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Shareholders In 3G Mobile Patent Company Seek US Investigation Of Nokia, Ericsson

By Dugie Standeford on 23 April 2010 @ 5:26 pm

[Updated below]

Two shareholders in a Pennsylvania company with patents key to third generation (3G) mobile communications want the US Department of Justice to investigate European mobile phone manufacturers Nokia and Ericsson and others for failing to pay royalties for use of the technology. Antitrust scrutiny is needed to prevent the same thing from happening as the next generation of mobile phones rolls out, Richard Monahan and Kent Greene say.

The men are long-term investors in InterDigital, Inc., which develops wireless technologies used in mobile devices, networks and services, but they do not speak for the company, they said. Since 2005, they have tried to persuade the Justice Department Antitrust Division to revisit its 12 November 2002 "clearance" letter to the 3G Patent Platform for Third Generation Mobile Communications Systems Partnership, Monahan told *Intellectual Property Watch*.

The 3G Patent Platform was created to identify, evaluate and certify patents essential to compliance with one or more of the five distinct 3G standards in the International Mobile Telephony-2000 "family," the 2002 DOJ letter said. It allows patent licensees and licensors to sign standard licence agreements for each 3G patent applicable to a technology, it said. Platform members included 19 wireless system operators and telecommunications equipment manufacturers headquartered in Asia and Europe, but none from North America, the agency said.

After analysing the proposed structure, membership, evaluation and licensing processes of the 3G Patent Platform, the DOJ said that although it posed several potential competitive issues, it was unlikely to harm competition and "could offer some integrative efficiencies for users of the various 3G interface standards." The department said it was "not presently inclined to initiate antitrust enforcement action" against the conduct. The European Commission (EC) also approved the agreement.

The regime allows the companies to share patented technical information for 3G mobile phones and to set a royalty cap on intellectual property technology necessary to operate equipment in the 3G system, Monahan wrote in a 22 February 2010 letter to US President Barack Obama.

On 22 February, Monahan and Greene asked DOJ to take another look at its 2002 letter. The agency notified them on 22 March that the complaint was under review, Monahan said. Antitrust Division guidelines say that if the agency decides to pursue a complaint beyond preliminary review, "you will likely be contacted within one month" of its submission. Monahan requested a status report on 22 April.

[Update: The DoJ notified Monahan and Greene on 30 April that their complaint does not raise antitrust issues warranting further review. The men have also submitted comments to a US Office of Management and Budget consultation on the US Intellectual Property Enforcement Joint Strategic Plan.]

Royalty Caps Said Hurting Competition

In licensing, uninhibited, fair-market, US-based IPR pricing determinations are tied to usual and ordinary research and development costs and cannot compete against primarily fixed, antitrust-exempt, foreign-based IPR pricing determinations tied to global product and infrastructure sales, Monahan wrote. Rather than promoting fair trade in the global wireless industry, the DOJ/EC approval "opened the floodgates for the foreign-based mobile device and infrastructure providers to free ride off the backs of US R&D innovators, namely InterDigital and Qualcomm..." he said.

The key to understanding the alleged antitrust violations is the fact that members of the European Telecommunication Standards Institute (ETSI) formed two separate alliances, Monahan told

Intellectual Property Watch. The first, formed six days before the [corrected]2002 DOJ letter, set a cap of 5 percent. A second alliance created after the letter called for a single-digit cumulative royalty cap.

Together, the amount of royalties for patents going into mobile phones cannot exceed 5 percent per the first alliance agreement, or 9.9 percent as was stated when the DOJ rendered its approval, Monahan said. If, for example, Nokia, Ericsson and others decide to increase their royalties on the basis that the cap is less than 5 percent, InterDigital will be entitled to lower fees than if the cumulative cap is 9.9 percent, he said. Manufacturers want to keep the cost of their phones low at the expense of patent-only providers, he said.

Since 2002, the cumulative 5 percent price cap has enriched foreign interests while the two main cap proponents, Nokia and Ericsson, have collectively paid Interdigital nothing for use of its 3G patents, Monahan wrote. Qualcomm settled with Nokia after protracted litigation, he said. A Nokia spokesman said the company has no comment on the matter. Ericsson did not respond to requests for comment.

Before the 2002 clearance letter issued, major mobile telecommunications manufacturers Motorola, Ericsson, Nokia and Samsung were developing a strategy to compel all 3G patent contributors, including US non-manufacturers such as InterDigital, to sign licensing agreements consistent with the overall 5 percent cumulative cap, Monahan wrote. The cumulative success of the cap was directly affected by the degree of success consenting cap-aligned manufacturers had in reining in US-based non-manufacturers who would have exceeded the 5 percent royalty ceiling if left unchecked, he said. Firms such as Interdigital cannot benefit like major telecommunication manufacturers who "conveniently" cross-licence each other's IPR to prioritize their own contribution and fix the price for their portion of the contribution as they move products to market, he said.

The manufacturers' portion of the cap made the system economically unattractive to non-manufacturers like InterDigital which could only seek licensing royalties because they had no device or infrastructure on which to cross-licence, Monahan said. Lawsuits ensued, which culminated in Nokia and Ericsson remaining unlicensed with InterDigital, he said. But although unlicensed, both mobile phone providers continue to use InterDigital's commercial IPR free of charge, he said. Some of that IPR is essential to the 3G system, he said.

The problem is that as the next generation of mobile telecommunications (4G) rolls out, InterDigital (and Qualcomm) face continuing discrimination, Greene said. Qualcomm is listed as the largest Long Term Evolution essential patent contributor to ETSI, InterDigital the next largest, he said. Mobile operators are already being assured that cumulative 4G royalties can be handled in the same single digit as 3G, sidestepping the 3G Platform protocols that have represented US policy on licensing matters since 2002.

"And then there is China," Greene said. It has its own set of parameters for exporting manufacturers that are based on greatly lowered royalty rates Qualcomm agreed to "in order to get their foot in the door," he said.

Burden of Proof for Review High

Monahan and Greene face a significant hurdle to win DOJ review but it could happen, said Bradley Arant Boult Cummings Partner Michael Denniston, who specialises in antitrust and IP litigation. DOJ agreed not to challenge the cross-licensing and royalty scheme as long as the 3G Platform did what it said it would do, he said. But if Nokia, Ericsson and others are acting outside the scope of its approval, or if possible anti-competitive effects are occurring, the agency could well decide to revisit its decision, he said.

The "big question" is whether the men's concerns are valid, Denniston said. Even if they are, they could be outweighed by the whole concept of patent pooling and cross-licensing, which allows patent holders to turn their inventions into 3G technology, he said.

DOJ could decide that the platform is working well, Denniston said. But if two or more patent-holding manufacturers are agreeing royalty rates, which they are not supposed to do under the 2002 approval, the agency could open a probe into whether negotiations and decisions on licensing and royalty terms are being made unilaterally or by powerful companies acting as a cartel, he said.

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