

Thank you for providing this opportunity for us (the general public) to request the Department of Justice to evaluate our concerns regarding theft of American Intellectual Property. Our attempt to bring this matter to your attention has been a three-stage process:

1. February 22, 2010, letter of proclamation about theft of American IPR.
2. Report detailing how DOJ facilitated this theft of American IPR.
3. The mechanism by which this theft of American IPR has been accomplished.

On February 22, 2010, we mailed a letter to 18 office-holders in Washington who, at some time, expressed concern over the theft of American technology by foreign entities. This mailing included Attorney General Holder and Deputy Attorney General David Ogden. As a result of that letter, several suggestions directed our attention to the announcement by the Department of Justice's Office of Management and Budget, that the Office was seeking comments regarding IP enforcement. In response to those suggestions, we prepared and submitted our report entitled "U. S. Department of Justice Facilitated Foreign Theft of American IPR" to March 12, 2010.

Stage three is our submission of a report which details how the mechanism contained in the DOJ approval letter of November 12, 2002 has been abused and implemented so as to achieve the theft about which we have reported. Several prior attempts to bring this to the attention of the Department of Justice have been met with much the same as the SEC responded to alerts on the Maddoff matter. We have been assured this will not continue to be ignored.

If I may point out to you, Charles A. James, Assistant Attorney General, Antitrust Division, is thoroughly familiar with the Department's response of November 12, 2002. If Attorney General James is still at the Department, he may be in a position to save much investigation into and evaluation of this matter.

Thank you,

Kent Greene and Richard Monahan

3G PLATFORM – PATENT LICENSING MECHANISM ABUSE

**By Kent Greene and Richard Monahan
March 19, 2010**

Patent platforms have not been well received in the 3G global mobile wireless industry. Nor were they ever intended.

A primary concern in the early 2000's involved a significantly large number of essential patent declarations for the 3G operating system. It was believed the cumulative royalties could reach as high as 25% for any one of the five 3G radio interface standards. This concern developed in part, as a result of a precedent established during the application of the 3G predecessors, particularly 2G CDMA, wherein U. S. based Qualcomm had been receiving royalty fees estimated to be at levels as high as 6%.

High R&D royalties were particularly problematic for 3G mobile device manufacturers, who would bear the brunt of the embedded cost in each device. Capping 3G cumulative maximum royalties became the preferred industry solution. Non-manufacturers, who only received remuneration for their IPR if accepted for inclusion in manufacturers' mobile devices, were clearly numerically disadvantaged whenever issues were voted upon. The manufacturers clearly had the upper hand in determining policy issues such as those applicable in 3GPP.

Consequently, much more was at stake than simply placing a maximum cap or limitation on 3G royalty fees. Whatever was decided would have ramifications for years, if not decades to come, for companies, particularly to U.S. non-manufacturers, which provided intellectual property rights associated with the operation of the 3G mobile communications systems.

During the early part of the last decade (i.e., early 2000s), the 2G wireless landscapes were rapidly changing, with Japan in the forefront and European manufacturers closing that gap. Neither group was about to surrender to its newly discovered Second Generation 2G manufacturing position to the up and coming challenge being brought on by American mobile communication corporations. Whatever course of action was taken would not only impact manufacturers, infrastructure providers, and operators, but literally entire countries as well.

Containing maximum cumulative 3G IPR royalties required some semblance of structure. The concept of pooling patents into platforms became the wireless industry's solution to effectively implement a maximum cap on royalties except;

there existed one major roadblock to placing such caps. The research and development non-manufacturers were not willing to accept such "manufacturer determined" caps on their technology.

The Japan Fair Trade Commission cleared the original version of the Platform with their letter dated December 14, 2000, and the European Commission's favorable action on a „comfort letter' was believed by industry participants to be forthcoming shortly thereafter. However, the US Justice Department's Antitrust Division began to raise questions, and continued to raise questions for almost two more years after the Japan Fair Trade Commission had issued its letter. This delay by DOJ - even though it had acknowledged the overall pro-competitive benefits of the 3G Patent Platform.

The U.S. DOJ ultimately concurred with the Japan Fair Trade Commission and the European Commission and, on November 11 / 12 2002, approved the formation of **five "independent platform companies"** within the **3rd Generation Partnership Project (3GPP)**, a collaboration between groups of telecommunications associations, to make a globally applicable third generation (3G) mobile phone system specification within the scope of the International Mobile Telecommunications-2000 project of the International Telecommunication Union (ITU). 3GPP specifications are based on evolved Global System for Mobile Communications (GSM) specifications. 3GPP standardization encompasses Radio, Core Network and Service architecture.^[1]

The 3GPP would also address a mechanism to contain maximum cumulative royalties for 3G WCDMA radio interface standards. (A second letter from the U.S. DOJ, also dated November 12, 2002, sent to counsel for the 3G Platform group, detailed the DOJ's intentions set forth in their other November 12, 2002 letter of approval. <http://www.justice.gov/atr/public/busreview/200455.htm>). Regulatory bodies representing three continents concluded pro-competitive benefits of five independent platform companies far outweighed anti-competitive concerns. 3GPP should not be confused with 3rd Generation Partnership Project 2 (3GPP2), which specifies standards for another 3G technology based on IS-95 (CDMA), commonly known as CDMA2000.

The patent platform became the patent licensing mechanism. Japan and Europe got it right. The U.S. is still reeling from the patent licensing mechanism result.

CDMA-2000 (IMT – Multicarrier)
W-CDMA (IMT – Direct Spread)
TD-CDMA (IMT – Time Code)
TDMA-EDGE (IMT – Single Carrier)
DECT (Digital Enhanced Cordless Telecommunications,
IMT – Frequency Time)

The Patent Platform was developed after years of effort by all segments of the mobile telephony industry (equipment makers, system operators and peripherals producers, in parallel to the industry's work in setting the third generation technical standards through the International Telecommunications Union). Learning from the mistakes and history of the second generation of mobile telephony, the 3G Patent Platform is designed to solve some of the tough patent licensing problems presented by multiple companies owning perhaps hundreds of patents essential for implementation of the complicated technologies. Significantly, both the industry and the competition agencies have now agreed on innovative new techniques to reduce patent licensing costs and delays for globally inter-operable mobile telephony complying with the third generation standards.

<http://www.3glicensing.com/articles/03%20-%203G%20%28p12-14%29%20f.pdf>

The U.S. DOJ approval of platform as the patent licensing mechanism to solve complex royalty licensing problems was no different than that which happens when five parts water representing technology contributions of manufacturers, operators, and infrastructure providers are mixed with one part oil representing augmenting technology contributions of R&D non-manufacturers. The two will never coalesce.

The patent platform became the 3GPP launch vehicle by which sustained royalty-free use of U.S. Intellectual Property Rights associated with 3G technologies is now being accomplished, particularly by Finland (Nokia) and Sweden (Ericsson). Well before the DOJ's approval of the five independent 3GPP companies for the corresponding 5 3G radio interface standards, the MENS cabal (Motorola, Ericsson, Nokia, Siemens - later replaced by Samsung) would use the 5% platform-based IPR royalty component as a basis for future capping cumulative 3G licensing royalties of non-manufacturers, namely U.S. based Qualcomm and Interdigital.

Patent pools are potentially an answer to all these issues. Subject to the aforementioned legal constraints, a pool can greatly simplify the licensing process by providing a single point of contact for the essential IPR. They also can potentially solve the royalty stacking coordination problems, when patent holders agree to a price cap that guarantees licensees a fixed price by diluting royalties proportionately for each new IPR claim added to the pool. In exchange, licensors may find the effect protection from their patent strengthened if the pool charges fixed (rather than proportionate) royalties for use of any pool patents that reduce the incentive to invent around or legally challenge any one patent.

*Despite these theoretical advantages of patent pools in standardization, empirical evidences to their benefits remains scarce..... When there is competitive heterogeneity between the firms' product and IPR positions, **it will be difficult for patent pools to attract (or maintain) broad enough participation necessary to make a significant patent***

pool. This is demonstrated by their relative unimportance in the case of UMTS standards.

http://www.dime-eu.org/files/active/1/IPR-WORKING-PAPER-9_BekkersWest.pdf

Royalty caps encompassing patent pools or platforms were only advantageous for cross licensing among global manufacturers, infrastructure providers, and operators unable to develop 3G wireless systems without the additional essential full complement of wireless innovations from U.S. R&D non-manufacturers Qualcomm and Interdigital. Two U.S. non-manufacturers (i.e., Qualcomm and Interdigital) by themselves contributed the third and fourth largest number of patents for all 3G systems covering the five radio interface standards. The Japanese and European regulatory bodies foresaw that by approving the use of platforms as a licensing mechanism to limit maximum cumulative royalties, the ever-increasing essential patent declarations from all providers could be contained at a predetermined maximum level per standard. The platform driven 3G-royalty price capping mechanism would become a bonanza for European and Asian manufacturers, if only American regulatory bodies concurred.

The Asian and European manufacturers ultimately succeeded in receiving the Japan Fair Trade Commission and the European Commission support, both of which persuaded the U.S. DOJ to approve the use of the five patent companies as the platform based mechanism to contain cumulative maximum 3G royalties. DOJ approval was set forth in the November 12, 2002, DOJ letter. This approval of patent platforms as a licensing mechanism by regulatory control agencies of three different countries became a win-win advantage benefiting manufacturers, infrastructure providers, and operators and a disadvantage for the non-manufacturing 3GPP participants (e.g., American corporations Qualcomm and Interdigital), whose technology was absolutely essential for any 3G-system rollout to be successful. **The establishment of anti-trust exempt patent platforms as pro-competitive licensing mechanism set the stage for sustained piracy of 3G U.S. intellectual property rights for years since 2002.**

The 3GPP Association is wholly different from the DOJ approved pro-competitive 3GPP licensing mechanism platform to contain cumulative maximum IPR royalties for participating 3G patent holders. The below linked article NTT DOCOMO Technical Journal Vol. 10 No. 3 entitled “Current Status of Platform WCDMA and its Joint Patent Licensing” provides insight as to the structure of the 3GPP platform:

In February 1998, the Universal Mobile Telecommunication System Intellectual Property Right (UMTS IPR) working group was formed through the voluntary participation of telecommunication equipment manufacturers and operators with the objective of studying solutions to patent issues. In January 1999, the basic concept of a new licensing mechanism differing from the conventional patent pool and known as a “patent platform” was proposed. In

October of the same year, the 3G Patent Platform Partnership (3G3P) was formed. Discussion was focused on specifically how the patent platform should be structurally organized to realize efficient management of the licensing of patents essential to the IMT-2000 specifications. The resulting patent licensing mechanism was revised to meet the requirements of the Japanese, European and the United States antitrust authorities during anti-trust law clearance procedures in these jurisdictions.

*In September 2003, Platform WCDMA Ltd. was established as the first patent platform and the study of detailed license conditions for patents essential to the W-CDMA specifications began. Subsequently, Platform WCDMA took over 3G3P's activities, and in October 2004 began its licensing operations. **As of September 2008, no patent platforms for any of the other IMT-2000 standards have yet been established.***

http://www.3glicensing.com/articles/DOCOMOTechnicalJournal_vol10no3.pdf

As the above cite indicates, the 3G3P Patent Platform Partnership was formed in 1999 by manufacturers and operators (**important to note - NO non-manufacturer members**). Non-manufacturers make no reference to 3G3P involvement. The follow-on November 11/12 2002 US DOJ 3GPP policy was shaped around anti-trust exemptions for **future** independent patent platform licensing mechanisms comprising the five global wireless standards. **Six years later the sum total of all IMT-2000 standards was ONE!**

*The Platform WCDMA organizational structure for patent licensing is shown in **Figure 1**. Platform WCDMA Ltd. was established as a Company Limited by Guarantee* **3** under British law and comprises W-CDMA essential patent holders.*

http://www.3glicensing.com/articles/DOCOMOTechnicalJournal_vol10no3.pdf

The implied approval of regulatory bodies was to allow 3G wireless essential patent holders to form anti-trust exempt platforms to minimize IPR royalties among participants i.e. any standards compliant IMT-2000 independent platform company could legally establish a licensing mechanism containing a maximum cumulative royalty rate.

However, six months earlier, a documented conflict between that which the U.S. DOJ approved and that which the major manufacturing participants were pursuing has been revealed: "With licensing arrangements already in place with several major companies.... Nokia's position and belief is that proposed five percent cumulative royalty level has been well received and supported by most major vendors and operators". From Ericsson's November 6, 2002 press release "Industry leaders NTT DoCoMo, Ericsson, Nokia and Siemens today reached a mutual understanding to introduce licensing arrangements... arrangement would enable the cumulative royalty rate for W-CDMA to be at a modest single digit level".

Advance use of the terms "proposed" and "mutual understanding" in the context of a 5% maximum cumulative royalty cap was wholly consistent with U.S. DOJ's

subsequent approval of anti-trust exemptions for patent platform licensing mechanisms. There was only one problem: **the pro-competitive independent company licensing mechanism platform by and large disappeared but the internationally promoted anti-competitive 5% and modified single-digit WCDMA maximum cumulative royalty caps persisted.**

Nokia, Ericsson, Motorola and others have had every opportunity over the ensuing years to join in pro-competitive cumulative royalty platforms they jointly pioneered as a 3G licensing mechanism.

Anti-competitive diversionary behind the scenes alliances targeting maximum cumulative royalties of U.S. based non-manufacturers Qualcomm and Interdigital have prevailed instead.

Six years after sustained Nokia-driven litigations, Qualcomm reportedly settled its royalty dispute with Nokia for \$2.3 Billion. Eight years after parallel Nokia-driven litigations, Interdigital, has received **zero 3G cumulative royalty remuneration** from Motorola, Ericsson, and Nokia. The U.S. DOJ was notified in a two-part complaint dated March 26, 2006, and April 24, 2006. No acknowledgement for either of these two notices has been received to date.

*One estimated placed the total royalties of UMTS equipment at 20% (PA Consulting, 2002), while the leading GSM vendors paid little or nothing due to cross-licensing (Bekkers, 2001; Loomis, 2005). In response, in May 2002 Nokia sought to cap total WCDMA patent royalties at 5%. **But in the end, Nokia won only support for “reasonable” licenses from DoCoMo and three European manufacturers.** Some other European and Asian manufacturers — as well as some operators — backed the competing 3G Patent Platform Partnership (3G3P). North American participants in WCDMA standardization (Qualcomm, Lucent, Motorola, Nortel, TI) joined neither camp (Tulloch, 2002; Lane, 2003; Salz, 2004).*

*A patent pool might be expected to reduce the transaction costs associated with implementing a standard, as with the successful DVD and MPEG-4 patent pools. **However, patent pools have been shown to fail when the primary motivation is to cap royalties (Bekkers, Iversen and Blind, 2006). In this case, the largest patent holders are outside the 3G3P pool.** Although it might be too early to judge, this particular pool seems have failed to make a significant impact on the market. **Other attempts to reduce royalties have included seeking a change to ETSI IPR policies, and an attempted European Commission complaint against Qualcomm, which hopes to use the ETSI (F)RAND policies to reduce Qualcomm’s UMTS royalty rate.** At this point, it is too soon to judge what the results will be (if any) from these efforts.*

http://www.dime-eu.org/files/active/1/IPR-WORKING-PAPER-9_BekkersWest.pdf

COMPLAINT FILINGS to FOJ and FTC

Multiple complaints were filed by e-mail with the Department of Justice from 2005 and beyond without a response. No reference to the role of patent platforms as a licensing mechanism was cited- largely because none for WCDMA other than the pro-competitive 3G3P is known to exist. No reference was made to multi-standard licensing policy of Interdigital.

Conclusions from original DOJ Complaint dated December 20, 2005

NOKIA is alleged to carrying out a price fixing conspiracy against Interdigital Communications:

** Probable participating in meetings, conversations, and communications in the United States and elsewhere with major competitors to advocate a 5% royalty cap to apply to WCDMA products.*

** Probable agreeing, during those meetings, conversations, and communications to assuming a lead role in enforcing the 5% cap, with full knowledge that Qualcomm alone was receiving about 4%, or 80% of the agreed upon cap for all essential patent holders.*

** Engaging non-manufacturer, Interdigital in a series of eight protracted court actions to contain 2G and 3G IPR royalties within agreed upon IPR maximum cap established by competing licensed and non-licensed manufacturers.*

**Possibly conspiring with competitors to defer licensing with Interdigital until NOKIA resolves its 3G WCDMA MFL royalty rate obligation under existing 1999 Master Licensing Agreement and associated Patent License Agreement*

OVERVIEW

Mobile wireless handset industry is controlled by a MENS cartel, consisting of Motorola, Ericsson, Nokia, and, CDMA-2000, TD-SCDMA, 802.11, 802.16e, and 802.21 wireless standards.

http://www.wipo.int/meetings/en/2006/patent_colloquia/11/pdf/frain_presentation.pdf

UNFAIR COMPETITION

Authority to address cumulative 3G IPR royalty caps on mobile devices by DOJ and EU failed to take into account how the cumulative royalty cap would be implemented. The bottom line is Nokia, the largest essential patent declarant to WCDMA standards bodies, aligned itself with Ericsson, Samsung, and Motorola to gain an extreme unfair IPR royalty price advantage over virtually any competing licensor of intellectual property (IPR). In the case of Interdigital, a US based IPR King of Prussia, PA wireless engineering firm, the MENS cartel has collectively enjoyed a ZERO-based FRAND IPR royalty rate since May 2002. Conversely, about one-third of smaller Interdigital FRAND based global licensees are at a distinct competitive disadvantage competing with zero based FRAND by MENS and certain others.

3G IPR ROYALTY FRAND BASED PRICE FIXING

There is no indication DOJ and EU anti-trust waivers to discuss or implement cumulative 3G royalty caps would allow a MENS cartel to specifically target FRAND demands averaging between 1.0 to 2.0% per device of US based Interdigital, which has filed a separate relief action against Nokia and Samsung with the US International Trade Commission (US ITC). From the offset, the cumulative royalty price fixing scheme proposed by Nokia and Ericsson in November 2002 would involve the full power of national and international courts to literally bankrupt dissenting IPR standards contributors unwilling to accept whatever FRAND IPR royalty rate an aligned cartel would independently levy in one on one deliberations.

EXTREME MONOPOLY POWER

In combination, MENS controls roughly three fourths of global 3G mobile device production, to soon exceed 1 billion devices. Any fractional reduction in 3G IPR royalties the cartel can carve from patent inventors, particularly Interdigital, falls directly to the bottom line as opposed to operators and ultimately subscribers, expressed in billions of devices over the next decade. It is alleged the zero FRAND based MENS monopoly could remain indefinitely intact, as evidenced by a prolonged series of WIPO Referenced “external pending cases” so long as no cartel member broke ranks and licensed under Interdigital’s definition of FRAND as opposed to the cartels.

ESSENCE OF COMPLAINT

The “many against one” aspect of an aligned mobile wireless industry cartel fixing the upper limit of 3G and beyond IPR royalties in the foreseeable future precludes any FRAND dissenting US based inventors from benefiting from patented contributions to global wireless standards. The DOJ and EU have allegedly made a serious error in judgment in approving cumulative 3G IPR royalty caps without having the foresight to realize resulting unfair competition by

an aligned cartel using the courts could ultimately destroy fair competition in the global wireless industry.

2008 FTC Complaint

The FTC Complaint contains a lengthy compilation of equally unanswered correspondence sent to the DOJ. One clear picture emerges:

It was virtually impossible for U.S. non-manufacturers Qualcomm and Interdigital to monetize their vast arsenal of 3G essential patented contributions using a “modified-single digit” overt PLATFORM driven patent licensing mechanism approved by U.S. and foreign regulators.

An overlapped covert scheme spearheaded by Nokia using sustained court litigations to induce Qualcomm and Interdigital to comply with maximum cumulative royalty caps benefiting manufacturers, infrastructure providers, and mobile device subsidizing operators resulted. While Qualcomm settled their dispute with Nokia in 2008, and the EC dropped a corollary anti-trust suit in 2009, Motorola, Ericcson, and Nokia (MEN) have collectively paid zero to Interdigital. Samsung has now licensed with Interdigital for 3G.

Neither agency seems to have discovered that oil rises to the top when mixed with water regardless of how many years one shakes the container