

The Impact of Patent Quality



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was a key player on these issues, both domestically and internationally. At the request of the President, he served concurrently in the fall of 1997 as acting Chairman of the National Endowment for the Humanities, which fosters and recognizes the work of America's artistic and creative community. In 1994, *The National Law Journal* named Mr. Lehman its "Lawyer of the Year." In 1997, the public policy magazine *National Journal* named him as one of the 100 most influential men and women in Washington, noting, "In today's Information Age, the issue of intellectual property rights is no longer an arcane concern, but a vital part of US trade policy. Since taking over his current posts in 1993, Lehman has been the Clinton Administration's outspoken voice on such matters here and abroad." Serving as the leader of the US delegation to WIPO's December 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Mr. Lehman concluded negotiations that resulted in the adoption of two treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; by updating international copyright law for the digital age, the treaties aim to facilitate the growth of online digital commerce over the Internet. Mr. Lehman's guidance on the development of the intellectual property provisions of the Uruguay Round Agreement, now known as TRIPS (Trade Related Aspects of Intellectual Property), has enabled American creators and inventors to more easily protect their creations from piracy throughout the world. Mr. Lehman engaged in streamlining the U.S. Patent and Trademark Office (PTO) to be more responsive and customer focused. His efforts were recognized by Vice President Gore's National Performance Review as a success story for government reinvention. As Commissioner, he held a series of public hearings throughout the country to solicit the views and concerns of PTO customers. Feedback led PTO to develop new guidelines for patents in the biotechnology field and establish partnership libraries in Sunnyvale, California, and Detroit, Michigan, to provide better public access to PTO information and services. Mr. Lehman also chaired the Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force. In September 1995, the Working Group released *Intellectual Property and the National Information Infrastructure*, which examines the role of copyright law in cyberspace and makes recommendations to fortify copyright protection of intellectual property in the networked environment of the information superhighway. For 10 years prior to joining the Clinton administration, Mr. Lehman was a partner in the Washington, DC, law firm of Swidler & Berlin. There he represented individuals, companies and trade associations in the areas of intellectual property rights. His clients were drawn from the motion picture, telecommunications, pharmaceutical, computer software and broadcasting industries. Prior to entering private practice, Mr. Lehman worked for nine years in the U.S. House of Representatives as Counsel to the Committee on the Judiciary and Chief Counsel to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. He was the Committee's principal legal adviser in the drafting of the 1976 Copyright Act, the 1980 Computer Software Amendments and the 1982 Amendments to the Patent Laws. Early in his career, Mr. Lehman served as Legal Counsel to the Wisconsin State Legislature, as an attorney with the U.S. Department of Justice and as an officer in the U.S. Army. Mr. Lehman received his BA in 1967 and his JD in 1970 from the University of Wisconsin. He is a member of the District of Columbia Bar. He is also a member of the Policy Advisory Commission to the Director General of the World Intellectual Property Organization (WIPO), the specialized United Nations agency headquartered in Geneva, Switzerland; a member of the Board of Directors of the U.S. Committee for WIPO; and a member of several corporate Boards.



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Patent Strategy & Management. His column, *IP Investor*, appears regularly in London-based IAM. Articles, chapters, and reviews written by him have appeared in many periodicals and books, including *The Book of Investing Rules* (Financial Times, Prentice-Hall, 2003), which The Motley Fool called one of the 10 most useful investment books. He has been cited as a resource in many business, technology and IP publications. A previous book to which he also edited and contributed, *Hidden Value: Profiting from the Intellectual Property Economy* (Euromoney Institutional Investor), was published in London in 1999. A frequent speaker, Mr. Berman has guest lectured at Columbia University School of Business and either chaired conferences or moderated panels for The Wall Street Transcript IP conference on ROI, the Intellectual Property Owners' Association "patent trolls" conference in Washington, DC, and the 2005 Center for Intellectual Property Studies conference in Gothenberg, Sweden. Mr. Berman received his Master's degree in Film Scholarship from Columbia University, where he taught for three years and also completed course and comprehensive requirements for his PhD. He received his Bachelor of Arts degree with honors in English literature and journalism from The City College of New York.

(ZBL302) Mr. Berman: Uncertainty regarding patent issuance, disputes and costs affect companies and governments worldwide. The focus of this dialog is patent uncertainty and cost, and how they are setting the stage for an innovation crisis. Are patents less reliable today than 20 years ago, or do they just appear to be so?

Mr. Lehman: I think the short answer is no, they're not less reliable than 20 years ago. Twenty years ago, the patent system had begun to improve. But we had just made a number of very significant changes, including the creation of the Court of Appeals for the Federal Circuit, so I would say that patent quality was already in the process of improving at that time. Also, 20 years ago, we had a Patent Office that had absolutely no automation whatsoever. It was very poorly staffed, and we had a much more extensive diversion of fee revenue at that time from the office than we do today.

I think one persistent reason that patents are perceived as perhaps not being as good now is simply because patents are more important. Back in the 1960s and 1970s, largely because of extremely poor examination of the PTO — and also because of different decisions in regional courts of appeals — patents really weren't very important. I don't think companies or individuals paid that much attention to them. So part of the perception of problems in the patent system — and probably the reason behind extensive use of the patent system today, which puts a lot of stress on the Patent Office and patent system — is precisely because patents are more important and higher quality.

TWST: What are "uncertain" patents and why are they such a big problem today?

Mr. Lehman: An uncertain patent can fall into several categories. To me, an uncertain patent is a patent that has had a poor examination. If a patent has received a proper examination and has been issued by the USPTO — I'm talking about the United States, but I think it would also be true of the JPO or the EPO in Europe, which are high-quality patent offices — you have a quality, viable patent.

Now, one of the problems is that a lot of people don't like certain patents. They get in their way. This goes to the subject matter issue. The Supreme Court and the Court of Appeals for the Federal Circuit have, of course, interpreted the patent law to continually embrace new subject matter as technology changes. So sometimes it strikes people as strange that they have business method patents, for example. They don't like that. But that doesn't mean that we don't have good patent quality. If a patent application includes claims that meet the test of patentability — novelty, non-obviousness, and usefulness — that means that that invention has never existed in the history of the world before, and it certainly can't get in the way of anybody who's out there already doing business.

Mr. Berman: Do uncertain or poorly examined patents and strong patent holder rights invite more disputes?

Mr. Lehman: I think there's another issue with uncertain patents. (This gets to the patent troll issue, and you may want to come back to that later.) Patents may be issued that may not immediately be worked — that is, actually exploited by the patentee, resulting in the manufacture of products that embody the patent — and they also may not be enforced. And as industry and technology proceed apace, a patent owner may decide later on to assert his rights. That sometimes creates a perception of poor patent quality.

Yet there's nothing wrong with the patent at all. It's just that the owner of the patent, the inventor, has decided to enforce his or her rights at a time after someone else has replicated the invention or copied it.

Mr. Berman: Examination quality is highly inconsistent. Frequently it depends on whether the patent involves a new area of art or a well-established one. What are some of the factors that go into examination quality?

Mr. Lehman: First, I'm not prepared to say that examination quality is necessarily poor. The IPO did a survey recently of users of the patent system, and there was a lot of concern expressed in that survey about poor patent quality. I think in some cases as many as 50% said they didn't think there was good patent quality. But it's very hard to really objectively determine whether a particular patent is a quality patent or not. Really, the principal test of patent quality is whether or not the patent will be found to be valid when it's asserted in litigation. And I think that if you look at the statistics, there really hasn't been a significant change over the years — particularly since we have put the Court of Appeals to the Federal Circuit into place — on patents being found invalid. That's really the ultimate test of quality. When I was running the Patent Office, that was a big issue we constantly struggled with — how do we define quality? I personally always came back to that test — are the patents found valid in litigation? In fact, something the Patent Office probably should do is to develop a more effective system for tracking that and then dealing with an analysis of what they have done when a patent has been found to be invalid through an error in the examination.

Of course, when I look at most litigation — and I am involved oftentimes as an expert witness — in cases where a patent has been found invalid, usually it's not really because of something that the Patent Office did. It's something that the applicant did — a failure to provide the Patent Office with the right information that caused an invalid application.

Mr. Berman: Do you think companies pay lip service to patent quality by failing to provide the necessary prior art in some cases to allow the PTO to conduct a thorough examination?

Mr. Lehman: This is a huge problem. In fact, I'm really shocked sometimes in the cases that I see from an expert-witness point of view — and in industries where patents are extremely important — at the poor quality of patent prosecution. And indeed, in the context of my law firm, as a lawyer, when we're pitching patent prosecution services, one of the things we find over and over again, even with very well-heeled, deep-pocket companies, is that they want to scrimp on patent prosecution. In fact, it's very hard for a top-tier law firm to charge fees that clients would not hesitate to pay in litigation where they perceive that the stakes are really high. Looking across the board at top-tier law firms, you see that it's very hard for them to sustain patent prosecution practices with their fee structures. That's because patent applicants always want to keep down the costs. In many cases, those cost savings are utterly swept away in the litigation that might follow as the result of a poorly prosecuted patent application. Patent examination is a two-way street: it involves the Patent Office, but it also involves applicants.

Now, there are issues here that have to do with more than just the legal quality of patent prosecution. When I look at the PTO's

effort, for example, to automate patent applications through electronic filing, it's been extremely difficult to get patent applicants, whether they be law firms or individual companies, to cooperate and to file patents electronically. In fact, the PTO has had to develop a system where all paper applications are digitized as they come into the office, and then they're handled electronically. But that's a very good illustration of where the patent applicants aren't, in my view, doing a very good job of seeing that the PTO's burden of work is made easier. But there's another issue there, too. When you use modern technologies — digital technologies, for example — the computer can catch a lot of errors and problems in applications that otherwise delay prosecution and sometimes result in mistakes.

Mr. Berman: It appears a sort of an arms race mentality exists with regard to patents, at least in the information technology industries. I'm thinking of companies that stockpile patents regardless of how well they're prosecuted or examined — they would rather have the patents issued and put them into their vaults and worry later if they are any good. What's your take on that?

Mr. Lehman: We've seen a huge increase in patent applications over the last decade or so. That leveled off a little bit after the tech boom busted; now it's back up again. I think the Patent Office is experiencing maybe 15% a year increases in applications. There are two reasons for that. One is what you might call the "patent arms race," i.e., people filing a lot of patents. Certainly there are famous examples of this, like **Microsoft** filing 3,000 patent applications a year. A lot of finance companies filed applications after the **State Street Bank** case about business methods, and a lot of newer tech companies are filing, particularly in the IT area. I suspect that in traditional areas like pharmaceuticals and chemicals, the rate of applications is probably pretty much the same. Where you see a sense of a patent arms race is probably more in the IT industries. Those companies are filing for two reasons. One, they're filing defensively. They want to have a large portfolio of patents so that they can have a great sense of certainty that they are covered in their own use of their technology and are not going to run into somebody else's patents, and if they're sued they may have something to assert back again. Two, in the IT industry — and increasingly in lots of industries — products interact with one another, so it is extremely important. In this sense, the IT industry is simply a new iteration of the consumer electronics industry, which for years has been accustomed to using patent pooling, to trading patents, and so forth.

TWST: Cross licensing?

Mr. Lehman: Yes, so that they don't get left behind when some new technology comes up. Now, there's an interesting article in a recent *BusinessWeek* about how **Toshiba** has decided to break that. They're not going to license their patents and try to keep things in a more proprietary manner. It will be interesting to see how that plays out. But I think in the IT industry — telecommunications, computer software, etc. — you're seeing just an expansion of this traditional phenomenon, and that results in a lot of filings.

The other big factor is globalization. People are filing now who didn't used to file. There are foreigners filing in this country because they're doing business here, and there are Americans filing abroad. So you have huge duplication in the

patent system. You have the same patent examination being filed now in many different markets because in a globalized economy, you can't just get away with filing in a couple of patent offices anymore — and that includes a US applicant filing abroad and foreign applicants filing here.

Mr. Berman: In theory then, patent examinations should not differ in Japan or Europe or the US. Is that correct?

Mr. Lehman: Yes. One of the interesting things about global patent law — which I think is not fully appreciated because we have some dysfunctionality there — is that in many ways patent law has been one of the most harmonized of all of the areas of international economic law — going way back to the Paris Convention in 1883. That international treaty set forth the fundamentals of what a patent is. It's an invention that has to be novel and non-obvious. Those notions of novelty and non-obviousness are at the heart of patent examination in every single country in the world that has a patent system, and every single country that has a patent system is a member of the Paris Convention. So they have to have an examination, and those examinations should be pretty much doing the same thing to meet those Paris Convention tests.

Mr. Berman: What's to prevent the JPO from sharing patent examination information? If Fujitsu is filing in the JPO for a certain invention and then they have to file in the US, what prevents the US Patent Office from using the JPO information for its examination when it would save time and money? It seems like it would be a healthier approach.

Mr. Lehman: Nothing prevents them from doing that, other than just simply the failure to do it. During my administration at the PTO, we began extensive work among the three big patent offices to compare our examinations. We did a project with the Japanese where, with the consent of the applicants, we had a group examination — examiners in Tokyo and in Washington shared information, and so on — and we found that the results were overwhelmingly the same. In 99% of the cases, they were the same. So we were really just duplicating effort. That began a discussion — which continues to this day in the trilateral context — to try to share work. The idea of it is that, for example, when the JPO has examined a patent, they would give their search results to the US office, and then the US office would simply begin its examination using those search results. There's nothing whatsoever that stops the Director of the USPTO from doing that simply on his own initiative. There doesn't have to be any legal change or anything else.

The problem with it, however, is that in spite of the fact that there has been trilateral discussion of the issue, in spite of all of its difficulties and rising pendency, the USPTO still processes its patent applications in a more timely manner than is the case in Japan or Europe. Now, that is partly because in those two markets they have deferred examination. So what happens is that applicants, particularly in Japan, will elect to defer examination until the USPTO application is issued and then they'll go to the Japanese patent office. Well, that doesn't do the USPTO any good at all! If that problem were addressed, then we could probably end up reducing the burden of examination in the USPTO by about 70,000 patents a year, which is the number of US examinations of Japanese patents.

Mr. Berman: Currently, pendency for some areas — software and business methods, for example — is up to three

and a half or four years, is it not?

Mr. Lehman: That's an average, three and a half. In some cases it's higher, and that number is going up very rapidly.

Mr. Berman: How do delays in patent issuance affect invention? Does it have a discernible impact on innovation?

Mr. Lehman: It creates a question mark. It creates uncertainty, a cloud over an area of technology. I think in the area of business methods, that's particularly the case. It's an area where people are already concerned, worried, and don't understand it completely — and then you have all these applications in the mill, and you don't know whether they're going to issue or not. Now, there's an interesting twist here. Under the legislation that was enacted when I was head of the office, we provided that applications would be published 18 months after they were filed. That was, in part, an attempt to deal with this difficulty of not knowing what was in the office because you could at least look up pending applications...

Mr. Berman: Which is publication requirement that most of the world currently follows.

Mr. Lehman: That's correct. They have an 18-month publication. However, because of opposition from independent inventors, there was an exception built into that statute that would be addressed in legislation now pending on the Hill (though it doesn't seem to be going very far very fast) that if you only file in the US you can choose to waive the publication requirement. Well, obviously, business method patents are principally a US phenomenon. Europe has made it clear that they're not going to accept business method patents, for example. So in business methods — now, I'm not sure this is true in great big financial services companies — considering that they're likely to be only filed in the US, people certainly have the opportunity not to publish. And that compounds the problem because then you don't even know that the patent is pending in the PTO — and who knows, an issue might pop up five or six years from now, and in the meantime people out in the industry are working in an area and maybe in an infringement situation. That is a very negative aspect of long pendency in this area.

Mr. Berman: With regard to international filing, in the 1950s, "Made in Japan" was synonymous with shoddy or even sometimes counterfeit goods. By the 1970s, however, the Japanese had some of the best inventions in the world, and were distinguishing themselves in innovation in the automotive and electronic industries. Similarly, the Koreans in the 1970s were known for providing low-cost, low-quality alternatives, and in the 1980s and 1990s they became leading edge, certainly in the US. Thirteen of the top 20 US patentees for 2004 are foreign-based companies, primarily Japanese and Korean. US patents are issued much more frequently to foreign, non-US companies than to those based here. So my question is this: what's going to happen with China? Though it is not currently thought of as a technological leader — certainly not the way Japan is — the Chinese are starting to invent. Will they be filing more US patents, and what does that mean?

Mr. Lehman: The short answer is they absolutely will. Exactly the same thing that happened with Japan and South Korea will happen with China. And that's not just speculation. You can look at statements made by the leaders of China and that is their stated intention. Indeed, they're starting already.

Obviously that depends on first building up their high-tech industries, but they're graduating more engineers and scientists than any other country in the world right now. They have extremely fine educational institutions such as Beijing University that are extraordinarily competitive and very difficult to get into. They're graduating PhDs and the intention is that these people will invent.

I think the Chinese Patent Office itself had about 300,000 domestic applications last year. That's one of the highest in the world. Those will obviously be transferred into international applications as Chinese companies begin to globalize.

Mr. Berman: Chinese companies will obviously avail themselves of the US Patent Office and the markets in the US for their products, but will the US be able to avail itself of China's intellectual property protection?

Mr. Lehman: Virtually every tech company I know of that is doing business in China is filing in China. There's a very high rate of filing. I suppose that 20 or 30 years from now, China will have a much more sophisticated system, but in about 20 years, China has come from no patent system, period, to what they have today and they have a Patent Office with well over 1,000 examiners.

China is a mixed bag. On the surface of it, they have all of the laws and they have the system in place, but obviously, as a practical matter, they're still kind of green. Whenever you're building something like that from scratch, it is obviously of limited quality.

And then you have two other huge problems in China. One is that China is not a transparent, democratic society at this stage. It's hopefully evolving toward that as time goes on, but obviously, there is a considerable capability of the political or policy system to influence law. In fact, there was a big case recently that received a lot of publicity in the US press, where a judge in China overruled the decision of a provincial government as being unconstitutional in China. This created a huge uproar that a judge could even do that and has really caused a focus on the fact that historically in China, all judges, all courts and all administrative agencies really are ultimately subject to political control. Those are the words that are used — political control of the Political Bureau of the Communist Party of China.

Obviously, you don't have what we would think of as rule of law. That means that if political bureaucrats in Beijing decide to send an order over to the Patent Office to reverse what otherwise might be an objective administrative determination, they can do that. They can even tell a court to change their position. That's technically the way the Chinese system works today.

Compounding that, you have the very serious problems of competence in the judicial system. Some people are on the cutting edge and are much more competent and much more well trained. But then you still have the legacy of a lot of the old-timey people, where you had judges who weren't even trained and here you're dealing with an extremely sophisticated subject matter. You have a lot of judges in China that don't even have college degrees, going back to the Maoist period when you had to be a worker or a peasant in order to be a judge.

Mr. Berman: What can developed nations worldwide, such as those in Europe, Japan and the US do to facilitate the

system, not just the Patent Office, but the court system for adjudicating patent disputes? What can be done to level the playing field and facilitate reciprocal IP practices??

Mr. Lehman: Of course the TRIPS Agreement, which was a part of the WTO Treaty and was negotiated during my tenure in office, required that all countries in the world have effective systems for the enforcement of a whole panoply of intellectual property rights that are covered in the TRIPS Agreement, including patents. So there's a standard there, but of course the question is, what is effective enforcement? It's obviously not terribly specific. But clearly that's intended to cover a situation in every country and say that you have to have a workable rule of law, judicial systems that enable rights holders to defend their rights in court.

Clearly China is a very mixed bag in that regard. There have been some successful litigations there, but it's of mixed quality. And so really what has to be done is China has to have the political will to have effective rule of law to effectively train judges and to deal with this problem.

I think there's another element to this too and that is in the area of patents. My colleague and predecessor in the PTO, Gerry Mossinghoff, has often stated publicly that he really thinks we need a global patent court. That would be a real problem, even here in the US, with sovereignty issues, but I think it's an interesting concept. I think that notion of taking the administration of the patent (you already see that in Europe with the EPO) out of the parochial national scene — since these really are common international standards — and internationalizing the system more would be of great value. It would particularly be of assistance to a country like China, which doesn't have this traditional infrastructure. I think that's a set of issues that could be discussed.

Mr. Berman: Would a regional patent office make sense in Asia that included China, India and other countries, similar to the EPO?

Mr. Lehman: I think it would be viable and it would also have an advantage, as it has had in Europe. Obviously, even in Europe, once the examination takes place at the EPO, patents are issued by the national authorities and enforcement is at the national level in the national courts, although they have now put in place an appellate system that will ultimately provide a Europe-wide appeal. It will take a long time for that to really get going fully, but the very existence of the EPO has had a tremendous impact in Europe. Remember that you have opposition proceedings in the EPO, where you can actually go into the patent office post-grant. The EPO in effect has developed an administrative jurisprudence that has had a tremendously harmonizing and positive effect on the European patent system.

TWST: Would you talk about the experience levels and the ability of the examiners within the patent and trademark office to examine the patent applications that are put before them, particularly as technology becomes more and more sophisticated? Is there a lot of turnover? Are these examiners poached by companies? Would you address the skill sets of the examiners?

Mr. Lehman: I think you've touched on an extremely important issue for the PTO. First, by and large, I would say that the technical skill levels of the examiners (that is, in the technologies they're examining) are quite high. In other words, their academic training is quite good. Virtually every examiner has a degree in

some technology from a reputable university and many of them have advanced degrees. In the biotech area, almost all the patent examiners, several hundred of them, have PhDs in biotechnology, so they understand the technology, I think.

The problem is not so much in the technical background of the examiner as in the internal training and learning-by-experience process that you have to go through to become a really good Patent Examiner. You can understand technology, but then applying that to the examination of patents is another matter. Typically, the USPTO recruits out of academia for Patent Examiners and then the Patent Examiner comes into the office and he goes through an internal training program at the USPTO. I think it's a 12-week training program. Then they have to go and start examining patents. Of course, when you start out, you have a primary examiner who supervises your work and then you have a supervising Patent Examiner above them. In fact, the primary examiner, who's the more experienced one, has to sign off on everything that a regular examiner does.

When I was at the office, we concluded that it takes about three years to start getting really good, where you can really trust the work of the examiner and the primary examiner doesn't have to be looking at everything they do. The problem is that at that three-year point or shortly thereafter, that's when they leave the office. In our law firm, we hire a lot of patent agents. You don't have to be a lawyer to be admitted to the practice to prosecute patent applications with the USPTO. You just have to take the exam, have the requisite academic requirements and then you can be a patent agent. We're paying non-lawyer patent agents more than \$90,000 a year. A third- or fourth-year Patent Examiner in the Patent Office isn't getting anywhere close to that salary.

By the same token, they may get paid a little less than employees at the companies who are filing all these patent applications. In fact, even clients of mine that I know of are building big in-house prosecution activities. (By the way, I think that's in some ways preferable to farming them out to patent mills that do inferior work in law firms.) But they're also recruiting a lot of these people.

What happens is, you've got a real turnover problem of keeping good people. I always felt that if we could have a different pay structure at the PTO, that would be much more competitive with the private sector, we would actually save money because we would get a lot more efficiency. A really super-duper Patent Examiner who's had 10 years of experience and who really knows that field is obviously vastly more productive and of course the quality of their work is greater, so they put out a lot more work. They might be able to do the work of five or 10 second-year employees, so you can actually save a lot of money.

In legislation that was drafted during my tenure and then enacted into law under Todd Dickinson, the PTO has the capability now by law (under the 21st Century Inventor's Act or whatever it's called) to develop its own personnel system separate from the government-wide civil service system. But that power has never been effectively used, I think largely because of the pressure that occurs in any administration. The Office of Personnel Management and the Office of Management and Budget don't want to let go of their powers over agencies like the USPTO. Even at the Department of Commerce, the PTO is the only bureau with the Department of Commerce that has that capability, so there's a lot of jealousy and

envy from other Commerce Department bureaus and that has restricted the ability of the Director of the USPTO (who obviously is a political appointee and has to account to these other people) to use these already-existing capabilities.

TWST: Are all the examiners full-time employees or are they consultants to the Office of Patents and Trademarks?

Mr. Lehman: They're all full-time employees and, by the way, that's an issue. You could contract out examination and that's a very, very sensitive issue. A lot of patent applicants don't like that idea. I personally think that it has a lot of merit, but at the present time, they're all full-time employees.

TWST: Would you discuss the protocols that are in place at the Office of Patents and Trademarks to ensure against conflicts of interest that the examiners may have in other areas of government, where there's a lot of scrutiny on the stock portfolios that government officials have?

Mr. Lehman: The USPTO has a very strong system of review. Employees have to report their stockholdings and that sort of thing and there are big restrictions on their capability to examine what they might have holdings in. As a practical matter, most of the employees as a result don't really trade in individual stocks. In the pension system at the PTO, they have a 401(k) type of system that is like mutual funds that are run by the government.

TWST: In the case of the Food and Drug Administration, pharmaceutical companies have an option to pay extra money and have their drug applications fast-tracked. Is there any corollary with the Office of Patents and Trademarks?

Mr. Lehman: Yes, there is. We have something called a Petition to Make Special. There are certain requirements they have to meet, but they're usually pretty easy to meet. You pay a little more money and you can have an expedited application.

Mr. Berman: Also under the Patriot Act, I believe that certain patent applications can be expedited.

Mr. Lehman: I haven't followed that. I wouldn't be surprised. We do have this Petition to Make Special. For example, I know in my firm, we routinely use that procedure on business method patents, but even so, we find that we have very serious pendency problems because of this real breakdown within the PTO. In the area of business methods, you, of course, have a second pair of eyes and you've even got a committee that has to review the patent, so there's only so much you can do to speed up the process.

TWST: What impact do you think trends toward outsourcing patent work to countries like India will have on patent quality? A lot of law firms are outsourcing the writing of patent applications to countries like India.

Mr. Lehman: My personal view is that maybe it will improve patent quality. That maybe a very controversial statement, but there are a lot of really serious big-time PhDs with lots of experience in India, I'm sure, who could be excellent patent draftsmen. India also has the English legal system, so they're sort of accustomed to rule of law, unlike China, where, as we were discussing, they don't have the same rule of law situation. In theory, just like in other activities such as software, you should be able to get extremely high quality product in those places.

Mr. Berman: I think what you're saying is that providing more certainty regarding patents is not just about the

quality of the patents issued or patent examinations, although they are certainly key factors. Patent pendency or the time it takes for patents to issue, how patent disputes are resolved and the direction provided by the courts also are important. Patent quality is not synonymous with patent value.

Mr. Lehman: Value has a lot to do with the scope of the claims and the subject matter of the patent and so on and so forth. A very, very narrow patent with very narrow claim coverage is obviously not going to be as valuable as one that's broader. A patent in some arcane aspects of bicycle technology is not going to be as valuable as some of the patents that are being asserted right now over major elements of the Internet.

Mr. Berman: What do the trends look like? Where do you see us in five or 10 years with regard to uncertainty in the US and also worldwide?

Mr. Lehman: I think we're facing a terrible crisis that is not being effectively addressed that could really bring down the whole system. That is this problem of duplication of work that is involved in the globalization of the system, increasing pendency at the USPTO, which pretty soon will be looking at over 1 million unexamined applications, particularly in certain areas like business methods and so on. This will ultimately result in a very, very serious problem of uncertainty in those industries because you're not going to have patents being issued in a timely manner and that will be compounded by the globalization of business, so that you will have this problem in many, many countries and you won't be certain what result you'll have from one jurisdiction to another.

Mr. Berman: I would assume that affects planning and investment and shareholder value as well.

Mr. Lehman: Yes. For example, tech companies now are starting to work in China. They're starting to apply there and so on, but, as I pointed out, the mechanism of patent examination is way behind where industrial reality is. This is a problem that has to be addressed and in my view, it's not being addressed at a very high level and a very rapid manner by those who have a fiduciary responsibility to shareholders, whose principal assets are important new technologies.

TWST: Thank you. (DW)

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