as an organization and a group and as individuals
to encourage people to really look at public
service and treat it with respect.

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

(Whereupon, the HEARING was
adjourned.)

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