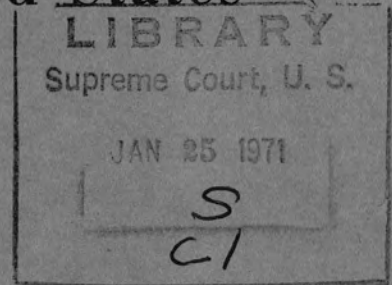


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

----- M  
BLONDER-TONGUE LABORATORIES, INC.,

Petitioners

vs.

UNIVERSITY OF ILLINOIS FOUNDATION ET AL.

Respondents.  
----- M

Docket No. 338

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Place Washington, D. C.

Date January 14, 1971.

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ARGUMENT OF:

PAGE:

ROBERT H. RINES, ESQ:  
on behalf of Petitioner

3

RICHARD W. McLAREN, ESQ,  
as amicus curiae

26

WILLIAM A, MARSHALL, ESQ.  
on behalf of Respondent  
University of Illinois Foundation

36

SIDNEY G. FABER, ESQ.  
on behalf of Respondent  
JFD Electronics Corporation

55

REBUTTAL ARGUMENT OF:

ROBERT H. RINES, ESQ.  
on behalf of Petitioner

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----  
4 BLONDER-TONGUE LABORATORIES, INC. :

5 PETITIONER :

6  
7 VS. :

No. 338

8  
9 UNIVERSITY OF ILLINOIS FOUNDATION ET AL. :

10 RESPONDENTS :

11  
12 -----  
13 Washington, D.C.

14 Tuesday, January 14, 1971

15 The above entitled matter came on for argument  
16 at 1:00 o'clock p.m.

17 BEFORE:

18 WARREN E. BURGER, Chief Justice  
19 HUGO L. BLACK, Associate Justice  
20 WILLIAM O. DOUGLAS, Associate Justice  
21 JOHN M. HARLAN, Associate Justice  
22 WILLIAM J. BRENNAN, JR., Associate Justice  
23 POTTER STEWART, Associate Justice  
24 ~~ROBERT D. WHITE~~, Associate Justice  
25 THURGOOD MARSHALL, Associate Justice  
HENRY BLACKMUN, Associate Justice

1  
2 APPEARANCES:

3 ROBERT H. RINES, ESQ., Boston, Massachusetts,  
4 on behalf of Blonder-Tongue Laboratories, Inc.

5 RICHARD W. McLAREN, ESQ., Assistant Attorney  
6 General, Department of Justice, Washington,  
7 D.C.. for the United States as amicus curiae

8 WILLIAM A. MARSHALL, ESQ., Chicago, Illinois,  
9 on behalf of Respondent University of Illinois  
10 Foundation

11 SIDNEY G. FABER, ESQ., New York City, New York,  
12 on behalf of Respondent JFD Electronics Cor-  
13 poration

14 \*\*\*\*\*  
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P R O C E E D I N G S

1 MR. CHIEF JUSTICE BURGER: We'll hear arguments  
2 next in No. 338, Blonder-Tongue Laboratories against the Univ-  
3 ersity of Illinois Foundation. Mr. Rines, you may proceed when-  
4 ever you're ready.

5 ARGUMENT OF ROBERT H. RINES, ESQ

6 ON BEHALF OF PETITIONER

7 MR. ROBERT H. RINES, ESQ: Mr. Chief Justice, and may  
8 it please the Court.

9 I'd like to take one moment to introduce my father,  
10 teacher, and partner, Mr. David Rines, my co-counsel from Chi-  
11 cago, Mr. Richard Phillips.

12 This case involves a conflict of decisions between the  
13 Eighth Circuit and the Seventh Circuit, with regard to the valid-  
14 ity of a patent to Isbell, dealing with television antennas. The  
15 type I'm sure Your Honors have seen cluttering the landscape  
16 of our rooves of houses, which are very necessary in order to  
17 get good television reception in the homes.

18 I have here, a typical antenna of the type I'm sure  
19 you've seen on the rooves, involving what we call dipoles. There  
20 is nothing magical about that; just little rods which are tuned  
21 and corrected in terms of dimension and direction to recieve  
22 from the television transmitting stations the signals that we  
23 tune into on our television.

24 In the Eighth Circuit, both the District Court and the  
25 Court of Appeals found the Isbell patent, which is owned by the

1 University of Illinois Foundation, to be invalid, for obvious-  
2 ness, in the light of the teaching of the prior art.

3 The University of Illinois Foundation filed not just one  
4 suit, in the winegard case, which is this Eighth circuit case,  
5 but filed a suit against Blonder-Tongue, a New Jersey Corpor-  
6 ation, in Chicago, by suing the customer, enjoining Blonder-  
7 Tongue, and a whole host of other manufactures throughout the  
8 land.

9 When the decision went against them in the Winegard District  
10 Court, and while they were appealing to the Court of Appeals of  
11 the Eighth Circuit, the University of Illinois Foundation pur-  
12 sued the suit against Blonder-Tongue in New Jersey, exactly the  
13 same patent. There was also another patent involved. And we went  
14 to trial before Judge Hoffman.

15 One of the issues in our presentation is the fact that we  
16 were forced to this trial, without the benefit of a single  
17 witnesses during the whole presentation of the University of  
18 Illinois' case in chief. As a result of that fact, when we  
19 were ready on December 18, the trial date, with our Cambridge,  
20 Massachusetts expert who had worked over a year on this with us,  
21 with Mr. Blonder, with various other customer witnesses from  
22 all over the country, and myself from Boston, the Judge could  
23 not hear it on the 18th, and he couldn't set a time for post-  
24 ponement.

25 The nineteenth, twentieth, twenty first, we still didn't

1 have a trial date. The result was that the day before Christmas,  
2 the trial was set for two days after Christmas. And I was not  
3 able to reassemble any of my witnesses. And the District Court  
4 refused to give me a few days in which to do this, but they  
5 forced us to go to trial without any witnesses at all.

6 Therefore, we were not able to produce any live witnesses,  
7 on the issue of whether or not the Isbell patent was or was not  
8 valid for obviousness or any other reason.

9 Q The trial originally was set for October or November,  
10 then?

11 A Well, it had been set several times, but was then post-  
12 poned, Mr. Justice Harlan.

13 Q And this---

14 A Till Devember 18th.

15 Q What caused the postponements?

16 A The prior trial of Judge Hoffman had not been finished.

17 Q I beg your pardon?

18 A The prior trial that the District Court had, had not  
19 been finished.

20 Q Yes.

21 A So it was postponed until December 18th.

22 Q Just one continuance?

23 A Oh, no, there were several during, at the request of  
24 the parties, at the requist of the Court. This is about the  
25 sixth or seventh postponement. But we're all zeroed in for Dec-

1 ember 18th.They're all there.

2 Therefore the record that has been produced in this case,  
3 is only the documents that we were able to put in before Judge  
4 Hoffman which were the same documents before the District Court,  
5 in the Eighth Circuit litigation, the Winegard litigation.

6 And we had to argue, therefore, from those documents, with-  
7 out the benefit of any expert or any witnesses at all, these  
8 issues of obviousness and validity.

9 Q You had oral testimony?

10 A Yes there was, the other side, the Defendant had a  
11 right and did produce an expert and the Court---

12 Q Did you---

13 A I wasn't in that.

14 Q Oh that's right.

15 A No, I'm a different Defendant.

16 Q That's right. You-- the Defendant there did, yes.

17 A Yes, he did.

18 So the issue squarely before this Court is, who is right,  
19 in terms of this conclusion of obviousness on substantially the  
20 same record? The Court of Appeals of the Eighth Circuit, or the  
21 Court of Appeals of the Seventh Circuit? And under the document  
22 of Triplett v. Lowell, to which we will address ourselves also,  
23 if you will recall, when a conflict does arise because a a pat-  
24 entee has a second bite of a thigh, if he loses in the First  
25 Circuit, the decision must rest with this Supreme Court, as to



1 whether the patent is valid or invalid.

2 Q You said, I thought, that on this same record was the  
3 District Court in the first case in the Eighth Circuit, dealing  
4 with the same record as the record in the second trial before  
5 Judge Hoffman?

6 A So far as the documents are concerned,---

7 Q Well, not---

8 A But he had more evidence in the Eighth Circuit because  
9 they had live witnesses and experts which we were not able to  
10 produce before Judge Hoffman. So a fuller trial was held in the  
11 Eighth Circuit, than we had in the Seventh Circuit.

12 Q So that it is not the same record in the broad sense  
13 of the work?

14 A No, it is not, Mr. Justice.

15 In addition, in---

16 Q You're not asking for Triplett to be overruled?

17 A No, I'm not.

18 I maintain that my brother here did have a right if there  
19 was a genuine new issue or some other interpretation of the  
20 claim or some interpretation of law in another circuit that's  
21 different than this Circuit, he had a right to try, under Trip-  
22 lett below, in another circuit.

23 In this particular case, where we're stuck with substan-  
24 tially the same documentary evidence, where we were not able  
25 to produce even that modicum of expert testimony that existed

1 in the Eighth Circuit, we think there may be as suggested by  
2 the Solicitor General, some reason for modification of that  
3 document in a case such as this.

4 The real question that is before this Court is, on the  
5 matter of obviousness, at the time that Mr. Isbell made his in-  
6 vention, what was the knowledge in the art? What was the skill  
7 of the ordinary mechanic? What had been known?

8 And we are very fortunate that one distinction between  
9 these two trials was that the University of Illinois this time  
10 in the Blonder-Tongue case chose to take in some fire-inves-  
11 tigators in this field, namely Dr. DuHamel, who had pioneered  
12 this kind of antenna at the University of Illinois many years  
13 before.

14 He was produced as the Plaintiffs witness, and fortunately  
15 through cross-examination we were able to get from Mr. DuHamel  
16 admissions that we think bolsters this concept of complete un-  
17 obviousness of this invention at the time that Mr. Isbell made  
18 it.

19 Now the District---

20 Q Mr. Rines, I want to be sure the so-called Mayes  
21 patent is not an issue not---

22 A It is not.

23 Q---here.

24 A For the edification of the Court, there were two pat-  
25 ents sued on by the University of Illinois. One was the Isbell

1 patent, which is this kind of an antenna, not this, where these  
2 rods, here, instead of being off at an angle, come out straight.  
3 That's Isbell.

4 Then they had a second patent; the Mayes, who just took  
5 these rods and bent them in this way into a V. The District  
6 Court found both those patents valid. The Court of Appeals  
7 threw out the V-patent, saying it wasn't valid. So that's not  
8 an issue in this Supreme Court. Not here.

9 However, one issue that is involved is that at the time  
10 they obtained this Mayes patent from the Patent Office, counsel,  
11 who were prosecuting both the Isbell and the Mayes patents to-  
12 gether, filed an affidavit in the Patent Office, which we main-  
13 tained was fraudulent, as a result of which this Mayes patent  
14 issued.

15 That affidavit concerned both inventions, both the Isbell  
16 patent and the Mayes patent inventions. And one of our contentions  
17 is that the Court of Appeals having reversed Judge Hoffman, and  
18 found that this affidavit was less than candid. And it was de-  
19 liberately given to mislead the Patent Office, that one of the  
20 questions we raise is that under those circumstances, there  
21 should be any standing in equity on either patents for the Plain-  
22 tiff.

23 And also involved in our case is the fact that the minutes  
24 that the fruit of this fraud were obtained, out in the market-  
25 place they went, with copious advertisements, telling the whole

1 world they'd invented the broad, log-periodic antenna, nobody  
2 else could make one, and this coupled with a whole series of  
3 other acts almost put our client out of business.

4 So that we have a counter-claim, which is in point 2, if  
5 you will, question number 4 before this Court, as to whether  
6 this is fair competition, whether this has not violated the  
7 anti-trust laws, to take the fruits of an illegally obtained  
8 patent and use it the way it was used in the marketplace, and  
9 to suppress competition.

10 Turning back for the moment, to the obviousness of the  
11 Isbell patent, at the time that Isbell made his invention, this  
12 whole magic of log-periodicity had been invented long since, as  
13 Judge Hoffman found. In the early 1950's at the University of  
14 Illinois. It's very simple.

15 What it means is that in order to have your television  
16 antenna listen to all of the channels, from the low frequencies  
17 to the high frequencies, we put in a whole bunch of these an-  
18 tennas, and we tune them to different frequencies. And if you  
19 shape them in the way that they go from the long wavelengths  
20 down to the short wavelengths, just taper their shape, that's  
21 a logarithmic variation. That's all it means.

22 And if you space it also, in accordance with the length,  
23 that again is a logarithmic variation. Those principles, and  
24 that discovery, we all admit was known before Isbell came into  
25 the scene. What, then, did Isbell claim was his invention?



1 Ah ha, he said. Other people, while they had done that  
2 variation of having long, shorter, shorter, shorter, shorter,  
3 while they had done that before, they didn't do it with a simpl  
4 single wire. They did it with what he calls teeth. See, these  
5 are little triangular teeth, and they didn't take, and just  
6 use one wire instead of the tooth.

7 So this is supposedly what Mr. Isbell invented.

8 But when Mr. Harris, their expert, got on the stand, he  
9 admitted to us, as shown in the record here, that the idea of  
10 these teeth, or straight lines, or folded lines, these are all  
11 well-known dipoles, all well known antennas, and in fact they  
12 all operate the same way to produce the same result.

13 I would like to hold up for you from Appendix, Volume II,  
14 if I may, page 475, the sketches that their witness, Mr. Harris  
15 put on the board, and which we transcribed on to paper, 475, and  
16 476, where he shows, if Your Honors please, first, these straight  
17 lines. The straight-line-dipole, so called, of Isbell.

18 And up above it he shows what the current is, this loop-  
19 dash line, that means that radio currents go across the antenna  
20 in that kind of a distribution.

21 Than onthe next page, Mr. Harris, their expert, sketches  
22 these triangular loops I just showed to you, in Item 6. And he  
23 shows the same current distribution. And below that he shows  
24 that you could fold the wire into a rectangular loop and get  
25 the same current distribution.

1 And there's no dispute but that all these antennas were  
2 known long before Isbell. Decades. So that the question resolves  
3 itself into can you give as many patents as there are well known  
4 types of shapes, by just magically putting them in this old  
5 formula for log-periodicity?

6 And this is what the Court of Appeals of the Eighth Circuit  
7 found to answer in the negative, but this is what Judge Hoffman  
8 answered in the affirmative. Now, why?

9 Judge Hoffman was impressed by Mr. DuHamels testimony.  
10 He was surprised that these straight line elements would work.  
11 Though, he said, after he thought about it he realized they  
12 would.

13 But when was he surprised? There's absolutely nothing in  
14 this record showing that it was not obvious at the time Mr.  
15 Isbell proposed to change from a fixed antenna to a thin wire  
16 that it was not obvious. And Judge Hoffman did not find that it  
17 was not obvious at the time Isbell made the invention, he just  
18 said at some time, he was not predictable, whether these  
19 different kinds of things would work.

20 But the statute says, we're concerned in Section 103,  
21 that obviousness at the time of the invention. And fortunately  
22 we were able to put in a document which was contemporary with  
23 Mr. Isbells invention. A document of the University of Illinois  
24 laboratory itself. Where, as we quote in our brief, and we've  
25 reproduced it, (it's only two pages long), in the first part

1 they say, Now we can predict from the mathematics, the operation  
2 of multi-element log-periodic antennas, and then in the lower  
3 paragraph it says Mr. Isbell is going to thin these down, now,  
4 into zero width, almost, little wires.

5 And that document itself, contemporaneous, not in anticipation  
6 of any lawsuits shows beyond any reasonable doubt, even if this  
7 were a criminal test, that at that time, it was completely ob-  
8 vious to those skilled in the art, that Isbells trivial change  
9 was an experiment, but was not something that was unobvious to  
10 those skilled in the art.

11 Q Mr. Rines, you keep referring to what the Eighth Cir-  
12 cuit found, to bring it up for my recollection, do you recall  
13 who tried it in the District Court, and whether invalidity  
14 was the result in the District Court also?

15 A Yes, it was. This was tried before Judge Stevenson,  
16 and Judge Stevenson found what I have just told you. The Court  
17 of Appeals sustained it.

18 Q In the southern district of Iowa, then.

19 A Excuse me?

20 Q In the southern district of Iowa.

21 A In the southern district of Iowa, all right.

22 Q Let's assume that the result of an experiment is not  
23 obvious. I mean it isn't predictable. But the experiment itself  
24 is obvious. I mean if you want to know what the results are going  
25 to be, at least there are plenty of indications of what kind of

1 an experiment you want to run.

2 A You're absolutely right, Mr. Justice Black.

3 Q Now, I don't suppose unpredictability in those---

4 A It's not synonymous with obviousness, but you see,  
5 Judge Hoffman, we believe, fell into the error of making it syn-  
6 onymous with obviousness. And his grounds were since it was  
7 unpredictable, I therefore think it's unobvious.

8 Now the Court of Appeals in the Eighth Circuit said no,  
9 that's not the test. It's obviousness, not predictability. They  
10 said if it would be obvious to a skilled person what to try,  
11 even if you don't know everything that's going to happen once  
12 you try it, if you'd be led by the prior art to try this thing,  
13 then that is not obvious because it was unpredictable.

14 Q Is there a pretty good law on that, in other cases?

15 A I haven't found it.

16 Q That's what I thought.

17 A The brief of the American Patent Law Association is  
18 pleading with this Court, and I think we do, too, to stick to  
19 Graham vs. Deere, and these other cases, where you have set  
20 forth sensible tests, as to how do you determine obviousness.  
21 You look at the scope of the prior art, you look at the claims,  
22 you compare the difference, you look at the skill of the man at  
23 that time.

24 Now we feel that this predictability issue comes in in that  
25 skill. Now would a man really have said, sure, try that, we know



1 it's going to work, somehow. Even though I can't tell you ex-  
2 actly what the outcome is. So we feel obviousness should be the  
3 test, and there isn't much law confusing the two that we've  
4 been able to find.

5 Reaching, then, our conclusion, that on a much better re-  
6 cord, and with an opportunity of trial and expert testimony,  
7 the Eighth Circuit reached the conclusion of obviousness and  
8 realizing that Judge Hoffman confused predictability and ob-  
9 viousness, and at that his confusion went to Mr. DuHamel talking  
10 about certain esoteric structures that weren't obvious.

11 He didn't say making these particular little elements  
12 wasn't obvious. Oh, no. Let me show you the testimony that he  
13 talked about when he spoke on obviousness.

14 Pages 412 of Volume II of the Appendix. Look at it. See  
15 this big conical structure, this sweeping fold going up into the  
16 air? On page 413 this zig-zag configuration? This vertical thing  
17 going up with all kinds of lumps on it? This is the testimony  
18 of Dr. DuHamel. These were the things he put into evidence to  
19 convince the District Court it wasn't predictable at all that  
20 dipole elements could be shaped from the log-periodic and  
21 come out right.

22 But he did not say that really to take a prior fixed an-  
23 tenna and make one wire of it wasn't obvious. Now in his cross-  
24 examination, Dr. DuHamel, witness for the University of Illinois  
25 admitted that what I hold in my hand here which is Defendants'

1 Exhibit 24, is a correct representation of what he described in  
2 his prior patent, prior to Isbell. It's prior art.

3 If you'll notice, he has antenna dipoles that vary in length  
4 as we go down from long and short, and spacings that vary in  
5 long and short. The so-called log-periodic spacing.

6 This, believe it or not, is one of the Blonder-Tonge in-  
7 fringements. And what is the difference, superfficially? Instead  
8 of having triangles, we have straight lines. If this was prior  
9 art, could the Isbell patent possibly be valid if it covers  
10 this, another equally well-known type of dipole? Just taking and  
11 fitting these triangular loops into single wires.

12 We think the question answers itself.

13 We come now, to summarize other points with regard to the  
14 invalidity of the Isbell patent and the non-infringement there-  
15 of. Every claim of the Isbell patent is restricted to the idea  
16 of putting these antennas as close as you can in one plane. So-  
17 called co-planar. Judge Hoffman read out of the claims the word  
18 co-planar. And found that a Blonder-Tonge antenna, which is  
19 their principal ones, which had dipoles deliberately in two  
20 widely spaced planes, which is the Blonder patent, not the Isbell  
21 patent. He found that that is all in the same plane. He doesn't  
22 explain why he found it all in the same plane.

23 And hence he found the Isbell claims, co-planar claims, to  
24 be infringed by this antenna. When we came to the Court of Ap-  
25 peals they apparently couldn't stomach that. And so they made

1 their own suppositions, they said apparently, and all they were  
2 looking at was this antenna, at the time, apparently, they said,  
3 you can't physically build these two sets of antennas to get them  
4 exactly in the same plane. So there has to be some separation  
5 about the order of an inch.

6 Hence, they said, we think co-planar applies to the Blonder-  
7 Tongue antennas.

8 When we called to their attention that the real antennas  
9 of Blonder-Tongue are four inches apart, and that it has no-  
10 thing to do with how close you can put these things together,  
11 we can put them together much closer, mechanically, but it's  
12 an entirely different purpose, they just took the one inch re-  
13 ference out of their decision, but let it stand that that is  
14 co-planar.

15 We submit that any such extension of a monopoly of a patent  
16 completely beyond the file history, completely beyond anything  
17 they ever asked for, to strip the word co-planar out of the  
18 claims and to hold a new inventor to be infringing when he isn't  
19 coplanar and doesn't even do the same thing is improper---

20 Q What patent is that?

21 A This is the Blonder-Schenfeld patent in our counter-  
22 claim.

23 Q What's the other patent?

24 A The Isbell patent.

25 Q That he just picked up?

1 A No, this is also made in accordance with the Blonder-  
2 Tongue patents.

3 Q That's right.

4 A No, these are in two different planes.

5 Q Do you have the Isbell patent there?

6 A We don't have the structure of it, as a model, but  
7 what it is, Your Honor, is instead of haveig these two tubes  
8 this widely spaced apart, Isbell put them absolutely close to-  
9 gether, as shown in his patent, almost touching. So that they  
10 could all be in the same plane.

11 Q Is that supposed to be the invention?

12 A Yes, Your Honor. They stress this throughout the pa-  
13 tent. They must be in the same plane. And the reason---

14 Q ---closer together?

15 A Very close together. As close as you can get it.

16 Q And that's their whole claim?

17 A That's their whole claim. Co-planar antennas in one  
18 plane shaped for these wires in this tapered shape, logarithmic  
19 shape we're talking about---

20 Q Does the shape have anything to do with it, or is it  
21 the closeness together?

22 A No. There are two requirements, Mr. Justice Black.

23 The first requirement is, that everything be in the same  
24 plane. The second requirement is that the lingshts of these  
25 antennas taper, such as I've shown to you, and the spacings taper.



1 Put those three things together and that's Isbells so-  
2 called invention.

3 Q And what's the difference between that and the other  
4 one?

5 A So far as Blonder-Tongue is concerned, it deliberately  
6 took the antennas out of the same plane and spaced them a slight  
7 different distance apart, compared to the wavelength, changed  
8 the whole concept of the feed, a different type of electrical  
9 feed, and operate with antennas that are not anywhere near int  
10 the same plane.

11 But they do have log-periodic shapes.

12 Q But when you get down to it, the difference is that  
13 closeness of these rods to each other?

14 A That would be the difference, yes, Your Honor.

15 Now the Patent Office---

16 Q This device, down on the table to your left, is that  
17 the---

18 A Blonder Tongue---

19 Q Is that the subject of your counter-claim?

20 A This is the subject of the accused infringement.

21 Q How about your counter-claim?

22 A Since our patent came out, they've copied it. So they  
23 have antennas just like this.

24 Q Well, I'm asking what was the---

25 A Just like this---

1 Q Subject of your counter-claim?

2 A Just like this.

3 Q ---for patent infringement?

4 A Just like this, Your Honor.

5 Q It was?

6 A Yes, Your Honor.

7 Q ---for lack of invention, I suppose Blonder-Tongue  
8 is, too?

9 A I don't think we have a strong patent, Mr. Justice  
10 White. But I do think that we're entitled to have a trial on  
11 it.

12 Q But you think that if Isbell is valid yours ought to  
13 be?

14 A No, I don't say that at all. Isbell has tried to  
15 capture the whole log-periodic concept of all kinds and shapes  
16 of dipoles. He says now he just wants the little ones.

17 Q You mean you're conceding if Isbells patent is valid  
18 yours infringes it?

19 A If Isbells patent were valid, yes, Your Honor, this  
20 antenna of ours would infringe it. There's no question about  
21 that.

22 Q You say they tried to capture yours by getting the  
23 rods closer together, or further apart?

24 A No, they tried to capture it by their claim language,  
25 Mr. Justice Black. They don't say in the---

1 Q When they get through, what is the physical thing  
2 they have?

3 A The physical thing they have is antennas all in one  
4 plane.

5 Q All right.

6 A That's the way they built it, until Blonder came and  
7 showed they way. They didn't leave it all in one plane. And  
8 this was such a remarkable concept, that you could move the  
9 planes and still get log periodicity, that the Patent Office  
10 granted us a patent for it.

11 It was a highly unobvious thing, we maintained, from all  
12 the training before, that everybody tried to get it all in the  
13 same plane.

14 Q Well, then,-----

15 A Maybe obvious to one skilled in the art. I'm not going  
16 to pretend that we've got the worlds greatest patent, all I  
17 say is this Court ought to guarantee our right to trial, and  
18 not have Judge Hoffman in one line say its obvious and complet-  
19 ely ignore your Graham vs. Deere.

20 Make no findings at all. Come and throw out our patent if  
21 it isn't an invention, but give us due process of law. You laid  
22 down rules in Graham vs. Deere that the District Court is sup-  
23 posed to follow.

24 You said make this finding. Make this finding. We have it  
25 in the rule books. The Federal Rules of Civil Procedure, what

1 he's supposed to do.

2 Q Mr. Rines, did Isbells patent antigrate yours?

3 A Oh, yes, he's a pioneer compared to us.

4 Q And I understood you to say in response to Mr. Justice  
5 White, that if their patent is valid, yours has infringed it.

6 A If you take this idea of co-planar, and say I'm going  
7 to read it out of the plan, so that it reads whether the di-  
8 poles are in the same plane or widely separated, we infringe.

9 But if you read co-planar in Isbells patent, we don't in-  
10 fringe. We deliberately got away from putting them in the same  
11 plane. Does that make that clear?

12 Q Well, I thought that just a moment ago you had made  
13 a concession that seemed to me to be an important one, and that  
14 would take with it a concession of invalidity of your patent,  
15 assuming theirs was valid.

16 A If I said that, I don't mean it that way.

17 Q All right.

18 A I was saying it in a context if we read out of the  
19 claim co-planar, and we give it no limitation in the Isbell  
20 claim, so that things can be in the same plane or different  
21 planes, if you took that out we infringe Isbells patent.

22 But that is n't Isbells patent,

23 Q All right, if you construe obviousness or non-obvious-  
24 ness the way you want us to, it sounds to me like your patent  
25 isn't very strong, as you say---

1 A I admit that.

2 I just would like the right to try my patent in the courts  
3 of merit. It's presumed valid. I'd like the right to try it.

4 Q Are you going to address yourself to the publication  
5 issue?

6 q A Yes, I am. The last concept that I want to address  
7 myself to in connection with the Isbell situation is that there  
8 was a publication completely describing Isbells patent that  
9 was put in a local library more than one year before the filing  
10 of that patent application.

11 The District Court disputed whether or not it was a real  
12 library. The Court of Appeals recognized that it was a library  
13 when we showed them the documents of the University itself cal-  
14 ling it a library---

15 Q Miss Johnsons operation?

16 A Miss Johnsons operation. And again, the Supreme Court  
17 has never passed on this point, so far as we can find, the lower  
18 court decisions. But we have followed that line of cases that  
19 says if you put it in a library, even a small library, this  
20 constitutes your intention to make it public, and the mere fact  
21 that nobody came to that library to draw out the copy is im-  
22 material.

23 Q Where is that document?

24 A In the University of Illinios, antenna section, they  
25 have a library of antenna publications where people come and



1 draw these things out. And the librarian so testified.

2 Q How would you characterize the laws which exist in  
3 the lower court as to what the standard of publication is?

4 A Well Judge Hoffman characterized them for me. He said  
5 if this really was a library, and Miss Johnson were a librarian,  
6 he said I'm compelled to say that this was published more than  
7 a year before the patent.

8 And then he turned around and said but I don't think it's  
9 a real library. It's a tiny place in the University.

10 Q Well, what's the heading over the door?

11 A I beg your pardon?

12 Q What's the heading on the door?

13 A It's called E-E-L-L. Local library. And this is the  
14 way it is on the distribution sheets of all the material that  
15 they send. They call it a library.

16 I'd like to take just a few minutes now on the matter of  
17 what happened to us in the marketplace. Once this fraudently  
18 obtaintd patent in the Patent Office came out.

19 The Foundation andttheir licensee, then exclusive licensee,  
20 JFD, took this patent, published copious adds, all @ver the coun-  
21 try, Look Magazine, we've put in whole copies of these, announ-  
22 cing that they had patented the log-periddic formula. That

23 nobody else could make log-periodic antennas. Then they took  
24 these adds out into the marketplace. They used them to coerce  
25 purchasers to buy only their products. Here is the University of

1 Illinois, and JFD, they had the patents, nobody else can use it,  
2 if you buy Blonder-Tongue, you're going to be in trouble, we're  
3 going to sue you. And they did that, they sued everybody.

4 We maintain that we have offered some evidence of tie-in  
5 sales, that the District Court said was some evidence. We offered  
6 evidence of raiding, where in the heat of the litigation they  
7 took away our employees who were investigating their activities.  
8 And with them dissappeared all the records. How am I going to  
9 proove my case? Where just before the trial they hired away our  
10 co-inventor, of our own patent in suit, so that I couldn't use  
11 his testimony on the matter of infringement.

12 Despite all of these things, we did, through depositions,  
13 get into the record something that the District Court conceded.

14 They patent mismarked. The District Court said that's di-  
15 minimous, though. They put in these adds I told you about say-  
16 ing nobody else could make an antenna, that they found.

17 They not only raided ours but in the marketplace they actu-  
18 ally told people, we have evidence of this, not the strongest,  
19 but it's in the record, that if they bought any of Blonder-  
20 Tongues line they wouldn't sell them. Their patented antennas.

21 And we maintain the District Court in picking all of these  
22 little things and saying well, you haven't prooved this enough,  
23 didn't follow the law in looking at the totality of all these  
24 acts, which we think was a serious anti-trust and unfair compe-  
25 tition violation, because it all stemmed from this fraudently

1 obtained patent, which the Court of Appeals threw out for that  
2 reason, though they didn't use the word fraud, they said de-  
3 ception.

4 All from that, they nearly put our client out of  
5 business.

6 I would reserve for my rebuttal, if you will, answers  
7 with regard to the Solicitor Generals' points on Triplett v.  
8 Lowell and what my brother might have to say about these issues.

9 Q Mr. McLaren?

10 ARGUMENT OF RICHARD W. McLAREN, ESQ.

11 AS AMICUS CURAIE

12 MR. McLAREN: Mr. Chief Justice, and may it please the  
13 Court.

14 The United States appears as amicus in this matter  
15 today, solely on the question of whether or not or to what extent  
16 the Court should continue to adhere to the doctrine of Triplett  
17 v. Lowell.

18 What Triplett held is that a determination of invalid-  
19 ity of a patent in a suit against one defendant does not preclude  
20 another suit upon the same claims against another defendant.

21 The holding was on the ground of the common law re-  
22 quirement of mutuality of estoppel. That is no one can take ad-  
23 vantage of another judgement unless he would also be bound by  
24 it.

25 Not the governments interest in this matter is on three

1 grounds. The government is a very frequent party in patent li-  
2 tigation, the government has serious responsibilities both for  
3 conducting and administering the patent system and for the  
4 enforcing of the anti-trust laws and of course the government  
5 has a great interest in the courts and in the fair and efficient  
6 administration of justice.

7 Now if I may at the outset, I would like to summarize  
8 our views and our position and then to discuss the arguments  
9 for and against the mutuality requirement.

10 In the last, approximately 30 years, the strict doc-  
11 trine of mutuality of estoppel has eroded very substantially  
12 both in the Federal courts, on federal questions, as well as in  
13 the State courts until now, I think it's fair to say, it is no  
14 longer the majority rule in the general Federal law, on Federal  
15 questions, or in our most populous states.

16 As a matter of fact one New York Court of Appeals  
17 judge, not too long ago, called mutuality a dead letter, under  
18 the New York law. However, in the patent field, the lower courts  
19 have felt bound to follow the doctrine of Triplett v. Lowell,  
20 and they have adhered to the mutuality rule, saying from time  
21 to time, that it was up to this Court, or to the Congress, to  
22 make any change in the rule. This happened, for example in this  
23 very case in the opinion of the Seventh Circuit below. It ques-  
24 tioned the soundness of the rule but indicated it had to follow  
25 it. It happened a short time ago in the case of Nickerson v.

Kutschera, 25

1 Kutschera, in the Third Circuit where the Court of Appeals re-  
2 luctantly followed Triplett, reversing the Delaware District  
3 Court and indicating its agreement that there should have been  
4 an estoppel.

5 Now we do not suggest abandoning the rigid, strict mu-  
6 tuality estoppel rule only to replace it with another strict  
7 kind of rule such as for example, in rem invalidity, which ap-  
8 parently is the fear of the Patent Bar.

9 Instead what we suggest is a loosening of the Triplett  
10 rule to permit pleading and consideration of a prior invalidity  
11 judgement as defense matter. The language of Triplett expressly  
12 holds, expressly prohibits the pleading of a prior judgement in  
13 so many words. We think that should not be. We would let the  
14 courts consider unilateral estoppel, if you will, and consider  
15 such claims on a case by case basis, giving due weight and re-  
16 gard to any fac tors that would point to unfairness, or to an-  
17 amolous result by application of the estoppel doctrine.

18 Now turning to the arguments in favor or abandonong  
19 the mutuality requiremnt, I think that the main argument is  
20 that it serves no use ful purpose. This critizism, incidentally,  
21 goes as far back as the works of Jeremy Bentham, in the middle  
22 of the ninethenth century. He found that mutuality served no  
23 rational purpose and he said" It was a maxim which one would  
24 suppose to have found its way from the gaming table to the  
25 Bench."



1 In more recent times, in the landmark Bernhard decis-  
2 ion the Supreme Court of California in 1942, opinion by Mr.  
3 Justice Traynor, he likewise found no rationalization for the  
4 rule. And he was unable to see, he said in the opinion, why  
5 the public policy values of the res judicata doctrine the  
6 certainty of the finality, the limiting litigation, the judi-  
7 cial economy. He could not see why these should fall before an  
8 artificial requirement of mutuality.

9 Now he said that he might have invoked the indemnity  
10 exception to this rule, and there are a number of exceptions,  
11 in fact I think that in states still following the mutuality  
12 rule it's fair to say it's riddled with exceptions, and the  
13 Bernhard case probably could have gone on on that ground.

14 But instead, Justice Traynor attacked the doctrine  
15 himself and in particular he felt that estoppel should arise  
16 and should be usable by a defendant against a plaintiff who  
17 had had a full opportunity to try his claim and had lost.

18 As the courts, both federal and state, have followed  
19 Bernhard, one after another, it's clear that the crowded con-  
20 dition of dockets and the need for judicial economy had weighed  
21 heavily when the courts had considered the rather artificial  
22 concept and the lack of value to mutuality on the one hand and  
23 weighed these other considerations against them.

24 Now specifically in the patent field, the arguments  
25 against mutuality I think are primarily three in number. First,

1 it's argued that Triplett gives a bad patent almost as much in-  
2 fluence as a good one. Businessmen accept a license, they buy a  
3 royalty to buy a piece despite the fact that a patent may once  
4 have been held invalid. They do it to buy their piece.

5 To put it another way, the mutuality doctrine places  
6 obstacles in the way of eliminating bad patents. I think it's  
7 fair to say that this would be contrary to the policy stated by  
8 the Court in the recent Lear v. Adkins case.

9 Q Of course, Mr. McLaren you're making your amicus  
10 in the contest of the case where the parties, both sides in this  
11 case have asked us not to overrule Triplett. And I suppose res  
12 judicata is a defense that could be waived, can't it?

13 A I would think it is,---

14 Q Well, all I'm suggesting is that in the context  
15 of the litigation where both sides are waiving it if you choose  
16 to speak it, or at least the party for whose benefit the doc-  
17 trine could be evoked is waiving it, it's not a very happy  
18 situation in which to reconsider a decision of this Court, is  
19 it?

20 A Well, Mr. Justice Harlan, I think that in view  
21 of the fact that Petitioner does ask that the rule of the Se-  
22 venth Circuit be upset that it is up to this Court to determine  
23 the grounds on which it is upset and to determine what shall  
24 happen in the District Court if the case is remanded. And it  
25 would be our view that the matter should be remanded for the

1 District Court to consider the Winegard litigation and to see  
2 what additional evidence, what hardship, why the District Court  
3 should not adhere to the Winegard rule.

4 I don't think that this Court is bound by the grounds  
5 which the parties assert when they come up here and invoke the  
6 Court's power.

7 Q Mr. McLaren, I understood Mr. Rines to say that  
8 he thought perhaps he wasn't asking that Triplett be overruled,  
9 but that there might be room for modifying it in this case, in  
10 the specific circumstances of this case, to preclude re-lit-  
11 igaing what the Eighth Circuit had, in the particular circum-  
12 stances---

13 A I--

14 Q Of this case. That's whay I understood, maybe I  
15 I'm wrong.

16 A I so understood him also, Mr. Justice White, I  
17 think that this is a little different position than was taken in  
18 his brief, but I think it is very close to the position that we  
19 take. I think also that the brief amicus of the Patent Bar As-  
20 sociation is not too far from the position that we take. They  
21 dont want to see a new rigid in rem invalidity kind of a law  
22 established and neither do we.

23 We are not suggesting that there should be a one  
24 shot and that is all kind of situation, we recognize some of  
25 these arguments that are made, pro and con, we think that the

1 Court is the place, the Courts are the instrument for carrying  
2 out reconsiderations of Triplett on a cautious case by case and  
3 step by step basis.

4 I would advert to the considerations set forth in  
5 Rule 60 for a new trial, I think they list newly discovered  
6 evidence, fraud or perjury, some sort of misconduct by the  
7 other side, and then I think it winds up with the statement any  
8 other matter that is necessary for fairness and justice. And  
9 we would suggest a similar rule in these cases.

10 Q In view of the position of the parties, at least  
11 as taken in their briefs, what you're suggesting we do is su  
12 responde ourselves to overrule a prior decision of this Court  
13 that's been on the books for this length of time, without ar-  
14 gument by the parties.

15 A I think, Mr. Justice Harlan, that the Court  
16 would be warranted, at least in re-examinig that portion of  
17 Triplett which says that a defendant may not plead as a defense,  
18 I think it's almost a direct quote, the fact of prior litigation.

19 I think that the Court should follow the modern trend  
20 in the courts, it should release the lower courts who apparently  
21 feel bound to follow the Triplett rule in a rather complete  
22 fashion despite their own ideas of what would be fair---

23 Q Couldn't we weigh the litigation in which that  
24 issue is put to us by the parties?

25 A I would think, Mr. Justice Harlan, that the sit-

1 uation in the courts now, considering the crowded dockets, or  
2 considering the technigraph litigations which I understand now  
3 numbers some 70 cases in 20 districts and more than 200 defen-  
4 dants, I think it would be well if the Court could see its way  
5 clear to giving consideration to this matter.

6 Q Has it been up in Congress?

7 A Yes, Mr. Justice Black it was up in Congress in  
8 a bill 2 years ago as a result of a recommendation of a presi-  
9 dential patent commission and it was suggested at that time that  
10 a kind of an in rem invalidity be adopted.

11 That bill was not reintroduced in the last Congress,  
12 and the provisions in the current patent, well I guess that bill  
13 has not yet been reoffered but it was in the last Congress, had  
14 to do with the payment of costs and I believe Counsel fees  
15 where a party had unjustifiedly brought a second or later lit-  
16 igation. But I would say that Congress has given no indication  
17 either or approval or of disapproval of the Triplett rule.

18 The Triplett rule is, I think, part of what the  
19 Court saw in 1936 as the general common law on the subject of  
20 estoppel by judgement and I think that the other parts of the  
21 law having changed, it's appropriate for the Court to develop  
22 the changes insofar as they apply in the patent field.

23 Q Does the Triplett rule rest at all on statute, or  
24 is it altogether judicially created?

25 A I would say it rests altogether on what was then



1 the generally accepted common law rule, Mr. Justice Black.

2 Just to conclude, the arguments are set forth in our  
3 brief in favor of overruling the mutuality doctrine, the other  
4 parties, the University of Illinois particularly, some of the  
5 amicus briefs, indicate the arguments in favor of the mutuality  
6 doctrine. Our conclusion recognizing that there are important  
7 questions raised, we think in balance that a clear case has been  
8 made for reconsideration of Triplett.

9 It was based on the general common law when it was de-  
10 cided, that law has now changed, and we do not think that Trip-  
11 lett is serving us so well that it should be retained as an  
12 exception to what we regard as the modern rule, and---

13 Q Suppose we were to agree with you, what would  
14 be the effect on this case?

15 A I would think, Mr. Justice Black, that it would  
16 be reversed, and remanded to the trial court to consider the  
17 Winegard litigation and what additional evidence the University  
18 of Illinois would have to offer to change that ruling. And if  
19 it cannot make out a case for a further trial, make out a case  
20 as to why it did not present Dr. DuHamels testimony, for ex-  
21 ample on the first trial, then I would think that the trial  
22 judge should adhere to it.

23 Q I thought your friends' request was somewhat  
24 marrower than that; he just said that he wanted a trial. One  
25 opportunity to try a case the way he thought it should have

1 been tried, that it, with witnesses available, I didn't under-  
2 stand him to suggest that the District Court in Illinois should  
3 have to give any particular weight to what the District Court  
4 in Iowa had done.

5 A Mr. Chief Justice, I think that he was referring  
6 to his counter claim that's where he said he wanted his full  
7 trial. And I think that Judge Hoffman had dismissed his counter-  
8 claim on his patent without findings on the obviousness issue,  
9 I believe that's what was referred to.

10 Q I'll clear that up in his rebuttal.

11 A Yes, sir.

12 Q Of course the Court of Appeals here, for the  
13 Seventh Circuit, I'm looking at page A5 of the Appendix, I don't  
14 know what page it is in the Federal Circuit, but in any event,  
15 they recognize that the, by quoting this sentence from the Trip-  
16 lett opinion, they recognize that the Iowa decision should be  
17 in the Eighth Circuit decision should be as a matter of comity,  
18 should be paid, respected, and as they say given great weight.

19 I don't quite understand what more you would want them  
20 to do. They did respect it, they read it, they understood it,  
21 and then they concluded that they disagreed with it.

22 A I read that to mean that but for the Triplett  
23 rule they would have followed the Eighth Circuit, Mr Justice  
24 Stewart.

25 Q Well, that's according to how you read it, I

1 guess.

2 A I think they went on to cite it and another  
3 justice in that circuit just a few years ago found the doctrine  
4 abhorrent in light of the crowded condition of the dockets---

5 Q I saw that quotation---

6 A And I venture to say that they would follow a  
7 unilateral estoppel rule of the kind that we have outlined that  
8 would always be subject to a fairness doctrine. We do not  
9 suggest any kind of a rigid per se, or in rem rule.

10 I thank you.

11 Q Mr. Marshall?

12 ARGUMENT OF WILLIAM A. MARSHALL, ESQ.

13 ON BEHALF OF RESPONDENT

14 UNIVERSITY OF ILLINOIS FOUNDATION

15 MR. WILLIAM A. MARSHALL, ESQ:Mr. Chief Justice, and  
16 may it please the Court, as I listen to Petitioners standing  
17 before this Court, it sounded like he was asking for a trial  
18 de novo. That isn't one of the issues that we have before this  
19 Court. There were two trials on this one particular patent, the  
20 Isbell patent. There were concurrent findings made below by  
21 not only the Eighth Circuit, but all of the Seventh Circuit  
22 Court of Appeals, and we feel that this Court should go from  
23 that particular point rather than start over and review all  
24 the facts in these matters.

25 For example, in the concept of due process, this wasn't

1 even raised as an issue in the Petition for Certorari. This was  
2 an argument that Petitioners had brought up here, but has not  
3 been raised as a point.

4           Therefore, I'm not going to pursue that because the  
5 concurrent findings below in the Seventh Circuit clearly held  
6 that there was no fraud so far as the endeavors of the University  
7 of Illinois foundation regarding the prosecution of the Mayes  
8 patent.

9           I might point out, so that this Court can properly  
10 review this matter in its proper perspective, the University  
11 of Illinois Foundation is an arm of the University of Illinois,  
12 and as such does not manufacture or sell anything. Its whole  
13 function in this particular instance is the function as a lic-  
14 ensing agent to license antenna manufacturers under the Isbell  
15 patent or any other patents they might happen to have in their  
16 portfolio.

17           Similarly, this question of the fraudulent affidavit,  
18 that affidavit was made, we contend that there was nothing fraud-  
19 ulent about it at all, but that affidavit was made in the pro-  
20 secution of the Mayes patent, which is not even an issue here.

21           And from the standpoint of the courts below, they  
22 found that there was no fraud there. The Seventh Circuit Court  
23 of Appeals said that that patent was invalid on the basis of  
24 obviousness, not that it was the result or the fruit of a  
25 fraudulent affidavit.

1 Now let me get down to what I feel is the basic issue  
2 so far as why we're up here. We, if I get a chance I'd love to  
3 discuss the Triplett v. Lovell because I have a lot of good  
4 points on that one, but my principal concern right here is the  
5 question of obviousness, as equated to this concept of "obvious  
6 to try" test.

7 You have to remember that in the end result that Sec-  
8 tion 103 calls for the test to be on obviousness, but what we  
9 say is that predictability of a factor which goes into determin-  
10 ing the question of obviousness so that you have to consider  
11 the "obvious to try" test vs. the concept of predictability as  
12 it relates to the issue of obviousness.

13 Nobody is so naive in the patent profession as to es-  
14 pouse the doctrine that unpredictability ipso facto gives you  
15 an ultimate result of unobviousness. You have to consider the  
16 end result that we're looking for, not the platitude. Predic-  
17 tibility can be of kind, or it can be of degree.

18 When you talk about predictability, predictability  
19 can be in terms of the routine experimentation or something  
20 that is predictable to the routine experimenter, vs. the un-  
21 predictability that arises from a situation which a pioneer en-  
22 deavor is faced with.

23 Let me illustrate the routine type of approach. That  
24 was brought up in the case of Mandel v. Wallace case which was  
25 before this Court, involving the incorporation of a corrosion



1 inhibitor in a deodorant. The Court justifiedly found that  
2 the incorporation of this corrosion inhibitor into this cos-  
3 metic because it should have been perfectly apparent to any  
4 routine investigator to investigate one, two, three, or four  
5 corrosion inhibitors, try them in this particular under-arm de-  
6 oderant environment, expect that they would work.

7 Therefore you have the concept of routine investigat-  
8 tion, routine experimentation. You couldn't really predict ab-  
9 solutely that this corrosion inhibitor would work, but you had  
10 a reasonable expectation.

11 Now you go to the other end. This is a predictability  
12 of degree which in my opinion, and in the opinion of the Su-  
13 preme Court, we agree, is unpatentable.

14 This is a routine type of experimentation. Let's go  
15 and see what we had in the case of Isbell. Isbell did not have  
16 this type of background prior art at all.

17 Q You have these two pencils and you get a blurred  
18 signal, and so everybody realizes that one of the problems is  
19 that they're together. So you separate them until you don't get  
20 a blurred signal. Would that proove invention?

21 A Mr. Justice, you have reduced it to the over-  
22 simplification. You can't do that. That is a generalized state-  
23 ment that I wouldn't even answer yes or no because again, I  
24 would have to depend on experimentation. If, by virtue of---

25 Q Yes---

1           A     separating these two spaced booms, there was  
2 some teaching in the prior art that I was going to clarify the  
3 signal, it would be unpatentable.

4           Q     I see.

5           A     On the other hand, where you have a situation  
6 like we have in the instance of the Isbell patent, I think in  
7 all due deference to Petitioner, he misstated this concept, Mr.  
8 Justice Black, because the invention, the Isbell invention,  
9 does not merely go to the spacing of the booms.

10           There are many other concepts involved in that, which  
11 you can see from a review of the claims. I don't want to go into  
12 the claims because this is a completely complex and technical  
13 approach that we could spend three hours on.

14           But basically, what you have in the instance of the  
15 Isbell invention, is complete unpredictability. This was not on-  
16 ly found by the Eighth Circuit Court of Appeals, it was found by  
17 Judge Goffman, it was found by the Seventh Circuit Court of  
18 Appeals. So for Mr. Rines or the Petitioner to say that the end  
19 result was predictable, is wrong. Because there is a concurrent  
20 finding that it was not predictable.

21           What we have is the instance, not of taking a bunch  
22 of components because we have to recognize that just because  
23 the claimed invention is a combination of old elements, this  
24 doesn't per se make it invalid in accordance with the U.S. v.  
25 Adams doctrine.

1 We have a situation here where one could not know  
2 what was going to happen. There was no big signpost, no guide-  
3 post which says "Log periodic antennas can be made." As a matter  
4 of fact, the Eighth Circuit Court of Appeals found that Judge  
5 Stenenson was clearly erroneous in making that finding, and  
6 found that there was no technique, no principle for designing  
7 log-periodic antennas.

8 What they found was that there is a principle of log  
9 periodicity. But this, in and of itself, does not permit you  
10 to design a log periodic antenna, only to design a log periodic  
11 structure.

12 The Structures, if you will look at the Jasik hand-  
13 book at page 430 of Appendix II. You don't have to look at it  
14 now, but there are a number of log periodic structures that  
15 were available that worked as log periodic antennas. Jasik him-  
16 self says that log periodicity is unpredictable. Now what you  
17 have is the dipole antennas which were old.

18 You have the transmission lines for connecting the  
19 dipole antennas. Those were old. You have the spacing of the di-  
20 poles, you have the length of the dipoles on the basis of this  
21 log periodic theory. But nobody, but nobody, in the prior art  
22 told you how to put all of these elements together with the  
23 predictability that they would work.

24 Q ---Cale antenna? Which one was that?

25 A Yes, sir. That was a one in which instead of

1 having straight dipoled---

2 Q Yes---

3 A ---the dipoles were folded dipoles. The woof of  
4 the cords---

5 Q And that was in the prior art, the ---K.O.  
6 antenna?

7 A Yes, sir, it was. And that was found not to be  
8 anticipatory, and it was also found that this invention was  
9 obvious over the K.O. antenna.

10 Q Was---

11 A Your Honor---

12 Q Unobvious---

13 A Yes, sir.

14 Q K.O. was disclosed in the application?

15 A No, sir, it wasn't. Because, I'll tell you the  
16 difference, basically what you had in the case of the K.O.  
17 antenna was a folded dipole and you get into the concept of  
18 frequency independence, and it was known that dipole antennas,  
19 because the folded dipoles were one of the first type of anten-  
20 nas that were used. I'm sure that you've all seen them.

21 They were known to be log band antennas. Straight di-  
22 poles were not. They did not have this band width that you get  
23 inherently from a folded dipole, and therefore it was unobvious  
24 to go from what is a broad band dipole to a straight dipole wh  
25 which had a narrow band width.

1 Q All of these antennas are antennas that you put  
2 on the rooftop, rather than on your set?

3 A They can work in the house. For example, this one  
4 here you could put on your set and it would work, this is for  
5 the ultrahigh frequency end of the range. Channels 12 - 8 and  
6 3.

7 Q Then it doesn't make any real difference whether  
8 it's on top---

9 A No, sir. Not at all. But once you assemble these  
10 elements you have the interrelationship between them. You don't  
11 know what's going to happen. For example, they're all picking  
12 up signals, all the time. So that you have this particular di-  
13 pole relieving a given channel area. You have this one re-  
14 lieving another one. And you have them both relieving the same  
15 signal.

16 So that you get this interdependent reaction that Mr.  
17 Harris has testified to and is in his testimony, and it's one  
18 of the problems that you have in predicting how this type  
19 of antenna is going to work.

20 So that you didn't have anyplace where Mr. Isbell  
21 could start. This is the type of case where even the Supreme  
22 Courts have recognized that there is this unpredictability as-  
23 pect.

24 For example in the Great Atlantic and Pacific case,  
25 340 US at page 152 where the Courts recognized that in the



1 recondite sciences such as chemistry, such as the electronics,  
2 you do have a given problem of predictability or unpredictibil-  
3 ity that you don't have in the purely mechanical arts.

4         If the concept of "obvious to try" is going to be the  
5 law of the land, I don't think that it augers well for the pa-  
6 tent system because I don't know of any invention that is not a  
7 combination of old or known elements.

8         For example, even the Edison light bulb patent which  
9 was adjudicated in 52 FED 200. I'm sure that you all have heard  
10 the story about Mr. Edison and his trials and tribulations in  
11 inventing the light bulb. Under the theory of "obvious to try"  
12 without regard to bringing in the concept of predictability of  
13 kind, you would have an invalid patent because all Mr. Edison  
14 did was try something like 1400 filaments to try and eventually  
15 get to his electric light bulb.

16         So that what we have here, is Isbell coming up with  
17 an invention. Something that was absolutely unpredictable as  
18 found by the Courts below. The record is replete that in the  
19 case of log periodic antennas one could not predict that what  
20 the end result was, that it was not a question of cutting and  
21 trying because there are thousands and thousands of permutations  
22 and combinations that one can cut and try with to eventually  
23 come up with an Isbell type of antenna.

24         Now if I might go to the Triplett situation. So far  
25 as, I believe that---oh, the library concept, Your Honors.

1 Here again, I believe Mr. Justice Harlan was the one  
2 to ask about the library.

3 Here we have concurrent findings below that this was  
4 not a library. There was not shown on the part of anybody---

5 Q You say concurrent. Do you mean the District  
6 Judges in each of the two circuits or the---

7 A In the Eighth Circuit, Your Honor, that question  
8 was raised as a defense but it was never decided either by Judge  
9 Stevenson or the Eighth Circuit Court of Appeals. They decided  
10 the invalidity of Isbell purely on the question of 103.

11 Q The question that interested me, accepting those  
12 findings, that this is not a library. What effect do you give to  
13 the answer of Miss Johnson, that if anybody had inquired about  
14 this publication, they could have had access to it?

15 A That isn't the test. The test is intention to  
16 publish.

17 Q That's what I want to know. What is the test?

18 A The test is intention to publish.

19 Q That is the Sixth Circuit opinion you're relying  
20 on, primarily, the language of that?

21 A Yes, sir.

22 Q Tompkins, or whatever it is?

23 A Yes, sir. No, that's the Masengill case.

24 Q What is the test, Mr. Marshall?

25 A Intention to publish, Your Honor. Now there was

1 absolutely no intention to publish here because basically this  
2 Quarterly Report number two, which is at issue, is a report  
3 which was prepared as a result of the antenna program which  
4 was being conducted by the University of Illinois.

5 As Mr. Rawley testified, it was the policy of that  
6 department to distribute to the correspondents who were par-  
7 ticipating in the program, copies of these reports before they  
8 were made available to the public.

9 So that it was quite clear that sofar as the University  
10 of illinios, because they were the ones who had control over  
11 this, there was no intention to publish on their part, at least  
12 until these copies were distributed to the information addressees.

13 Q But this had been a library, though?

14 A The facility--

15 Q Had been, you would say that---

16 A Mr. Justice White---

17 Q ---there was no intent---

18 A ---if---

19 Q ---to publish?

20 A If it were a library, I mean if it were a full  
21 blown library and a document were put in that library, obviously  
22 there was an intention to have this published---

23 Q Yes---

24 A ---to anybody who came into the library.

25 Q But if this were a llbary, there would have been

1 publication?

2 A Well---

3 Q I mean---

4 A If there were a library, and if it were proved  
5 that that document---

6 Q Yes---

7 A Were in the library, there isn't even any proof  
8 that it was in the library---

9 Q Yes---

10 A Because it was a question of three or four days  
11 timing here---

12 Q I see---

13 A These quarterly reports were printed up and were  
14 sent from the printer to Miss Johnson, who kept them in a bun-  
15 dle. And she said if somebody would have come in and knew that  
16 that specific thing was there, I would have given it to him.

17 Well, Mr. Rawley says that that was not the policy.

18 Q That was not what?

19 A That was not the policy of the University of  
20 Illinois.

21 Q You say that the test is intention to publish,  
22 meaning by that that intention to publish to the whole world?

23 A Yes, sir.

24 Q Anybody.

25 A Anybody.

1 Q As distinguished from sending it to the Air  
2 Force, or some special---

3 A Well, now there, now I wouldn't draw a line there  
4 I would say that if I sent a publication to the Air Force, un-  
5 less there was some confidentiality aspects of that, that could  
6 be a publication.

7 But there wasn't any proof that any of these quarterly  
8 reports had been mailed out. They were merely there on the floor  
9 of Miss Johnsons office. They weren't even in this "Library"  
10 outfit.

11 Q Is there an Index, so that if somebody came to  
12 look through an Index they would find a lead to it?

13 A Not at that time, No, sir. Eventually it would  
14 have been.

15 Q But the intent's---

16 A Oh, I think it would, yes, sir.

17 Q But the intention to publish. I have a little  
18 confusion about it. Suppose you put it in the largest, most  
19 public library in Chicago? And said here, this is for you. The  
20 fact that they left it in the package would not interfere with  
21 your intention to publish, I would assume---

22 A Well, I don't know.

23 Q I dont think its---

24 A That's pretty close, Mr. Justice Marshall. There  
25 might be an intention to publish but it wouldnot be accessible



1 to anybody. Ypo'd have to know it was there. So that if a  
2 bundle of pamphlets came in to the Chicago Public Library,  
3 and wereput on the floor someplace and there was no Index that  
4 anyone, so that anyone could go in to the back room---

5 Q So it wouldn't be sufficient to just put it in  
6 an envelope and mail it to the---

7 A No sir.

8 Q I don't quite see yet, Mr. Marshall how the  
9 intention, if that's the focus, the intention is affected by  
10 how the librarian handles it in the first instance. Here you  
11 concede that Miss Johnson intended to Index it at some point,  
12 but had not got around to it.

13 A Yes sir.

14 Q Why sbould that relate back to the intent of the  
15 person who sent it?

16 A Because in this particular instance, Miss Johnson  
17 wore two hats. She was also like a secretary/office manager of  
18 this Electrical Engineering Department, and as a result of that,  
19 she ran these two offices, plus this library thing that we're  
20 talking about.

21 I would say that, for example, if a publication, a  
22 thesis, I mean these are the classic cases, ones where a thesis  
23 is deposited in a library. when does it become a publication.

24 I think what we have to be concerned with is when  
25 does it become legally known? And--pardon me, sir?

1 Q If that wasn't a library, what was it?

2 A It was a room in the Electrical Engineering  
3 building in which pamphlets would be placed from time to time,  
4 they had, there was no librarian who was assigned full time there  
5 in fact there was nobody in there full time because most of these  
6 publications were kept in steel files.

7 Q What was the lady's occupation?

8 A She was actually a member of the Electrical Engin-  
9 eering staff and I believe, her training was not as a librarian.  
10 She was like a secretary, or a---

11 Q Secretary to who?

12 A An office manager, of something like that.

13 Q Secretary to who?

14 A To Mr. Lawler. Mr. Lawler was the business man-  
15 ager of the University of Illinois Electrical Engineering De-  
16 partment. And she was on his staff. Not as a librarian, but as  
17 a secretary, this type of thing.

18 Q What was Mr. Lawlers testimony, or did he tes-  
19 tify?

20 A He testified, Justice Harlan, that what he, he  
21 testified as to the policy with respect to the University of  
22 Illinois, particularly these quarterly reports which would be  
23 distributed to the information addressees. And it was his tes-  
24 timony that when a report was prepared, it would be sent down  
25 to Miss Johnson from the printer for distribution to the infor-

1 mation addressees, and that his testimony was that it would  
2 not be made available to the public, even if they knew it was  
3 there, would not be made available to the public until they  
4 were mailed out, until these quarterly reports were mailed out  
5 to the information addressees.

6 Q And that was on May 5, 1959?

7 A Yes, sir.

8 Q And it's not clear at all that this document was  
9 even in that so called library, and---

10 A That's right, Your Honor.

11 Q At that time, is it?

12 A The only testimony, the only documentary evidence  
13 of that nature were these mailing slips and things of that na-  
14 ture which clearly peg down this May 5 date.

15 Q You say that availability is synonymous with  
16 intention to publish? I mean that's the test that you mentioned.

17 A Well, availability to the public.

18 Q Availability to the public.

19 A Yes, sir.

20 Q Well, it needn't be the general public.

21 A No, sir.

22 Q It could be the scientific community or---

23 A Yes, sir.

24 Q Or a restricted segment---

25 A Yes, sir.

1 Q Of the public.

2 A Yes.

3 Q It needn't be the general public.

4 A No, sir.

5 Q Well, what did this lady mean, then, when she  
6 gave that answer?

7 A Well, what she said was that if someone knew that  
8 it were there, and came in, she probably would have given it to  
9 them. Now this is inference on inference, or innuendo on innuendo  
10 she didn't say that it was available to the public in the sense  
11 that a publication would be. She didn't---

12 Q What if the, in April, the reports had been mailed  
13 out to those so-called correspondents?

14 A Then we'd have a problem.

15 Q What?

16 A Then we'd have a problem.

17 Q You'd have a problem.

18 A Yes, 'sir.

19 Q Now what if one of the correspondents came in on  
20 the day before they were mailed and asked for one?

21 A Under those circumstances if the information  
22 addressee knew that Quarterly Report #2 was there, he could  
23 have come in and got in and that may have been a publication;  
24 I don't know.

25 I mean that's hypothetical, because that isn't what

1 happened here. We didn't have anybody coming in and asking  
2 for a copy.

3 Q But it was available to the addressees.

4 A Well---

5 Q It was available to those that it was going to be  
6 mailed to. The University had every intention of mailing it, that  
7 report, as soon as it was printed, to the addressees.

8 A Well, they had the intention of mailing it as  
9 soon as it was mailed, not as soon as it was available because  
10 someone would have to know, let's say someone who was an infor-  
11 mation addressee, would have to know that that Quarterly---

12 Q Were available?

13 A Yes, sir. Because, how else would they know where  
14 to go?

15 Q The Univeristy might change its mind before they  
16 mailed it.

17 A Well, then, if they put out an advanced list,  
18 saying that on May 1, we're going to have Quartetly Reports #  
19 #1 - 7 available,---

20 Q As a matter of fact, long before the printed re-  
21 ports were on Miss Johnsons desk, the University had every in-  
22 tentation of mailing the reports out to those addressees.

23 A That's right. But they weren't mailed until  
24 May 5, which was after the critical date.

25 Q Yes.



1           Q     Mr. Marshall, I'm reading the testimony of Mr.  
2 Lawler, and after acknowledging that Miss Johnson had indeed  
3 described this as a local library, he was then, he qualified it  
4 and said, well, it really isn't a library, it's a depository.  
5 And he was asked what they named it, how they called it, and he  
6 said it was the local reading room.

7           A     That's right.

8           Q     And then a little later on, he was asked was the  
9 information concerning the documents, the reports, filed, avail-  
10 able, and he said yes. In what manner? A card file, which was  
11 maintained in the publications office. And which he later  
12 then said---

13          A     Yes, sir.

14          Q     that these things would be catalogued.

15          A     Yes, sir.

16          Q     Now that certainly is a classic example of the  
17 fundamental function of a library, isn't it?

18          A     I agree, I agree that from the standpoint of a  
19 principle, we're talking about a principle here, but so far as  
20 the facts are concerned, the facts are that there was not a  
21 publication. If, as you say, the report had been prepared,  
22 my time is up, Your Honor, if a report had been prepared, put  
23 into the library, and simultaneously therewith, or beyond the  
24 critical date a card made up and put into the Index, you would  
25 have had a publication. You didn't have that situation here.

1 These were not available to the public.

2 Q Thank you.

3 A I'm sorry I didn't get a chance to discuss Trip-  
4 lett, Your Honor.

5 Q Are there any cases in this Court, I'm not aware  
6 of any, on this publication?

7 A No, sir.

8 Q How voluminous are the cases below in the lower  
9 courts?

10 A Relatively few, Your Honor. It's purely a matter  
11 of fact. And you have the District Court below and the Court of  
12 Appeals below finding that there was not publication.

13 Q What did the Eighth Circuit do with this?

14 A They didn't decide the question, Your Honor.

15 Q I didn't remember it was in their opinion.

16 A It was simply a matter of defense. But they, as  
17 I mentioned before, they went off on 103.

18 Q Yes.

19 A Thank you very much. I'm sorry I didn't get to  
20 discuss Triplett.

21 Q Mr. Faber?

22 ARGUMENT OF SIDNEY G. FABER, ESQ.

23 ON BEHALF OF RESPONDENT

24 JFD ELECTRONICS CORPORATION

25 MR. FABER: Mr. Chief Justice, and may it please the

1 Court.

2 Of the three questions presented in the Petition for  
3 Writ of Certiorari, namely, the validity of the Isbell patent  
4 because of divided decisions, secondly, the so-called fraud and  
5 the strictures on JFD for utilizing certain patent legends and  
6 certain patents in furthering its sales, and three, the re-  
7 invocation of going against Deere because the Court of Appeals  
8 in this case had said that the District Court itself had not  
9 followed the formula set down in Graham against Deere with re-  
10 spect to holdings of obviousness.

11 JFD is of course primarily interested in number 3,  
12 where JFD is charged with patent infringement, number 2, where  
13 JFD is charged with unfair competition by itself and in cahoots  
14 with a very good company, the University of Illinois and of  
15 course JFD is the licensee of the Isbell patent.

16 Now the Blonder patent was brought into this Court  
17 under question 3, when question 3, as raised in the Petition  
18 which was granted by this Court, asked by the requirements in  
19 the District Court for due process and specific findings under-  
20 lying the determination of obviousness in patent causes as laid  
21 down by the Supreme Court in Graham against Deere mandatory or  
22 just optional and ignorable?

23 And this question started the strictures by the Court  
24 of Appeals of the Seventh Circuit on the trial judge which had  
25 said the District Court did not describe the scope and content

1 of the prior art, identify the differences between the prior art  
2 and claim nor state the level of ordinary skill in the prior  
3 art.

4           Something that the Seventh Circuit Court of Appeals  
5 did do. However, we did not get the whole story in the Peti-  
6 tion, nor did we get the whole story in the brief filed by the  
7 Petitioner in which the Petitioner says, page 63, "The mere  
8 conclusion by the District Court of Claim 5 of the Blonder-  
9 Tongue patent is obvious at the time it was made and is there-  
10 fore invalid", is entirely unsupported by any special or sub-  
11 sidiary facts.

12           The fact is, however, that that appearance of that one  
13 sentence all by itself in the brief by the Petitioner, is the  
14 first sentence of a two sentence paragraph. And the second  
15 sentence of that two sentence paragraph by Judge Hoffman on  
16 page 89 of the Record says "The alleged improvement was taught  
17 by the following references in the prior art. One, technical  
18 part #52, two, the Mayes and his --- , and three, the prior  
19 art patents cited.

20           They used the word obvious in that one sentence which  
21 I've read. First, and then he said it was taught by technical  
22 report #52. The Court of Appeals of the Seventh Circuit as I  
23 pointed out, said that the trial judge had applied the holdings  
24 the formula prescribed in Graham against Deere, and then it  
25 itself tried to follow its own rulings and it ended up by saying

1 they've said here in the record, if we understand its position  
2 correctly, this is the Court of Appeals talking, Blonder-Tongue  
3 places chief reliance on the fact that while Isbell teaches that  
4 the two planes in which the dipole elements lay are close en-  
5 ough together so that the dipoles are substantially coplanar,  
6 Blonder teaches that the planes may be separated by some dis-  
7 tance of less than the wavelength of a band.

8           Then the Court of Appeals went on. "A substantial  
9 separation of these planes is clearly shown, however, in the  
10 1961 publication cited by the court. (That's the Court below.)  
11 Technical report #52 of the --- Laboratories." (That's of the  
12 University of Illinois) So that we have the Seventh Circuit  
13 saying to Judge Hoffman, thou hast not followed the rules of  
14 Graham against Deere, and then saying but we do exactly the  
15 same thing Judge Hoffman did, we find that technical report #52  
16 does the job in toto.

17           Now, you know Your Honors, section 102 of the Patent  
18 Act says that if the invention is described in ---printed pub-  
19 lication, it may not be patented.

20           Section 103 says that if it is obvious from one or  
21 more prior patents or publications, then on the showing that  
22 that was beyond the standing of ordinary skill, it may be  
23 patented.

24           But Graham against Deere pointed out that when you're  
25 going to use 103, then in the proper administration of justice,



1 so that the decision can be understood, please explain.

2           And this Court itself gave an example of such explan-  
3 ation in a later case. Anderson, I fully believe that the  
4 Anderson Black Rock, Inc. against Pavement Salvage Company, Inc.  
5 was decided by this Court in the way that it was, to set forth  
6 a very succinct, complete example of what the Court wanted when  
7 it said, in Graham against Deere, that the various other courts  
8 should follow the rules set forth, because this particular  
9 case...

10           Now, when we turn, however, to the patent itself,  
11 and I ask those of you who are able to do so, to turn to page  
12 39 of this yellow book, the Supplemental Appendix, where you'll  
13 find a reproduction of an exhibit that was introduced at the  
14 trial.

15           This reproduction shows on the left side, principal  
16 drawing of the Blonder-Tongue patent, In the middle, the claim  
17 %, which is the only claim Blonder-Tongue has brought to this  
18 Court, and on the left side, this Technical Report #52 that  
19 had been referred to by Judge Hoffman, and had been referred to  
20 by the Court of Appeals, and those, this chart draws a relation-  
21 ship between the claim and each of the two disclosures, Blonder-  
22 Tongue and ---.

23           Then you find that item one, a pair of rigid, longi-  
24 tudinal conductors held spaced a predetermined vertical distance  
25 apart in a vertical plane is found in Blonder-Tongue, of course,

1 that's where the claim comes from. It is found in this tech-  
2 nical report #52 which has been published early enough to be  
3 a reference, there's no question there.

4 First and second pluralities of dipole elements lying  
5 in corresponding first and second vertically spaced horizontal  
6 planes containing the respective conductors: it's there.

7 Right down the line, the spacing, the dipoles in  
8 separate planes, it's all there in each of these two things.  
9 Except one is a publication antedating the filing date of the  
10 patent by more than a year, and the other is the patent itself.

11 However, you'll notice in this chart, on item 4a, in-  
12 stead of being able to put in the statement that yes, this  
13 particular strain relief appears in technical report #52, we  
14 had to say no, but, and we went to two references.

15 Let me explain a strain relief, very very briefly and  
16 in the simplest terms. When I have to change the electric plug,  
17 in the toaster in my kitchen, and knowing that my wife may well  
18 pull that plug out by the cord rather than by the plug, I will  
19 tie a knot in the wire entering the hole in the plug before I  
20 connect those two wires through the screws on that plug, and now  
21 if that plug is pulled by the wire, rather than by the plug,  
22 that knot that has been tied in the wire will bear against the  
23 hole, and we won't be pulling the contacts out.

24 So this strain relief is something that has existed  
25 for many years, Blonder, who is one of the co-inventors here,

1 testified that the strain relief specifically had existed for  
2 many many years.

3 The Court of Appeals said that Blonder admitted that  
4 all the other mechanical elements were --- , the only sum total  
5 of all the other mechanical elements in this claim 5 is this  
6 one item.

7 Blonder also testified, and by the way Petitioners  
8 brief makes much of the fact that Blonder is a minister of  
9 science type of person, Blonder is of course the moving spirit  
10 of the Petitioner, Blonder himself testified, not only as an  
11 expert, but also testified that the Ranger 3 antenna put out  
12 by Blonder was made in accordance with claim 5 which is the  
13 only claim at issue in this patent.

14 And so, when we look at the Ranger 3 antenna, which  
15 by coincidence, not exactly coincidence I must confess, happens  
16 to be opposite page 40 of this same yellow book. The Ranger 3  
17 antenna does not provide a strain relief, or a means of anchoring  
18 that lead in, onto the antenna, so on page 2 of the brochure  
19 that goes along with the Ranger 3, on the second page, bottom  
20 of the first column, there's an instruction to the installer.

21 "Wrap electricians tape around the stand off as indic-  
22 ated by the dotted lines in B." So the strain relief isn't on  
23 the antenna as sold. The standoff shown up there at the upper  
24 right on page 2B is a means of supporting or spacing the lead  
25 in from the vertical mast, and the vertical mast is not the

1 antenna. The antenna sits on the vertical mast and this Ranger  
2 3, which according to Mr. Blonder is made in accordance with  
3 Claim 5, of his patent, is sold without this strain relief, but  
4 sold with the instruction, put some tape around this spot.

5 So when Judge Hoffman said, in the second sentence of  
6 that paragraph I read to you, when Judge Hoffman said that it  
7 is taught. That was the end of it; he's either right or wrong.  
8 And having said it is taught by technical part #52, if it is  
9 taught, perhaps he might have said it is , just as I looked at  
10 a picture of myself, said yes, it's got a nose, it's got two  
11 eyes, yes it has hair, not too much hair, but when he says it's  
12 taught he's making a statement.

13 And when, in a later case, or another judge, should  
14 want to see what the basis for the decision was, he simply  
15 gets a Xerox copy of that reference.

16 And when the Court of Appeals said it was taught,  
17 except for some mechanical elements, which Blonder admitted to  
18 be old, those mechanical elements added up to all of that si-  
19 ngle unit, the strain relief.

20 Now, in a few seconds left, in considering question  
21 number two, the charges of fraud, what nasty people JFD were,  
22 JFD either led the University of Illinois down the garden path  
23 or vice versa, I don't know.

24 Just keep in mind that when you read these charges,  
25 every single one of them is an allegation, and every single one



1 of them without a single exception is not supported by proof.

2 And in the time left to me let me just take up a  
3 few of them. Number one, JFD raided the Blonder-Tongue employ-  
4 ees. In the period that JFD was supposed to have raided the  
5 Blonder-Tongue employees, stolen them all away, a hundred em-  
6 ployees left Blonder-Tongue, five of those who had left came to  
7 JFD. When Mr. Blonder was asked to list all of the antenna manu-  
8 facturers, I think he was able to list 6 or 7, maybe there are  
9 12 or 15 throughout the country, and why did as many as 5, one  
10 twentieth of those who left, come to JFD?

11 Well, Blonder-Tongue is located in Newark, JFD  
12 is located in Brooklyn, and I'm sorry to say not too many peo-  
13 ple want to kive in Newark, sorry Mr. Justese Brennan, and  
14 not too many people want to live in Brooklyn, and when somebody  
15 is living in Westchester on Long Island, he can commute almost  
16 as inconveniently to either place. In other words there is prox-  
17 imity, and JFD got one twentieth of those who left.

18 Mr. Balash, Blonder says, was given a job of keeping  
19 tabs on JFD. Not only keeping tabs on JFD, he was supposed to  
20 be really fully in charge, according to the allegations, of the  
21 whole antenna division of Blonder.

22 The general manager of Blonder-Tongue testified that  
23 Mr. Balash was a very angry man who left, who complained for  
24 many years, was reduced gradually in rank and finally left a  
25 year and a half before the trial. Thank you.



1 Q Mr. Faber? You have about seven minutes left.

2 q REBUTTAL ARGUMENT OF ROBERT H. RINES, ESQ.

3 ON BEHALF OF PETITIONER

4 MR. RINES: Thank You, Mr. Chief Justice.

5 While we're on that subject my brother failed to tell  
6 you that even the District Court found that when Mr. Balash,  
7 the head of our whole antenna program left, all of the records  
8 of Blonder-Tongue, dealing with the customer relations and the  
9 investigation that Mr. Balash for this very suit, for the plead-  
10 ing, mysteriously disappeared.

11 I think also, we should bring out who were these key  
12 people that were raided. You cannot compare the fact that in a  
13 factory you let so many people go when you have production and  
14 do many people come back. It's not a numbers game for raiding,  
15 they took the head of the antenna business.

16 They took all of our proofs and records with regard  
17 to the customers. They took our co-inventor of the Blonder pa-  
18 tent, who was going to testify about the infringement. He took  
19 all the tests, and this was taken just before the trial, maybe  
20 a month or so before, and in addition we had one bit of evi-  
21 dence on the west coast about the customers, that they took away  
22 just before the trial Mr. Sissen, our west coast representative.  
23 So we couldn't use him as a witness.

24 So I don't think raiding is a numbers game.

25 Q Well, has Petitioner finally decided to forego

1 any request for reconsidering Triplett, entirely, or in any  
2 part? I understood you previously to say you would welcome a  
3 modification of it to some extent.

4 A Well, Your Honor, I think that is correct. The  
5 question which, the latter, the question that was asked of us  
6 in our brief by this Court was should Triplett be overruled. That  
7 we answered no.

8 Now the question is should there be modification. I  
9 think in all of law, when somebody is abusing it, or somebody  
10 is not taking advantage of what was intended by something, there  
11 are exceptions , and I think the Solicitor is very close to  
12 use in the idea that if in fact this were the same trial and they  
13 had the opportunity to present their witnesses before, and they  
14 didn't do it, that it seriously ought to be considered whether  
15 there ought to be an estoppel in a situation such as this.

16 Q Your question----before the defense, understand-  
17 dably?

18 A No, we did not. Understandably, we didn't have  
19 the decision at the time of the pleading.

20 Q All right.

21 A The last thing I would like to bring out is on  
22 this matter of obviousness, just to quote from page 499: "The  
23 experimental results which have been obtained for the multi-  
24 element log periodic antennas are found to be predictable,"  
25 and a few sentences later, "An investigation of log periodic

1 structures of thin linear elements (That's Isbell) is planned."

2 What's that from? The antenna report of the antenna  
3 laboratories of the University of Illinois, 30 January, 1959,  
4 at the time that Isbell made his so-called invention. That's  
5 the disclosure of the invention. Predictability in their words  
6 before litigation.

7 Not now. And not in the Eighth Circuit.

8 I'd lastly like to plead with this Court, that the  
9 Solicitor General has done a very gracious thing, I think, in  
10 presenting a balanced picture on Triplett v. Lowell. I want to  
11 read from the top of page 32 of his brief, and this is what  
12 a Solicitor General is for, I think: "It is as important that  
13 sound patents and invention be rewarded as that the public be  
14 protected against patent monopolies based on insufficient in-  
15 vention. Both are strong public policies."

16 Please, please restore to the patentee his right to  
17 due processing in the federal courts of America. Thank you.

18 Q Thank you, gentlemen, the case is submitted.

19 (Whereupon at 2:38 p.m. argument in the above  
20 entitled matter was concluded.)  
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