



June 22, 2009

Ex Parte – Via Electronic Filing

Ms. Marlene Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: MB Docket 09-23

Dear Ms. Dortch:

On behalf of Petitioner, the Coalition United to Terminate Financial Abuses of the Television Transition (“CUT FATT”), we respond to the lengthy ex parte submitted in this docket on June 9 by Dolby Laboratories, Inc.

Nearly a quarter of Dolby’s ex parte filing (pages 6-10) is based on the false premise that Petitioner urges the Commission to force holders of non-essential as well as essential patents into a patent pool. Contrary to that assertion, Petitioner does not intend to force anyone into the pool and seeks to eliminate the practice of tying licenses for non-essential patents to licenses for essential patents. Petitioner’s reply comments could hardly be more clear in stating that “the Commission should *encourage* patent holders to form a pool that *includes all essential patents* and offers licenses on terms that fulfill the RAND requirement” (at ii (emphasis added)) – that is, the requirement that licenses be offered on “reasonable and non-discriminatory” terms. The reply comments reiterated that patent holders should “form a comprehensive pool offering a license for *all patents essential to the ATSC standard* on RAND terms” (at 13 (emphasis added)). In addition, the Petition and Petitioner’s reply comments challenged as unreasonable the “tying” practice of some patent holders, who demand that DTV manufacturers purchase non-essential patents in order to obtain licenses to use essential patents. Thus, Dolby’s argument has no basis. Petitioner urges the Commission to live up to its promise to ensure that rates for patents essential to the ATSC standard are offered at reasonable and nondiscriminatory rates and on terms that do *not* require the purchase of non-essential patents as part of the price for obtaining essential licenses.

Dolby also argues at length (pages 12-15) that Commission action is unnecessary because experience shows that the International Trade Commission (“ITC”) and the courts can determine whether patent holders are complying with commitments to offer licenses on RAND terms. In a footnote (page 12 n.5), Dolby notes that it is relying on Funai’s description of its ITC litigation with Vizio in making that argument. But as we showed in our reply comments (at 16-18), Funai is just wrong in asserting, without citation, that the ITC determined that Funai is complying with its RAND commitment. The ITC made no such finding – and it obviously could have made no finding, in connection with the dispute between Funai and Vizio, that the many other entities

claiming to hold patents essential to the ATSC standard are offering them on RAND terms. The Commission premised its adoption of the ATSC standard in 1996 on RAND pricing, 11 FCC Rcd at 17794, ¶¶ 54-55, and the Commission should ensure compliance with the requirement it imposed.

In addition, Dolby contends (pages 10-12) that Commission action is not warranted because the market for DTVs is competitive and the prices of DTVs have been falling. Of course that is so, but it is completely beside the point. Retail prices for DTVs are falling on account of economies of scale and because manufacturers such as Vizio and Westinghouse have offered DTVs at very low prices. But unreasonably high patent fees have prevented prices from dropping even lower. As we pointed out in our reply comments (at 5), it appears that this year alone consumers will be charged close to a billion dollars more than they would pay if patent holders were offering RAND terms. It does not make sense for the Commission to ignore exploitation by patent holders because unrelated efficiencies are masking the effect of their excessive demands. Consumers should reap both the benefits of competition by DTV manufacturers and the benefits of patent licensing on RAND terms.

Nor is there merit to Dolby's argument (pages 2-6) that patent holders can be trusted to charge reasonable fees because it is in their interest to encourage widespread adoption of the relevant technology. Whatever the merits of that argument in other circumstances – where, for example, there are competing technologies – it does not hold water in this case, where the Commission mandated the use of the ATSC standard and now has terminated analog broadcasting. Because it is unlawful to sell TVs in the United States that do not comply with the ATSC standard, ATSC patent holders are protected from normal market pressures. Dolby nevertheless asserts (page 4) that a government-mandated standard is not fundamentally different than a “de facto” standard that has achieved widespread acceptance. But even in the case of a “de facto” standard, effective RAND requirements are necessary to prevent patent holders from “extract[ing] supracompetitive royalties,” as the Third Circuit recently explained in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007). It is true that a monopolist will not price a product so high that no one buys it – a monopolist instead will attempt to price its product to obtain a monopoly profit. But consumers should not be required to pay excessive rates based on market power resulting from a government mandate – and the Commission adopted the RAND requirement to ensure that patent holders charge reasonable rates rather than monopoly rates.

Finally, it is noteworthy that Dolby does not dispute the showing in Petitioner's reply comments, supported by the declaration appended to those comments, that entities claiming to hold patents essential to the ATSC standard are demanding between \$24.10 and \$40.10, depending on the size of the DTV, many times the amount charged for DTV licenses for Japan and Europe. Nor does Dolby dispute Petitioner's showing, echoing Senator Kerry's statement last year, that the Commission is ignorant of the most basic facts concerning the demands made by entities claiming to hold patents essential for the ATSC standard. Public Knowledge, Consumer's Union, Free Press, the Media Access Project, and the New America Foundation filed reply comments urging the Commission to investigate our allegations by requiring disclosure of patents claimed to be essential and the terms under which they are licensed. As the reply comments of those public interest groups conclude (at 5), “[t]he public interest requires

that the scope and cost of any mandatory standards be clear to those who would adhere to them.” Accordingly, the Commission should promptly gather the information necessary for it to ensure that the RAND requirement it adopted is being followed and that consumers are not paying unnecessarily high prices for DTVs. Obtaining answers to the 13 questions listed on pages 7-8 of our reply comments is the logical next step for the Commission to take.

Sincerely,



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