



October 14, 2009

**Ex Parte – Via Electronic Filing**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: MB Docket No. 09-23

Dear Ms. Dortch:

At our recent meeting with the Media Bureau, we emphasized the wide disparity between the rates demanded by entities holding patents alleged to be essential for the ATSC standard mandated by the Commission and the rates charged by entities holding patents essential to the DVB standard used in Europe and the ISDB standard used in Japan. As we noted, Douglas Woo, President of Westinghouse Digital Electronics, LLC, submitted a declaration on May 27, 2009, showing that ATSC patent holders were demanding between \$24.10 and \$40.10, depending on the size of the DTV.<sup>1</sup> Licenses for the DVB and ISDB standards, on the other hand, were available for far less – approximately \$3.50, depending on the exchange rates.<sup>2</sup>

In our recent meeting the Bureau asked for more information about this disparity and the DVB and ISDB standards more generally. This letter provides that information. As an initial matter, we note that some ATSC patent holders have asserted that the wide disparity in patent fees result from an alleged superiority of the ATSC standard. However, as we stated in our reply comments (at page 14), those allegations are much too conclusory to justify the patent holders' argument that the Commission should not even gather additional information. The real reason for the wide disparity is that there has been much more active oversight of patent licensing practices in Japan and Europe, either led or encouraged by government entities.

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<sup>1</sup> Mr. Woo's Declaration is attached to the Reply Comments filed on May 27, 2009 in this docket by the Coalition United to Terminate the Financial Abuses of the Television Transition ("CUT FATT"). Several parties have incorrectly suggested in comments to the Commission that manufacturers need only obtain a \$5 MPEG-LA license in the United States. Mr. Woo's declaration – which no party has challenged – demonstrated that this is flatly wrong.

<sup>2</sup> Mitsubishi claims that the ISDB license costs approximately \$2 rather than \$1, which would raise the total for a license to manufacture a DTV set for Japan to \$4.50, still a small fraction of the costs in the United States. Mitsubishi Comments (April 27, 2009) at n.14.

The Japanese government's oversight efforts are detailed in the comments in this docket of Rob Glidden.<sup>3</sup> The ISDB standard was the third standard to be developed, and it had not been adopted outside of Japan in 2000. The Japanese government therefore worked with patent holders to attempt to persuade more countries to adopt the standard, principally targeting countries in South America and Asia – and a key part of the attempt to persuade other countries to adopt the ISDB involved keeping patent rates low. According to Mr. Glidden, holders of patents essential to the ATSC standard may have decided, in contrast to the Japanese approach, that it “simply made more financial sense to ‘price high’ and capture maximum revenues from those deployments that were already locked in to the ATSC standard, writing off the potential of further national adoptions around the world to other standards.”<sup>4</sup> In any event, the fact that entities holding patents essential to the ISDB standard are willing to offer them for a fraction of what ATSC patent holders are demanding strongly suggests that the ATSC demands are unreasonably high.

The European approach is described in detail in a paper by Carter Eltzroth, the Legal Director of the DVB Project.<sup>5</sup> As in the United States, entities holding patents essential to the DVB standard were required to commit to “reasonable and nondiscriminatory” (“RAND”) licensing – called “fair, reasonable and nondiscriminatory” (“FR&ND”) licensing in Europe.<sup>6</sup> Patent holders were encouraged to join patent pools, and independent patent examiners reviewed claims that particular patents were essential to the DVB standard.<sup>7</sup> Members of the pool agreed to arbitrate disputes over whether their rates and terms satisfied the FR&ND standard.<sup>8</sup> Perhaps because the process resulted in low rates and a reasonably comprehensive pool, arbitration has never been invoked.<sup>9</sup> It bears mention that, although patent holders are required to license on FR&ND terms to third parties as well as to members of the pool, only members of the pool are entitled to arbitrate disputes (a fact the DVB Legal Director terms “anomalous”).<sup>10</sup> But perhaps because the process has resulted in transparent licensing terms and a clear promise not to discriminate, as well as low rates, it appears that third parties are satisfied with the results.

The FCC's adoption of the ATSC standard subject to RAND licensing is predicated on its ability to engage in oversight similar to that of Japan and Europe. But the Commission has not gathered the information needed to determine whether patent holders are complying with that condition and therefore has not engaged in oversight. CUT FATT therefore urges the Commission to require patent holders to declare whether they claim to hold essential patents and

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<sup>3</sup> See, e.g., Reply Comments of Rob Glidden (May 27, 2009).

<sup>4</sup> *Id.* at 11.

<sup>5</sup> See “IPR Policy of the DVB Project: Commentary on Article 14 MoU DVB,” available at [http://dvb.org/membership/ipr\\_policy/IPR\\_commentary0712.pdf](http://dvb.org/membership/ipr_policy/IPR_commentary0712.pdf).

<sup>6</sup> *Id.* at 19-22.

<sup>7</sup> *Id.* at 36-37.

<sup>8</sup> *Id.* at 25-29.

<sup>9</sup> *Id.* at 27.

<sup>10</sup> *Id.* at 26.

to provide basic information concerning the rates and terms on which they offer licenses. These steps may lead to the formation of a comprehensive pool offering a license on RAND terms. In addition, like the availability of arbitration in Europe, the possibility of review of compliance with RAND principles by a Commission ALJ may result in the formation of a comprehensive pool offering a license on more reasonable rates and terms, especially after public disclosure of the patent holders' current practices. If the Commission does nothing, patent holders will continue to charge prices much higher than those charged in Europe and Japan and to continue the practices – like tying non-essential to essential licenses and hiding demands by means of confidentiality agreements – that we have alleged to be unreasonable (and no one has defended).

Finally, there is little question that the disparity between rates charged by ATSC patent holders and rates charged for licenses to use the DVB and ISDB standards are a red flag that confirms the need for Commission action. Application of the 15 *Georgia-Pacific* factors for establishing reasonable patent rates often boils down to application of “‘the willing buyer and willing seller’ rule.”<sup>11</sup> When willing buyers and willing sellers agree to dramatically lower rates for a similar product – approximately \$3.50 for licenses for patents essential to the DVB and ISDB standard – that is a sure sign that demands of \$24.10 to \$40.10 are unreasonably high. In comparable situations, decision makers determine appropriate rates under a willing buyer/willing seller standard by identifying a “benchmark” rate and adjusting it.<sup>12</sup> CUT FATT has proposed that any rate that exceeds international comparables by more than 50% ought to be declared presumptively unreasonable. Whether or not the Commission ends up adopting that standard (and whether or not it needs to adopt any standard, which may be avoided by the formation of a comprehensive pool that offers RAND terms), the current situation – where the demands for ATSC licenses exceed international comparables by about 700% – shows the need for prompt inquiry by the Commission.

Sincerely,

/s/

Christopher J. Wright  
*Counsel for CUT FATT*

cc: Bill Lake  
Bob Ratcliffe  
Eloise Gore  
Mary Beth Murphy  
Steven Broeckhart  
Alison Neplokh  
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<sup>11</sup> *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970).

<sup>12</sup> *See, e.g., Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 571 F.3d 69 (D.C. Cir. 2009) (identifying and adjusting a benchmark to establish royalty rates for webcasters to pay record labels for playing songs under 17 U.S.C. § 114(f)(2)(B), which establishes a willing buyer/willing seller standard).