

PANEL I: *Monsanto v. Scruggs*: The Scope of Downstream Licensing Restrictions

Moderator: John Richards^{*}
Panelists: Mark R. Patterson[†]
Richard B. Ulmer Jr.[‡]
Peter Carstensen[§]
Jay P. Kesan^{||}

MR. RUBIN: Good morning, ladies and gentlemen. My name is Jay Rubin. I am the editor-in-chief of the *Fordham Intellectual Property Journal*. I want to thank you all for coming.

I also want to thank our panelists and the faculty, Profs. Hansen, Katyal, Richards, and Patterson, who have participated today.

I want to thank Helen Herman and her administrative staff for helping us put this together. I also want to thank my editorial board and staff, and especially Brian Danitz, for really putting an outstanding program together today.

To introduce our program and to welcome us, we are graced by Dean Treanor. Also I want to thank him for his participation and

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support, for us to be able to put a symposium together every year. Thank you.

Here is Dean Treanor.

DEAN TREANOR: Thanks very much, Jay. Welcome.

One of our great strengths at Fordham is intellectual property law. I am really delighted about that.

In the summer of 1981, when I was a summer associate, I was working for a big law firm, and I was the first summer associate they had ever assigned to intellectual property. They didn't have enough for me to do, so I wound up mostly doing antitrust. That, for me, captures—now, intellectual property is a mainstay for all of the big firms and so many specialty firms—it really captures how, in a quarter of a century, intellectual property has really moved to the center of law.

We are very fortunate at Fordham to have faculty who are so strongly at the cutting edge. I would like to recognize in particular Prof. Mark Patterson, who will be on the first panel, Prof. Katyal, Prof. Hansen, all of whom will be part of the program today and are really part of what I think is one of the most impressive intellectual property faculties in the country. We have increasingly stressed that area. This year we started for the first time a graduate program in intellectual property and information law, which is a terrific, terrific program, and, again, really highlights how much at the core of Fordham's operations intellectual property is.

One of our gems is our journal. The *Intellectual Property Law Journal* is really, year in and year out, one of the leading fora for the discussion of cutting-edge intellectual property issues in general. These symposia, year in and year out, take what really are the most pressing issues and bring together extraordinary practitioners and faculty members to work through them. So it is one of our great traditions here. I have to say, this program, I think, is particularly exciting. It really is dazzling for me to look at the panelists who have been assembled and the importance of the topics that you will be looking at today.

I want to recognize the staff of the IPLJ for putting this together. In particular, I want to recognize Jay, who has done such a terrific job as editor-in-chief; Managing Editor Ashok Chandra,

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who is just fabulous, as well as being, like myself, a great Harry Potter fan—we were discussing the new Harry Potter movie on the way in—and I would particularly like to recognize Brian Danitz, who just put together the most amazing program.

Without any further ado, let me turn you over to the first panel.

MR. CHANDRA: Hi, all. Yes, I am the Harry Potter fan.

My name is Ashok Chandra, and I am the Managing Editor of the IPLJ. I am the patent guy at the journal. I will be working at Cooper & Dunham next fall.

I would like to introduce our panel. Our panelists will discuss the degree to which patent holders may impose licensing restrictions on end users.

Our moderator today will be Mr. John Richards. Mr. Richards is a partner at Ladas & Parry and an adjunct professor here at Fordham, where he teaches U.S. and international patent law. Mr. Richards joined Ladas & Parry in 1973 and became partner in 1982. He is the general editor of *The Legal Aspects of Introducing Products to the United States*¹ and co-author of *Intellectual Property and the Internal Market of the European Community*.²

MR. RICHARDS: Thank you, Ashok. Good morning.

As Dean Treanor said, when he started off in big firms, antitrust was up and IP was down. Now we have IP up and antitrust I am not quite sure where, but I think it is beginning to come back after a period in the doldrums.

What we are looking at this morning is very much the interface between antitrust and intellectual property. We have had a number of criticisms of the patent system over the last few years. This conference last year looked at some of those. Some of the issues which come up go to the scope of what you can do with a patent, what you can do with an invention, how broadly you can get protection for an invention. Last year we were looking at what you need to do from the patent side; this year we are looking at what

¹ JOHN RICHARDS, *LEGAL ASPECTS OF INTRODUCING PRODUCTS TO THE U.S. MARKET* (1988).

² PETER GROVES, TONY MARTINO, CLAIRE MISKIN & JOHN RICHARDS, *INTELLECTUAL PROPERTY AND THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY* (1993).

you can do in order to get a patent and how broadly the patent can be—that was last year. This year it is how we can use the patent and what limitations we have on the use of the patent, in view of the resurgent antitrust law.

Mark Patterson, who is a full-time professor here, will kick off with a general overview, and then we will move on to some of the more specific post-sale use restrictions and issues of that type.

PROF. PATTERSON: [Slide] Actually, I am not just providing an overview. I have a few things to say about my view about the appropriate scope of field-of-use licensing as well. But I am going to begin with an overview.

[Slide] The practice of field-of-use licensing involves the licensing of patents under a contract or license that imposes restrictions on what the licensee can do with the patented invention. An example from the Supreme Court was the *General Talking Pictures* case³, which involved a license to manufacture audio amplifiers, but restricted the manufacturer to manufacturing them for sale for home use. In other words, the patentee was trying to split up the market between those manufacturing for home use, where the sales would be at a lower price, and those manufacturing for commercial use, where the price would presumably be higher—though there is some issue in the case as to whether the amplifiers themselves were actually different.

[Slide] Here are more recent examples that will be discussed today:

The *Lexmark* case⁴ in the Ninth Circuit, in which the use restriction involved allowed buyers of toner cartridges to use the cartridge, but not to refill it. So you could only use the cartridge once and then return it to Lexmark—that is, if you did anything else with it after using it, you returned it to Lexmark. The *Lexmark*⁵ case actually involved an option. Lexmark also let you buy the printer cartridge with the right to refill it at a higher price.

³ *General Talking Pictures v. Western Elec. Co.*, 305 U.S. 124 (1938).

⁴ *Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981 (9th Cir. 2005).

⁵ *Id.*

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I don't actually know whether anybody ever did buy it—we may learn that today—at the higher price.

Another case we will be talking about today—two of the panelists here, Prof. Carstensen and I, were involved in it, in one way or another—involved a license to plant seed incorporating a patented gene, but you could only plant the seed in one growing season.⁶ In other words, you couldn't plant the seed, then harvest the seeds from the plants, and then plant again the next season. You had to buy new seed the next season, rather than engaging in seed saving.

The New York Times had an article about this general issue about a month or two ago, commenting on the *Lexmark* case, which was decided recently.⁷ They raised the question: Suppose a car manufacturer—and a car is certainly going to include some patented inventions—instead of selling you the car, had a little license agreement on the car, so that when you took possession of the car, you didn't actually own it, but you possessed it under a license that wouldn't allow you to sell it as a used car.⁸ The *Times* hypothesized this as the bottom of the slippery slope, presumably, in the issue of field-of-use licensing.⁹

[Slide] On the previous slide I characterized these things as licenses. There is some question, particularly as in the *New York Times* example, of whether we should characterize them as licenses or sales. This matters for the purposes of patent law, because the patent law has a first sale doctrine, or an exhaustion doctrine, that says that once the item has been sold, then the patentee has no further patent rights in it. The property rights are exhausted at that point. Presumably you can still have contractual restrictions, but you wouldn't be able to enforce them through infringement suits, just through breach-of-contract actions. And there would be some question even about that, because some contractual restrictions would probably be impermissible under antitrust law, for example.

⁶ See *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 342 F. Supp. 2d 584 (N.D. Miss. 2004), *appeal pending*, Nos. 04-1532, 05-1120, 05-1121 (Fed. Cir. argued May 1, 2006).

⁷ J.A. Biersdorfer, *By Tearing Open That Cardboard Box, Are You Also Signing on the Dotted Line?*, N.Y. TIMES, Oct. 3, 2005, at C4.

⁸ *Id.*

⁹ *Id.*

On the other hand, the way the law currently stands, at least in the Federal Circuit, is that if the patentee's transfer is under a license, with a condition, then any use outside the terms of the license condition is infringement, which converts the breach-of-contract action into a patent-infringement action, which has implications for remedies, in terms of attorneys' fees and perhaps multiple damages. Moreover, the property protections, then, as property protections do, carry on down the line to downstream purchasers.

[Slide] The Federal Circuit and the Supreme Court have couched the terminology of what sorts of use restrictions are permissible similarly. The Supreme Court says it is "reasonably within the reward which the patentee . . . is entitled,"¹⁰ and the Federal Circuit says "reasonably within the patent grant or relates to subject matter within the scope of the claims."¹¹ The Federal Circuit has said that it may be permissible anyway, if it is not anticompetitive. But the language that the two courts use is more or less the same. But that, I think, is largely where the similarity ends.

[Slide] The Supreme Court hasn't decided any of these cases lately, so it is all rather historical. But its approach historically has been on this distinction between property and contract. This may be a stretch, but when you read the Supreme Court's decisions, they actually seem to use the terms "license" and "contract" advisedly, in that every license is a contract, but not every contract is a license. I have argued in an *amicus* brief—almost convincing myself—that they use these distinct terms intentionally and mean to maintain the distinction.¹²

In any case, what they have said is that there are several types of restrictions that would be permissible as a matter of contract, but would not raise issues of patent law.¹³ In other words, you could sue in a breach-of-contract action, but you couldn't sue, even if the contract is breached, for patent infringement. One of the examples

¹⁰ General Talking Pictures Corp. v. W. Elec. Co., 305 U.S. 124, 127 (1938).

¹¹ See, e.g., U.S. Philips Corp. v. ITC, 424 F.3d 1179, 1197 (Fed. Cir. 2005).

¹² Bowers v. Baystate Techs., Inc., 2001 U.S. Fed. Cir. Briefs 1108 (2002).

¹³ Bowers v. Baystate Techs., Inc., 320 F.3d 1316, 1324 (Fed. Cir. 2003).

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was with a geographical restriction, when a purchaser was, in effect, evading the geographical restriction of the patentee, and the Court said maybe the patentee could stop that through contract, but it could not do it through a patent infringement suit, because once the first transfer happens to the first purchaser/licensee, that purchaser can sell it anywhere without being subject to any restrictions.

The Federal Circuit, on the other hand, has this doctrine about whether it is within the scope of the patent claims, but it has not exactly said what that means. It can't just mean infringement, because if there were no infringement, then this would never be an issue. This issue only comes up when the purchaser is using the invention in some way, and so is, arguably, infringing. There has to be some narrower category of things—narrower than infringement—that raises this issue. It is not clear what that is.

The Federal Circuit has written as though the patentee could do almost anything in the way of use restrictions, though it really hasn't held that, and its statements, even, have been not entirely consistent. So it is a little difficult to know what the law is.

[Slide] So we have the contract/property distinction I mention below. I think you can read the cases as reflecting this—the Federal Circuit takes an approach that is all based on contract, that the nature of the rights transferred is just a matter of the terms of the license between the patentee and the purchaser. So it is all a matter of consent of the two parties.

Whereas the Supreme Court—and, again, these are old cases; it is hard to know what the Court would do now—seems to focus on the nature of the invention. The invention is the “thing.” I will come to some ways in which that conception is reflected in the Court's opinions in a moment. The Supreme Court focuses on a contract or quasi-contract between the patentee and society. The patentee gets exclusive rights, the society gets the information, and that establishes the patent rights. So the contract is defined by the claims, in some sense, is defined by the nature of the invention, not by the contract between the patentee and the licensee.

So the Supreme Court has this whole property conception, and the downstream restrictions are like restraints on alienation. Once

you acquire the thing, you are allowed to do whatever you want with it, and contract does not give the patentee the right to impose the restrictions, because that would be restraint on alienation. That is the flavor of the Court's decisions.

[Slide] One way this comes up is that the Supreme Court has established that the purchaser of a patented product has the right to repair it. The language of these cases focuses on the idea that when you get the product, you get this "thing." In one of the best-known cases, you get a convertible top, and when the fabric wears out, you get to replace the fabric, because you still have the right to the convertible top, and only part of it is worn out, so you can repair it, so as to maintain the value of this thing that you acquired from the patentee.¹⁴

The Federal Circuit has said, or at least suggested, in a case involving a license restriction that said you have the right to use the invention only once, that if that restriction is valid—it didn't hold that it was valid, but it suggested that it was (this is the *Mallinckrodt* case¹⁵)—if that single-use restriction is valid, then you have basically eliminated the right to repair.

In my view, that can't be right. When you read the Supreme Court opinions on the right of repair, nothing suggests that the patentee could just, by contract, get rid of those. Nothing holds that they can't either. So the law is certainly unclear, but it is not the basic thrust of the opinions. Those Supreme Court repair opinions, in contrast to some of the other field-of-use opinions, are actually fairly recent.

[Slide] Finally, downstream restrictions—that is, restrictions either on the ultimate user of the product or on the second purchaser of the product. The manufacturing patentee might sell to a dealer, who then sells to an ultimate consumer.

The Supreme Court has never upheld a use restriction against a downstream purchaser who bought validly from a licensee. In *General Talking Pictures*,¹⁶ it held the final purchaser liable for infringement, but that was because the licensee had sold in

¹⁴ Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964).

¹⁵ Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700 (Fed. Cir. 1992).

¹⁶ General Talking Pictures v. W. Elec. Co., 305 U.S. 124 (1938).

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violation of the terms of the license. The Court made it fairly clear that that was the reason.

On the other hand, although it has never upheld such an infringement decision, it has also never rejected one, because it hasn't really had the opportunity to do so.

The Federal Circuit, in contrast, has never disallowed a restriction on a purchaser and generally has suggested that they are within the scope of the patent. On the other hand, it has never upheld one either, because it has always remanded for consideration by the trial court or has rejected a trial court's narrow construction of what is permissible.

So there is a huge range between what the Supreme Court has said is impermissible and what the Federal Circuit has said is permissible. It is not at all clear where the line is drawn there.

[Slide] So I want to ask, when we think about downstream restrictions, what should we do? If we can think about how patent protection typically works, the basic structure is that we are willing to suffer the higher costs of patented products because they are the costs of creating the incentive. When you add in the downstream restriction idea, you add an additional cost in there, I would say—at least often—which is the uncertainty of subsequent purchasers of whether they are subject to whatever restrictions were imposed upstream. The subsequent purchaser, in many cases—like the farmer in *Monsanto*¹⁷—Monsanto licenses its patented invention to seed partners, who then put the gene in the seeds and then sell it to the farmer. Monsanto imposes restrictions between itself and the seed partner about what they can do. Monsanto seeks to impose restrictions on the farmers as well, by labels on the package. But depending on how the farmer acquires the seeds, the farmer may not be party to any contract that puts the farmer on notice of the restrictions to which it is subject.

That would mean it is not subject to a breach-of-contract action, but, because the courts have generally held that the upstream purchaser can only transfer what it has, courts have

¹⁷ *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 342 F. Supp. 2d 584 (N.D. Miss. 2004), *appeal docketed*, Nos. 04-1532, 05-1120, 05-1121 (Fed. Cir. argued May 1, 2006).

sometimes held that the downstream purchaser—the farmer—will be subject to whatever restrictions were imposed upstream, even if it doesn't know about them. That is the nature of property rights.

[Slide] The other issue is that downstream restrictions, at least if there is an intermediate market—say, a dealer market or Monsanto's seed partners—downstream restrictions on the farmers inevitably are going to impose some sort of constraint on what goes on in that intermediate market. That is something that the patentee shouldn't be able to control.

[Slide] If we accept that downstream restrictions pose these sorts of problems, then we can ask ourselves, why would we allow them at all? One reason is that they would allow the patentee to price-discriminate among users. Different users might have different uses for the invention, and the patentee might want to charge higher prices for some uses than for others. That would increase the revenue to the patentee and presumably, therefore, increase the incentive for creative activity, and that might be good. The other possibility is that it could allow the patentee to maintain profits against competition from users. So the users might do something downstream that would tend to degrade or lessen the profits of the patentee, and that would be a bad thing, thus reducing the incentive.

So let's talk about these for a minute.

[Slide] Price discrimination: The welfare effects of price discrimination are generally ambiguous. We don't entirely know whether it is good. But, maybe more doctrinally, the Supreme Court has disallowed practices that allow patentees to price-discriminate. For example, tying arrangements are often used as a means of price discrimination. The Supreme Court has said, however, that you cannot use a patented product to tie purchases of unpatented products, even though the purpose of that may have no competitive effect in the unpatented product market, but may just serve to maximize revenue in the patented market.

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The repair right does this as well. Think about *Lexmark*.¹⁸ The reason that Lexmark wants to impose the no-refill restriction is so that—or the effect, at least, of imposing the no-refill restriction is that if you are a heavy user of printer cartridges, the absence of the ability to refill means you have to go back to Lexmark and buy more, so they are, effectively, going to be able to charge more to heavy users of their printer cartridges than to less heavy users of their printer cartridges and effectively get a price discrimination scheme there.

[Slide] “Should we allow this?” is the question. I have argued, in an article several years ago, that for a use restriction to provide valid price discrimination—that is, price discrimination that we think should be okay under patent law—the discrimination should be based on the use of the invention.¹⁹ So I would say that in *Lexmark*, if it has inventions related to how you refill the cartridges, then it makes perfect sense to not allow people to refill the cartridges. If their inventions with regard to the cartridge are, say, related to delivery of the toner material from the cartridge, but have nothing to do with refilling, then the price discrimination that they are engaging in isn’t related to the difference in the uses of the purchaser, and is therefore unrelated to the invention, in that sense, and, I would say, shouldn’t be permissible.

In *Monsanto*, you could argue that it should have to turn on the difference between planting for crop—that is, planting a cotton crop to get the cotton—or planting the cotton crop to get the seeds. Of course, the act of planting is the same, regardless. As the Federal Circuit has acknowledged, it just doesn’t make any difference.²⁰ You plant the same way, whether you are planting for a crop or for a seed.²¹

[Slide] What about the other reason, profit maintenance? The way this works is that you can imagine that what happens downstream can affect the patentee’s profits. The Supreme Court

¹⁸ *Ariz. Cartridge Remanufacturers Ass’n v. Lexmark Int’l, Inc.*, 421 F.3d 981 (9th Cir. 2005).

¹⁹ Mark R. Patterson, *When Is Property Intellectual? The Leveraging Problem*, 73 S. Cal. L. Rev. 1133, 1142–43 (2000).

²⁰ *See Monsanto Co. v. McFarling*, 363 F.3d 1336, 1342–43 (Fed. Cir. 2004).

²¹ *Id.*

has said that a patentee can impose downstream license restrictions that enable it to protect its own profit stream. It may be competing, in some sense, with the downstream purchasers or the licensees. In the *General Electric* case, it said it can control their prices and restrict what they can do in order to protect its own sales.²² It actually wasn't quite as explicit as that, but that is how *General Electric* is generally read.

[Slide] But for that to make sense, the way the downstream purchaser typically, in these use-restriction cases, competes with the patentee is by making the product. Now, you don't need a use restriction to prevent the downstream purchaser from making the product. That is illegal under Section 271 of the patent statutes.²³ So you really wouldn't need a use restriction to do it. For example, in the *Lexmark* case, you ask, does Lexmark need to do this to effectively prevent its purchasers from making new cartridges by refilling them?²⁴ That implicates the repair/reconstruction doctrine. We have a body of law, or at least a doctrine, that is supposed to deal with this. If it is repair, it is permissible; if it is reconstruction, that is making the product and it is impermissible. So we could deal with that under the repair/reconstruction doctrine.

Instead, Lexmark is basically evading the repair/reconstruction doctrine by imposing use restrictions.²⁵ I would argue that that shouldn't be permissible. I have a citation to the *Jazz Photo* case there on the slide, in which the Federal Circuit said that, in a disposable camera, replacing the film cartridge after it is used is repair, not reconstruction.²⁶ I am not sure I agree with that decision on the facts, but at least it suggests the kind of inquiry that I would think could be made in the *Lexmark* context as well.

[Slide] Also, a use restriction shouldn't require the purchaser to get additional products in order to operate. That is the problem

²² U.S. v. General Elec. Co., 272 U.S. 476, 489 (1926).

²³ See 35 U.S.C. § 271.

²⁴ See Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981 (9th Cir. 2005).

²⁵ *Id.*

²⁶ Jazz Photo Corp. v. ITC, 264 F.3d 1094, 1105 (Fed. Cir. 2001).

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in the *Monsanto* case.²⁷ In *Monsanto*, the question would be, if you require the farmer to purchase seeds every year, then the farmer is not just purchasing Monsanto's gene, which Monsanto does have the right to control, but is also purchasing the rest of the seed, which was produced by the seed partner.²⁸ In order, then, to prevent the competition from the farmer, who is, in effect, producing seed in competition with Monsanto, you are also restricting the farmer from doing something else that it is allowed to do, which is to re-create the portions of the seed that are introduced by the seed partner and have no intellectual property protection. In effect, I would say Monsanto is overreaching in its effort to try to avoid competition.

So I would have concerns about both Lexmark's and Monsanto's practices, though the concerns are animated by different aspects of the problem.

[Slide] Seeds are weird, though. Seeds are self-replicating. Lexmark's toner cartridge does not make new copies of itself, but seeds do. The Federal Circuit, in the *McFarling* case,²⁹ said they are a special category, which makes sense. Then Judge Gajarsa in *SmithKline*³⁰ said these sorts of things are not patentable at all. That would make this inquiry quite easy, of course. But I am not sure I would go that far.

You can see what is going to happen. If Monsanto is not allowed to impose this one-season-only restriction, it is only going to be able to sell these things once, because once it makes one sale of the seeds, the farmers will replant the seeds the next year. It basically makes the sale one year, and that is it, which means it is going to have to raise the price considerably that very first year. I guess Monsanto could argue, "If we do that, the problem is, we are basically going to lose out in the market. The price is going to be too high. Farmers can't afford it. They will have to take out loans or something."

²⁷ *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 342 F. Supp. 2d 584 (N.D. Miss. 2004), *appeal docketed*, Nos. 04-1532, 05-1120, 05-1121 (Fed. Cir. argued May 1, 2006).

²⁸ *Id.*

²⁹ *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1343 (Fed. Cir. 2004).

³⁰ *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1362 (Fed. Cir. 2005) (Gajarsa, J., concurring).

I guess one response I have to that is, “So what?” You are not entitled to a particular pricing technique that will allow you to maximize your profits under the patent law. You are only allowed to exclude. So if you are excluding in some illegitimate way, that is going farther than you ought to be allowed to.

The other answer I would have is, maybe you could get a process claim, get a process claim to the use of the seeds. There is still a problem there, in that there might be implied license issues when you sell the seeds the initial time. But at least then we focus on what is going on here. We basically focus on whether, in fact, your implied license would carry through to previous years in a way that reflects the basic structure of patent law and creates the proper incentives, rather than allowing contract to impose the patentee’s view of what patent law ought to do on purchasers. It would focus us back on the patentee-society bargain, not on the patentee-licensee bargain. That should generally be the approach in these cases.

Thank you.

MR. RICHARDS: Thank you, Mark.

Our next speaker is Dick Ulmer of Latham & Watkins, who was involved in the *Lexmark*³¹ case and might take a different view.

MR. ULMER: Thank you.

I thought what I might do is just spend ten minutes or so giving you a thumbnail sketch of the *Lexmark*³² case and, in the course of that, will touch on a few of the points that Prof. Patterson raised.

Lexmark, for those of you who don’t know it, is a company that was spun off from IBM in 1991–1992. Its primary mission is to make computer printers, both laser and ink-jet, although the issues in the case that we are going to be talking about deal solely with laser cartridges. Lexmark is number two in computer printers. Number one, by a big margin, is Hewlett-Packard. HP is

³¹ Ariz. Cartridge Remanufacturers Ass’n v. Lexmark Int’l, Inc., 421 F.3d 981 (9th Cir. 2005).

³² *Id.*

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the 800-pound gorilla in this market space, as they would say in Silicon Valley.

One of the ways that Lexmark has tried to improve its market position is—it noted that the remanufacturing of the cartridges was becoming more prevalent. None of Lexmark’s competitors—HP, Canon, Brother, Epson—was really getting into that remanufactured cartridge market. So Lexmark said, “We’re going to do that. Why are we going to do that?”

Number one is for an environmental purpose. It is better to have cartridges reused than have them end up somewhere in a landfill.

Number two is that some of the cartridges that were being remanufactured by the remanufacturing industry, which is largely kind of a mom-and-pop industry of tens of thousands of small competitors around the United States and around the world—some of those cartridges, frankly, aren’t very good. They leak in the machines, sometimes even destroy the machines. When the user then goes and opens up the machine and sees that the machine is broken, they don’t blame the remanufacturer; they blame Lexmark. They don’t know where the remanufactured cartridge may have come from. So that was another reason for Lexmark’s desire to get into remanufacturing.

The third one is, frankly, a desire to make profits, to get into this market that nobody else was tapping.

How did Lexmark go about doing this? They decided to institute a label license that requires, as Prof. Patterson said, the cartridge to be returned to Lexmark only, if people are going to return it. What the customer gets in return for that is what is called a “Prebate,” which is a play on the word “rebate” and the word “pre.”³³ Instead of having to send in a coupon to get your rebate—this just happened to me the other day. We bought a cell phone for my daughter, and there is a \$50.00 thing you have to send in. Just before I left to come out here, I said, “Honey, where’s that coupon?” She goes, “I don’t know.” So we are going to have to chase the thing down.

³³ *Id.* at 983.

Lexmark said, “Let’s just give the rebate right up front.” So you can buy a Prebate cartridge with the license restriction that you return the cartridge to Lexmark, if you are going to return it. You can also buy a regular cartridge, without the Prebate restriction.

You will be happy to know that the data shows that about 10 to 15 percent of people do buy the regular cartridge. Because they are honest, they don’t want to cheat on the license agreement. What they do is, they have what are called closed-loop systems, where they remanufacture the same cartridge up to six or seven times, and thereby recover their costs in that way. So there are sales of the non-Prebate regular cartridges.

Lexmark was very careful in structuring this program. They very closely followed the *Mallinckrodt* case,³⁴ which was of great interest to them. The other key case in this field, although it is not a patent case, is the *ProCD* case,³⁵ which, to our mind, is the key case saying that shrink-wrap, label, click-through licenses are valid. That was really kind of the first case in that field. The last time I checked, there are in the range of thirty to forty ProCD-type cases. There have been a lot of challenges of shrink-wrap licenses, but I have to tell you that the results have been overwhelmingly in favor of shrink-wrap licenses. I think the last time I checked, the margin is about five to one. So shrink-wrap licenses are here to stay.

What happened next? Lexmark’s program ran for about four years, and then a group called the Arizona Cartridge Remanufacturers Association sued Lexmark. This association was a gathering of these small remanufacturers, who put together a war chest to sue Lexmark to try to stop this program. Their concern, I think, was not so much Lexmark as they were afraid that HP and the other competitors in the market would adopt the same sorts of programs that Lexmark had adopted.

I said that they put together a war chest. Frankly, it wasn’t a real big war chest. They didn’t sue under antitrust law or they didn’t sue for patent misuse, but they sued under a couple of unique California statutes called Business and Professions Code

³⁴ *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992).

³⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

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17200 and 17500.³⁶ These are very, very broad unfair-competition laws in California, and practitioners there know that it is close to malpractice not to toss a 17200 claim into any suit you file these days. It is so broad that it outlaws anything that is “unfair.”

With respect to business-to-business transactions, the California Supreme Court has trimmed back on that a little, but as far as consumer transactions go, anything that is unfair is illegal. You can imagine what kind of trouble that standard causes.

The plaintiffs’ theories, to put it charitably, went through a lot of evolution in this case. What finally wound up in the Ninth Circuit was nowhere to be found in anything that they had ever pleaded. But that’s litigation. We roll with the punches and address the arguments that are presented when they are presented. What it was, was essentially a false advertising case. What the plaintiffs were saying was that Lexmark, by saying that the Prebate license was legal, was misrepresenting the facts. Our rejoinder to that was pretty obvious: Whatever you think of the *Mallinckrodt* case,³⁷ it has been the law of the land for twelve years now. We are just stating the facts. *ProCD*,³⁸ at that time, had been the law of the land for ten years. So we said, this is a pretty simple case. We can’t possibly be guilty of falsely advertising what is entirely true.

To my mind, the most interesting issues were raised very late in the game. In fact, we heard one of them for the first time, I think, in the oral argument before the Ninth Circuit. They had to do with, first, the old-fashioned contract notion of privity. The argument was that the end user/buyer of this cartridge doesn’t have a contract with Lexmark, according to the plaintiffs. What the Ninth Circuit said to that was what Judge Easterbrook said to the *ProCD* plaintiff back in that case, and that is that what Lexmark does by having this label license is offers to the buyer, “You can use this cartridge if you agree to the terms of our license.” So that is the offer; that is the acceptance; that is the privity.

³⁶ Cal. Bus. & Prof. Code §§ 17200, 17500 (1977).

³⁷ *Mallinckrodt*, 976 F.2d 700.

³⁸ *ProCD*, 86 F.3d 1447.

The other interesting issue had to do with the downstream issues that Prof. Patterson was talking about earlier. In the Monsanto cases,³⁹ Monsanto has a very elaborate system of special licenses that it has with its seed company partners and then there are some licenses with the growers. It is all, to my mind, pretty complex. That simply would not work in a Lexmark-type situation, because Lexmark sells its cartridges through so many different distribution channels and so many different types of distribution channels. So the argument was the one that Prof. Patterson made, essentially: When you made the first sale to a distributor, you didn't have a restriction on that sale, and therefore that was an unconditional sale and your patent rights evaporate.

Our point to that is a pretty simple one. Everyone in the stream of commerce who buys that cartridge takes it with that license. Anybody who opens it—what it says, essentially, is, “Open up this box, use this cartridge, and you are bound by the license.” That applies to everyone in the stream. Whether a distributor opened the box and used it—not common, but it happens sometimes. Our view is that that solves the downstream problem. Frankly, I view the license schemes in Monsanto as a little bit of belt-and-suspenders. I don't think it is that hard. I think that a label license on a sack of seed would actually be enough.

The other thing that happened in our case was that the Electronic Frontier Foundation—and Brian has included their brief in the packet here—filed an *amicus* brief that invited the Ninth Circuit to create a circuit split with the Federal Circuit over *Mallinckrodt*, saying that *Mallinckrodt* was wrongly decided.⁴⁰ We pointed out that that was all very interesting, but what we noted was that EFF in its brief never once told the court what kind of case our case actually was. They never mentioned Business and

³⁹ *Monsanto Co. v. Ralph*, 382 F.3d 1374 (Fed. Cir. 2004); *Monsanto v. McFarling*, 363 F.3d 1336 (Fed. Cir. 2004); *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 342 F. Supp. 2d 584 (N.D. Miss. 2004), *appeal docketed*, Nos. 04-1532, 05-1120, 05-1121 (Fed. Cir. argued May 1, 2006).

⁴⁰ Brief for Elec. Frontier Found. as Amici Curiae, *Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc.*, 421 F.3d 981 (9th Cir. 2005) (No. 03-16987), available at http://www.eff.org/legal/cases/ACRA_v_Lexmark/20040211_amicus.php (last visited Sept. 16, 2006)

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Professions Code 17200 or 17500.⁴¹ So it was really sort of an academic exercise on their part. The Ninth Circuit declined to create a circuit split. I think they dropped a footnote that said, “This isn’t before us, and for another day, if ever.”

I think that is probably it from my perspective. I guess I would say, kind of doctrinally—I am just a country lawyer out there in the trenches, trying to win cases, so I tend not to think of things on an academic level a whole lot—our basic view of the *Mallinckrodt* case is that all it does is bring patent law into line with antitrust law.⁴² When you go and read the *Mallinckrodt* case, you see that. The *Schwinn*⁴³ and *Sylvania*⁴⁴ cases are cited repeatedly. What *Schwinn* and *Sylvania* did was to hold that restrictions after a sale were judged under the antitrust rule of reason unless there was price fixing involved or some sort of tying. Otherwise, a rule-of-reason approach is taken to a restriction after a sale.⁴⁵

To our mind, all *Mallinckrodt* did was to allow patent rights, the right to exclude, to be treated in the same way as other property rights.⁴⁶ When you step back and think about it, why shouldn’t that be so? Why shouldn’t freedom of contract also apply in the patent arena?

I thought, contrary to what the professor said, the *Mallinckrodt* case was well-reasoned, well-decided. When you actually go back and look at the cases that had established this so-called patent exhaustion doctrine, what they were all about was price fixing or tying. As the Federal Circuit pointed out, there is not a single one of them that had to do, really, with anything else. So it was one of those things in the law that kind of grew up over time, where nobody was really kind of digging in and saying, what do these cases really say?

I think I will leave it at that.

MR. RICHARDS: Thank you.

⁴¹ Cal. Bus. & Prof. Code §§ 17200, 17500 (1977).

⁴² *Mallinckrodt*, 976 F.2d 700.

⁴³ *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

⁴⁴ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

⁴⁵ *See Sylvania*, 433 U.S. at 49–50.

⁴⁶ *See Mallinckrodt*, 976 F.2d 700.

Our next speaker is Peter Carstensen, who is the Young-Bascom Professor of Law at the University of Wisconsin. He comes from an antitrust perspective, I believe.

[See article below in lieu of presentation transcript.]⁴⁷

MR. RICHARDS: Thank you.

Back in the 1970s, there was a thing called “The Nine No-No’s of Patent Licensing.”⁴⁸ It sounds a though we are trying to get back to that.

Jay, maybe you are going to take the view from the intellectual property side and readdress the balance here a little bit.

Jay is a professor at the University of Illinois School of Law and is an intellectual property lawyer.

[See article below in lieu of presentation transcript.]⁴⁹

MR. RICHARDS: Thank you.

The problems presented by self-replication, I think, are relatively new. Many of the other issues that come up in this area, though, go back at least 100 years. The idea that a patent right is exhausted by first sale is something which has been around for a long time. The contrary idea that the patent owner, when he sells, because he has the right also to control use (because the patent right includes the right to use the invention, as well as the right to make and manufacture it) can impose license conditions, and that you simply have an implied license by purchase of the item originally, and that the implied license can be overruled by explicit provisions—that is the contrary view, which has also been around for 100 years.

I think we have heard some very contrasting opinions on which of those two approaches is appropriate.

⁴⁷ Peter Carstensen, *Post-Sale Restraints via Patent Licensing: A “Seedcentric” Perspective*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1053 (2006).

⁴⁸ See Bruce B. Wilson, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions*, Address Before the Fourth New England Antitrust Conference (Nov. 6, 1970).

⁴⁹ Jay P. Kesan, *Licensing Restrictions and Appropriating Market Benefits from Plant Innovation*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1081 (2006).

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Maybe, Peter, you would kick off with your views on that, and then we can develop it out from there.

PROF. CARSTENSEN: I think maybe I was too reticent about it.

PROF. KESAN: I have never heard Peter be reticent on anything.

PROF. CARSTENSEN: I do think that we need to be very restrictive on the number of circumstances in which the bundle of rights that go into a patented product or process get severed and controlled post-sale or after the developer has substantially parted with dominion and control over the product or process. Jay gave you a bit more of the agricultural stuff. It is sort of funny—a guy from Illinois and a guy from Wisconsin coming out to New York City to talk about crop issues.

PROF. PATTERSON: And Mr. Ulmer said he is just a country lawyer, too.

PROF. CARSTENSEN: That is right. And I happen to know that you are from Ohio and have a little bit of a rural background yourself.

It seems to me that what is required, again, is very cautious acceptance of the post-sale kind of restriction. I am not prepared to say they are categorically bad, though I come a lot closer to that than many people would like.

Again, what was interesting was the way that Jay did not engage fully with the alternative that I was talking about, except to say he rather liked it, at the end, when he talked about anybody with over 150 acres paying the seed cleaner. Seed cleaners are key players. They are indispensable in cotton. You cannot save cottonseed without going to a seed cleaner, and you really need to use a seed cleaner in soybeans if you want to have any success at all in saving your crop.

So there is a bottleneck through which these things will pass. The point for competition in the market and competition in technology is that if you are very restrictive and you say to Monsanto, “Gee, guys, you have a problem here because of this replication,” and we, as a matter of patent law, decide that this

really is the making or the using of the patented product without a license—and that is a contentious issue, and I am skeptical, myself. I think that requires Congress to act. Rather than the courts rewriting what Congress has written in the past, let Congress resolve that directly.

But at that point, we say, “Okay, you can put your tax on, but it can’t be in the form of forcing people to buy new seed.” There are two reasons for that. The price of a bushel of soybeans for use is about \$5.00. That same bushel for use as seed is \$12.00. The farmer has to pay a couple of extra dollars to get the seed cleaned and prepared for planting. So there is a \$5.00 to \$7.00 cost savings that the farmer can get, not by taking one of the technological innovators out of the market, but by taking a greedy seed company out of the market.

So to impose, one way or another, fairly strict scrutiny on these exceptions that you might carve to the “you sold it, you sold it” kind of standard, is what I personally would see as the much better strategy, not only for farmer cost savings, but also for technological innovation. One of the things that happens in herbicide-resistant genetics—there were three, maybe four different genetic alternatives out there which had the same advantage. That is, once it was in your crop, you could blow the herbicide over the crop, the crop would live, the weeds would die.

Monsanto’s strategy was such that, by guaranteeing that the seed companies could sell seed without the threat that the farmer would save seed—and I disagree with Jay on the empirics; save-seed has almost entirely disappeared from soybeans and cotton. The seed companies now saw that what would happen if you had competing genetic alternatives that were herbicide-resistant, price would start to go down. Some of the competitors would, in all probability, start allowing farmers to replant the seed, with much lower cost. It actually happened in corn, where there were competing root worm—I am not getting the name quite right—technologies—Bt corn. There were competing technologies. The price of the genetics dropped dramatically, because once it was in the seed, it was in the seed.

My suggestion here is not, much as I would like to embrace it, total prohibition of any post-sale restriction as an absolute. If you

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are going to do it, it has to be done very carefully, very circumspectly, where there is a real interest, and then it has to be no more anticompetitive, no more exclusionary than absolutely necessary to accomplish the legitimate objective. My quarrel with *Monsanto*⁵⁰ and with the other strategies that have the expansive reading of *Mallinckrodt*⁵¹ is that it goes way beyond that.

MR. RICHARDS: Thank you. Jay?

PROF. KESAN: Peter makes a couple of interesting points. If you go and talk to most of the seed producers, they will tell you that, obviously, it is no good for them to be suing farmers. These are their ultimate customers, and they have longstanding relationships with them. Indeed, some of them, as a matter of policy, refuse to do that. For example, DuPont-Pioneer refuses to sue ultimate farmers. They may sue seed companies, but they don't sue farmers.

There is a whole lot going on in this area. There are other countries that are experimenting with exactly the sorts of things that Peter is talking about, where you don't make farmers pay, but you make other people in the value chain pay. For example, for those of you who are not that familiar with this industry, Argentina is basically the mirror image of the United States in the Southern Hemisphere, and so northern Argentina looks like southern United States. The crops that grow there are very similar. They are the second and third producer of soybean and corn in the world. They have some very interesting experiences with GM, and they are one of the few countries that embraced GM in the early 1990s. They are experimenting with taxes as a way of trying to see that the large life-science companies are paid in this area.

We can argue about whether it makes economic sense or not, but the idea here is not to impose the burdens on the farmer. Brazil is experimenting with payments from elevator operators—that is, people who actually benefit from the seed. You are the person who is benefiting from this huge high yield, and so why don't you pay?

⁵⁰ See *supra* note 39 and accompanying text.

⁵¹ *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992).

The idea here is, once again, that there have to be other mechanisms that can be put in place so that the people who are innovating are rewarded.

There are obviously contractual issues that I glossed over, in part because the Monsantos of the world are perfecting their notice and contracting. So I don't expect those things to be that much of an issue anymore. They are learning from not providing proper notice and so on. But, of course, there are contractual issues. There are players in the middle who basically buy from the Monsantos of the world, folks like JEM Ag Supply, in the *JEM v. Pioneer* case.⁵² In that particular case, the litigation came about because there were thousands and thousands of Pioneer seed bags that were found in JEM Ag Supply, and every one of these bags has a unique number to it, and JEM Ag Supply had not paid for it.

So the relationship between some of these retailers and the Monsantos and Pioneers of the world is a bit testy. Nevertheless, there is a lot going on, and there are different ways of trying to get at the same problem.

MR. RICHARDS: Dick, do you want to add anything?

MR. ULMER: I did read back through those Monsanto cases the other day. The thing that kind of strikes me about them is that what we have here is a situation where we have a farmer with 14,000 acres, and this guy is an admitted cheater. He knew what bargain he had entered into. He didn't go into court and say, "This is a bad bargain." He tried to get around it. He cheated. He saved the seed. He went out and planted it. I have a hard time feeling too sorry for him, I have to say.

PROF. KESAN: I entirely agree, and I do commend a Web site to your reading, if you guys love this stuff. It is percyschmeiser.com. Percy Schmeiser is the equivalent of Homan McFarling in Canada, and his case went up all the way to the Supreme Court of Canada, where he also lost. But he has this great Web site. He is greeting all the world officials and so on and so forth. He is a farmer who is on a crusade. It's just a lot of fun.

MR. RICHARDS: Mark?

⁵² *J.E.M Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001).

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PROF. PATTERSON: I just want to respond to a couple of things that Mr. Ulmer said a moment ago. If an IP owner is misusing the IP, then ignoring the IP rights is not cheating. It is true that Mr. Scruggs might have ignored the IP rights, but he did not feel the IP rights were being used validly—just as was true for Zeidenberg in the *ProCD* case.⁵³

The other thing I wanted to talk about is—Mr. Ulmer, I think, teed up the issue really well in this idea that Lexmark wanted to enter the remanufacturing business. I think that is right, and that's great that it wants to enter the remanufacturing business. Then it has this Prebate program. Of course, the Prebate on the cartridge that you are not allowed to refill is the same as having a surcharge on the cartridge that you do want to refill. So, basically, they want to compete in the remanufacturing business, but the way they want to do it is by requiring those who want to have somebody else refill their cartridges pay a surcharge, thus putting them at a disadvantage. So Lexmark wants to compete, but only with the leg-up that is provided by the surcharge on the refillable cartridges.

The question, I think, is, do you think that the fact that it manufactures the cartridge should entitle it to get a leg up in the remanufacturing business? I think some people think that it should, that basically these cartridges were created by it. This is sort of Mr. Ulmer's point; it is a question of the distribution of the market. Other people would take the view that the remanufacturing business is separate from the manufacturing business—at least it could be, depending on the patent rights—and thus the fact that it manufactures these cartridges shouldn't allow it to have an advantage in the remanufacturing business.

MR. RICHARDS: We have a few minutes for some questions or comments from the floor, if anybody has any.

QUESTION: My name is Michael Rand, and I am not a lawyer—at least not yet.

I have two questions. The first is a general set of questions. It sounds like what is happening here, in terms of overall process, is that these companies are waging business by law—like waging

⁵³ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

war, only in this case, waging business by law, or competing. I realize there might be certain things that can't be said, but I am just wondering, overall, if people on the panel know whether the companies bring in lawyers in the process of product development and realize what might happen as time progresses—that they might be sued, that they would have to put aside money to deal with it; if they design the product in a certain way, it would have legal implications this way or not have legal implications that way, et cetera. How much, in the process of doing business, is law involved?

A second question I have—I guess to the gentleman at the end—is, when can you go too far? We are hearing now in the news the Sony case,⁵⁴ with the rootkit software, where, in order to protect their CDs—you made the point, if the CDs could reproduce at night, they might get upset. They are upset, and now they seem to have gone too far. I heard a presenter in another conference say that Sony might have shot itself in the foot, because one division wants to protect the CDs, but the other divisions want to use open-source software to create new products, and now they can't because of all this stuff going on. Can you go too far? Now the lawyers, of course, are fighting it out, because there could have been real damage.

MR. RICHARDS: Jay, since half is addressed to you, and I think you can probably deal with the other half as well, maybe you will take it.

PROF. KESAN: Can you go too far? That is always a concern. It is a concern for every person who operates in the patent world. They will tell you that a lot of times that is why it is very common in the patent world to go after intermediate players for contributory infringement and actively inducing infringement—271(b)⁵⁵ and 271(c)⁵⁶—instead of going after the direct infringer, because the direct infringer is very often a customer. Right here we have a situation where Monsanto is going after the direct customer, but

⁵⁴ 24/7 Records, Inc. v. Sony Music Entm't, Inc., 429 F.3d 39 (2d Cir. 2005).

⁵⁵ 35 U.S.C. § 271(b) (2006).

⁵⁶ 35 U.S.C. § 271(c) (2006).

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DuPont-Pioneer is not. So there is a realization that this is an issue.

At the same time, I think there is a concern that if you are going to be slumbering on your IP rights, that is going to create problems of its own.

PROF. CARSTENSEN: May I say something about the first part of that question, the lawyer part?

I can't think of the name of the paper right now, but one paper that I recall hearing found that there was a correlation between number of patents and number of lawyers working for a corporation, but no correlation between the research and development and the number of patents being sought. That is, the patents are more a function of the lawyer than of the research and development.

It is, I think, the case, increasingly, that lawyers are getting involved earlier in the product-development process, especially when you do have all these wonderful levers you can pull—shrink-wrap, tag licenses that start imposing restrictions. Then, thinking through some of the puzzles that Jay is talking about, about the scope of your entitlements, getting the lawyers involved early here makes sense.

There is a *Wall Street Journal* article about lawyers in the design of cars, where Ford has its lawyers in very early in the automobile design, explaining the risks, alternatives, and getting the lawyers' advice about which risks to take. Apparently, they did learn something from their Pinto gas tank experience.

MR. RICHARDS: We will take just one more question.

QUESTION: I will start it as a question to Prof. Patterson, but anyone on the panel can join in. I am just thinking about the Lexmark cartridge. I don't know exactly the facts. I am just spinning it as a hypothetical. The company, Lexmark, keeps all the expense of the development and all the expense of manufacturing the cartridge, and it sells the cartridge. That cartridge is probably a relatively low-margin business. Refilling the cartridge doesn't require the capital expenditures. It is a high-margin business. If you will not give Lexmark a leg up on the secondary market compensation, wouldn't that require Lexmark to

raise the price on the initial sale of the cartridge? In the Monsanto case, if you can sell only one bag of seeds and then you allow them to resell it and store it, then that bag will be a \$100 million bag.

So won't, in all practicality, it come out the same?

PROF. PATTERSON: Sure. I think that is right, but I don't think it's a problem. We don't worry when, say, a patentee comes up with a new invention that has competition out there, and therefore he is not able to price it where he would like. This is similar. I think the fact that you have a patent means you can prevent other people from doing the same thing, but it doesn't entitle you to any particular profit level as a result of making the invention. So the fact that patent law might be structured in such a way as to let you make less money than you would like to make does not mean that patent law is structured incorrectly, I would say.

MR. RICHARDS: As long as the amount you make is sufficient to enable you to carry on with your innovation. That is, I think, the balance point which is very difficult to determine and can only be done empirically, because there is no accurate way of coming up with it. We see these problems, and maybe sometimes we try to correct them and sometimes we just let them sit there until the next generation takes over.

I think that probably is where we have to end this morning. Thank you all very much. Thank you to the panel. Thank you for your questions.