

The Panel:



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About This Issue:

This special Roundtable was sponsored by Thomas, Kayden, Horstemeyer & Risley, LLP and InteCap in cooperation with the marketing department of the *Daily Report*. The Roundtable series is a supplement to the *Daily Report*. Supplements are produced independent of the editorial staff of the newspaper.

To the Reader:

Intellectual property is all around us.

From the cars we drive and machines we use to seemingly mundane items such as tissues and pens—all were invented by someone.

The cover photo of Jeffrey R. Kuester, one of the moderators of this roundtable, shows the ubiquitous nature of intellectual property. Look closely. Behind him is a Scientific-Atlanta set-top box. On the desk are products from other companies involved in the roundtable as well: Brawny paper towels and Vanity Fair napkins (Georgia-Pacific), Coca-Cola, UPS, and a phone hooked up to a Bell South telephone line, and in the distance, a Lucent-manufactured fiber optic cable.

Understanding how so many items incorporate intellectual property can be daunting. Managing that knowledge is the key to success.

InteCap, the nation's largest consulting firm focused on intellectual capital valuation and strategy, and the law firm of Thomas, Kayden, Horstemeyer & Risley, LLP hosted a roundtable to discuss the various issues and complexities involved in intellectual property management.

Their discussion, edited for clarity and brevity, follows.

Cover Photo:

Jeffrey R. Kuester photographed in Atlanta for the Fulton County Daily Report by Mark Greenberg on March 22, 2001. All other photos were taken by Fulton County Daily Report Staff Photographer John Disney.

“The key is not just to be reactive, but to be proactive ... and have a good understanding of the patents that are issued in your space.”

—James E. Malackowski



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KUESTER: Much has been said and written about the topic of patent management, but what does the term “patent management” actually mean? How about intellectual property management, or intellectual asset management?

MALACKOWSKI: My experience as a venture capitalist has only reinforced my old views on intellectual property management, which is that it all begins with people. It is a question of the management quality of those assets. In my opinion, there are a few key components, one of which is a dedicated focus, and an intellectual property holding company or similar vehicle provides that. Actually having a plan, or written document, and a strategy to integrate intellectual property with your business is also critical.

KUESTER: And with that dedicated focus, I’ve often heard it said that there must be an owner of that focus.

MALACKOWSKI: Yes, someone who has responsibility, accountability and a feeling of ownership for the assets that they’re managing and the results that they bring.

FRANK: At BellSouth, as we get even more competitive, we are looking at what makes us

different from our competitors. It could be state-of-the-art technology that makes our telephone lines faster, enhanced software for better customer service or innovative communications options. It could be our reputation which ties into our trademark. Any of those innovative competitive advantages come from, we like to think, the brilliant minds of BellSouth employees. I do believe in order to manage those innovations optimally, you need to have them come to a central place. You need to have someone who owns that responsibility to identify the intellectual property (IP), develop the IP properly, protect the IP, maintain the IP, and ultimately leverage the value of the IP.

KUESTER: Scott, you happen to be a lawyer, but the hat that you’re wearing is president of a corporation. If an organization were interested in starting a patent management program, is that a legal department responsibility, or are in-house counsel generally too busy already?

KENNEDY: There are three broad ways to describe the management of intellectual capital: capture, protect and maximize value. Who should do this? Should it be a lawyer or a business person? You really need to have three different types of individuals: technical, legal and business.

KUESTER: How about the focus, though? It

PHOTO: (FROM LEFT) SCOTT M. FRANK, ROBERT A. CURRIE, HUBERT J. BARNHARDT III, RICHARD FOLK, MICHAEL W. McLAUGHLIN, FRANK A. LANDGRAFF, DAVID A. KENNEDY, JAMES T. HARRIS, JAMES E. MALACKOWSKI, JEFFREY R. KUESTER



Michael W. McLaughlin

Michael W. McLaughlin is a managing director of InteCap and a member of the firm's IP transactions & licensing practice group. McLaughlin is the project manager of several large patent-licensing programs spanning various industries. The programs are from enforcement (infringement) and strategic licensing (non-infringement) perspectives. These separate licensing teams consist of numerous professionals, including InteCap professionals, the patent owners, outside patent prosecution counsel and outside litigation counsel, who collectively negotiate, draft and execute patent-licensing agreements. McLaughlin has a bachelor's degree in finance from Florida State University and he is a member of the Licensing Executive Society and the Technology Association of Georgia.

“Being creative in the fee structure allows the conversation to continue.”
—Michael W. McLaughlin

PHOTO INSET:

(FROM LEFT) FRANK A. LANDGRAFF, ROBERT A. CURRIE, JEFFREY R. KUESTER

seems to me there needs to be a person who is ultimately responsible in the organization for making money on the intellectual property, choosing to hire internally or employ outside counsel and consultants.

KENNEDY: Absolutely. About half of what we do is help new companies with their plans around intellectual capital. I believe there needs to be a leader who has ultimate responsibility, and just as important, there needs to be a written plan. Commercialization of IP is not a short-term thing. There are oftentimes opportunities for commercializing, selling and licensing the most valuable non-core patents out of your portfolio that is often referred to as “low-hanging fruit.” But to really sustain this long-term growth rate, you have to have a long-term vision.

KUESTER: Should a budget be built under the finders and the protectors as well? Should part of the legal budget, for example, be placed under this “make money on patents” group?

FOLK: Yes. At Lucent, and AT&T prior to that, the budget is vested in an IP organization. And basically, it's a corporate organization. All intellectual properties need to be corporate assets. And out of the revenues we collect, we fund all of the patent filings, the attorneys' fees, etc. So the generation of the intellectual property or the protecting of it in terms of getting the patents—or whatever—is not a burden on the business units. It's a free asset that they—free at their level—that they somehow have some interest in. But they don't own it. We've found that in large companies, at least, you always have cross-purposes. One business unit wants to license X, and the other business unit says no, that's critical to me and I don't want it going to my competitors. Having the intellectual property be a corporate asset helps minimize this. Also, you're constantly coming into situations where a business unit doesn't want to license the technology because they think it's some kind of competitive advantage. We had Marshall Phelps of IBM come in and talk to us. He told us that not only all patents but all technologies are corporate assets. And moreover, unless a rock-solid business case with numbers could be shown as to why technology should not be licensed, all technology, as a priority, was available for licensing and to anyone at any time, as long as the deal was right. And he said that mind set, which took a couple of

years to percolate out through the corporation, led to the kind of success that IBM is having now where they're pulling in more than a billion dollars a year. In fact, maybe close to \$2 billion a year in their entire intellectual property licensing program.

HARRIS: Not only do you not want to be a financial burden on your division, but you don't want to burden people. It takes time to talk to the vendors and the engineers. You need the support from the top so they can push that down and so those managers know that protecting IP is a priority. In terms of funding, this is a concept that could be beneficial. When you're licensing patents, those revenues come back to, let's say, a holding company. But it's nice if you can disburse maybe a portion of that back to divisions that created the IP. I think that's even more motivation for them to help you protect and license your IP.

LANDGRAFF: I think the common theme around this table has been that what people have—patents and technologies—are business assets. Prior to a couple of years ago, I think they were considered to be non-business assets. It's interesting that the majority of people sitting around this table are patent lawyers. I

think if you look at a company's evolution with their intellectual property management program, every company began that evolution in legal. I believe that's partly because the patent lawyers and the other lawyers are the ones that had the original contact with the technologies, understanding the technologies, and through the prosecution of those patents, understanding the value of those patents. If you look at the evolution of most companies' programs, they started it in their patent departments, in legal. And then it moved forward after some of the low-hanging fruit was picked and management said, “You guys are bringing in some money. Let's take a little bit of a harder look at this.” Those programs evolved either into freestanding companies such as in the case of BellSouth or, certainly, separate divisions in a particular company.

KUESTER: Do you see Coke moving in that direction?

LANDGRAFF: We have on the trademark side. Our trademark-licensing program is a freestanding business program. We're still at



the very early stages on the patent side.

MALACKOWSKI: I would be interested in how many of our corporate participants have a written plan, and how many of their CEOs can articulate the essence of that plan.

MALACKOWSKI: My experience, sitting as an outside director on corporate boards, is that if IP management reports through the general counsel's office, it has a very different reaction than if it reports through business development.

THOMAS (ATTENDEE): Does anyone see a trend with regard to nonexclusive vs. exclusive licenses or field of use licenses?

FOLK: All of Lucent's licenses are nonexclusive. There is a very simple reason for this. We have broad cross-licenses with major players around the world. So you pick any one patent we have in the portfolio, it's already licensed to three or four or five, maybe a dozen, people around the world. So we can't grant exclusives. In the past, we generally had broad field of use licenses: semiconductors, manufacturing, data communications, things like that. That's becoming more focused now as a way of optimizing the value and reserving our ability to get licenses in another area at some later time. In the old Bell System days, we generally tended to do broad or all patent licenses to obtain patent peace. Now, with the purpose of generating revenue, we've been segmenting the portfolio into smaller and more narrowly focused increments. We've also moved from lifetime rights, which were the de facto standard 10 years ago, to what are sometimes called drop-dead or guillotine licenses. We cross-license each other for five years, then the license is terminated, and you sit down and you renegotiate fresh from that point forward. That has run into a lot of resistance in some areas, most particularly Japan.

MALACKOWSKI: Have they been in place long enough to come up for renewal?

FOLK: Oh, yes. I was working with IBM last year, and I think it was something like the 13th bilateral cross-license agreement that I could find in the files. We have licenses that were signed by Tom Watson Sr. But Bell Labs and AT&T have been around for a while.

CURRIE: I'd like to jump in and ask Rich

and Scott a question. Georgia-Pacific is a company that is made up of very diversified businesses. If you look at the growth of our company, it's been by acquisition. That applies to the other companies here as well. But a couple of questions: When you acquire large companies, do you automatically put all of their intellectual capital into your holding company? And secondly, I see that there may be tension between, say, those who control trademarks on the one hand and those who control patents on the other hand. And I also see an ever-expanding body of copyrighted technology coming up. So when you speak of having all of your intellectual capital in one place, are all of your trademarks and all of your copyright assets—say, software, for instance—in one place together with patent, and are they all managed by one entity within the company?

FOLK: We have an intellectual property holding corporation which owns all intellectual property except the trademarks.

CURRIE: Scott, I'm particularly interested in your situation. When you bring your group together, is it principally patent-based or does it capture everything that's considered intellectual property?

FRANK: Our IP group captures everything. Here are a few key points. One, it's not about licensing, per se. Licensing and revenues are just a component of the intellectual property management program. It's about value, about value to your shareholders. That's what ultimately every single one of our companies is about, and it's about figuring out how to maximize that value. When you recognize that, then you look at all of your intellectual capital and you say how do you manage all of that? Are there distinct pieces that don't need to come together? Do certain pieces need to be looked at in some relationship to the other pieces? Building on one of the questions that Jim had, who do we report to? The IP group reports to the Chief Planning and Development Officer at BellSouth, Keith Cowan. He is one of a handful of direct reports to our CEOs, so we're just two notches down from the CEO and have a fairly high profile. Getting to your question about trademarks and copyrights: All IP, again, does come into our organization. We believe that our trademark is obviously our single most valuable intellectual property asset, and it's probably one of the most valuable assets of the whole corporation. We believed all along that trademarks



Frank A. Landgraff

Frank A. Landgraff is senior patent counsel for The Coca-Cola Company. Landgraff has been a patent attorney with Coca-Cola since 1994. Prior to joining Coca-Cola, Landgraff practiced patent law with Jones & Askew. Landgraff received his B.S.E.E. from Clemson University in 1985 and his JD from the University of Florida in 1988.

“The common theme around this table has been that what people have—patents and technologies—are business assets.”
—Frank A. Landgraff

PHOTO INSET: (FROM LEFT) JAMES E. MALACKOWSKI, SCOTT M. FRANK, MICHAEL W. McLAUGHLIN



Scott M. Frank

Scott M. Frank is the president of BellSouth Intellectual Property Management Corporation and BellSouth Intellectual Marketing Corporation. He is responsible for the identification, development, protection, management and marketing of BellSouth's intellectual property. Prior to joining BellSouth in April 1998, Scott was a patent attorney practicing intellectual property law in Atlanta at Troutman Sanders LLP for seven years. Prior to Troutman Sanders, Scott was an electrical engineer with Northern Telecom (Nortel) for five years, and a computer analyst with AT&T for two years. Frank received his bachelor's in electrical engineering from Georgia Tech and his law degree and master's in business from Georgia State University. He is also registered to practice patent law at the U.S. Patent & Trademark Office.

“It’s about value, about value to your shareholders. That’s what ultimately every single one of our companies is about.”
—Scott M. Frank

PHOTO INSET: SCOTT M. FRANK

should be in our group, and, interestingly, when I came over to BellSouth a few years ago, it was not part of what we were doing. It was in advertising. However, advertising's job is to maximize the exposure of a brand, be creative in its usages and just make all of these wonderful uses of the trademarks to enhance brand recognition. These creative people generally do not have the background and are less focused on protecting the trademarks or maximizing their value, which may include licensing. Last year it was officially brought into our group; that was a missing piece. We now have full responsibility for identifying, developing, protecting, maintaining and marketing all of BellSouth's intellectual property, including its trademarks. We also have responsibility for patents, copyrights, trade secrets and trademarks related to all of BellSouth's software. I think if you really look at the value proposition, you'll see that they all interrelate, and when you look at a product or service, it can be really difficult to pull apart and divide up the IP responsibilities for the trademark and the patent and the trade secret and the copyright.

KUESTER: So if you acquired a company, it's very unlikely that they would keep their patent portfolio. If BellSouth acquired a new technology company, those assets would come into your organization simply because of the value that you would be able to maximize from those assets.

CURRIE: Is there any resistance from the acquiring company? Are they simply told at the beginning that your intellectual property will now be transferred into BellSouth Intellectual Property Management?

FRANK: I think there would be a lot of excitement because they would know that they're going to be cared for by one of the best in the country, and we believe we are.

MALACKOWSKI: It sounds to me like BellSouth's reporting structure is best in class. That's a great role model. The other issue in your question that hasn't been raised, Bob, is the tax consequences of any transaction involving the movement of IP assets. There are tremendous bottom-line shareholder value dollar implications to how you treat those assets in a merger or acquisition. I would clearly encourage everyone to consult their tax department very actively before those assets are transferred.

KENNEDY: Oftentimes, it's one of the primary reasons an intellectual property holding

company is set up. That shouldn't be a primary reason, but oftentimes it is. Along with that, a well-established business purpose or real organization has to be established to really entitle you to a tax benefit. So it cannot be just established as a shell corporation that is there for the tax deduction. It really has to be something like what BellSouth has set up, a real organization that is. It has its own strategic plan, its own management, its own vision and budget.

HARRIS: I've got a question for Scott. Mergers and acquisitions—what part does the company play in assisting M&A when they are looking at companies to acquire in valuing their IP portfolio?

FRANK: We play a pretty key role. Again, we report in to the Chief Planning and Development Officer. He was actually our head of M&A, and now he has been promoted up to Chief Planning and Development Officer, which includes overseeing

all M&A activity, so we are all in the same group. The M&A group covers the whole company, and we cover the whole company. We are all about value for our shareholders.

Regardless of the business opportunity, the IP group is responsible for maximizing the value of the IP in the deal.

HARRIS: Now, do you work with consulting companies to value some of the patents they have, or do you do that in-house?

FRANK: We do a combination depending on the situation, and we have done a fair amount of work with outside consultants.

KUESTER: What is IBM doing? We've already identified this idea of focusing in on it, getting somebody to own it, coming up with a plan, having them report to the right place. All of those factors are good, but are there other key things?

LANDGRAFF: One of the things IBM did initially is they fully funded it, which caused it to hit the growth curve at a very rapid pace. That did two things. It was a message from their management that this is something that we're taking very seriously and not some sort of sideline item. From what I know about IBM's experience is they created 50 to 70 new patent lawyer positions. That's a tremendous statement being made by management to say obtaining patents and extracting value from them is a primary business goal of IBM.



KUESTER: Do they have a similar structure like we're talking about here? Do they have a separate IP company which had its own budget that funds the development of the patents?

HARRIS: I think one of IBM's biggest strengths is actually the number of patents that they have because it puts them in a great position to negotiate and/or cross-license. I think you've got to think twice about, say, suing IBM for patent infringement because they can look in their portfolio and see what kind of technology they do have. That means a great negotiating position to be in.

LANDGRAFF: When they're filing thousands of patent applications, they're spreading the risk a lot better than most companies because they know with those thousands of applications that they are going to have some hits with commercially viable technologies.

CURRIE: I listened to IBM's licensing manager two years ago at LES' annual meeting. I came away with three things about IBM: First, they have a culture that encourages employees to formally record knowledge, that is, people are encouraged to write down what they know so that knowledge stays when employees go. Second, they have taken a leadership role in making it easy to electronically receive invention disclosures and file patent applications and a leadership role in finding and organizing patent information. Finally, they have also developed an IP culture that says either you use it or you lose it. They demand that their divisions refresh their technology by innovating. They have a three- or four-year window, perhaps up to the first maintenance fee, to exploit IP exclusively within the company. If they miss that window, then the IP automatically goes into a pool for licensing out.

MALACKOWSKI: I think those companies that are truly successful have made a transition from a purely internal focus to an external focus. On the internal side, they have now protected what they own. They're starting to extract revenues. Then they move to an external focus where they're looking at their competitors. And once you make that transition to an external focus, it really becomes a strategic issue, or true intellectual capital management.

KUESTER: What's not working?

HARRIS: I've heard a lot about auctioning of patents on the Internet, and I heard that's a possibility, but I haven't seen anybody having any success on that.

MALACKOWSKI: Why is that, you think?

HARRIS: Well, I think a lot of people don't even know it's there, for one thing. And I don't know if that's the best way to go about finding technology. Usually, your technical people know good licensees. It's another avenue. I wouldn't totally discount it.

LANDGRAFF: Also, I think when you're licensing or purchasing an intangible asset, the relationship is very important. I think the Internet sort of depersonalized that relationship, and there probably is some lack of comfort in using those types of resources, at least right now.

KUESTER: One of the impediments to a smaller organization getting into this is the need for technical analysis manpower. While our law firm can handle the technology side too, with respect to evaluating patents and potential targets, it may be better to team with consulting engineers, and in no case, should the client need to furnish the technical resources unless they wish to provide that support. What about a corporation that has a bunch of patents and knows that there is some value there, but your job is to try to help them figure out how to get that value. What's the best model for that?

MALACKOWSKI: Others may have different opinions, but I think that a simple survey exercise where you ask your inventors and counsel inside the company what they view as the top intellectual property assets of the business makes a great model. Take that small collection, and you can extract themes of inventive ideas or key technologies.

FOLK: Lucent's whole IP business unit is about two-thirds engineers and one-third legal. The two-thirds that are engineers have a rotation arrangement with the business units where we will bring in engineers for two to three years into the licensing group. We will train them in negotiating skills to make them licensing negotiators or assistant licensing negotiators, and after two or three years, they can go back to the business unit. And so when those people come in on a rotational basis, they are not necessarily devoting



Hubert J. Barnhardt III

Hubert J. Barnhardt III is an attorney with Scientific-Atlanta Inc., a major supplier of equipment and services for the cable television industry. Barnhardt is the intellectual property lawyer for the company's Transmission Network Systems sector. His primary responsibilities include managing the sector's patent program, negotiating license agreements and other contracts, and managing intellectual property-related litigation. In addition, Barnhardt is responsible for managing the acquisition and protection of the company's trademarks. Prior to joining Scientific-Atlanta in 1998, Barnhardt was an associate at an intellectual property law firm in Atlanta. He received his bachelor's and master's degrees in electrical engineering from Georgia Tech. He is registered to practice before the U.S. Patent and Trademark Office and is licensed to practice law in Georgia and Florida.

“It seems like it's a little hard to make a friendly business-guy-to-business-guy pitch when what we're selling you is freedom from a lawsuit.”
—Hubert J. Barnhardt III

PHOTO INSET: (LEFT TO RIGHT)
JAMES T. HARRIS, RICHARD FOLK, DAVID A. KENNEDY,
HUBERT J. BARNHARDT III



James T. Harris

James T. Harris is corporate legal counsel for United Parcel Service (UPS) in Atlanta, where he is responsible for management of their worldwide patent portfolio, technology transactions including e-commerce and wireless, trademark, advertising and copyright matters, and athletic and sport sponsorships. He is also a registered patent attorney with experiences in corporate and private practice in patent prosecution, licensing and litigation. Harris has a bachelor's in mechanical engineering from Tennessee State University and a law degree from Chicago-Kent College of Law.

“Not only do you not want to be a financial burden on your division, but you don't want to burden people.”
—James T. Harris

PHOTO INSET: JAMES E. MALACKOWSKI

their lives to intellectual property licensing, but they're refreshing our internal store of knowledge. If they like it and if they're good, we retain them. Others are more technically oriented and don't want to lose touch with the technology, which is their first love, so they want to get back into the inventing and development.

KUESTER: So how do you start them off? Do you give them a product line, maybe the one they were in, and say here are the patents in that area, so make something happen?

FOLK: We give them part of the portfolio and explain the way we previously rated the patents, explaining that they might not have been looked at for a few years. We ask them to sit down and spend two months and re-rate these things based upon what they know. Is it inventive on some kind of a scale? Is it discoverable? You might have the greatest invention in the world, but down at the submicron level, you'll never find it without a tunneling electron microscope. Another thing might be, is it technologically avoidable? Then we get the attorneys involved. Are the claims easily avoided legally? We have a scale of zero to 20, and from the first assessment we get, the good ones may be an eight, nine or 10, for example. Then you get into a more focused review with a dedicated attorney, and if it's real good, it's a 15. And once it's gone out into the world and you've actually negotiated licenses, you've asserted the patent and maybe even wound up in litigation and it's gone through a court case and it stood the test of time, then it winds up as a 20.

KUESTER: Now, what does the attorney do in that process? Is the analysis performed in view of identified possible targets?

FOLK: Yes, after the engineers do the first cut and do the first funnel, then an attorney is assigned. Then he starts looking at the details of the claim. What do the claims cover? What don't they cover? Are the claims robust? You know, the technologist is looking at it like this is a whiz-bang technology. But maybe for prior art or other things, we have a patent, but it's not really worth a whole lot. Generally it is done in view of specific targets, but sometimes more generally.

KUESTER: And then once the patents are ranked, does the engineer go back and start focusing on contacting potential licensees?

FOLK: Yes, then we usually have a target list of companies. We also have a strange mix because we've been doing this for so long. We have renewals all the time. I'd say at least half of our activities are renewing old agreements. So it's not like you're starting from scratch finding an infringer or a partner or a technology target. You're usually re-upping to a certain extent. So it's a simpler job in some cases because of that.

KUESTER: Why would an engineer do this? Is it something that's viewed upon by upper management as a very good thing to have in your career?

FOLK: It's probably a good stage in your career, and there is another, very parochial reason. In the last three years, our group has had among the largest yearly bonuses of any unit in the company.

KENNEDY: There is your answer.

FOLK: Yes. Very remunerative. Which is not publicized widely, but tends to leak out and becomes known. It is also good exposure, a broadening experience, in general.



KUESTER: Scott, do you see BellSouth doing anything like that, bringing in engineers and rotating them through the business group and sending them back out at some point?

FRANK: I think it's a great way to run the business, but BellSouth has not yet been able to do this. We are very dependent on the engineers in the business units. A couple of thoughts: One, recognize that your inventors are customers, even though they're employees. At most companies, their bonuses and raises are almost entirely based on them getting innovations and technologies to the marketplace, and much less tied to protecting and leveraging IP. Therefore, you must treat them as customers, treat them special. Give them awards. Give them special recognition. Take them out for lunches. Treat them as customers. Building on what Rich has said, we have some people in our group that are engineers, but we didn't bring them in from BellSouth. We brought them in from the outside world. These people essentially develop the customer relationships with the engineers and developers of the entire corporation. They spend the majority of their time traveling around our region, hanging out with engineers, building a trust relationship, and getting them to think about patenting their

inventions because a lot of engineers don't think they're worthy enough or that they have the time to do it.

FOLK: I was going to add AT&T and IBM have patent reward systems to kick-start the generation of patents. IBM has got a very elaborate system. It takes about four pages to describe it. We keep it real simple. You get \$1,000 when your patent application is filed. In one subsidiary company, we gave \$1,000 when it was filed, and another \$2,000 when it issued. I knew one inventor there who had 55 issued patents. He bought two sailboats.

KUESTER: How about the future? Let's say that patents made the company \$10 million?

FOLK: It's real hard. In our case, we hardly ever have single-patent licenses. We usually have grant areas or broad areas. So yes, we did a cross-license and it brought in so many dollars, but how much of that is attributable to this one patent with this one named inventor? We don't know.

KUESTER: Does IBM have anything on this issue?

FOLK: Yes. They do rate their successful patents; I think they rate their top ten annually. They rate their top five or 10 commercially valuable patents, and the inventors associated with them get some special awards. But it's not a percentage.

BARNHARDT: It sounds like you don't end up going back to the engineers and trying to get their time to help you on the licensing side.

FOLK: Kind of a last resort. We have engineers in our group. They are smart people. Sometimes, especially in an assertion situation, where the other side just isn't buying that they are really infringing a patent, sometimes it helps to bring in someone from Bell Labs.

BARNHARDT: We're at the stage where we don't have a central organization, so the engineers that are busy working with our customers and developing our products are the very first people we go to to answer those questions.

FOLK: We use them sparingly.

BARNHARDT: At BellSouth they have

engineers as a part of the licensing organization, and then they cultivate the relationships?

FRANK: I would say it's a little bit more than a last resort because we don't have as many engineers in our group as they do at Lucent. However, we do try to minimize their time because they have so much other critical work going on. They have limited bandwidth. At the same time, they are very key to us being able to license our patents and technologies.

KUESTER: What if you're a smaller company trying to figure out how to make some money on your patents? What's the right mix of outside consultants and law firms? What's the right business arrangement for that? Many times the consultants and the law firms come in and say that the first thing they need is your engineering time and money. Both of those kill the deal.

McLAUGHLIN: Each situation is different. With the size of company that I think you're talking about, oftentimes, I think, they don't realize that their technical resources don't need to be leveraged as much as they think they need to be leveraged.

The team approach is also best, with a consulting firm that has the business background or the accounting/financial background teaming up with someone with more of a technical and legal background, like your firm, where you could bring the whole team to the table and give them that one-stop type of approach where you handle all aspects of the patent-licensing for them.

KUESTER: And all on a success fee basis?

McLAUGHLIN: It depends on the situation. I'm sure the company would prefer it to be purely on a success fee basis. However, being creative in the fee structure allows the conversation to continue. You're right, if you walk in there and say, "We can do this, this and this, all on an hourly basis," that stops the deal typically. However, to be creative in your fee structure and allow at least a portion of your fees to be success fee-based allows the conversation to continue. I think you can come to an arrangement where at least a portion of your fees are based on deals you get done.

KENNEDY: I think there is an interesting continuum of that solution, and it starts with a BTG type approach where some companies will actually take ownership of the



Richard Folk

Richard Folk has been engaged in licensing various forms of intellectual property around the world for more than 14 years. He has worked for Western Electric, AT&T, Paradyne Corporation and, most recently, Lucent Technologies. He has participated in licensing projects in the United States, Great Britain, Australia and Japan. He was the intellectual property director at Paradyne Corporation, handling intellectual property matters including patents, trademarks, software and technology transfers, for five years. More recently, he has concentrated on patent-licensing issues relating to Japanese semiconductor and data networking firms, on behalf of Lucent Technologies. He holds a master's degree in electrical engineering from Columbia University and is a member of the Licensing Executives Society.

**“Almost always
you're dealing
with an attorney
across the table.”
—Richard Folk**



David A. Kennedy

David A. Kennedy is a founder and managing director of InteCap, as well as the firm's IP transactions & licensing national practice leader. Kennedy's primary consulting focus is in the area of IP valuation, licensing, technology transfers and strategic technology consulting services. He sits on the board of several Internet-related companies and serves on the advisory board of an intellectual capital venture fund. Kennedy holds a BBA in accounting from the University of Georgia and is a certified public accountant in Georgia. He is also a member of the Licensing Executive Society and the Technology Association of Georgia.

“There are three broad ways to describe the management of intellectual capital: capture, protect and maximize value.”
—David A. Kennedy

patent and take care of all costs. And then you just move along that continuum all the way to the internal approach that BellSouth and Lucent have. And they still periodically will use outside help, obviously, as needed. But on one end of the extreme you oftentimes have to give up 50 to 60 percent of value in intellectual property to a BTG or to an intellectual property contingent fee organization. And then at the other end of the extreme you're funding it internally. Obviously, for a higher return, but your risk is greater because you're spending current dollars.

LANDGRAFF: But you've really got to remain flexible. With each technology there are applicable deals for that technology. For instance, I'm beginning to see a lot more licensing deals where to use an outside consulting firm would be very difficult because you've got certain industries that are predominantly small players that can't pay a lot of money up front. You give them a nonexclusive in exchange for an equity interest in their company which may generate no income then or ever. If you spread your risk out, you're eventually going to get some winners and have some losers.

KUESTER: And it just complicates it because the consultant could take the equity interest as well.

LANDGRAFF: Theoretically. I don't necessarily know of a lot of firms in that type situation. You might be making the deal too complex just from the start. But the key theme that I see coming through is you've got to be flexible. Internally, you've got to at least do some triage on every type of technology to know the appropriate ones to partner with an outside business consulting firm.

MALACKOWSKI: Referring back to David's continuum, I've been surprised at the number of business plans I've seen where stand-alone patent incubator contingent licensing businesses are looking for funding. I think you're going to see a trend where more of those companies will be created.

LANDGRAFF: You're also seeing more bigger players becoming involved in these things. I attended a meeting in Washington recently where I sat next to Chase

Manhattan patent counsel. I'm just getting over the hurdle of realizing Chase Manhattan Bank has a chief patent counsel. The large international banks are now getting into this business as well through funding and through hedging their investments.

MALACKOWSKI: It's a fundamental change. Because if a large company takes its portfolio and offloads it to one of these development entities, then the risk of getting hit with a cross-license or cross-litigation is substantially reduced, if not eliminated. If they were to knock on the doors themselves, the first thing they hear is "cross-license," with no immediate revenue or potential litigation.

KUESTER: Do you think there is still some risk? The name of the company is on the patent, and I assume there would be some type of revenue flow back to the company.

MALACKOWSKI: Those who run those businesses will tell you they have eliminated that risk.



HARRIS: Something that I've seen when you talk about smaller companies, taking them a further step down, is individual inventors. What I'm starting to see is a lot of patent attorneys putting on the patent

licensee marketing hat and starting to send letters. I think a lot of marketing is on a contingent fee basis because they see a lot of potential, and if it takes off, they can get a lot of rewards in it. So, I see a lot more of the traditional patent attorneys turning into the marketing licensing guys now.

LANDGRAFF: There are patent attorneys saying up front that they are going to fund enforcing these patents, and taking a percentage of the returns.

MALACKOWSKI: In many ways, it's no different than contingent fee litigation.

LANDGRAFF: Absolutely. And to think that it used to be that the contingent fee litigation used to be taboo in IP cases. Fortune 500 companies are now negotiating contingency fee type cases, whereas before it was the personal injury type cases.

KUESTER: If it's a business guy coming in to a business guy at the corporation saying, "Here is a licensing opportunity for you; it's

a win-win for both of us," then maybe that gets handled differently internally from when a law firm sends a, "You're infringing my patent. If you don't stop, we're going to sue you" letter? That goes to the legal department, perhaps outside counsel, because it's a legal issue as opposed to a business deal. It seems to me the better approach might be to start it in the business side.

CURRIE: Whenever we're approached to take an interest in technology, it helps if the submission is complete and well thought-out. Many submissions are poorly done. Outside inventors submitting ideas to companies rarely think about the effort required to convert intellectual property to cash. Many inventors come to us with hardly any thought about whether this invention is actually something that we can make or sell. It's a shotgun approach, and most of the ideas go nowhere. The other end of the spectrum, the threatening end, doesn't work very well either. I would rather speak quickly and directly to the patent attorney representing the inventor so that we can get to the core of the invention. What's innovative? How does it work? What's been done to protect it? What is the prior art and how does this differ? Why are you approaching our company? The other side's patent attorney may not know everything, but we can usually get to the essence of the matter much quicker.

FOLK: Lucent has a separate litigation organization that is strictly a law organization. The hostile incoming fire generally gets shunted right to that group, and sometimes we never see it or hear it again.

KUESTER: Do you think it would get better reception, at least initially, if the business guy is convinced this is a patent that it would make sense for the business unit to have?

FOLK: Yes. I think a lot of the deals do get started that way, but it's not necessarily a policy. It's more happenstance.

MALACKOWSKI: I think everyone in this room has participated in litigation involving large damage awards. That puts fear into a licensing department or a business. I think the key is not just to be reactive, but to be proactive and do product clearance work and have a good understanding of the patents

that are issued in your space. If there is a potential issue for you, from an infringement standpoint you can actively consider a license before you've got a huge investment in litigation.

KUESTER: Rich, do you find yourself dealing with other legal people when Lucent goes out?

FOLK: Almost always you're dealing with an attorney across the table. Sometimes there will be a business person present, usually someone from a strategy or development organization, but rarely do you deal with just a business person.

McLAUGHLIN: On most licensing programs that I work on, both from a strategic and enforcement perspective, our goal is to get to the internal business person and start there. Lawyers eventually get involved, and obviously, sometimes it is more enforcement or more strategic, but we've been much more successful in getting deals done if you can get that internal business person to understand the issues and become an internal champion.

KUESTER: You are also focused more on helping them to justify to their superiors why this is the right business deal for them and why they need it apart from the legal threat?

McLAUGHLIN: Right.

CURRIE: Won't you alienate internal counsel?

McLAUGHLIN: You have to be careful. In a sense, you try to develop a relationship with the internal business person. You don't tell them we're trying to avoid your counsel, but just get dialogue going with the business person. You should talk a little bit about the technology and what our client might be bringing to the table, but they don't immediately need to get their counsel involved. Clearly, that's going to happen. We'll have patent or deal counsel from our side too. It's just that when we send the letter, if it goes to the attorney first, then a lot of times it's received as a threat, and the potential licensee moves right into the defensive posture of getting outside counsel involved early on in the process.

KUESTER: To some degree, it's a sales job, and many lawyers are not naturally very good salesmen. In fact, even Lucent's engineers



Jeffrey R. Kuester

Jeffrey R. Kuester is a registered patent attorney and a partner with the intellectual property law firm of Thomas, Kayden, Horstemeyer & Risley, LLP in Atlanta, where his practice focuses on strategic patent matters. Besides teaching as an adjunct professor of intellectual property law at Georgia State University College of Law, as well as serving on the Board of Editors for American Lawyer Media's *Patent Strategy and Management*, Kuester serves the American Bar Association Intellectual Property Law Section as chairman of the Special Committee on Patents and the Internet. Kuester has written and lectured on such topics as patent portfolio management, extracting real value from patents, and creating marketable e-commerce patents. He earned his JD from Georgia State University College of Law and his bachelor's of electrical engineering degree, with honors, from the Georgia Institute of Technology. He also serves the State Bar of Georgia as vice-chair of the Intellectual Property Law Section and immediate past chair of the Computer Law Section.

“One of the impediments to a smaller organization getting into this is the need for technical analysis manpower.”
—Jeffrey R. Kuester



James E. Malackowski

James E. Malackowski is a founding principal of VIGIC Services LLC, a GTCR Golder Rauner LLC company focused on venture investments with an intellectual capital-based competitive advantage. Prior to partnering with GTCR, he spent 15 years as an entrepreneur focused on professional services. Malackowski is a director of Ford Global Technologies Inc.; ewireless, inc.; Insignis Inc.; Evince LLC, Infocast Corp. and Solutionary Inc. He is also president-elect of the Licensing Executives Society, a trustee for the National Inventors Hall of Fame and a resident adviser for the U.S. Department of Commerce and U.S. Information Agency on matters relating to intellectual capital. In 1988, he co-founded IPC Group Inc. (now InteCap Inc.) Malackowski majored in accountancy and philosophy and is a summa cum laude graduate from the University of Notre Dame. He is a licensed certified public accountant in Illinois.

“If IP management reports through the general counsel’s office, it has a very different reaction than if it reports through business development.”

—James E. Malackowski

have to be trained in negotiations. And so I think it takes a sales mentality to some degree, and maybe lawyers or engineers don’t have that innately, and so they have to be trained in learning how to do that. Persistence is another key in this area since I would think a lot of these letters or phone calls would get dismissed.

KENNEDY: We’re talking about getting business people to talk to business people. Oftentimes, during the marketing phase of your intellectual property management program, the best answer might be a quick “no” as opposed to a protracted and expensive technical and legal analysis to analyze a patent only to be followed by a business analysis that kills the deal. A business person can give you that baseline hurdle answer to the question, “Does this deal work for us from a strategic standpoint?”

CURRIE: There are some other things that come into it as well. Many of the people who approach us have not pursued the patent option to begin with. They want to do it all on a trade-secret basis. They come to us and give us one line, maybe one word sometimes, about the invention or idea. Then they want a confidential disclosure agreement. The answer on our end is always “no.”

LANDGRAFF: I think ultimately in any deal, whether it’s one person representing a corporation or a number of people, there are two hats that need to be worn. One of them is issue identification, and that’s historically been a lawyer’s role. The second one is issue resolution, and that’s historically been the business role. There are people who can wear both hats. Scott Frank is a patent attorney. He will tell you his primary role is a business person. He wears the issue resolution hat, but he draws upon his experience as a lawyer to identify the issues in order to resolve them. I think it can be one single person, but it just has to be somebody who understands those two defined roles and is able to execute those two roles. If not, you need more than one person involved in that particular deal.

BARNHARDT: To back up a couple of steps, is there a different approach that you would take if you’re just licensing a patent to somebody vs. licensing some kind of know-how? A lot of the conversation here has talked about providing something of value to this licensee. Most of the letters we get are not offering any-

thing except avoidance of a lawsuit. It seems like it’s a little hard to make a friendly business-guy-to-business-guy pitch when what we’re selling you is freedom from a lawsuit.

MALACKOWSKI: Yes, by definition that’s not well received. You know, we’ve talked a lot about licensing, and I’m curious if anyone considers a more proactive lifting out of their technology to start new ventures or partner with developing companies and proactively mining what they may have, but are not directly using in their business. If there are any examples along that line, I would be interested.

KENNEDY: I think an example of what’s not working is a corporation that only focuses on the patents that they have that might represent low-hanging fruit that can quickly be licensed for a fully paid-up fee. They often create their hurdle for next year’s budget, but they may have licensed the easiest to license technology, and then it becomes hard. If you don’t have that internal organiza-

tion with a focus on intellectual property, then you can’t handle the

next phase of the corporation’s licensing life cycle, and that is, taking intellectual capital that can’t be

easily licensed and creatively structuring

deals that will allow you to

generate recurring royalty income. To increase the odds of success, the IP should be put into a special purpose vehicle or an IP subsidiary or holding company that can help facilitate bringing in other strategic partners, for example, to help develop a piece of software beyond what this corporation has been using it for. And maybe it’s best in class, but it’s not going to stay best in class. So how are you going to do that? You have to collaborate with other companies that are in that business. If you are in the telecommunications business, you’ve got a great piece of software, but you’re not in the software services business. How do you handle that? Well, you partner with a software company that focuses on telecommunications, and then maybe you partner with somebody else that wants to put capital in. It becomes very complex, and I don’t think you can do that without an internal strategic vision of where you want to go with your patent portfolio or software inventions.

LANDGRAFF: We do a tremendous amount of joint development of technology in our company. That’s the only way we can really truly bring breakthrough technologies



to market. So I deal with these issues on a day-to-day basis. Internally, from a very practical standpoint, there are three things on which you have to get everybody to sign off before you can consummate a deal. Are you comfortable with what could happen in the worst-case scenario? Are you comfortable with what can happen in the best-case scenario? And are you comfortable with what will happen in the most-likely scenario? Many times the answer is no. And while it tends to make things more complex, you've got to then break down the scenarios with those particular partners and say look, we want to work with you with that technology, but you need to come to an internal understanding that if this works, you may not be able to help us commercialize it because you don't have the resources to do that. And how are we going to handle that?

MALACKOWSKI: Whenever you have joint development that's core to your business, you're going to have those difficult issues. I can think of an example between UPS and Ford where they took some of UPS' tracking technology and Ford's large vehicle delivery technology and put those together to create a new entity so that the combined logistics software paradigm could be sold to third parties. I think you're going to see a lot more of that type of partnership in the future funded in part by the venture firms.

HARRIS: And a big part of that, when you have a joint venture of strategic alliances, is ownership. Who is going to control the licensing of the technology?

KUESTER: How about donations, are you all seeing this more, or was it a short-lived trend?

MALACKOWSKI: I don't believe it's a short-lived trend at all. I think now it's a very customary method of maximizing portfolio value. It's a great way to generate short-term results in a socially responsible way.

KENNEDY: If you donate, you may get the fair market value of that patent as a deduction. Obviously, you only get 30 or 40 percent of the fair market value back depending on your tax rate.

KUESTER: In addition, a tremendous amount of goodwill can be created for the company for contributing intellectual property to a charity or university. But what about the down side? I can't say I've got 10,000 patents anymore, and that might make a difference in some licensing negotiations when I'm trying to say I've got a lot more bullets than you do.

MALACKOWSKI: I don't think there is much down side there. I think people really focus on the quality of the select claims at issue rather than the quantity of package. If you've got 10,000 patents, I suggest you first take a look at how many you really need because you're spending a lot of money to maintain those on a global basis.

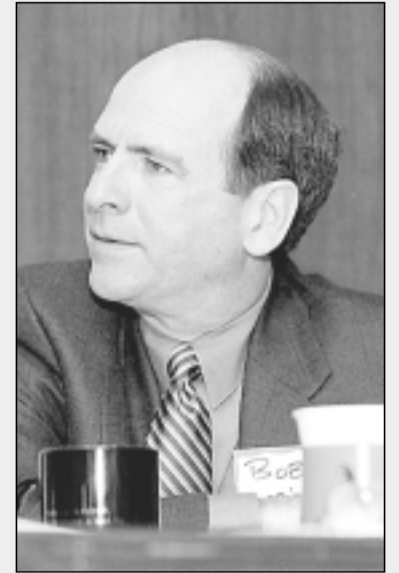
FRANK: Again, our goal is to maximize the value of our intellectual property. It all goes towards generating value for our shareholders, and value can include many components, such as tax relief, reduction in patent maintenance fees, goodwill from a nonprofit organization and good publicity. If donations are going to help BellSouth maximize the value of its IP, then of course we will do it.

LANDGRAFF: At Coca-Cola we haven't looked heavily at the donation issue. However, I'll bring a perspective from the other side. I'm on the research foundation board of my university, which is essentially the company that receives these donations. I think they will be a continuing thing. But I think the valuations are out of line.

LANDGRAFF: I think that the valuation model will change over time. Quite frankly, this is a brand-new field, and so there was no sort of prior history to be able to say, here's what these should be valued at.

KUESTER: So if you're going to donate, you might want to think about doing it now.

FOLK: We have been approached by people who ask for a license under one or more specific patents, and what we find out typically is that at their startup, they have filed for some kind of patent, and one of our patents was cited as prior art. I think in many cases their venture capitalists tell them, "I'm not going to give you a dime until you get a license from whoever holds



Robert A. Currie

Robert A. Currie is corporate counsel in intellectual property for Georgia-Pacific Corporation in Atlanta. His practice covers patents, trademarks, copyrights, trade secrets and technology licensing. The company holds approximately 1,000 patents and 2,000 trademark registrations worldwide. Prior to joining Georgia-Pacific in 1984, Currie was an associate with Troutman, Sanders in Atlanta. Prior to that, he was a senior industrial engineer with Westinghouse Electric Corporation's R&D Center in Pittsburgh and its nuclear fuel division in Columbia, S.C. Currie earned his JD in 1982 from the University of Pittsburgh, his Masters in Business Administration in 1978 from the University of South Carolina, and his bachelor's degree in industrial engineering/operations research in 1972 from Cornell University. He is registered to practice before the U.S. Patent and Trademark Office. He is also a member of the American Bar Association, the American Corporate Counsel Association, the International Trademark Association and The State Bar of Georgia. From 1994-1997, he held successive positions of secretary, vice-chairman and chairman of the State Bar of Georgia's Computer Law Section, and is coordinator of the licensing committee of the State Bar's Intellectual Property Law Section.

**“Outside inventors submitting ideas to companies rarely think about the effort required to convert intellectual property to cash.”
—Robert A. Currie**

PHOTO INSET: JEFFREY R. KUESTER

**“A tremendous amount of goodwill can be created for the company for contributing intellectual property to a charity or university.”
—Jeffrey R. Kuester**

this overhanging patent.” And so then they come to us, and say, “I’d like to get a license, what are your terms?” These projects start with a simple phone call, but they can very rapidly move to the sort of situation where they’re not in business yet, there is no revenue stream, so you start talking about equity and a lot of other things. I’ve had four of those approaches within the last 18 months.

KUESTER: I want to give everyone a final chance to get those burning thoughts out.

FOLK: I have a question for Georgia-Pacific. How do you value your patent portfolio? What rates do you apply, what royalties do you look for? Do you have any kind of guidance in those areas?

CURRIE: We’re probably the company at the table licensing out the least. We’ve taken an extensive look at one of our divisions in order to “value” that

portfolio. This took several months and a lot of time and effort. We felt we made a pretty good estimate at the end of the project, and from a management perspective it opened eyes about what we had. That portfolio coincidentally became the subject of significant litigation against our chief competitor in that field. So we ended up with hard data about the value of the portfolio, both in terms of damages and the ability to exclude others in the field. The valuation effort was a hard exercise, and it was just coincidental that litigation came along to really bring it into focus. Beyond that, we don’t yet have any systematic or easy way to place a value on a patent portfolio, and I look forward to the day when we will. Our approach is to identify products affected by each patent—one product may be linked to several patents of course, and one patent may be linked to several products. We investigate the product’s sales and margins, and try to estimate the portion of the margin attributable to the patents. From that, we end up with a best estimate of what a portfolio is worth, but beyond that it wasn’t very scientific. It was just a lot of hard work.

KENNEDY: How did the values that you established before you went out to enforce the patents compare with the damages that were awarded?

CURRIE: To just give a short answer, the estimated value of the portfolio of about 10 U.S. patents was in the low tens of millions of dollars. The actual value of winning the litigation was quite a bit more than that, by a factor of four or five. So it turned out we were too conservative with the estimate.

MALACKOWSKI: Jeff, I did have one final thought. I think that this discussion has been very informative, and it’s reflective of a long-term trend. If you go back 25 years and examine the S&P 500, 80 percent of their value is represented by tangible assets. We didn’t have a Court of Appeals for the Federal Circuit. We didn’t have the dot-com gold rush. Today, 80 percent of value of the S&P 500 is represented by intangible assets, and I think that trend will continue. In the future, a corporation will report what IP is contributing to their shareholders. You’ll see even more explicit value extraction.

FRANK: My final thought is that it is going to be very difficult for any company to develop a complete organization quickly and maybe even long-term because managing intellectual property is very complex, ever changing, and resource intensive. I believe it’s going to take almost any organization a long time to develop all the expertise and all the resources needed to do this on their own. For that reason I would suggest that there is a huge opportunity for external expertise from lawyers, from consultants, from venture capitalists, and from many others. Therefore, as you might expect, BellSouth’s IP group has a substantial amount of its budget earmarked for external expertise and resources.

KUESTER: Finally, what is the long-term view on Internet-patent or business-method patent assets?

MALACKOWSKI: We’re not going to know which of those patent applications will be allowed for several years. When they do issue, and a lot of those companies have just gone bust, the last lingering asset for those investors will be those patent rights. How they manage those, how they try to capitalize on that asset is yet to be determined.

KUESTER: Great discussion!



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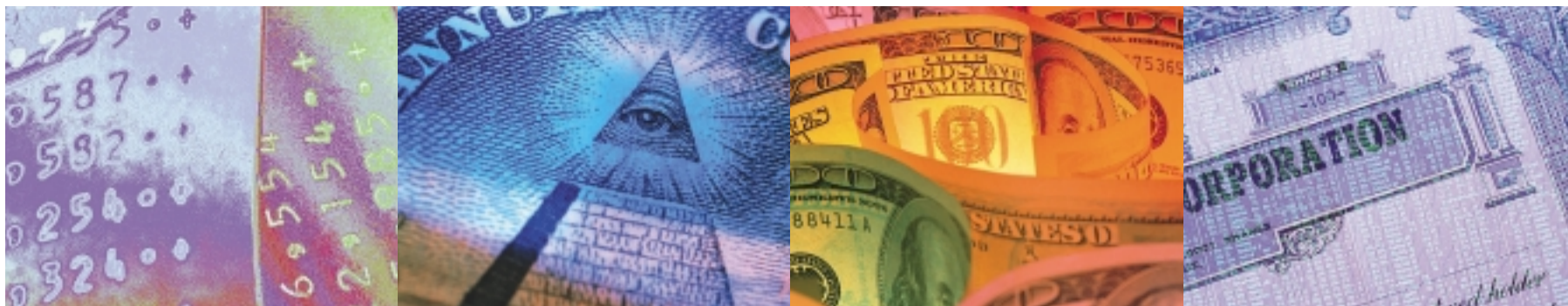
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