



August 10, 2009

**Ex Parte – Via Electronic Filing**

Ms. Marlene Dortch  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> 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 ex parte letter recently filed in this docket on behalf of Funai Electric Co., Ltd. and Funai Corporation, Inc (“Funai”).<sup>1</sup> The letter effectively concedes that, contrary to Funai’s prior representations, the International Trade Commission (“ITC”) has *not* determined that Funai is offering reasonable and nondiscriminatory (“RAND”) terms to companies seeking to obtain licenses for patents Funai claims are essential to manufacturing digital televisions (“DTVs”) that comply with the mandatory Advanced Television Systems Committee (“ATSC”) standard.

This is an important change, because in its comments Funai had claimed that “[t]he ITC has already ruled on RAND issues with respect to VIZIO and other respondents” and asserted without citation that the ITC “rejected” Vizio’s claim that Funai is not complying with its RAND commitment.<sup>2</sup> That was the centerpiece of Funai’s argument that the Commission should not take steps to protect consumers and manufacturers of DTVs, or even ask parties claiming to hold essential patents about their licensing practices.

CUT FATT replied: “Funai is simply wrong in asserting that the International Trade Commission has determined that its rates are reasonable and nondiscriminatory. It made no such finding.”<sup>3</sup> Indeed, because this was such an important point, CUT FATT made it twice.<sup>4</sup>

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<sup>1</sup> Letter from C. Tritt to M. Dortch, MB Docket No. 09-23 (July 7, 2009) (“*Funai ex parte letter*”).

<sup>2</sup> Comments of Funai Electric Co., Ltd. and Funai Corporation, Inc., MB Docket No. 09-23 (Apr. 27, 2009) at 5 (“*Funai comments*”).

<sup>3</sup> Reply Comments of the Coalition United to Terminate Financial Abuses of the Television Transition, MB Docket No. 09-23 (May 27, 2009) at iii (“*CUT FATT reply comments*”).

<sup>4</sup> CUT FATT reiterated: “Funai is just wrong to assert, without citation, that the Commission should abstain from addressing RAND issues because the ITC ‘has already ruled on’ the issue.” *Id.* at 16-17.

Funai has now abandoned its earlier claims on this critical issue. While Funai correctly notes that the ITC conducted a proceeding involving Vizio and Funai, it no longer claims that the ITC “decide[d] RAND issues” in that proceeding or “rejected” arguments that Funai is failing to abide by its RAND commitments.<sup>5</sup> Funai essentially admits that it was “simply wrong” in alleging that the ITC had ruled on RAND issues, as CUT FATT had demonstrated.

More generally, Funai also is wrong in its suggestion that the ITC is available as a forum for parties who believe that DTV patent holders are not complying with the Commission’s RAND requirements. The current ITC proceeding, for example, is not about RAND compliance. It is about excluding televisions manufactured by Vizio from the United States. Vizio advanced many arguments in response, including an argument that Funai lacked standing to seek exclusion because its commitment to license on RAND terms meant that, at most, it should be entitled to damages calculated as a reasonable fee. But this did not lead to an examination of the issue of RAND compliance. In fact, the ITC did not even address Vizio’s “standing” argument or decide anything else relevant to whether Funai is offering licenses on RAND terms. And the ITC said nothing about whether the 16 other entities not part of that proceeding claiming to hold essential ATSC patents are offering them on RAND terms. While the legal proceedings associated with the ITC proceeding are quite complicated, the key point is that it is not the ITC’s job to rule on RAND issues.

The Commission created the RAND requirement and the Commission should enforce it. To do so, the Commission should begin by learning the facts. Although the Commission conditioned its adoption of the ATSC standard on compliance with RAND requirements,<sup>8</sup> Chairman Martin admitted last year that he did not know what patent holders were demanding.<sup>9</sup> No one other than CUT FATT has provided useful information concerning the rates and terms demanded by patent holders. Although a number of commenters noted that patent pool licenses were available for \$5 and suggested that little more was required, CUT FATT filed a declaration – un rebutted by anyone – showing that patent holders demand \$24.10 to \$40.10 per set, depending on size, much more than the \$3.50 charged for DTV licenses in Europe and Japan.<sup>10</sup> The declaration also showed that patent holders are engaging in a number of unreasonable activities, defended by no commenter, such as requiring manufacturers to purchase patents that have nothing to do with manufacturing DTVs in order to purchase licenses claimed to be essential to compliance with the ATSC standard.<sup>11</sup>

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<sup>5</sup> *Funai ex parte letter* at 5.

<sup>8</sup> Advanced Television Systems, 11 FCC Rcd 17,771, 17,794 (¶¶ 54-55) (1996).

<sup>9</sup> See Questions for the Record from Senator Kerry to the Honorable Kevin Martin at Question 3 (attached as Exhibit 2 to the Petition initiating this proceeding filed Jan. 2, 2009).

<sup>10</sup> See Declaration of Douglas Woo, Exhibit A, attached to *CUT FATT’s reply comments*.

<sup>11</sup> *Id.* at ¶ 11.

Finally, no one has disagreed that the DTV market is competitive. But this does not mean – as Funai and others suggest – that there is no problem here to be solved.<sup>12</sup> Rather it means that a several billion dollar reduction in aggregate patent costs resulting in RAND pricing should flow through to consumers.

In these circumstances, the Commission should require patent holders to answer the questions listed by CUT FATT in its reply comments. A number of public interest groups, including Public Knowledge, Consumers Union, Free Press, the Media Access Project, and the New America Foundation, agree that the Commission should require disclosure of the terms under which patents claimed to be essential to the ATSC standard are licensed. As those groups stated, “[t]he Commission should investigate allegations that existing licenses for patents essential to the DTV standard are unreasonable or discriminatory.”<sup>13</sup>

Sincerely,

/s/

Christopher J. Wright  
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cc: Rick Chessen  
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<sup>12</sup> *Funai comments* at 8-10.

<sup>13</sup> Reply Comments of Public Knowledge, Consumers Union, Free Press, Media Access Project, and New America Foundation, MB Docket No. 09-23 (May 27, 2009) at 1.