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A Case Study of a Successful Private Entrepreneurship - Speaker

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His current assignment is to champion Research in Motion's efforts to reform intellectual property law. We were just discussing this. He told me that his major focus is those regulation-addicted Europeans, and what they do in this sort of thing, although God knows there are enough problems with that in the United States and Canada, too.

So let me ask Bill Davies to come on and talk to you about Research in Motion, about entrepreneurship, about intellectual property, and the travails that one goes through and what ought to be done with intellectual property to enhance entrepreneurship. And I think you are going to really enjoy this.

SPEAKER

*William A. Davies**

MR. DAVIES: Okay. Well, after that sort of stirring introduction, I find it hard because the first thing that happened to me was Deborah said, "Well, give him about 15 minutes." So I got to get all of that in 15 minutes. And then she said – and this was the one that really hurt – "No Power Points."

I have been in the high-tech industry for 30-plus years, and I am not supposed to give a Power Point presentation? Well, okay. So I didn't do it. I was very good, and I don't have any Power Points. However, I did want to start off with a historical quote. A very intelligent, brilliant leader, Winston Churchill, once said, "The only statistics that you can believe are the ones that you fiddle yourself."

And I want to tell you some statistics that I gathered today. The first one is that I have met four Case Western students. So, I can tell you that 100 percent of them are beautiful women. Okay?

The second one is that 50 percent of them did not know where the law school was.

Now, the other two, one is a student here, and the other one was an alumnae. So there you have the statistics for today.

Well, I have been thinking that I was going to give you a long and rather boring lecture and talk about *E-Bay*, and we were going to talk about the different opinions and how some of them didn't make sense, and how did they get so many different ones to all come out unanimous?

But, that would be more boring than you could possibly take on Friday evening after cocktails. And so we are not going to do that. We will just talk a little bit about the way the world seems to be working on entrepreneurship.

[Phone rings.] And people call. I have no idea why they called that.

MR. CUNNINGHAM: You are proving the truth of my story. Someone is looking for Dick Cunningham.

MR. DAVIES: That's right. Absolutely. Didn't say that, but it probably was.

As a matter of fact, this is, by the way, not the absolutely newest version, but this is the first sort of consumer version of the Blackberry, and it actually has a camera in it. It actually has an MP3 player in it. I don't know how to use the MP3 player, and I can barely take a picture with it. But it does have those things.

I am very amazed at how they can manage to get all the stuff into these little tiny packages. I will also tell you one other thing. Now they have keyboards that are this thin and just a little bit bigger but with a full QWERTY keyboard. That's what I want. They haven't given me one of those yet.

So let's talk about entrepreneurship and the law, and we will get some anecdotes about how RIM is doing. As you know, RIM fell prey to somebody who could be described as a troll.¹ A patent troll is normally a

* Born in Argentina of an Irish Argentine family, he was raised in Brazil and educated in the United States. He speaks English, Spanish and Portuguese. He graduated from Purdue University in Economics and has a Degree of JD, cum laude, from Indiana University School of Law. During his professional life, William A. Davies has worked for a variety of private sector enterprises. After service in the United States Army he became a Reinsurance Representative of Lincoln National Life Insurance Company with responsibility for Latin America and the Caribbean, it is here that his interest in working with Governments for the benefit of private enterprise was developed as the Life Reinsurance business is highly regulated and a significant part of servicing the Life Insurance company clients was lobbying government on their behalf. He then pursued a legal career; First with Cahill Gordon Reindhel & Ohl a Wall Street law firm where he had the good fortune to work closely with the former legal adviser to the US State Department who was then a senior partner at the firm; Second with Motorola Inc. where he held successively positions of responsibility advising the business sectors. This included 5 years in Geneva Switzerland where he was very active with the fledgling European Commission in the lobbying of the necessary rules for the Common Market while not hindering the conduct of business. He served as Vice President and Assistant General Counsel and then as VP and Director of Technology Transfer. He also was the founder and architect of the Motorola Government Relations Team for Latin America, which he successfully led for 6 years. He then became a Senior Principal for the professional services firm of DeLevante y Asociados, Panama, R.P. where he consulted for clients throughout the Americas on spectrum, telecommunications and standards issues. He is currently a General Manager and President of Research in Motion (Barbados) Ltd. His current assignment is to champion RIM's efforts to reform of the IPR laws. During his career Davies has served on the Board of Standards Review of the American National Standards Institute, The Joint Government Private Committee of Experts on Electronic Commerce of the FTAA, and the Board of Trustees of Latin American Young Executives, he has been a member of the Argentine, Venezuelan and Canadian Delegations to the CITEL Permanent Consultative Committees I and II (formerly III), and has been a frequent speaker at industry Fora.

¹ Leslie T. Grab, Recent Development, *Equitable Concerns of eBay v. Mercexchange: Did the Supreme Court Successfully Balance Patent Protection Against Patent Trolls*, 8 N.C. J.L. & Tech. 81, 85-87 (2006).

patent-holder who does not develop technology on their own.² They go out and buy technology, or acquire it in some way, and then go around and sue people. Now, that is a fairly, you would think, innocuous sort of thing to do. I mean, that's what we do for a living, isn't it? We sue people.

However, the problem with a patent suit in the United States, at least, is that until the *E-Bay* case, injunctions were automatic.³ There was no consideration. The normal equitable considerations for whether an injunction should flow or not were left out. So you had a Draconian remedy.

And so it became very easy to be a patent troll because you can easily put a company like RIM out of business. Before we really go further into that, though, I want to talk about why it is that these patent trolls exist. This wasn't a problem thirty years ago.⁴

There are two separate reasons why it wasn't a problem thirty years ago. One of them is the fact that North America, Europe, and Japan even, have started to de-industrialize.⁵ We don't make things any more. China and the little tigers, India, have become our factories.

As a matter of fact, I made an interesting observation the other day. I saw that there is a real issue in Los Angeles about what to do with containers. Containers come over on ships and are big and 40 feet long and 20 feet wide. Well, they are heavy, and you don't send them back.

It is too expensive to send them back, so they end up piling up in Los Angeles. They have acres and acres of them in Los Angeles. They don't know what to do with them because we don't sell anything to China.⁶ China sells to us. So it is kind of interesting.

There are some things that we do sell to China. And obviously, it is very high-tech things, which are, at the moment at least, still such small markets that only several firms can have the volume. For example, commercial aircraft, where you have four firms total that make up the entire market for

² *Id.* at 83-84.

³ *Id.* at 81.

⁴ See Jason Rantanen, *Slaying the Troll: Litigation as an Effective Strategy Against Patent Threats*, 23 Santa Clara Computer & High Tech. L.J. 159, n.36 (“[P]atent trolling is a fairly recent phenomenon.”).

⁵ See Robert Rowthorn & Ramana Ramsawamy, *Deindustrialization – Its Causes and Implications*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/pubs/ft/issues10> (last visited Oct. 13, 2007) (“The trend [of deindustrialization], particularly evident in the United States and Europe is also apparent in Japan.”).

⁶ See generally *Containers Pile Up as Imports from China Soar*, REUTERS, June 15, 2006, available at <http://kerryfoxlive.com/wordpress/?p=568> (“China is shipping so many goods to the United States that the Chinese often find it cheaper to build new containers . . . and leave the empty ones in the United States.”), see also Bruce Odessey, *While U.S. Exports to China Rise, Imports From China Rise Faster*, USINFO, <http://usinfo.state.gov/eap/Archive/2005/Mar/03-517799.html> (last visited Oct. 13, 2007) (shows trade volume for U.S. trade with China).

commercial aircraft – two that dominate it: Boeing and Airbus – and a couple of others like Embraer and Bombardier.⁷

As a matter of fact, I flew in a Bombardier jet up here from Dallas on the way here. It was a very nice plane, very nice plane. I liked it a lot. So, we still sell those kinds of things, but that's because that market is not big enough to have 50 competitors that are efficient. It is now consolidated, but it used to have 50 competitors.⁸ And then, we also have some very high-tech things, which are still so closely tied to their markets that it is hard to replace them with just raw manufacturing capacity, like Blackberries. Believe it or not, every Blackberry here – and there are a lot of them I noticed – was made in Waterloo, Canada.⁹

It is amazing when you go there. I can't remember the last time I saw a real factory in North America, especially a high-tech factory. We still have the big heavy factories, but high-tech is kind of a rarity now.

And the other thing that has happened and it is something that may be part of the problem, is that more and more things are networked. This has obviously come about because of the Internet (which has expanded enormously) and also because the physical networks that carry the Internet have expanded enormously as well.¹⁰

Now, for example, the cellular industry is putting out things that have two or three megabytes throughput.¹¹ The other wireless things like Wi-Max are going to have even more. So we have an expansion of those networks, both the physical networks and the logical network, and we, therefore, get more and more equipment that makes our lives easy, that are networked.

In other words, now we have refrigerators that are networked.¹² And it is quite common now to have security systems that you can access anywhere in

⁷ *Id.* (China imports commercial aircraft from the U.S.).

⁸ See generally Michael J. Harrison, *U.S. versus EU Competition Policy: The Boeing-McDonnell Douglas Merger*, AMERICAN CONSORTIUM ON EUROPEAN UNION STUDIES: CASES ON TRANSATLANTIC RELATIONS, NO. 2, 4 [http://www.american.edu/aces/Cases/ACES Competition Policy.doc](http://www.american.edu/aces/Cases/ACES%20Competition%20Policy.doc) (last visited Oct. 13, 2007) (refers to consolidation of commercial aircraft industry).

⁹ See generally Company, RIM, <http://www.rim.net/company/index.shtml> (last visited Oct. 13, 2007) (RIM is based in Waterloo, Ontario).

¹⁰ See generally Aggelos Bletsas, *Physical Limitation on the Expansion of Internet*, MIT MEDIA LAB <http://web.media.mit.edu/~aggelos/861.html> (last visited Oct. 13, 2007) (describes how the expansion of the Internet depends on the expansion of physical networks).

¹¹ See, e.g., Pascal Deriot, *XIM vs. Code Shadowing Architecture*, MICRON TECHNOLOGY <http://www.wirelessdesignmag.com/ShowPR.aspx?PUBCODE=055&ACCT=0030150&ISSUE=0312&ORIGRELTTYPE=FE&RELTYPE=PR&PRODCODE=00000&PRODLETT=B&CommonCount=0> (last visited Oct. 13, 2007) (discusses throughput capabilities of late model cell phones).

¹² See, e.g., *Samsung's Revolutionary Digital Network Refrigerator Keeps the Kitchen Connected*, BUSINESS WIRE, Apr. 4, 2002, available at http://findarticles.com/p/articles/mi_m0EIN/is_2002_April_4/ai_84392672 (discusses

the world.¹³ You know, I have a beach house in Panama that has a camera in it. In my house in Barbados, I can look and see what's going on at my house because there is a little camera I can move and which I can look at through the Internet.

And that's just an example, but it happens with an awful lot of things, and it is getting cheaper. So, for example, as I understand, you can get coffee makers that are networked.¹⁴ If you unload coffee in them a week ago, it will grind them tomorrow and brew it the day after, whatever. I don't know that you would want to do that with a coffee maker, but apparently, you can.

But what this brings about – and it is something that sometimes those of us who are not engineers forget – is that you have to have all these things play together. So we have to have networks. Networks require standards for their interfaces.¹⁵ In other words, that refrigerator or that camera in Panama has got to somehow talk to my computer in Barbados or, for that matter, my hotel room over here. It has got to talk there, but it has to play with a set of standards.

And the standards have become very important because of the networking. When I first started in the high-tech business, they didn't do standards. What did they do? They did E-1s.¹⁶ Who cares about E-1s, right? They did a few other things. The network standard they had was AT&T's Notes on the Network.¹⁷ That was it, and nobody needed anything else.

Now, there is no AT&T, and Notes on a Network is someplace in the archives of some library; a mere famous historical document. But now, what we have instead is an enormous number of standards. All these standards are built by different organizations, some of which you may have heard of and some of which you wish you never have, like ISO, ITU, ANSI, all the ones

example of a networked refrigerator).

¹³ See generally George Jones, *Build a PC-based Home Security System*, BYTE.COM <http://www.byte.com/documents/s=9988/byt1151252609290> (last visited Oct. 13, 2007) (explains how to build a networked security system).

¹⁴ See Russel Redman, 'Connected Kitchen' Product Line Debuts at CES, CRN, <http://www.crn.com/digital-home/18825238> (last visited Oct. 13, 2007) (describes networked kitchen appliances, including coffee maker).

¹⁵ See generally Jim Duffy and Tim Green, *Dearth of Standard Stalls Ethernet Services*, NETWORK WORLD, June 13, 2005, 79 (lack of standard Ethernet interface impedes plans to extend networks).

¹⁶ See generally *E1 Tutorial: An Overview of the Basics of the E1 Digital Transmission Telecommunications Link Standard Used Predominantly in Europe*, RADIO ELECTRONICS.COM, http://www.radio-electronics.com/info/telecommunications_networks/telecommunications_standards/e1/e1.php (last visited Oct. 13, 2007) (overview of E1).

¹⁷ See generally *AT&T Dumps Network Notes*, CNET, http://www.news.com/ATT-dumps-Network-Notes/2100-1023_3-206380.html (last visited Oct. 13, 2007) (discusses AT&T Notes).

that report to ANSI, ATIS,¹⁸ et cetera, et cetera. All of these are acronyms, which you certainly don't need to remember.

But they are, in essence, organizations of private businesses that put together standards so that their equipment or their software can interoperate with the other equipment and software in a network.¹⁹ This is an enormous effort. It goes on all the time, but one of the things that happens – and this is important also – is that every private company (as well as academia) is trying to make sure their patent is in the standard. Okay? So we have a couple of things.

First, the deindustrialization of the West – I hate to use that. It sounds so incredibly apocalyptic – none of us in the West have lost an inventive edge. We are still inventing away and producing intellectual property. Part of what we are doing is buying the stuff from the Chinese with our intellectual property. You know, to give you a good example of why our intellectual property is still very important is to look at the movie industry. Most of the movie industry is owned by the Japanese.²⁰ Not all of it. Part of it is owned by the Australians.

But the intellectual property that resides in Hollywood is such that that's where you make movies. That's where you find directors. That's where you find make-up people. That's where you find all of these people that make up the intellectual property that goes into a movie. That's very valuable.

And so what happens is that we are buying, oh, I don't know, this microphone from the Chinese by selling them movies, which is basically intellectual property. It is one of the reasons why people who are in that part of intellectual property are so interested in copyrights and piracy. That really is one of the major issues of our balance of trade²¹ – the West's balance of trade, not just the United States.

I was once told that a company which you have probably never heard of, called Televisa, is the second largest foreign exchange earner in Mexico.²²

¹⁸ See generally *Internet Related Standards Organizations*, FAQS.ORG, <http://www.faqs.org/rfcs/inet-standards.html> (last visited Oct. 13, 2007) (includes hyperlinks to Internet standards organization Web sites).

¹⁹ See, e.g., *About Us: OpenOffice.org*, OPENOFFICE.ORG, <http://about.openoffice.org/index.html#history> (last visited Oct. 13, 2007) (example of a standards organization heavily backed by the private company Sun Microsystems).

²⁰ See, e.g., *Affiliated Companies (Outside Japan)*, SONY CORPORATION, <http://www.sony.net/SonyInfo/CorporateInfo/Subsidiaries/outside.html> (last visited Oct. 13, 2007) (Sony Global Corporation, with headquarters in Tokyo, lists Sony Pictures – major producer of movies – as one of its affiliated companies).

²¹ See generally Moeen Qureshi, *Henry and Hank*, THE WALL STREET JOURNAL, Apr. 21, 2006, at A14 (“No doubt [China and the U.S.] have serious issues to resolve on monetary policy, balance of trade and protection of intellectual property.”).

²² See generally *Televisa*, http://www.televisa.com/index_eng.html (last visited Oct. 13, 2007) (refers to Televisa as the world's largest Spanish Language media corporation), see also

They put out these horrible but Copyrighted Telenovelas – which no one in their right mind would watch – which are the most popular thing on television all over the Spanish-speaking world, including the United States, by the way.²³

But they are the second largest foreign exchanger in Mexico because of Telenovelas. So this is valuable stuff. It is very important to us, especially with, as I said, the deindustrialization of the West.

So what has happened is that an awful lot of the industrial giants of the West have become IPR houses. We patent, we copyright and we enforce patents. So you have to have standards in your product regardless of what product you make.

In other words, for example, let's take the Blackberry. We have a lot of nonstandard stuff in here and a lot of proprietary stuff, which makes it a Blackberry: your push e-mail, touch and feel, the ease of work and all that, that's all proprietary.

By the way, I will break off and tell you a story. My daughter – my oldest daughter – I gave her a Blackberry. About two weeks ago I got a message from her, which said, "I am finally using the Blackberry for what it is really meant for. I am sending this to you from under the table in a boring meeting."

And it is a niche, and it is a nice niche. Now, any –

MR. CUNNINGHAM: We rehearsed this in advance by the way.

MR. DAVIES: But anyway, the fact is that all of these things that we have on here all ride on top of standard stuff. In other words, the radio, in the case of this GSM, GPRS and EDGE – none of which you need to understand, they are standards for making cellular networks work – are in the radio, and without them, it wouldn't work.²⁴

So it is not like a stand alone PDA any more. I don't know if you remember Palm Pilots. They didn't need anything that was standard because they were not networked together. Now they do, by the way, because they

GRUPO TELEVISIA, S.A., REPORT OF FOREIGN ISSUER (FORM 6-K) (2006), available at http://sec.gov/Archives/edgar/data/912892/000089534506000596/am6k4_grupo.txt (Televisa is the largest Spanish speaking media company in the world and equity owner the largest Spanish language media company in the U.S.).

²³ See generally *Telenovela*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/archives/etv/T/htmlT/telenovela/telenovela.htm> (last visited Oct. 13, 2007) (describes Telenovela genre), see also Ronald Grover, *Televisa and Univision: Stay Tuned!*, BUSINESSWEEK, June 27, 2006, available at http://www.businessweek.com/investor/content/jun2006/pi20060627_999458.htm?campaign_id=tbw (36% of Univision programming consists of telenovelas licensed from Televisa.)

²⁴ See *Enhanced Data Rates for GSM Evolution*, TELECOMSPACE, <http://www.telecomspace.com/datatech-edge.html> (discussing the EDGE enhancement to GPRS networks) (last visited Oct. 6, 2007).

have now started to have cellular and two-way paging in them. Now they have to have standard things, and that's because of the networking.

So what is really happening, because of these two trends, is that intellectual property has become very important to any entrepreneur, high-tech, obviously, but even not-so-high-tech. I think the movie industry and the television industry, even with things like Telenovelas, tells you that intellectual property is important.

And what has happened, therefore, is that people have become much more aware of it. There is a lot more patent activity going on. Everybody does their thing with copyrights. They are all worried about piracy, as they should be. What has happened with that is that, for every entrepreneur, we now have to run a gauntlet of the patents that are in the air, because that's what people do now. Instead of making things, they invent things and patent them and also the patents therein embedded in standards.

The patent troll is really a creature of these two environments, or these two changes. It is interesting, the Europeans, by the way, are trying to change their patent system radically. But one of the things they want to do is to have a new treaty. I don't know if you know what the European patent system is right now.

There is a patent system in almost all the countries, and there is also the European Patent Office.²⁵ The European Patent Office when it grants a patent – it is in Munich – when it grants a patent, you don't get anything except the right to take that patent and turn it into a national patent.²⁶ So, in essence, you get the right to have thirty-three national patents issued from a European patent. However, you have to enforce them in each country.

So, Europeans thought up a new idea, which they called the European Patent Litigation Agreement (EPLA), which was designed; it appears, in order to make life easy for the troll.²⁷ It will only use three languages.²⁸ Now, there is a reason for that. It is better to have three languages than thirty-three languages. But, what it does is it makes it very difficult for some poor schnook in Andalusia who has never heard English, French, or German to be able to defend himself. And, as all of you who are attorneys know, you have to have your client actively participate in and understand the litigation. Otherwise, it just doesn't work very well. Additionally, judges will all come from the European Patent Office, and their loyalty will be to the European

²⁵ The European Patent Office Homepage, <http://www.epo.org/> (last visited Oct. 7, 2007).

²⁶ See How to Apply for a European Patent, <http://www.epo.org/patents/One-Stop-Page.html> (stating that a European patent is a "bundle" of national patents) (last visited Oct. 7, 2007).

²⁷ See generally EPLA – European Patent Litigation Agreement, <http://www.epo.org/patents/law/legislative-initiatives/epla.html> (discussing the history and some details of the EPLA) (last visited Oct. 7, 2007).

²⁸ *Id.*

Patent Office, the people who have issued the patents.²⁹ So finding one of them not valid is going to be a rare occasion under the European Patent Litigation Agreement.

A part of my job now is, as a matter of fact, to lobby against the EPLA. And fortunately for me, the French don't like it either.³⁰ As I made a comment to my boss when the French came out with their statement that they wanted something different than EPLA, he said, "I can still see Admiral d'Estang's fleet out on the horizon there. They came to our rescue again." However, he then reminded me that it was a Canadian company.

But the fact is that the EPLA is a bad approach.³¹ And we hope that the community, rather than the EPO, will be the people in charge of the EPLA – or something like the EPLA – because you have more checks and balances at the European Court of Justice. And, you have the national judiciaries that can be tapped and those kinds of things.³²

Oh, I only have five minutes? You could have just said five minutes. You were trying to be subtle, weren't you? Okay. Shall I go faster? I can just quit now. Okay. See, I switched to the last page of my notes. I hadn't even turned from the first page before that. All right?

That's the European problem, and I can talk for a couple of hours on that one, but I won't. In fact, I will really quit.

So what we are really talking about now is that every entrepreneur, especially new ones, has to do two things. One, they have to have an R & D department, an innovation department. And then they have to have a legal department. And everything else is superfluous. If you don't have those two, you are out of business.

And I think that that's something – well, it is good for the profession, it is delightful – it actually is not very efficient for the economies. And so we have to fix the problem of the IPR law. And I don't know how yet, but I am trying to figure it out. If anybody has any ideas, I will be happy to hear them. See, I am all done. Okay?

DISCUSSION FOLLOWING THE REMARKS OF WILLIAM A. DAVIES

MR. CUNNINGHAM: Okay. Great. You can't leave. We have questions and answers. You can't get out of here that quick.

MR. DAVIES: Okay.

²⁹ Paul Meller, *European Parliament Wants Changes to Patent Agreement*, IDG NEWS SERVICE, Oct. 12, 2006, http://open.itworld.com/5007/061012eupatent/page_1.html.

³⁰ *France: Why We Oppose the EPLA*, MANAGING INTELLECTUAL PROPERTY, Jan. 9, 2007, <http://new.managingip.com/Article.aspx?ArticleID=1257409>.

³¹ See EPLA: Full Briefing, <http://epla.ffii.org/briefing> (listing a number of criticisms of the EPLA) (last visited Oct. 7, 2007).

³² *Id.*