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PANEL #4: PATENTS

"Business Method Patents: Logical Evolution
or Radical Break from the Past?"

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The Cato Institute
F.A. Hayek Auditorium
Washington, D.C.

P R O C E E D I N G S

PAUL MISENER, VICE PRESIDENT, GLOBAL PUBLIC POLICY,
AMAZON.COM

MR. MISENER: I think I may be brief here, because what Amazon.com has done and what it believes about this particular subject matter is fairly straightforward, I think. And it might be most helpful to say, for those of you not familiar with the events of the past two years, that we have been grappling with the whole subject of process patents, business method patents, for about the past two years in our company. I can walk you through the history fairly quickly, and then I'll let you know where we stand on the issue, if we can call it that.

In late 1999, we were granted a patent for our one-click technology. This is a relatively complex invention. And for those of you who disagree or think otherwise, just on the seeming obviousness of the name, I challenge you to actually look at the grant itself. The claims therein are inventions, are novel inventions, and it is relatively complex. It is certainly more complex than people assume when they talk about it and when Scott Adams parodies it in "Dilbert."

And it's one of the best "Dilbert" cartoons. I don't know if you've seen this, but it's a great one. Dilbert is of

course working at his PC and in walks Dogbert, who says: I've just received a patent on my no-click technology, and I'm sure some whiners will complain that it was obvious. But, hurry up, you better click something or I'll have to send you some books.

(Laughter.)

MR. MISENER: I have no idea what the reference was.

In late 1999, we were granted this patent, and we immediately turned around and used it to bar some infringing activity by an erstwhile competitor of ours, BarnesandNoble.com. And amazingly, a preliminary injunction was issued very quickly. And this is amazing not because the patent is questionably valid, but because preliminary injunctions very rarely issue before there is litigation on the validity of the underlying patent. And so it was a great victory and probably a somewhat surprising victory for us in that sense, in the procedural sense, but not at all a surprise to us that Barnes and Noble was found to have been, at least presumptively, infringing.

That preliminary injunction bad news, for us anyway, was vacated on Valentine's Day of this year. And basically, what the court said was, well, we're not going to rule on the validity of the patent -- that's not before us -- but it is very unusual for a PI to issue without the patent being litigated specifically on the merits. And so we will lift the preliminary injunction -- which they did. The trial on the merits, which we still feel

very confident that we will win, is not scheduled now until March of next year.

But that is not the real point here. That is kind of how we got into this discussion. But how we got into this discussion is a lot less interesting than what we did once in it. When we sued BarnesandNoble.com and were granted this preliminary injunction, there was somewhat of an uproar in the community. There was this sort of visceral reaction from some netizens, saying: Gee, you guys have sort of abandoned the Web community; how could you do something like this? This is bringing lawyers into the domain of engineers.

Which is good and bad, depending on what you are I suppose. I'm both, so I can say that.

So what happened, there was this popular revolt, let's call it, and they found us to be revolting. And we received a lot of complaints. Well, it had just died down a little bit over the ensuing couple of months. The injunction was issued in early December, and then, come the February time frame, we were granted another patent. And this one was for our associate's program, another, allegedly, business method patent. Well, this time it was too much. There was too much momentum, and folks in the netizen community got very upset with us. And led by a fellow named Tim O'Reilly, who is a fairly well-known publisher of

computer books, O'Reilly & Associates, they complained to us, and complained directly to my boss, Jeff Bazos.

Well, Jeff is a very open-minded guy and decided that he wanted to engage in a discussion on this, even though it was very clear to us that we had simply obtained rights, or we were acting to protect rights that we had legally obtained. So he engaged in a discussion with O'Reilly, and others, which led him to rethink his view on so-called business method patents. His view now, and then, generated I guess in early 2000, was that, gee, maybe these patents are different; they deserve some different treatment in the law. And he not only did that, but he sort of put his money where his mouth is and decided to come to Washington and actually lobby the point.

So he and I went around and saw the leadership of both the House and the Senate in this area of intellectual property and actually lobbied on the point of something that is contrary to our basic interests. We, the holder of patents at issue, were actually lobbying for reducing the term of these patents.

Now, what do we mean by that? Well, quite simply, Jeff felt like 20 years past application was too long a period for these kinds of patents, which he felt could go a long way in just, say, three to five years. He also suggested that they receive different treatment in the context of the examination of patent applications. And he said that he thought it was

appropriate, even in the context of U.S.-only patents, that there be some pre-issuance comment period that, tied with a prior art database, could be used to ensure that subsequent patents would not be issued on a questionable basis.

We lobbied that and pushed for it, and spent some political chits, capital, on doing just this. So we feel like we have actually taken to heart the concerns raised to us by the Net community and have done something about it.

Now, as you know, nothing has changed, and there hasn't been any great groundswell of support for these proposals. I will say, however, that there is one last proposal, one other aspect of things, that we've been involved in. And I frankly think those who are concerned about "business method patents" and the potential for abuse thereof really ought to spend time less thinking about the underlying law, which may take a long time to change, than the actual -- if I can use the word -- "process" that is used to grant them.

Right now, as many of you may know, the U.S. Patent and Trademark Office serves as something of a cash cow. It takes in more money in patent applications than it is allowed to keep to spend on patent examiners and its internal processes. And the figures are really staggering. I think it's on the order of two-thirds of the money that they get to keep, or somewhere around there. So fully a third, if not more -- and somebody may

know this better than I -- of the money that the Patent Office takes in, in the form of application fees, it turns over to general revenue, and it goes to wherever. This could be farm price supports or a new monument in Minnesota or something; I don't know.

If you're concerned that the Patent Office may be granting patents that are, for lack of a better term, bad, that really should not have been granted in the first place, this is the easiest and fastest and perhaps best way to fight that. That is, to get more money into the hands of the examiners so they can spend more time on the examination process.

And I know that it sounds like, yes, throw more money at it, that makes it better; that's something a good Republican would always say. But the reality is that the patent pendency -- that is, the time an application sits at the Patent Office before it's granted -- keeps growing. So even if you care not about the quality of the patents granted, you ought to care about the length of time that the Patent Office is taking to process applications.

That's all I have for right now, Drew, and I would be happy to take your questions in a little bit.

(Applause.)

(End of Mr. Misener's remarks.)