

eBay, Metabolite, Trolls and Business Methods: Why General Counsels Should Still Worry about Patents

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“In recent decades . . . the fraction of the total output of our economy that is essentially conceptual rather than physical has been rising. This trend has, of necessity, shifted the emphasis in asset valuation from physical property to intellectual property and to the legal rights that inhere in the latter.”¹

On May 15, 2006, the U.S. Supreme Court handed eBay Inc. a unanimous (pyrrhic?) victory over MercExchange, LLC in a much publicized patent dispute.² *Forbes* reported the decision with a headline reading: “Supreme Court Buries Patent Trolls.”³ Similarly, the *Financial Times*’ headline read: “US Technology Groups Win Patent Lawsuit.”⁴ Consequently, Corporate America’s general (and chief IP) counsels and their law firm counterparts must now fight to educate the C-level executives to whom they report against this backdrop of false euphoria. That is, the *eBay* ruling, although a 9-0 decision, contained no resounding victory for operating companies similarly-situated to eBay against Patent Licensing and Enforcement Companies (PLECs or so-called “Patent Trolls”) similarly-situated to MercExchange. Furthermore, the Supreme Court’s June 22, 2006 decision to dismiss the *Laboratory Corporation of America Holdings v. Metabolite Laboratories*⁵ case leaves the current patentability of business methods (and all the controversy surrounding them) in tact.

The eBay Facts and Procedural History

In September of 2001, MercExchange filed suit against eBay in the United States District Court for the Eastern District of Virginia, alleging infringement of three patents.⁶ The patents allegedly covered eBay’s popular online auction “buy it now” functionality - which reportedly accounted for approximately 34% of 2005 gross sales revenue on eBay’s online auction site.⁷

On May 27, 2003, after a five-week jury trial, the jury returned a verdict against eBay for \$35 million. After several post-trial motions the district court reduced the award to \$29.5 million. The district court, however, denied MercExchange’s request for a permanent injunction in part “because there is a growing concern over the issuance of business-method patents,” and because “the public interest would not be served by such an injunction . . . particularly in this case where the patentee does not practice its patents, nor has any intention of practicing its patents.”⁸

On March 16, 2005, the U.S. Court of Appeals for the Federal Circuit reversed the denial of MercExchange’s motion for a permanent injunction. “Injunctions are not reserved for patentees who intend to practice their patents, as opposed to those who choose to license. . . . We therefore see no reason to depart from *the general rule that courts will issue permanent injunctions* against patent infringement absent exceptional circumstances.”⁹ The court went on to state that such “exceptional circumstances” were typically those cases where there was a “need to use an invention to protect public health.”¹⁰ It thus concluded that a “general concern regarding business-method patents, however, is not the type of important public need that justifies the unusual step of denying injunctive relief.”¹¹

So the basic issue before the Supreme Court on appeal was: Why permanently enjoin an infringer when monetary damages will make the patentee whole? Approximately 30 amicus briefs were filed in the case - a majority of which sided with MercExchange (*i.e.*, arguing to keep the *status quo* of “near automatic” injunctions being awarded to the patentee against an infringer once the patent-in-suit is finally found not invalid and infringed).

The Majority Decision

The Court's unanimous and relatively short decision, authored by Justice Thomas, can be summarized in a three-step analysis:

1. The Court first observed that: “[T]he Patent Act expressly provides that injunctions ‘may’ issue ‘in accordance with the principles of equity.’”¹²
2. Next, the Court observed that the standards for granting of an injunction are well established within equity jurisprudence. That is, in order for a court of equity to issue a permanent injunction, a plaintiff must show: (i) it has suffered irreparable injury; (ii) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (iii) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (iv) that the public interest would not be disserved by a permanent injunction.¹³
3. Lastly, the Court held that: “[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion *must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.*”¹⁴

Thus, given the foregoing three-step analysis, the Court was forced to vacate the decision of the Federal Circuit on the basis that they had admittedly abandoned the well-established four-factor test for issuing permanent injunctions in favor of the “near automatic” rule. Further, the Court could not simply reverse the Federal Circuit because the district court also had failed to fairly apply the four-factor test. In sum, the majority opinion amounted to the legal equivalent of a “punt” as the legal proceedings, short of a settlement, are far from over. Additionally, the two concurring opinions, as explained below, had enough verbiage for both sides of the debate to hang their hats on in the upcoming rounds and in subsequent, unrelated patent infringement suits.

Patentees and the Roberts Concurrence

While it may be difficult to dissect Chief Justice Roberts' short (approx. 338 words) concurrence, which was joined by Justices Scalia and Ginsburg, it will no doubt be relied upon by patentees in future patent infringement suits. Roberts writes that: “from at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”¹⁵ He goes on to observe that this is not surprising “given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to use an invention against the patentee's wishes.”¹⁶ Thus, Roberts' concurring opinion arguably can be cited for the proposition that when applying the four-factor test, the trend will most likely approximate the Federal Circuit's “near automatic” grant of a permanent injunction.

Trolls, Business Methods and the Kennedy Concurrence

On the other hand, Justice Kennedy's concurrence, which was joined by Justices Stevens, Souter and Breyer, will no doubt be relied upon by defendants in future patent infringement suits. In contrast to Chief Justice Roberts' view that “a page of history is worth a volume of logic,”¹⁷ Kennedy observed that given the rise of PLECs, reliance on history is inappropriate. Rather, “[i]n cases now arising[,] ... the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases.”¹⁸ Thus, “legal damages may well be sufficient to compensate for the infringement and a [permanent] injunction may not serve the public interest.”¹⁹

Perhaps the most baffling statement in the entire opinion is the part of Justice Kennedy's concurrence which stated:

In addition injunctive relief may have different consequences for the *burgeoning number of patents over business methods*, which were not of much economic and legal significance in earlier times. *The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.*²⁰

What is baffling about this statement -- which opponents of business method patents (and patents in general) will no doubt hang on to for dear life -- is that the four-factor test is only applied **after** a patent is found not invalid and infringed! These same opponents would likely feel even less comfort if they knew that one recently-released study has shown that the Federal Circuit has an affirmance rate of 72.3% when a district court finds a patent not invalid and infringed.²¹ Interestingly, the Federal Circuit has an affirmance rate of only 57.3% when a district court finds a patent invalid.²²

Likely Effects of the eBay Decision

While the true effects of the *eBay* decision won't be known for some time -- as it makes its way back through the courts, the Federal Circuit has a chance to craft and develop its progeny, and perhaps the Supreme Court may have a second look at the *eBay* case itself - the following eight questions deserve some speculative thought.

1. Will it Increase in Uncertainty?

The answer to this question is undoubtedly a “no brainer.” Whenever you move from a “near automatic” rule to a four-factor equitable (*i.e.*, balancing) test, there will be uncertainty. Since 1984, the Federal Circuit has never refused to enter a permanent injunction.²³ Whether one agreed with this rule or not, it did give litigants (and those in pre-litigation, licensing negotiations) some predictability. This predictability is now lost with the *eBay* decision.

2. Will it increase expert and legal fees?

*Markman v. Westview*²⁴ ushered in a new era of “Markman Hearings.” So, the question becomes is it likely that post trial, once a patent is found not invalid and infringed, that an “*eBay* hearing” will take place to apply the four-factor test in deciding on the permanent injunction issue. Perhaps this new “phase” of the trial will be replete with briefs, oral arguments and even expert testimony. Or, even if no “*eBay* Hearing” is necessary, patentees will no doubt make sure the trial record contains a sufficient showing such that the four-factor test weighs in their favor. Thus, in either case, the cost of an average patent litigation suit may increase accordingly.

3. Will it increase the leverage of alleged infringers versus trolls and other patentees?

In a post-*eBay* world, patentees can no longer rely on the “hammer” of the near-automatic permanent injunction. Thus, in any (pre-litigation) licensing negotiations, *eBay* has caused a shift in negotiation leverage from patentees to potential defendants. If an alleged infringer is not facing the almost certain pre-*eBay* shut down of their business, the likelihood that they will be willing to settle most certainly decreases. One may argue, however, that operating companies who enforce their patents will not face such increased leverage by potential defendants. This is because, unlike individual inventors, universities, PLECs and the like, operating companies are more likely to establish irreparable harm, and thus still be awarded the pre-*eBay* “near automatic” permanent injunctions.

4. Will it increase the amount of litigation as alleged infringers “roll the dice” rather than license?

Given, the post-*eBay* increased leverage that alleged infringers now have in pre-litigation negotiations as described above, it is not a far leap to predict that there may be an increase in the number of patent law suits filed. As one Fortune 500® company's general counsel stated: “There will now be a greater willingness to take cases to trial ... [since] if you lose a case there is a potential you can compensate the plaintiff in dollars rather than having your whole

company shut down.”²⁵ Thus, we may very well see an increase from the 2,700 patent lawsuits filed in 2005.²⁶

5. Will it decrease the value, generally speaking, of patents?

With the above-described decreased leverage in pre-suit negotiations and the possibility that more alleged infringers will the roll the dice rather than agree to take a license, the *eBay* decision may have the impact of generally decreasing the power and thus the absolute value of patents. In other words, litigation is an inefficient method of monetizing patents. Therefore, if the effect of *eBay* is to increase the number of patent litigations, it increases inefficiency in the marketplace as well as decreases the liquidity of patents as an asset class. Quite simply, inefficiency and illiquidity means lower value.

6. Will it decrease settlement amounts?

Given the foregoing, the *eBay* decision may have the effect of decreasing settlement amounts. This simply may be a natural extension of the decreased leverage patentees will now have in pre-suit negotiations with potential defendants due to the loss of the near-automatic permanent injunction threat. In other words, given the significant amount that a patentee must spend to litigate a patent, and the decreased pressure on an alleged infringer to settle without the threat of a permanent injunction, it is fair to speculate that settlement amounts may tend to decrease over time as patentees may take a lower settlement to avoid the increased costs of a post-*eBay* patent suit.

7. Will it decrease damages awarded in patent infringement litigation?

If one were to believe that an effect of *eBay* is to generally push down settlement amounts, then one may believe that the decision will also tend to decrease litigation damages as well. This is because once a patent is found not invalid and infringed, the floor on damages in a “reasonable royalty.”²⁷ A hypothetical negotiation between the patent holder and the infringer is the construct generally used to determine a reasonable royalty. Such a hypothetical negotiation construct is evaluated by the district courts and the Federal Circuit using the 15-factor framework set forth in *Georgia-Pacific Corp. v. United States Plywood Corp.*²⁸ One of the 15 factors rest upon “[t]he amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement.”²⁹ Thus, if settlement amounts are pushed downward due to the lack of the “permanent injunction hammer” and in light of the Kennedy concurrence, one may presume that reasonable royalty infringement awards (*i.e.*, the amounts the parties “would have agreed upon”) are also likely to be pushed downward.

8. Will the Federal Circuit “hand wave” the four-factor test and still almost always issue an injunction once infringement is found?

Unless there is some legislative action to formalize some or all of the four-factor test, many may speculate as to whether the Federal Circuit will simply “hand wave” or perform lip service to the four-factor test and still continue to issue permanent injunctions in almost all cases. This result may flow from, and thus would not be inconsistent with, Chief Justice Roberts’ concurrence. If this is the case, and given the small chance that this same issue (or even the same case) may return to the Supreme Court’s docket anytime soon, there simply may be no “*eBay* effect” after all.

Metabolite

Another closely-watched case coming from the Federal Circuit was *Laboratory Corporation of America Holdings v. Metabolite Laboratories*. This case involved Metabolite’s patent which contained a claim to a method for detecting vitamin B12 or folic acid deficiency in a patient by a doctor making an observation of elevated levels of a certain amino acid found in the patient’s blood or urine. In June of 2004, the Federal Circuit affirmed a jury’s \$2.038M infringement award, finding the patent not invalid and infringed and the U.S. District Court for

the District of Colorado's issuance of a permanent injunction against the defendant, Laboratory Corp.³⁰ The patent's validity was only challenged by Lab. Corp. on prior art and technical grounds, but not on the issue of patentable subject matter. Curiously, however, in October of 2005, the Supreme Court granted certiorari on the issue of patentability. The question accepted by the Court for review was: "Whether a method patent ... directing a party simply to 'correlat[e]' test results can validly claim a monopoly over a basic scientific relationship used in medical treatment such that any doctor necessarily infringes the patent merely by thinking about the relationship after looking at a test result."³¹

This curious (if not rhetorical) question obviously related to the medical community. Many, however, saw *Metabolite* as an opportunity to finally get the Supreme Court to weigh in on the issue of patentability of business method patents. The Supreme Court last addressed the scope of patentable subject matter in its 1981 decision *Diamond v. Diehr*³², recognizing that the patent laws were made to cover "anything under the sun that is made by man."³³ Since then, the Federal Circuit's decisions in *State Street Bank & Trust Company v. Signature Financial Group, Inc.*³⁴, and *AT&T Corp. v. Excel Communications, Inc.*³⁵, along with the USPTO Board of Patent Appeals and Interferences' decision in *Ex Parte Lundgren*,³⁶ have consistently upheld the patentability of business method patents. These decisions have engendered spirited debate over the scope of patents in the popular press, the business community (especially the financial services industry), Congress, the U.S. Patent and Trademark Office (USPTO), members of the Patent Bar, as well as the legal community at large.

Oral arguments in *Metabolite* were held on March 21, 2006. However, on June 22, 2006, the Supreme Court without comment dismissed the writ of certiorari as being "improvidently granted" in a 5-3 decision.³⁷ Many can see why this outcome was justified as the issue of the patentability of *Metabolite*'s patent claims (let alone the issue of patentability of business methods) was never argued nor briefed before the district court and the Federal Circuit.

Justice Breyer authored a dissent that was joined by Justices Stevens and Souter - the same three justices who joined the Kennedy concurrence in *eBay*. Breyer acknowledged that because the parties did not explicitly argue patentability in the lower courts, there was "a technical procedural reason" for dismissing the case.³⁸ However, he felt that there were strong public policy reasons for deciding the case in order to clarify the law, especially when "[t]he relevant issue has been fully briefed and argued by the parties, the Government, and 20 amici."³⁹

Breyer's dissent went on to reach the merits of the case and conclude that the patent claim at issue should have been found invalid because long-standing case law has always held that one cannot patent a "natural phenomenon."⁴⁰ Thus, the dissent's reasoning focused on a long-standing and relatively uncontroversial exception to patentability. It did not rest on anything having to do with business methods. Opponents of business method patents, however, will probably take comfort in the fact that Breyer, referring to the Federal Circuit's *State Street* decision - which many blame for opening the floodgates for business method patents, stated: "[T]hat case does say that a process is patentable if it produces a 'useful, concrete, and tangible result.' But this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary."⁴¹ Unfortunately for such opponents, the dissent was just that - a dissent. Thus, the *status quo* lives on and business method patents remain patentable so long as the method cannot be classified as an "abstract idea" (such as a mathematical algorithm), a "natural phenomenon," or a "law of nature."⁴²

True Patent Reform

The *eBay* decision comes just two months after Research In Motion, Ltd. - makers of the popular BlackBerry[®] wireless devices - finally settled their five-year patent infringement battle with NTP, Inc. (a PLEC) for \$612.5M.⁴³ As one Fortune 500[®] company's general counsel stated:

“One lasting impact of the [NTP] case is that it has turned patent litigation from simply a legal issue into a broader business, commercial and even an economic issue. If the lasting consequence of the case is to broaden awareness and promote the level of debate that we need to have about what it takes to have a healthy patent system, then there is a good side to that.”⁴⁴

However, true reform must honestly recognize that we are now in a new age of IP rights and its associated marketplace. We are no longer in the era where “feudal lords” (*i.e.*, a small handful of large “old economy” companies) controlled all the (intellectual) property and those who were without property had no rights and virtually no “say so” in the licensing and enforcement of IP, as well as the legal landscape defining the rights associated with such IP. The IP marketplace has matured (and continues to do so). We are now in an era of “IP for the masses and not just the feudal lords” where the IP marketplace operates according to the “Golden Rule” -- those with the gold (*i.e.*, patent rights) now have a “say so” and can make the rules. This new era is also characterized by the rise of intermediaries such as PLECs, IP outsourcing companies, licensing agents, merchant banks, exchange operators and the like who seek to make IP a liquid asset class. The “do as I say, not as I do” attitude that predominated the period of the feudal lords will no longer carry the day. The *eBay* decision will not make such entities go away, and companies who insist on behaving as though the feudal system of IP is still extant will suffer.

Further, with the dismissal of the *Metabolite* case, the rise in number of such intermediaries (and business method patentees) is not likely to wane anytime soon. This is because “[a]s much as three-quarters of the value of publicly traded companies in America comes from intangible assets, up from around 40% in the early 1980s.”⁴⁵ Thus, there is too much economic justification for such entities to exist. Consequently, corporations which either use patented technology in their products or services, or in cross-licensing programs, must become more active in the patent market. By actively seeking out and acquiring patents valuable to their businesses, corporations can limit their potential exposure to PLECs and improve their own patent portfolios, all while reducing the number of patents available to PLECs. And it is Corporate America’s general (and chief IP) counsels and their law firm counterparts who must lead the charge to educate the C-level executives to whom they report.

Conclusion

eBay and *Metabolite* are just the beginning of the patent reform debate and history will prove them to be worthwhile cases only if they spur real patent reform. Perhaps rather than new laws on injunctions, venue and damages, real solutions to the patent quality problem should be the focus. That is, too many are focused on downstream reactive bandages (*i.e.*, litigation reform) to heal upstream gun wounds (*i.e.*, patent quality, the USPTO backlog and overlapping patents leading to excessive rent seeking⁴⁶). Proposals that would separate the USPTO from the U.S. Department of Commerce into an independent agency with a professional CEO who can increase efficiency -- and not a political appointee -- and the ability to keep all fees generated are needed. Only such proposals would assure that the United States’ IP system makes our economy competitive and the envy of the world in the new, knowledge-based economy.

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¹ Alan Greenspan, Remarks at the 2003 Financial Markets Conference of the Federal Reserve Bank of Atlanta, Sea Island, Georgia (April 4, 2003).

² *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (US 2006).

³ Jessica Holzer, Forbes.com (May 16, 2006). “Patent Troll” is a derogatory term, coined in 2001, used to refer to companies who obtain ownership of patents for the sole purpose of licensing and enforcing them. Such companies offer no products or services and typically have few, if any, full-time employees, thus making them immune from counterclaims. Although the term can technically be applied to “real” operating companies who engage in patent licensing and enforcement activities outside of the fields in which they do offer products or services, that is not the connotation referred to in this article.

⁴ Patti Waldmeir, Financial Times USA (May 15, 2006).

⁵ 2006 WL 1699260 (US June 22, 2006).

⁶ U.S. Patent Nos. 5,845,265, 6,085,176, and 6,202,051.

⁷ See *eBay Patent Wars*, available at <http://www.auctionbytes.com/cab/pages/patent> (visited June 18, 2006).

⁸ *MercExchange, L.L.C. v. eBay, Inc.*, 275 F.Supp.2d 695, 714-15 (E.D. Va. 2003).

⁹ *MercExchange, L.L.C. v. eBay, Inc.*, 401, F.3d 1323, 1339 (Fed. Cir. 2005) (emphasis added).

¹⁰ *Id.* at 1338.

¹¹ *Id.* at 1339.

¹² *eBay*, 126 S. Ct. at 1840 (emphasis added) (citing 35 U.S.C. § 283).

¹³ See *id.* (internal citations and quotations omitted). This test is hereinafter referred to as the “four-factor test.”

¹⁴ *Id.* at 1841 (emphasis added).

¹⁵ *Id.*

¹⁶ *Id.* (emphasis in original).

¹⁷ *Id.* at 1842 (Roberts, CJ, concurring).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

²¹ Matthew D. Henry and John L. Turner, *The Court of Appeals for the Federal Circuit’s Impact on Patent Litigation*, 35 J. Legal Stud. 85, 103 (Jan. 2006).

22 *Id.*

23 See, Brief Amici Curiae of 35 Intellectual Property Professors in Support of the Petition for Certiorari, 2005 WL 2381070 at *2 & n2 (Sep. 26, 2005).

24 517 U.S. 370 (US 1996) (Holding that “the construction of a patent, including terms of art within its claim, is exclusively within the province of the court,” thus spawning “*Markman* hearings” where the trial court judge typically decides the meaning of disputed patent claims before submitting the question of infringement to a jury).

25 Patti Waldmeir, *US Technology Groups Win Patent Lawsuit*, Financial Times USA (May 15, 2006) (quoting Bruce Sewell, General Counsel of Intel Corporation).

26 Administrative Office of the U.S. Courts, *Judicial Facts and Figures* at Table 4.7 (2005) (available from <http://www.uscourts.gov/judicialfactsfigures/Table407.pdf>).

27 See 35 U.S.C. § 284 (“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty”).

28 318 F. Supp. 1116 (SDNY 1970).

29 *Id.* at 1120.

30 See *Lab. Corp. of Am. Holdings v. Metabolite Labs.*, 370 F.3d 1354 (Fed. Cir. 2005).

31 See Order granting cert., 126 S. Ct. 543 (Oct. 31, 2005).

32 450 U.S. 175 (1981).

33 *Id.* at 182 (quoting S. Rep. No. 1979, 82d Cong. 2d. Sess., 5 (1952); H.R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952), U.S. Code Cong. & Admin. News 1952, pp. 2394, 2399).

34 149 F.3d 1368, 1375 (Fed. Cir. 1998) (taking the “opportunity to lay this ill-conceived [business method] exception to rest”).

35 172 F.3d 1352, 1356 (Fed. Cir. 1999) (holding that “the judicially-defined proscription against patenting of a ‘mathematical algorithm,’ to the extent such a proscription still exists, is narrowly limited to mathematical algorithms in the abstract”).

36 2004 WL 3561262 at *5 (Bd. Pat. App. & Int. 2005) (*per curiam*) (“Our determination is that there is currently no judicially recognized separate ‘technological arts’ test to determine patent eligible subject matter under [35 U.S.C.] § 101. We decline to propose to create one. Therefore, it is apparent that the examiner’s rejection [of a business method claim without the disclosure or suggestion of computer, automated means, apparatus of any kind] can not be sustained.”).

37 2006 WL 1699360 (US June 22, 2006) (Chief Justice Roberts took no part in the consideration or decision in the case).

38 *Id.* at *5.

39 *Id.* at *6.

⁴⁰ *Id.* at *7.

⁴¹ *Id.* (citations omitted).

⁴² See USPTO, *Interim Guidelines for Examination of Patent Applications for Patent Subject Matter Eligibility* at 16-17 (Oct. 26, 2005) (citing *Diamond v. Diehr*, 450 U.S. 175, 185 (1981) (available from: http://www.uspto.gov/web/offices/pac/dapp/opla/preognotice/guidelines101_20051026.pdf).

⁴³ See, e.g., Mark Heinzl, *RIM To Pay NTP \$612.5 Million To Settle Blackberry Patent Suit*, Wall Street Journal (Mar. 4, 2006).

⁴⁴ Mark Heinzl, *Debate on Patents Heating Up: Power of Firms Like NTP Questioned, Lawyer Predicting Reforms are Likely*, Toronto Star (Mar. 7, 2006) (quoting Brad Smith, General Counsel of Microsoft Corporation).

⁴⁵ *A Survey of Patents and Technology, A Market for Ideas*, The Economist at 1 (Oct. 22, 2005); see also Baruch Lev, *Intangibles: Management, Measurement and Reporting* (Brookings Institution Press 2001) (including an independent measurement of the breakdown between tangible and intangible asset value of U.S. corporations in the S&P 500 that identified a shift from 38% in intangible assets in 1982, 62% in 1992, and 85% of asset value being in intangibles by 1998).

⁴⁶ See, Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Executive Summary 6 (Oct. 28, 2003) (available at <http://www.ftc.gov/os/2003/10/innovationrptsummary.pdf>).