

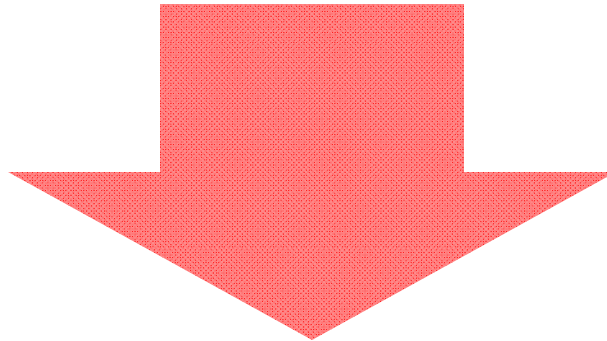


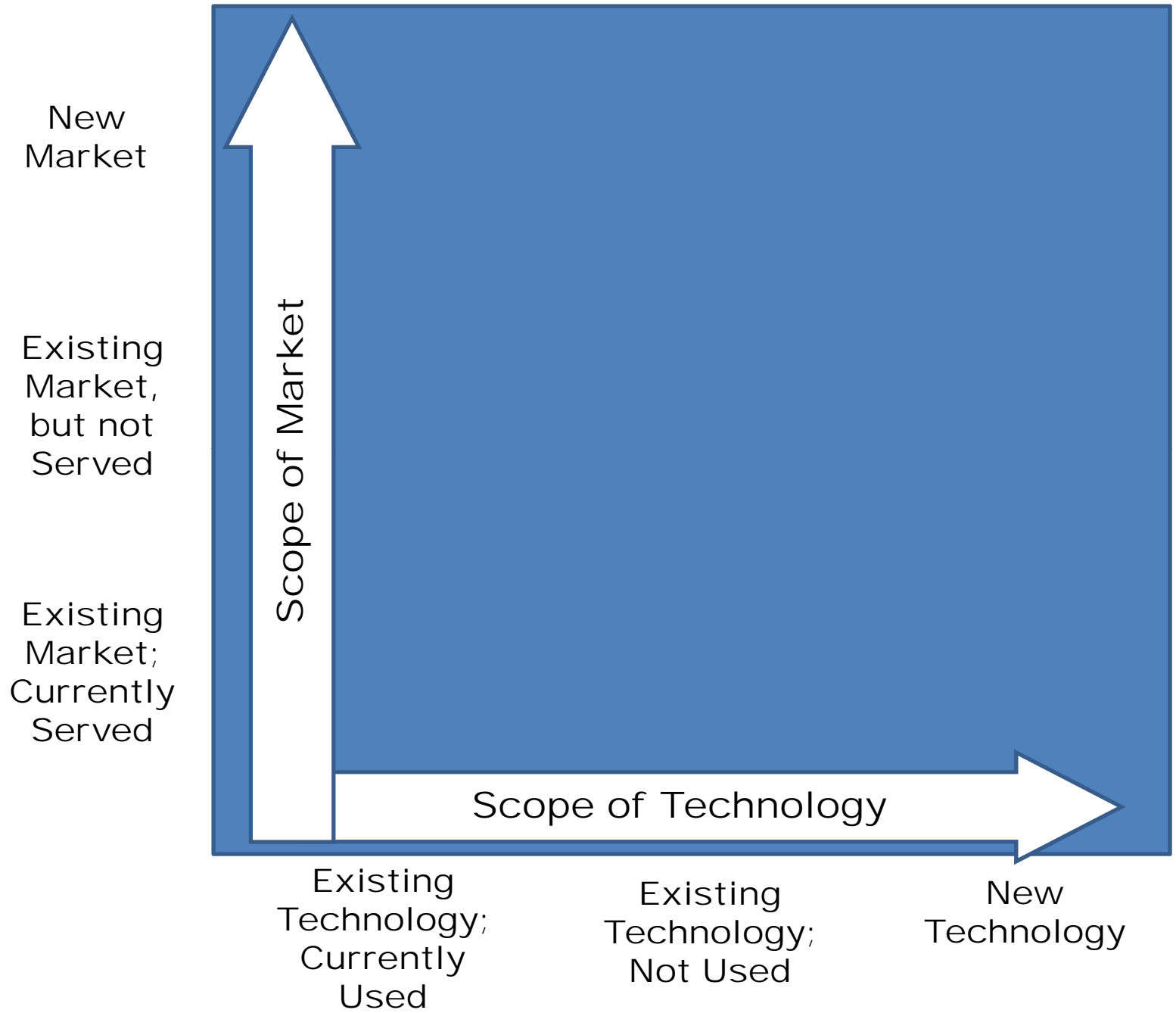
**United States
Federal Trade Commission
“The Evolving IP Marketplace”**

**Hearing on Patent Damages
February 11, 2009**

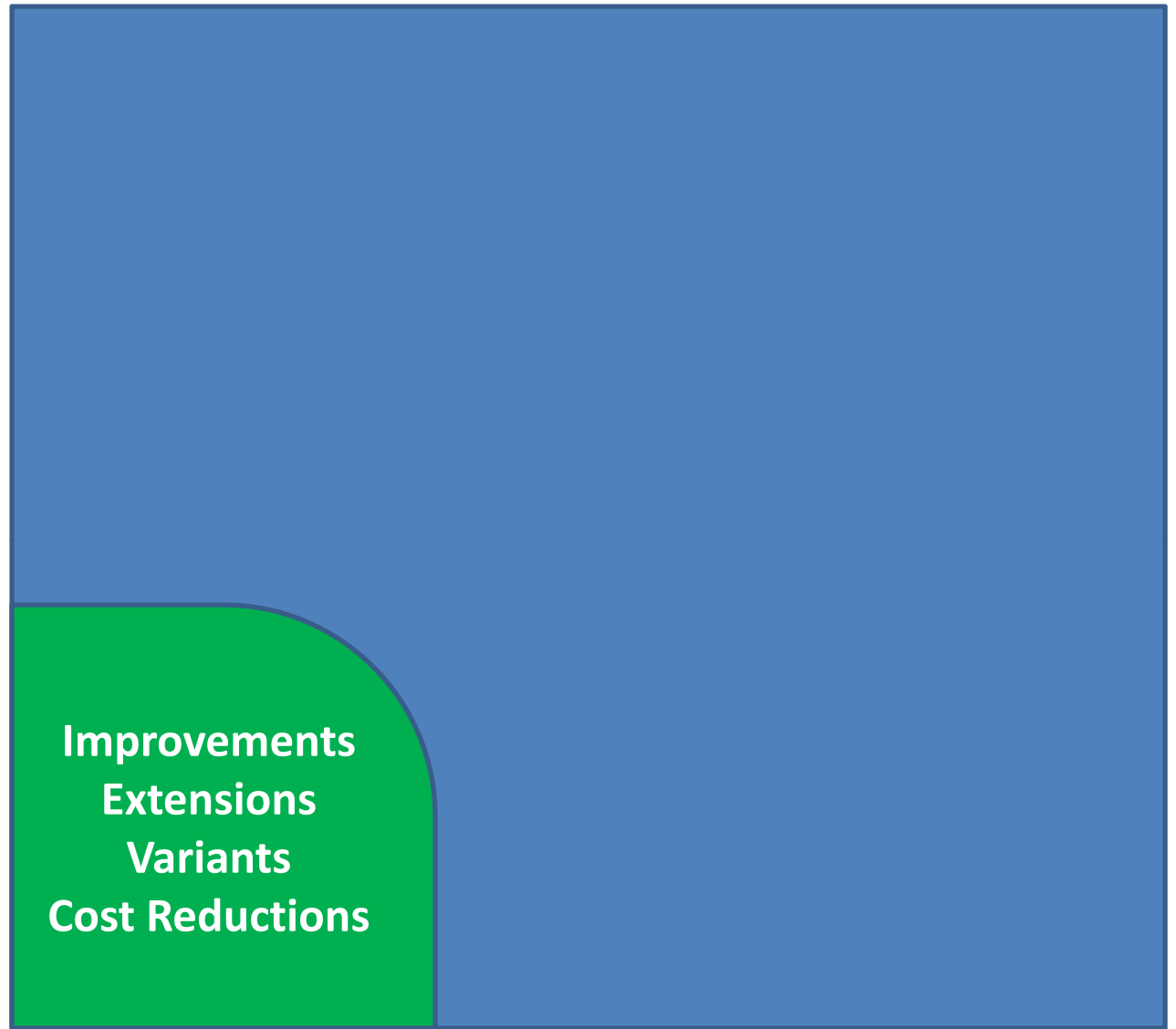
**Bryan P. Lord
VP and General Counsel
AmberWave Systems Corporation
Salem, New Hampshire**

Is reducing damages
for patent infringement
good public policy?



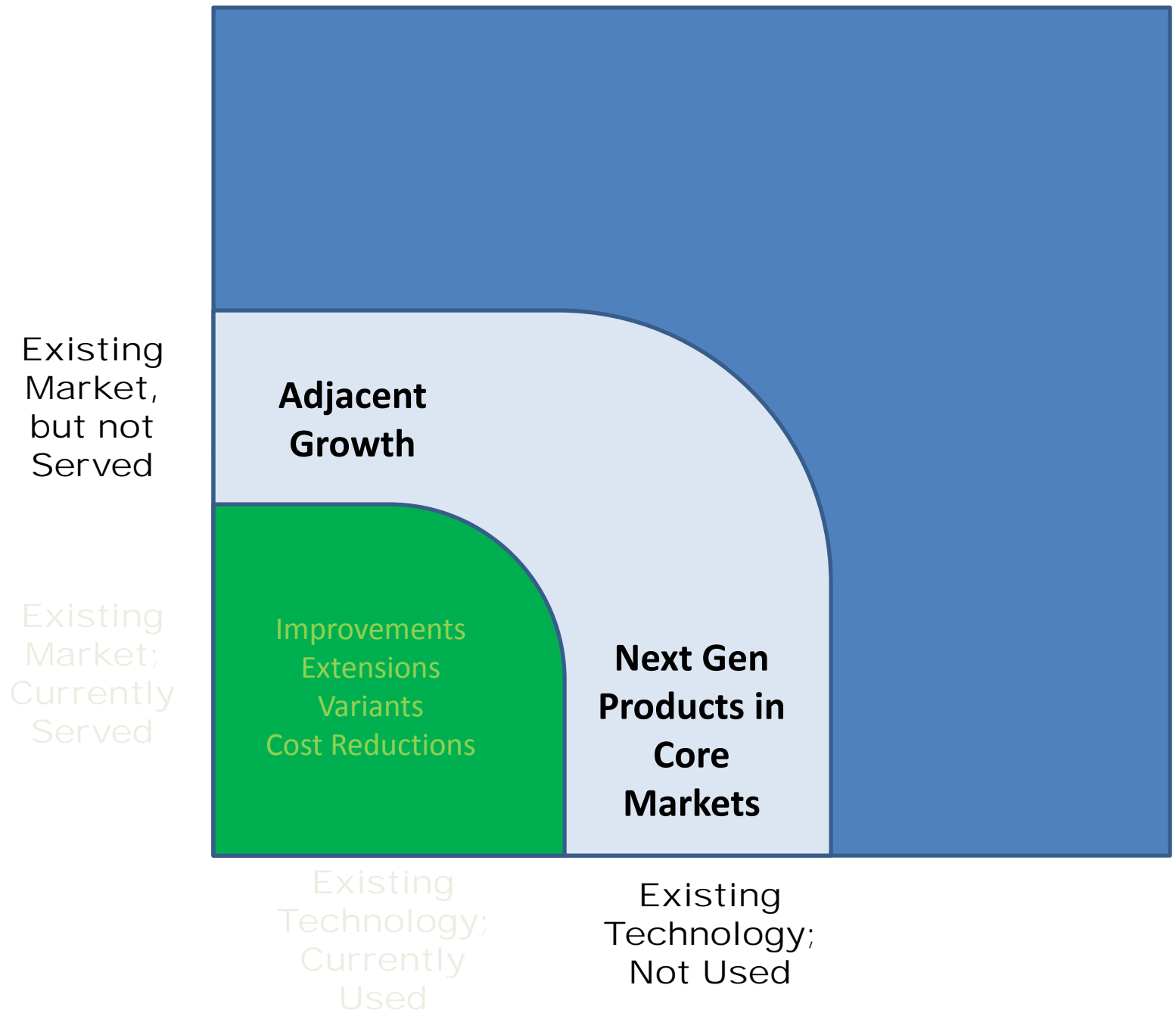


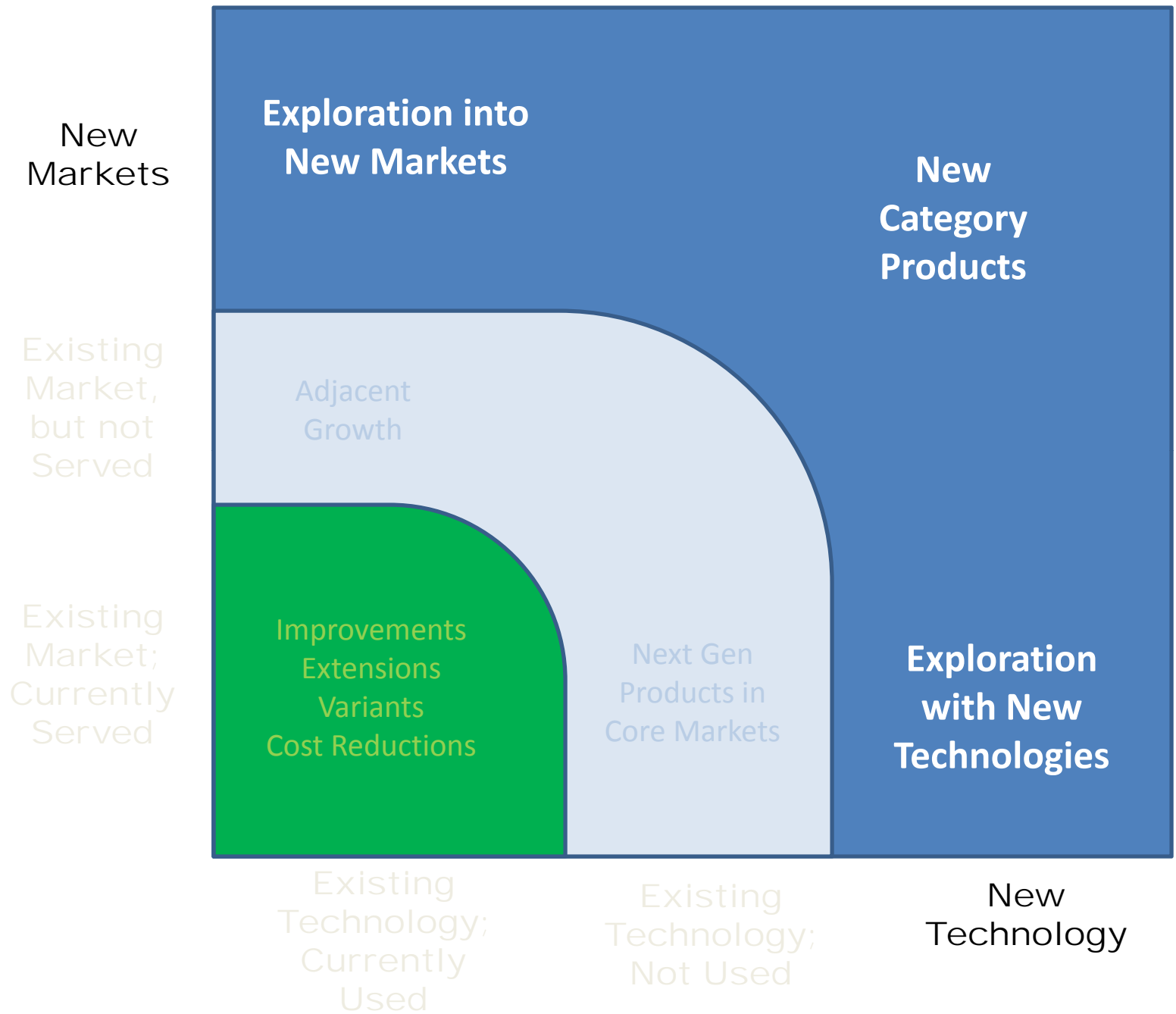
Existing
Market;
Currently
Served

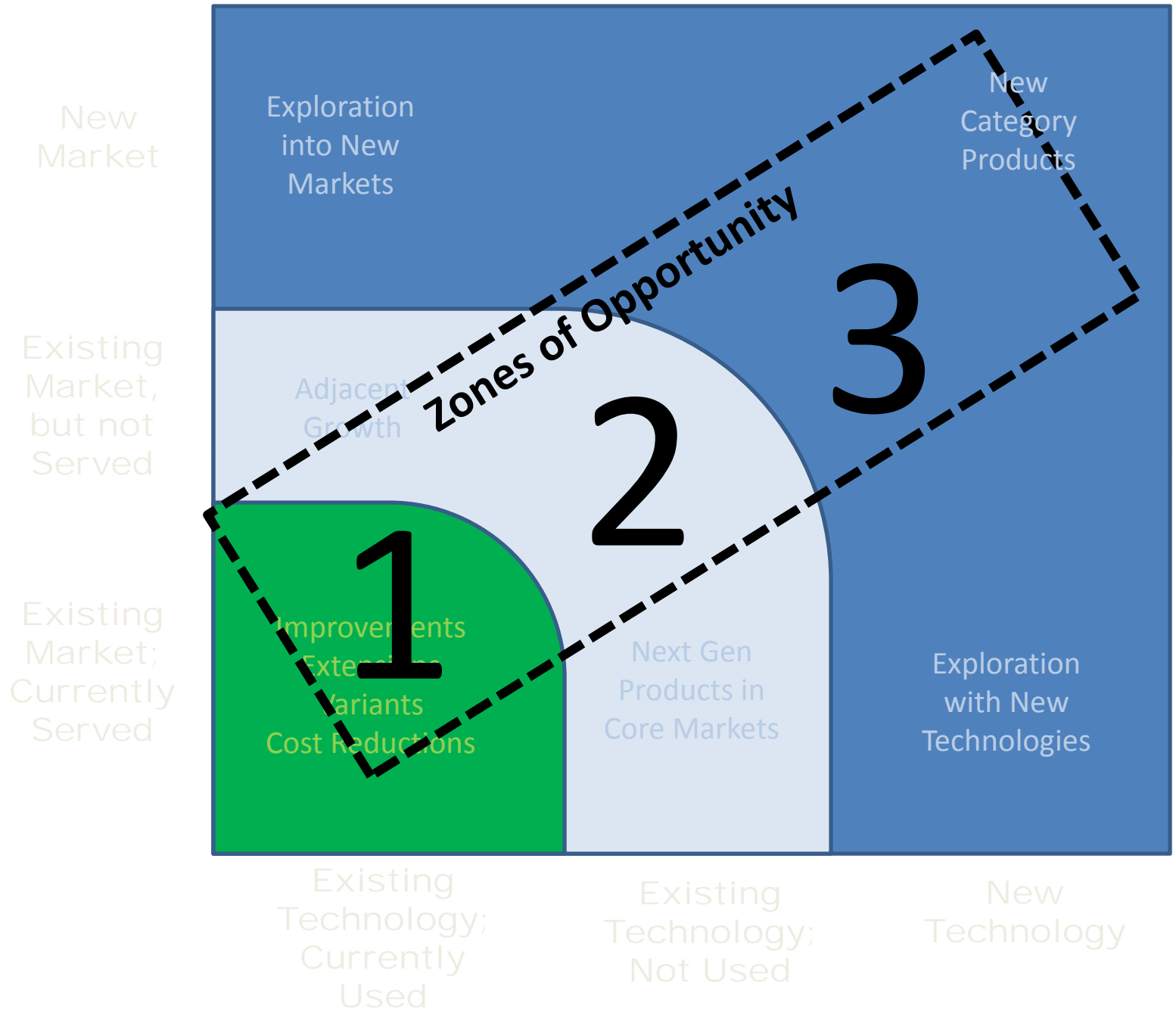


Improvements
Extensions
Variants
Cost Reductions

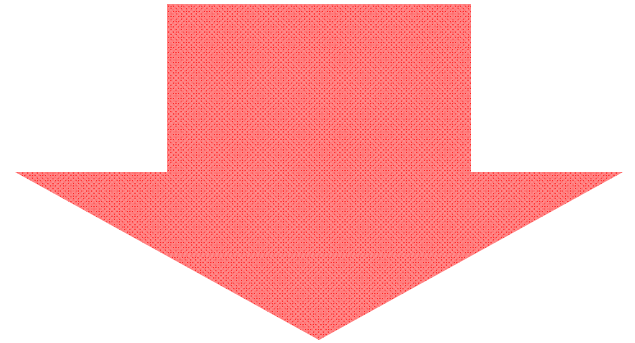
Existing
Technology;
Currently
Used







Is reducing damages for patent infringement good public policy?



“Yes!” say the proponents:

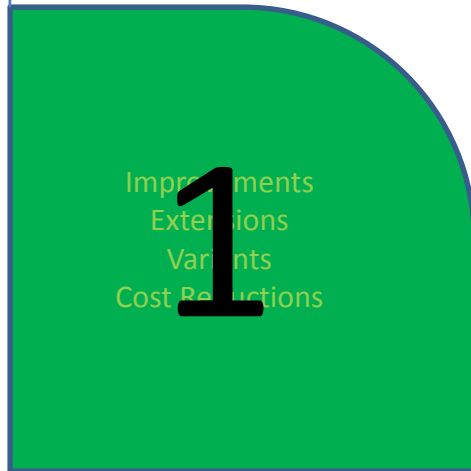
“The U.S. economy is increasingly bogged down in patent disputes that drain billions of dollars that would otherwise be invested in ... developing new innovations”

“The U.S. economy is increasingly bogged down in patent disputes that drain billions of dollars that would otherwise be invested in creating jobs”

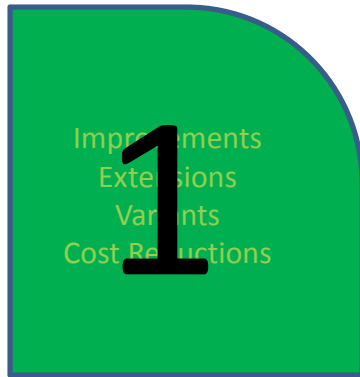
Zone 1

**The focus of the
“patent reform” debate today**

Existing
Market;
Currently
Served



Existing
Technology;
Currently
Used



Zone 1

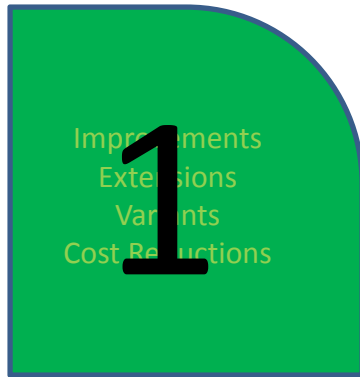
Opportunities

- Incremental improvements
- Extensions / Variants
- Cost Reductions

Competitive Advantage

- Experiential Development
- Speed to Market
- Defensive Patenting





Zone 1

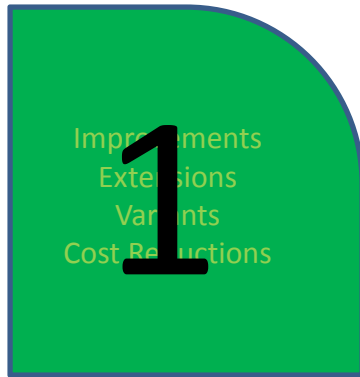
Defensive Patenting

We get patents **not to protect our own products**, but because it gives us power to exclude in areas where others might want to participate.

- Hewlett-Packard Patent Attorney

A defensive strategy is simple. **Patent everything in sight and threaten competitors** with infringement litigation when they come too close to making products or doing business in a similar fashion.

-Sampson Vermont



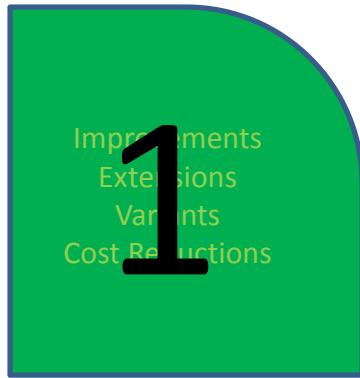
Zone 1

Defensive Patenting

Eric Aside (Microsoft)

When using existing libraries, services, tools, and methods from outside Microsoft, we must be respectful of licenses, copyrights, and patents. Generally, you want to carefully research licenses and copyrights (your contact in Legal and Corporate Affairs can help), and never search, view, or speculate about patents. I was confused by this guidance till I wrote and reviewed one of my own patents. The legal claims section—the only section that counts—was indecipherable by anyone but a patent attorney. Ignorance is bliss and strongly recommended when it comes to patents.

“When using existing libraries, services, tools, and methods from outside Microsoft, ... never search, view, or speculate about patents. ... **Ignorance is bliss and strongly recommended** when it comes to patents.”



Zone 1

Defensive Patenting Turned Offensive?

[S]ome CEOs, such as Steve Appleton of Micron and John Chambers of Cisco, have long concluded that building a strong *offensive* patent position ensures that their executive and operational staffs are not disrupted by the tedious intricacies of patent litigation....

–Dan McCurdy

Improvements
Extensions
Variants
Cost Reductions
1

Zone 1



VS.



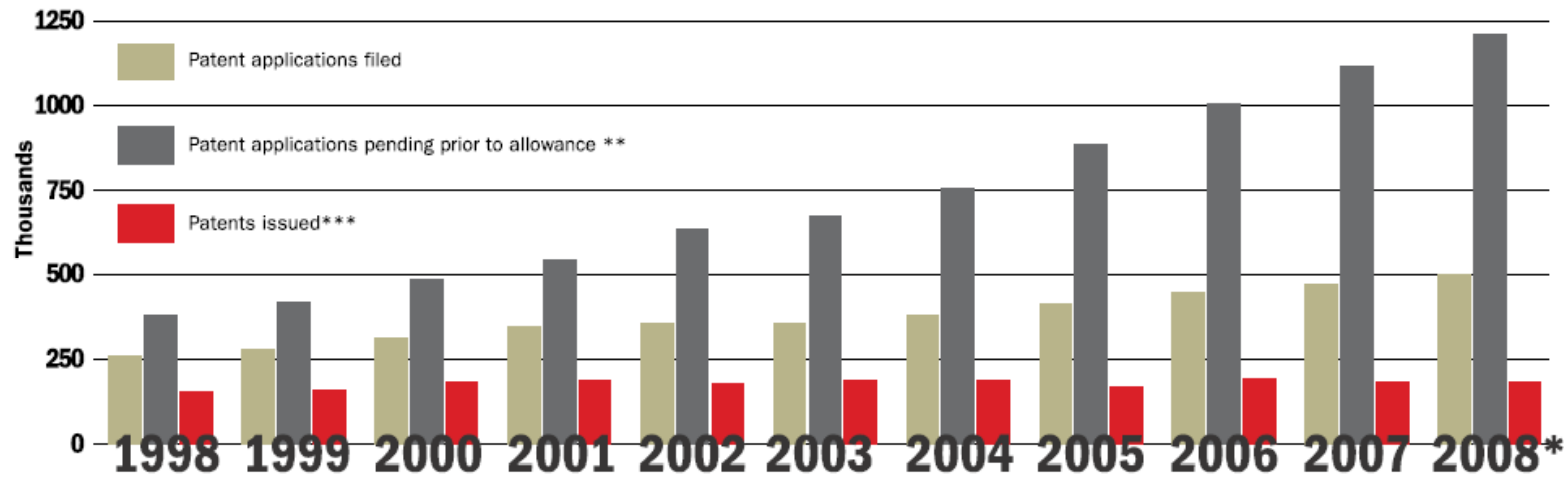
VS.



Improvements
Extensions
Variants
Cost Reductions

1

Patent Applications are Rising



*FY 2008 data is preliminary and will be finalized in the FY 2009 PAR.

**Includes patent applications pending at end of period indicated, and includes utility, reissue, plant, and design applications. Does not include allowed applications.

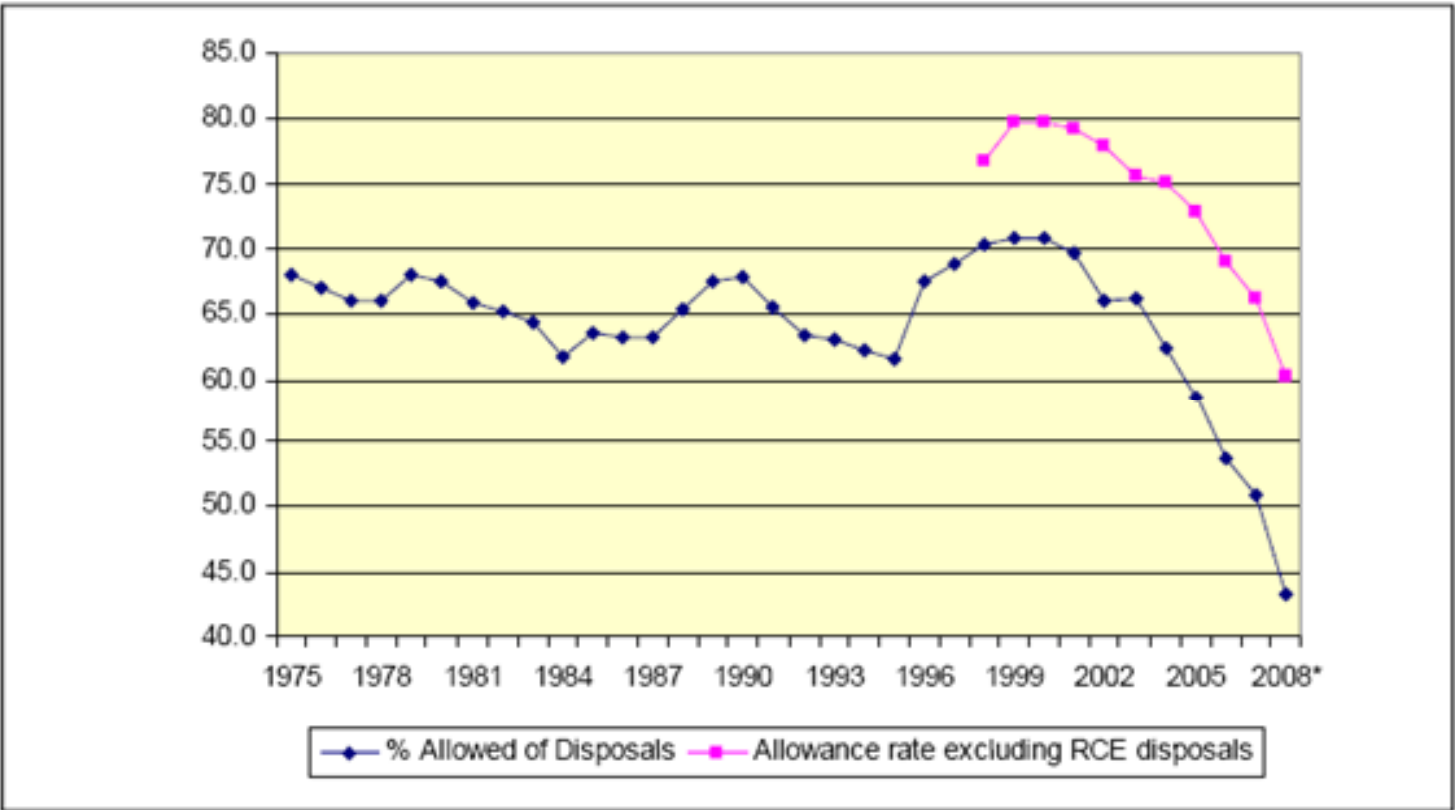
***Excludes withdrawn numbers.

SOURCE: USPTO report

Improvements
Extensions
Variants
Cost Reductions

1

Yet allowance rates are falling

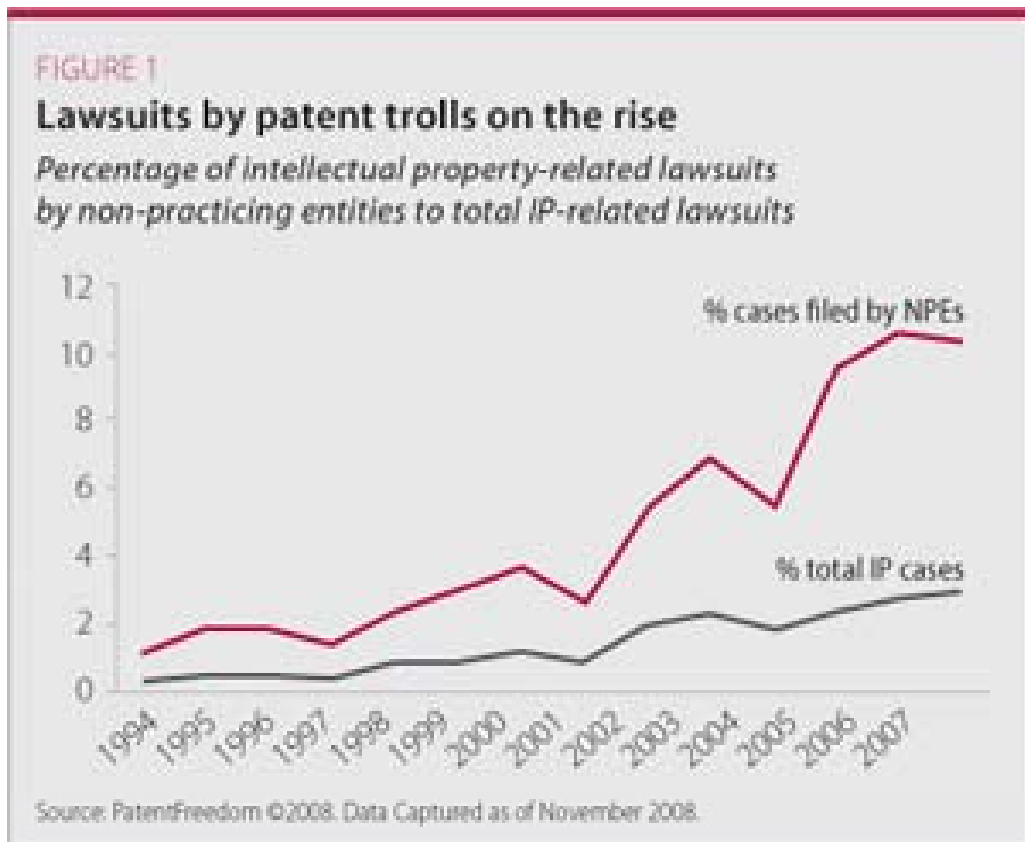


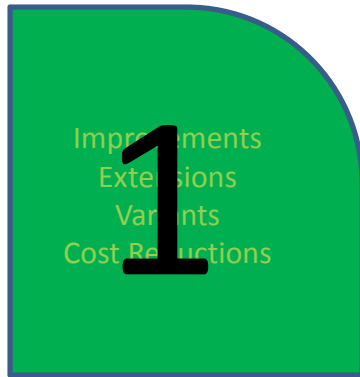
Data is through the 3rd Quarter of 2008.

Improvements
Extensions
Variants
Cost Reductions

1

Trolls (NPEs) Are Entering the Market



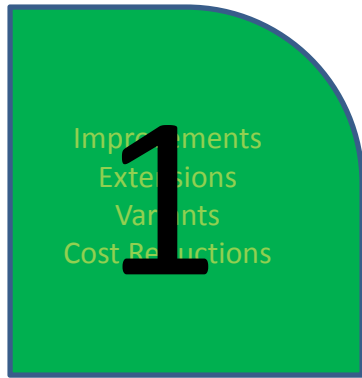


Who is a troll?



“Operating companies almost universally agree that a patent troll is any entity that attempts to enforce a patent against them and is **not vulnerable to patent counter-assertion** because they have no or an inconsequential amount of product sales.”

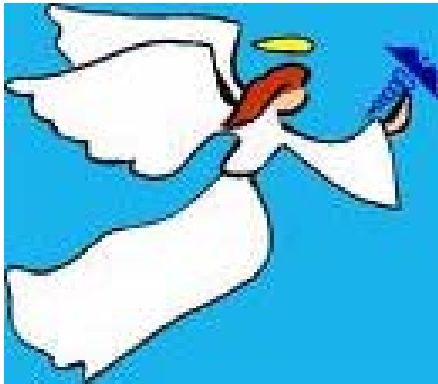
“In broad definition, patent investors, law firms that accumulate and enforce patents, failed companies, **individual inventors, research institutions, and even universities** would largely qualify.”



In other words:

A

Seeks patents to exclude others
Ignores / considers patents nuisances
Seeks to “horse trade” & counter-assert



B

Seeks patents to protect own tech
Not vulnerable to counter-assertion
Seeks to license tech to others

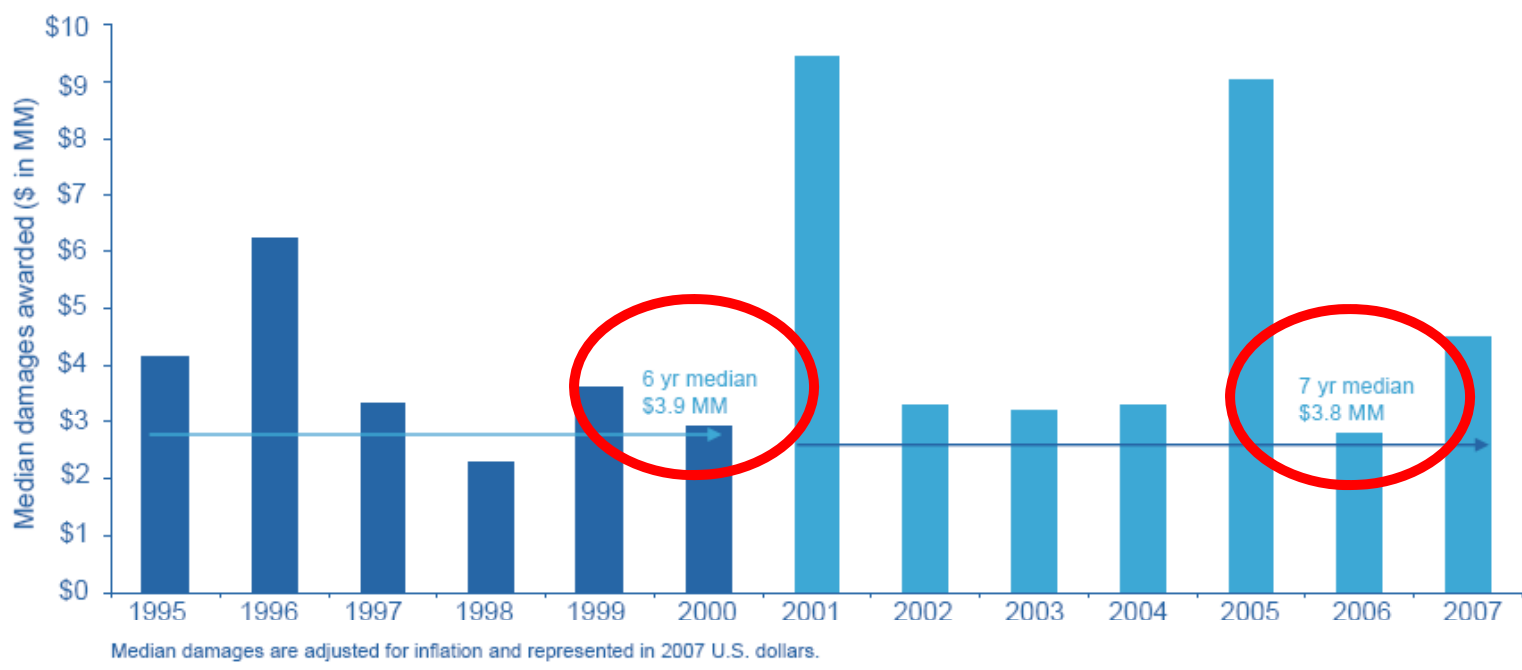


Improvements
Extensions
Variants
Cost Reductions

1

And yet, the annual median damage award has remained flat

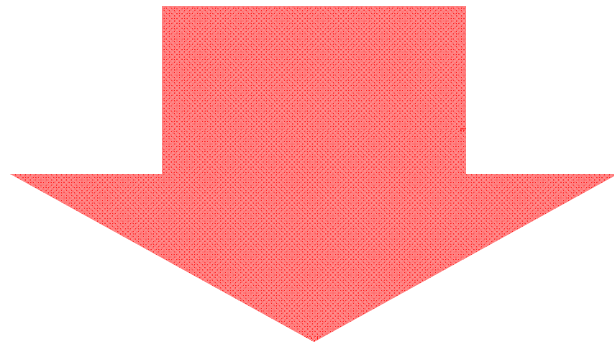
Chart 2A: Median Damages Awarded: 1995 to 2007



Improvements
Extensions
Variants
Cost Reductions

1

Is reducing damages
for patent infringement
good public policy?



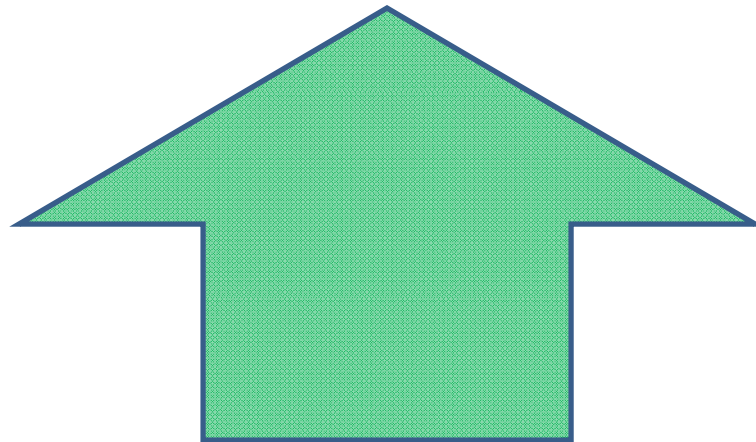
(the important question):

How do we:

Create U.S. jobs?

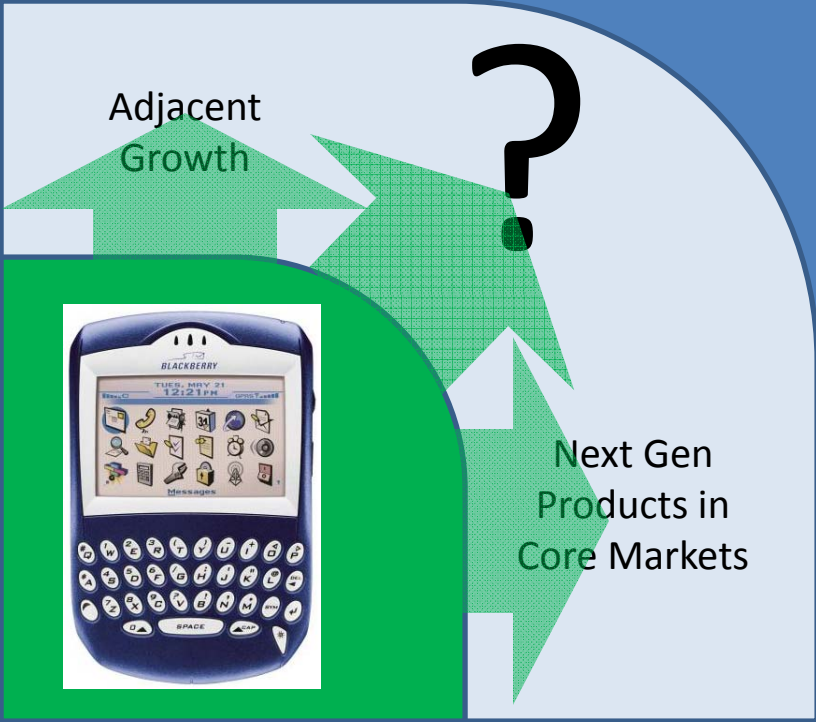
Stimulate the economy?

Invest in future technologies?



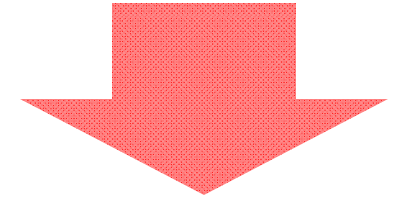
Exploration
into New
Markets

New
Category
Products



Exploration
with New
Technologies

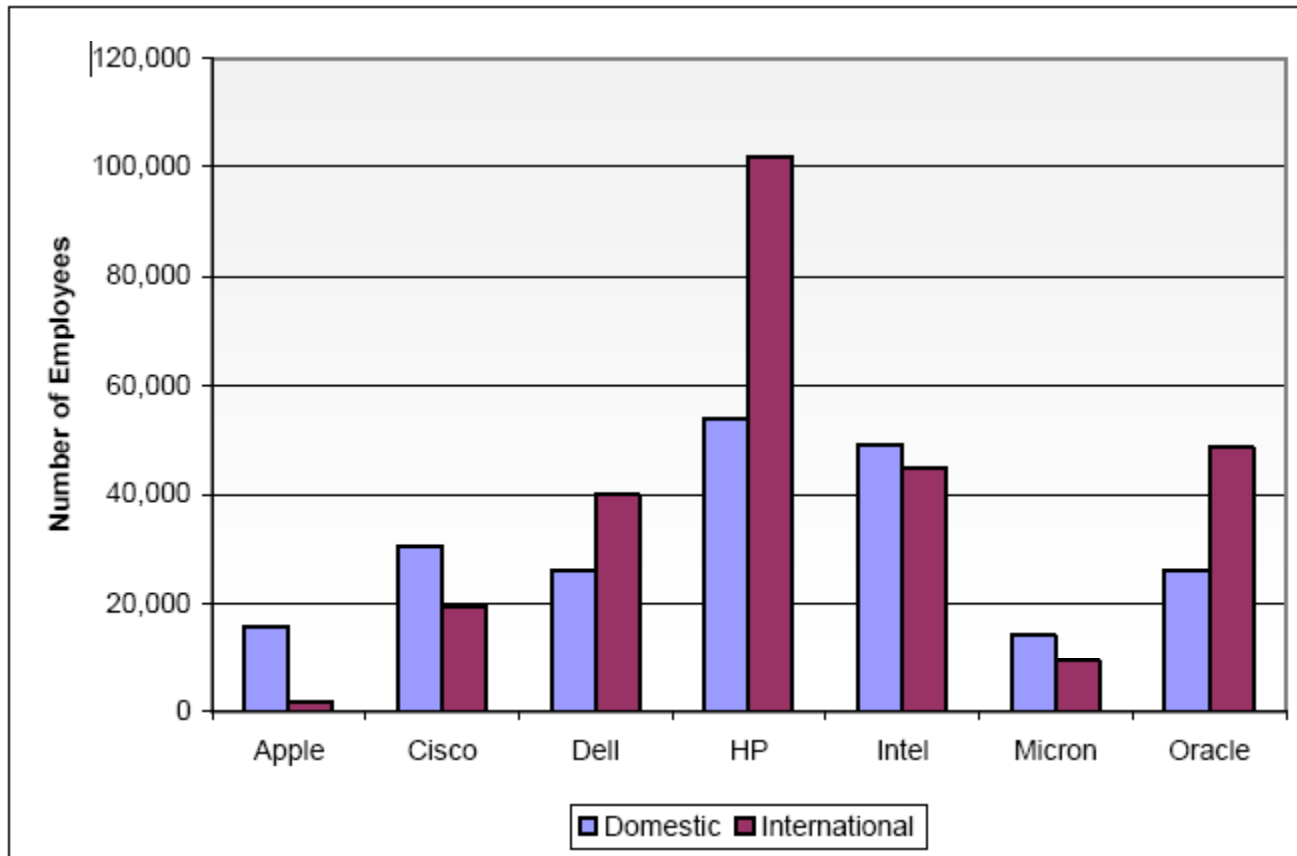
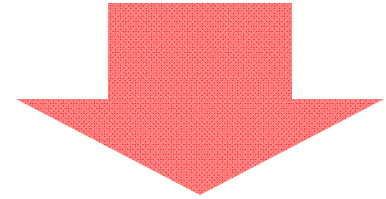
High Tech Corporate Investment in Basic Research is on the Decline



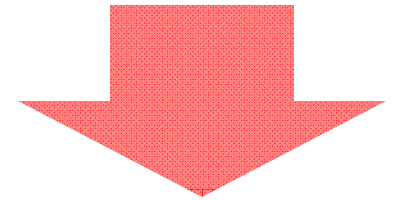
“Basic research inside companies is **impossible** in a competitive industry, according to [Cisco’s] Mr. Giancarlo.

‘We might decry this on a public-policy basis, but at least as far as public markets are concerned, it is a Darwinian world.’”

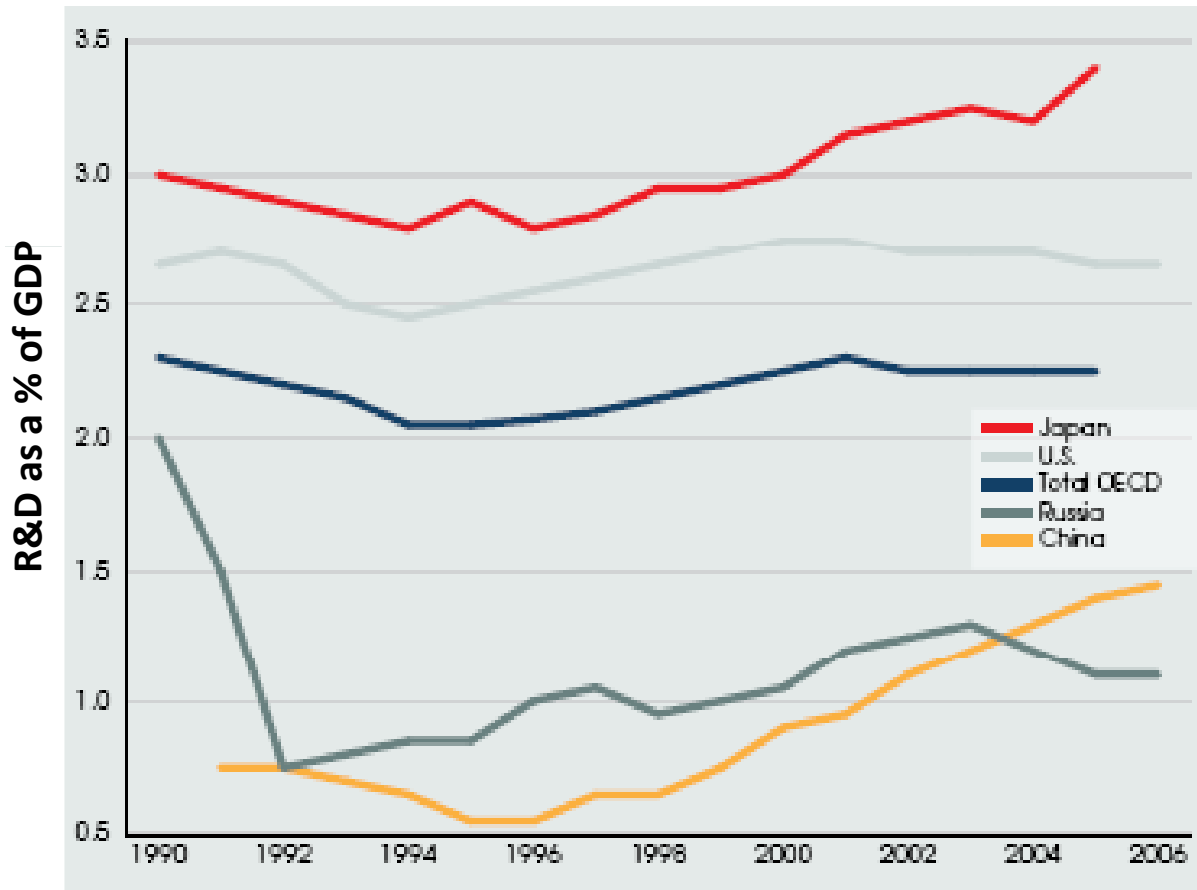
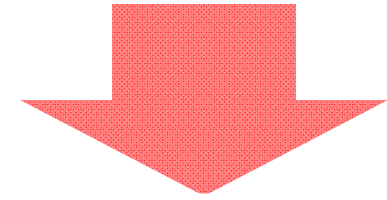
High-Tech Corporations are Moving Jobs Offshore



**Domestic Job Losses are Significant
and Well Documented**

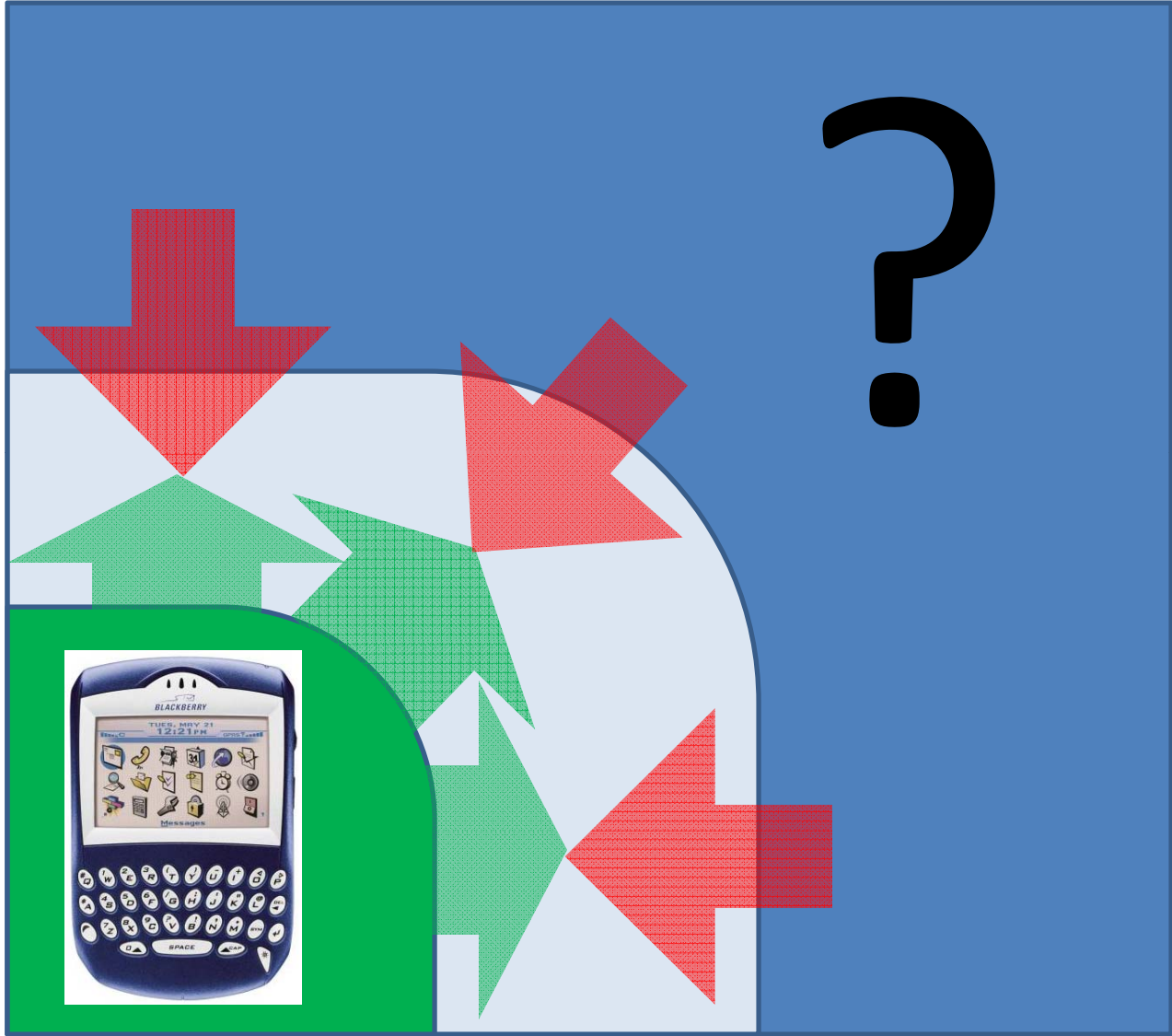


China & Japan Continue to Close the R&D Gap



Source: R&D Magazine

The level of R&D investments as a ratio of gross domestic product (GDP) has been fairly stable for most countries except China, which continues to expand its investment portfolio.



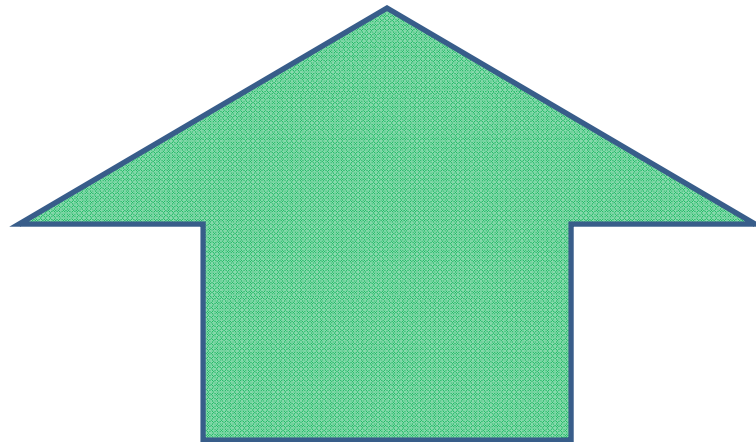
(the important question):

How do we:

Create U.S. jobs?

Stimulate the economy?

Invest in future technologies?

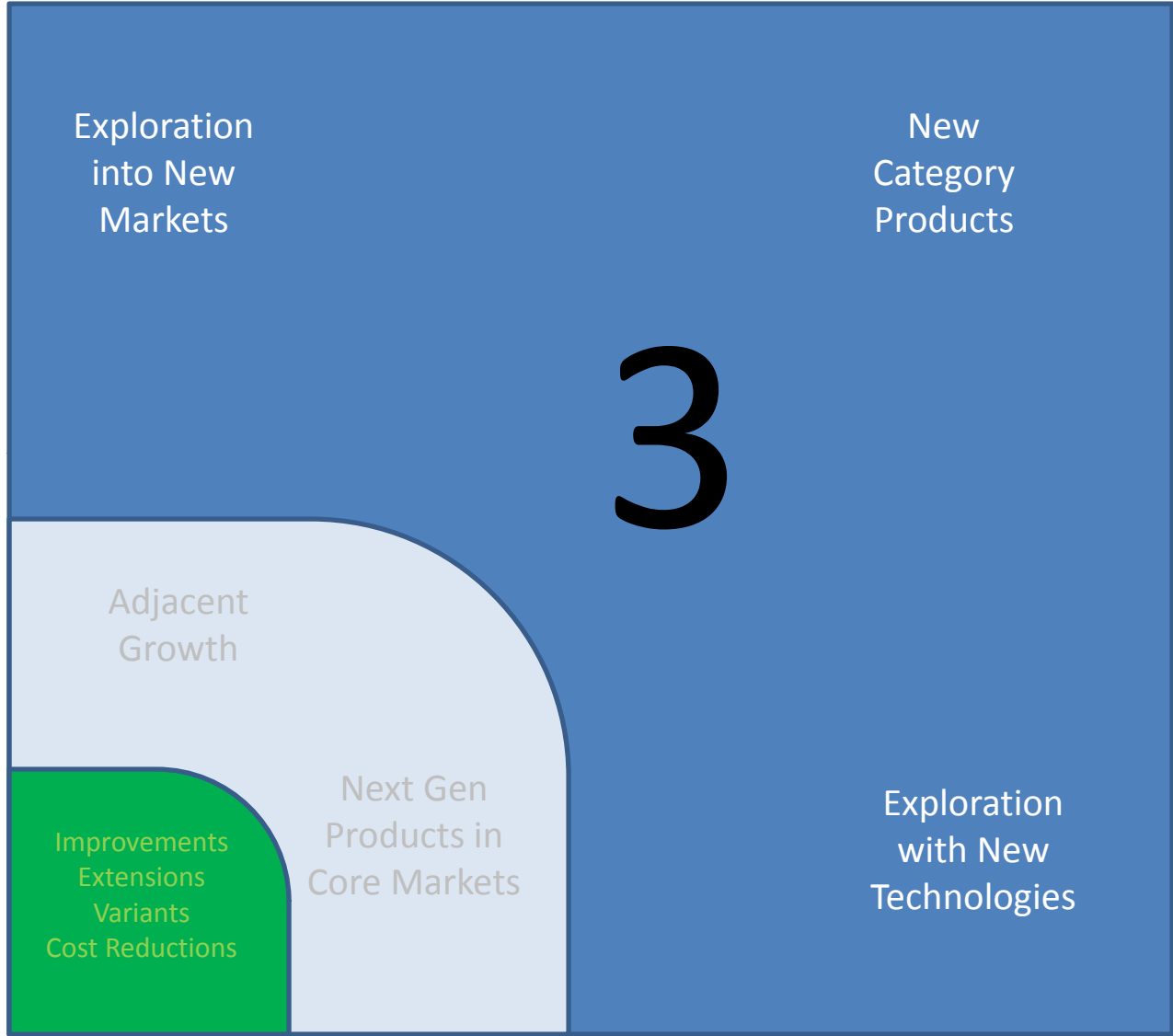


(the important question):

Answer:

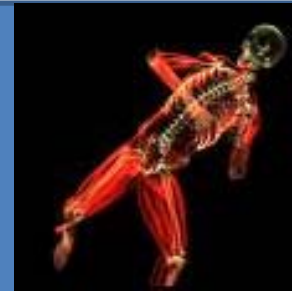
Look to Zone 3

New Market



New Technology

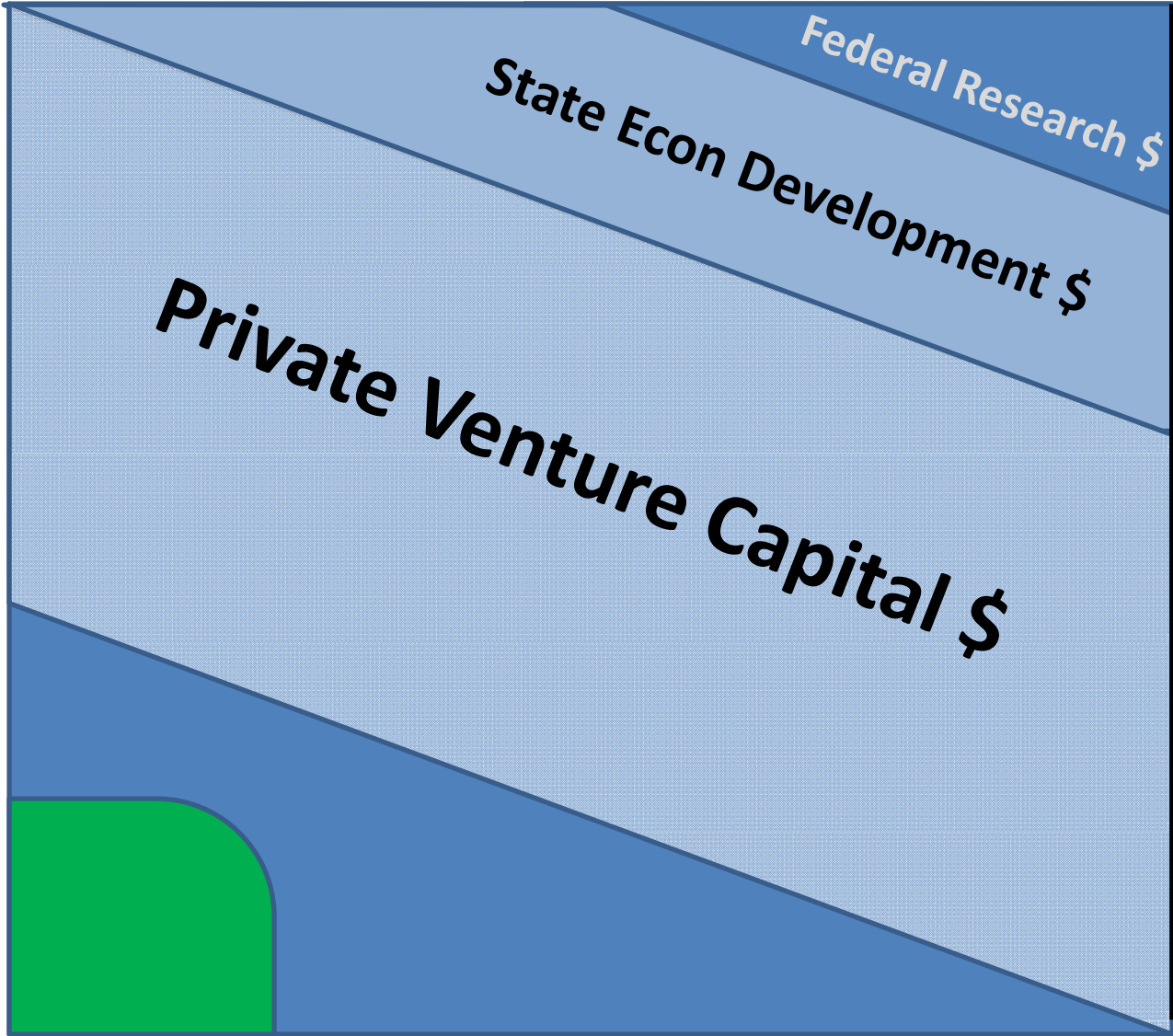
Source: Karl Ulrich, The Wharton School



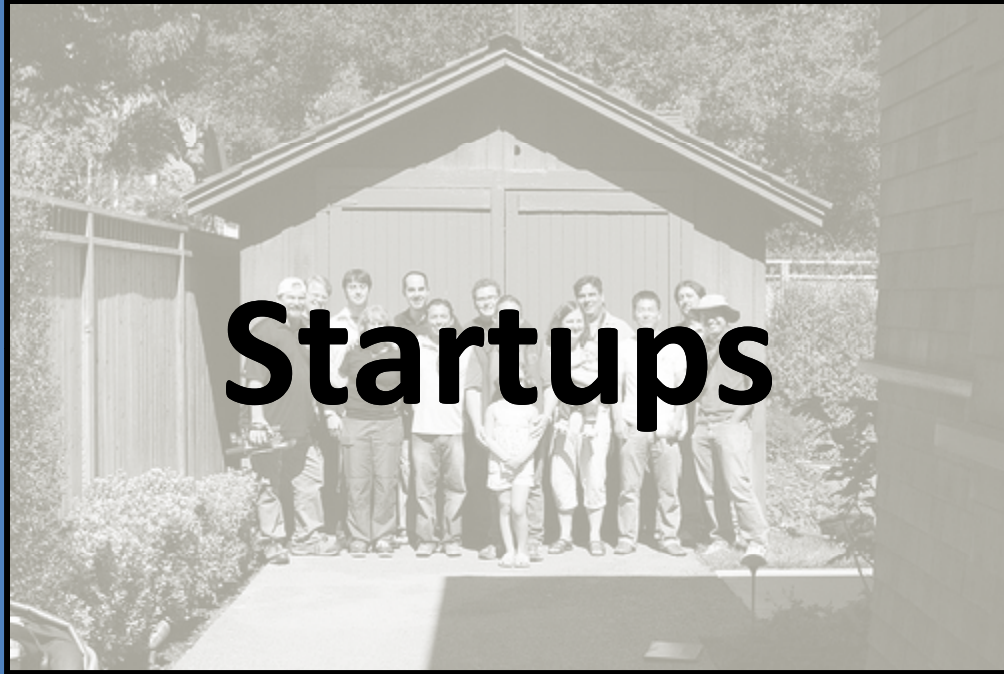
Biotech
Nanotech
Green Tech
Med Tech
Stem Cell Research
Clean Energy

Improvements
Extensions
Variants
Cost Reductions






Startups





**“Our data should give
policymakers and
budding entrepreneurs
great hope**

Kauffman Foundation /
US Census Bureau

A black and white photograph of a diverse group of people, including men, women, and children, standing in front of a house. The text is overlaid on this image.

**... we can solve our
current crisis
and grow jobs
through
entrepreneurship.**

Kauffman Foundation /
US Census Bureau

Where to Invest?



Where to Invest?


Everywhere!

But...

The seal of the United States Court of Appeals for the Federal Circuit is visible in the background, featuring a central shield with a scale of justice, surrounded by the text "UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT".


If a certain brand of patent law reform might cut the value of most corporate patent portfolios in half and perhaps greatly reduce stock values, dividends and employment, is that what our country now needs?

- Chief Judge Paul R. Michel

The seal of the United States Court of Appeals for the Federal Circuit is visible in the background. It features a central shield with a scale of justice, surrounded by a circular border containing the text "UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT".

**If a certain type of legislative change
would greatly help three industries
while greatly harming 30 others, is that
desirable?**

- Chief Judge Paul R. Michel

The seal of the United States Court of Appeals for the Federal Circuit is visible in the background. It features a central shield with a scale of justice, a sword, and a laurel wreath, surrounded by the text "UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT".

If the net impact would be to lower net investment in new technologies, is that what America needs?

- Chief Judge Paul R. Michel

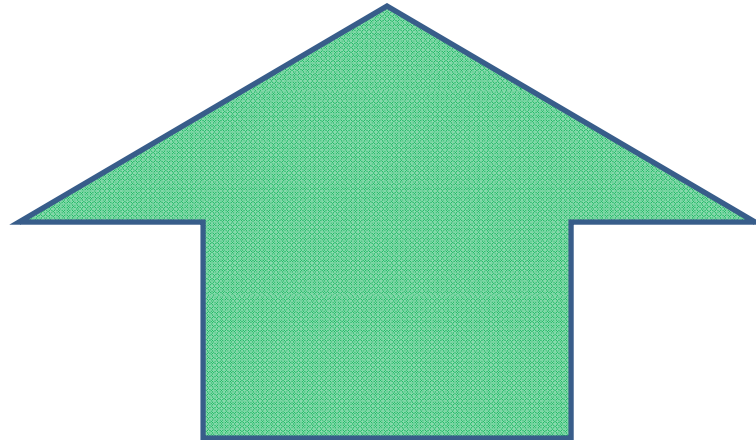
(the important question):

How do we:

Create U.S. jobs?

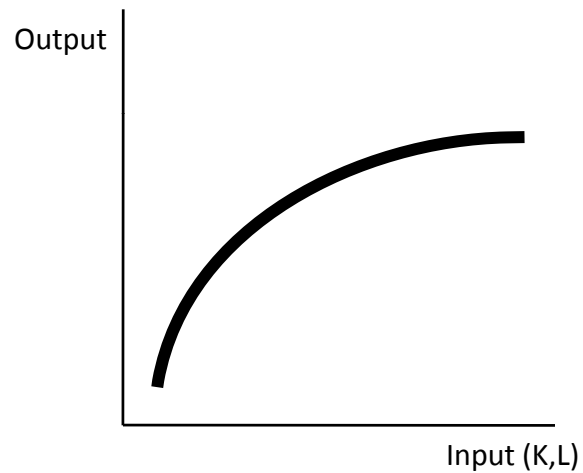
Stimulate the economy?

Invest in future technologies?



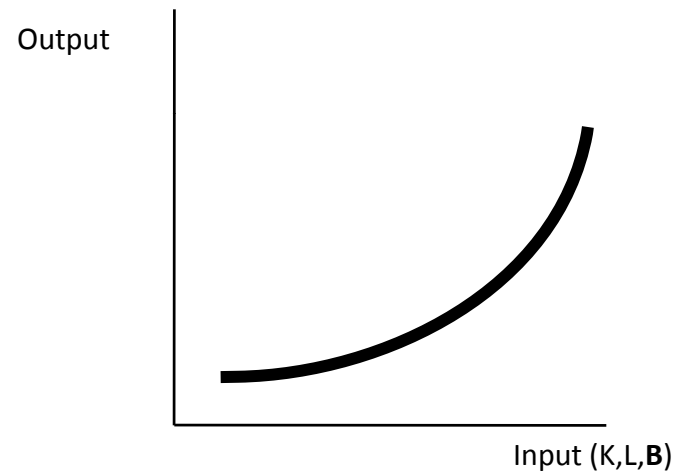
Emergent Economics

Decreasing Returns to Scale



- Capital (K)
- Labor (L)

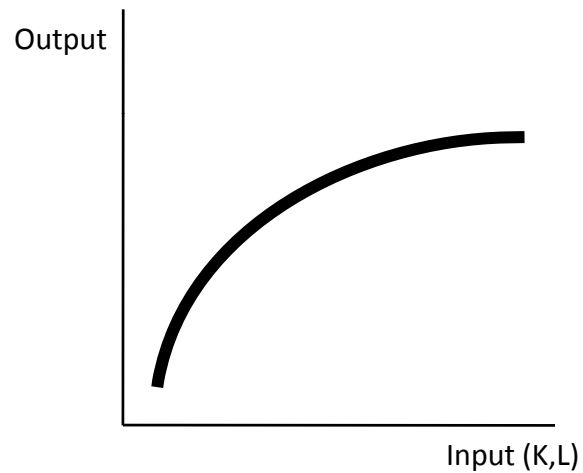
Increasing Returns to Scale



- Capital (K)
- Labor (L)
- **IDEAS (Bits)**

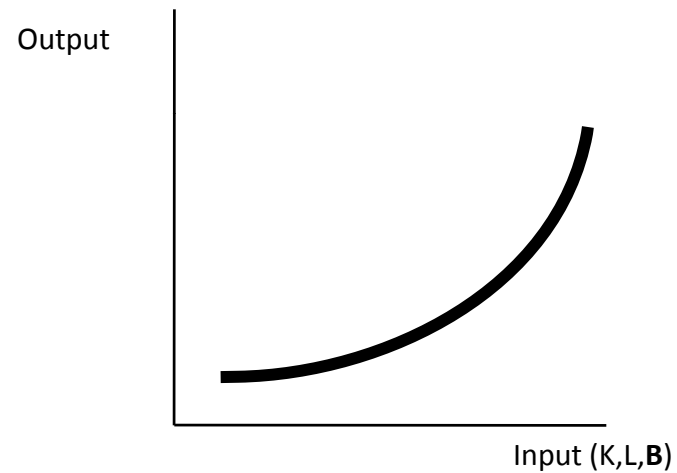
Emergent Economics

Decreasing Returns to Scale



- Raw Materials
- Goods
- Finite
- Scarce

Increasing Returns to Scale



- Knowledge
- Technology
- Easily reproduced
- Leverageable

Emergent Economics

Decreasing Returns to Scale

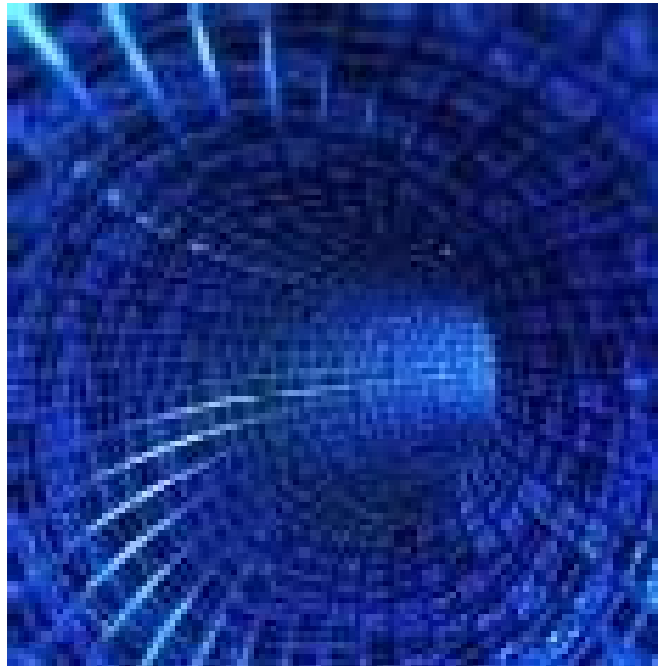
The current
patent debate

Increasing Returns to Scale

The innovation
policy discussion
we ought to be
having

**“Ideas are what truly matter in
generating economic growth.”**

- Paul M. Romer





**To generate economic growth,
ideas need:**

1. Incentive

Optimal growth happens when the non-rivalry of information is balanced by the appropriate degree and type of excludability, giving innovators **incentive to undertake research and development** in the first place.

- Richard Whitt and Stephen Schultze



2. Coordination

“Stronger [patent] enforcement can facilitate the good type of coordination that increases competition and access, such as **coordination among entrepreneurs, inventors, and venture capitalists** to facilitate commercialization of new ideas.”

- F. Scott Kieff



3. Capital

“The prosperity of America depends in large measure on finding **financial support** for the comparatively small percentage of **new ideas** and developments which give promise of expanded production and employment, and an increased standard of living for the American people.”

- General Georges Doriot, the “First Venture Capitalist”



4. Protection

We grant **[temporary] property rights over knowledge**, and this leads to a leapfrogging process whereby the potential of future monopoly profits induces new discoveries.

- Paul M. Romer

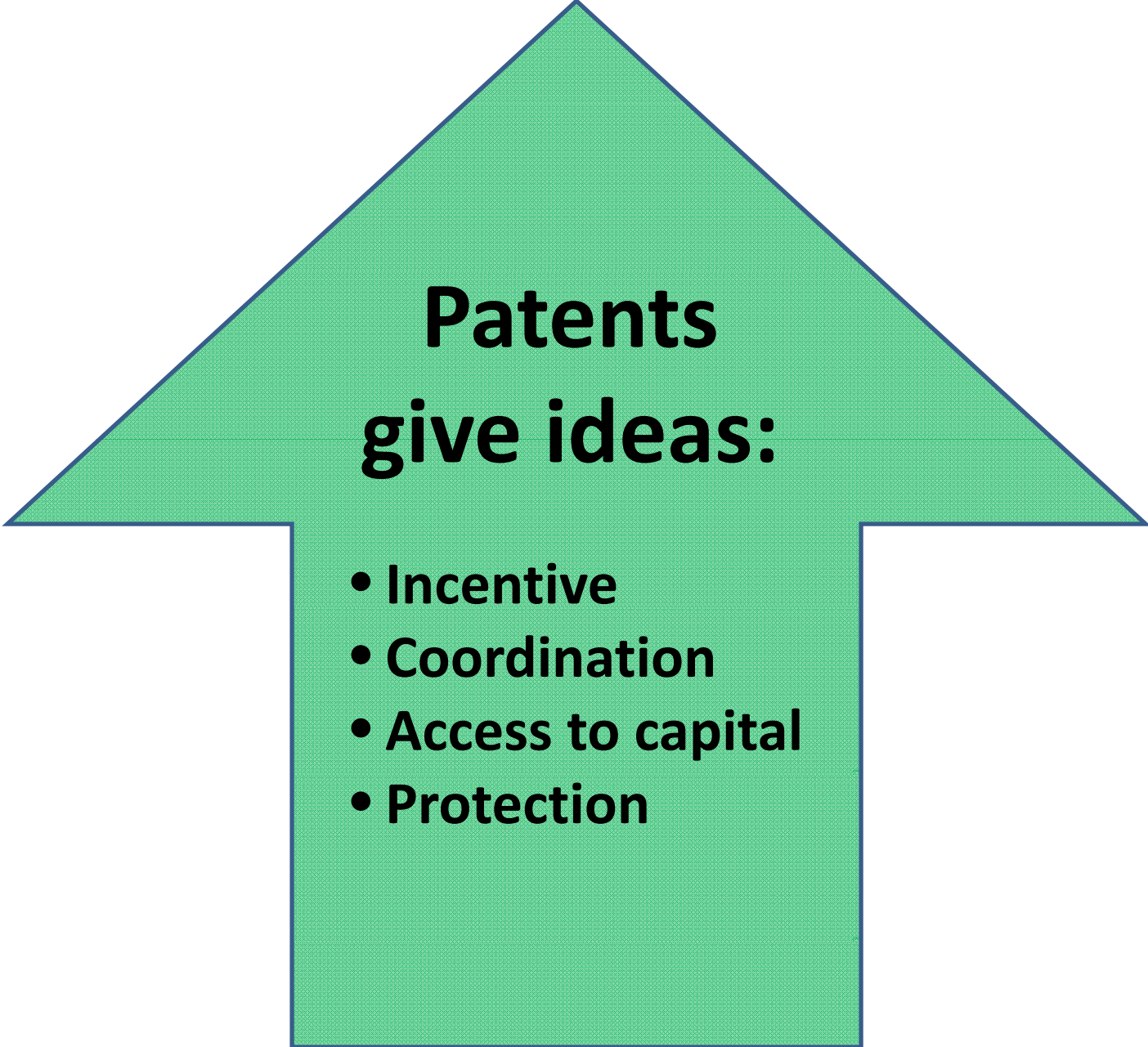


= Economic Value

As a result, a **new entity** will emerge and come into a market at some point and leapfrog all the existing entities. When that happens, you'll get a big jump in terms of productivity and **economic value**, and the old monopolists will typically be displaced.

- Paul M. Romer





**Patents
give ideas:**

- Incentive
- Coordination
- Access to capital
- Protection



**Ideas generate
economic value**

+ Competition

As a result, a new entity will emerge and come into a market at some point **and leapfrog all the existing entities**. When that happens, you'll get a big jump in terms of productivity and economic value, **and the old monopolists will typically be displaced**.

- Paul M. Romer



**Ideas & patents
generate
competition**



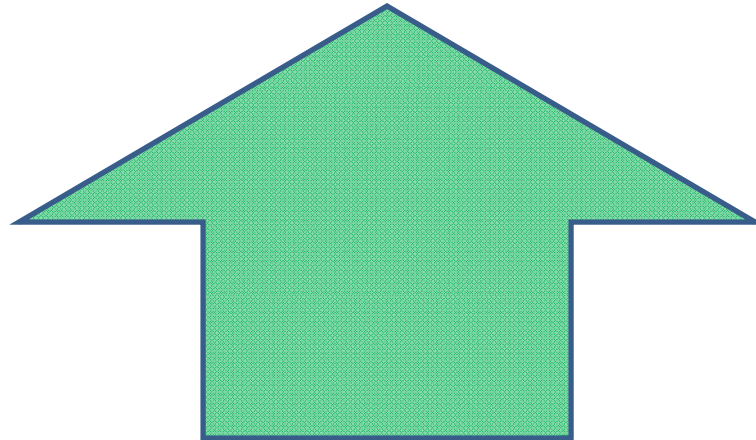
(the important question):

How do we:

Create U.S. jobs?

Stimulate the economy?

Invest in future technologies?



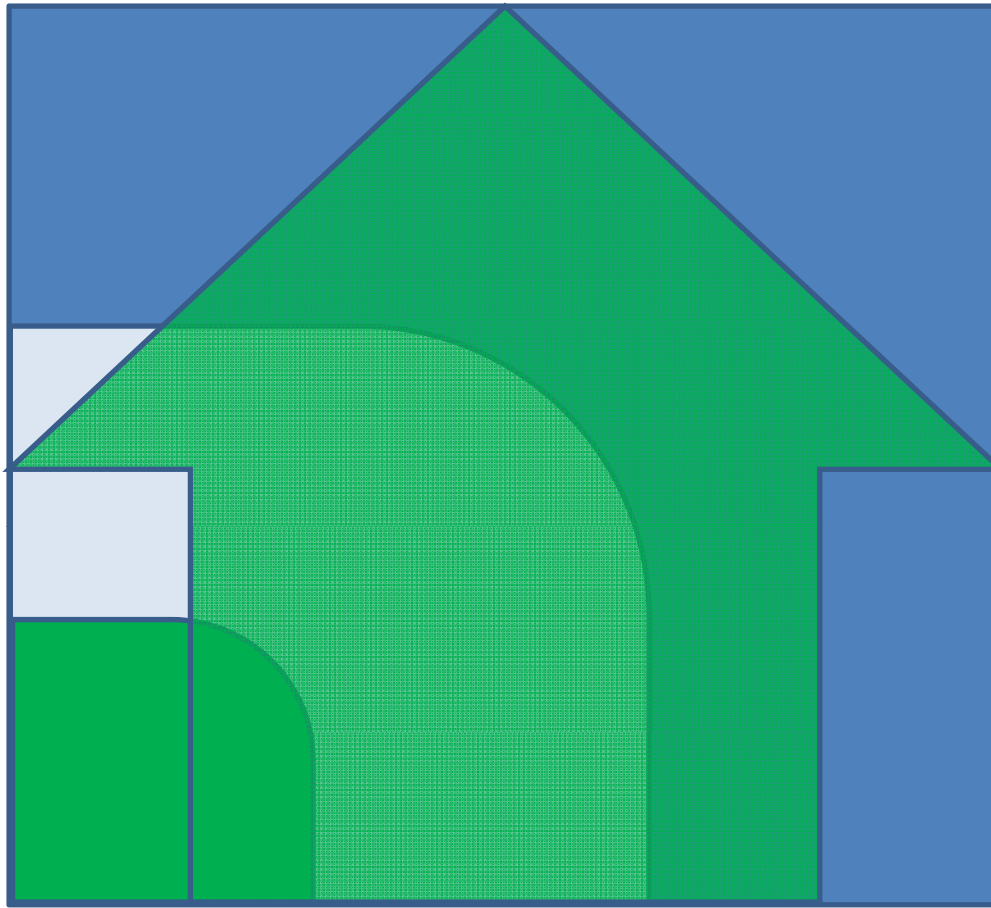


**Improve,
Don't Weaken,
Patents**

Is reducing damages
for patent infringement
good public policy?



No.



Thank you