
The Antitrust Analysis of the 3G Patent Platform

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SUMMARY

In November 2002, almost 2 ½ years after the dissemination of the original plan in June of 1999, the Antitrust Division of the Department of Justice (DOJ) approved in a Business Review Letter, a revised structure to establish a patent platform for Third Generation Mobile System (3G) technology.¹ The complex approach taken in the 3G letter, with five competing technology licensing groups sharing a common "patent platform," may appear at first to diverge from the approach in business review letters issued by the DOJ in the late 1990's approving (or, more precisely, declining to challenge) earlier patent pools. Nevertheless, as explored below, upon closer examination the approach of the DOJ as expressed in the 3G Business Review Letter is largely consistent with prior DOJ thinking. This article explores the unique issues raised by the 3G patent platform and the DOJ approach.

3G promises super-fast data transmission and increases in capacity, a major issue for overburdened wireless networks. There are five 3G radio air interface technologies from which future mobile communication technologies will continue to develop: CDMA-2000, W-CDMA, TD-CDMA, TDMA-EDGE and DECT.² Although the proponents of the technology originally proposed a single patent pool formed to encompass essential patents within a single standard, the intervention of the DOJ compelled the parties to take a less inclusive approach. Under the structure approved by DOJ, each 3G technology is grouped into a larger 'patent platform' (3GPP) and the collective activities of

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the platform are more limited than previously reviewed patent pools. Patent platforms are an innovation that can be pro-competitive but, as is the case with patent pools, can sometimes raise antitrust concerns.

The complexity of the 3GPP necessitated a close coordination between the 3GPP developers and the Japanese, EU and U.S. antitrust authorities. The Japan Fair Trade Commission approved the 3GPP in December 2000, while the U.S. DOJ and the European Commission approved a revised version of the patent platform in November 2002.

I. The Typical Patent Pool Approach

In three business review letters issued in the late 1990's, after the issuance of the Joint FTC/DOJ Antitrust Guidelines on the Licensing of Intellectual Property in 1995, (the MPEG-2, DVD-3 and DVD-6 business review letters), the DOJ weighed the competitive benefits and costs of the proposed patent pools. The following guidelines for structuring patent pools emerged from the MPEG-2 and DVD business review letters:

- include only patents "essential" for standard compliance (no substitutable patents);
- appoint an independent expert to evaluate the essentiality of the patents;
- license the underlying patents on non-discriminatory and non-exclusive terms;
- allow licensors the freedom to develop products outside the pooling agreement;
- establish royalty rates that are not excessive in relation to the price of products produced using the technology; and
- allow licensors to retain the rights to non-essential patents.

Additionally, the MPEG-2 and DVD business review letters flag patent pools' potential for anticompetitive effects through the use of grantback provisions,³ non-objective experts, and inclusion of "necessary" but "non-essential"

patents.⁴ The potential for foreclosure in downstream markets is also a concern the business review letters address. To set the stage for analysis of the 3G Business Review Letter, we now briefly review each of the MPEG-2 and DVD business review letters in relation to these factors gleaned from the collective body of those prior letters.

MPEG-2

In 1997, the DOJ issued a Business Review Letter regarding the MPEG-2 proposed patent pool. The MPEG-2 patent pool framework sought to reduce infringement claims by pooling together the patents essential to compliance with the MPEG-2 compression technology standard.⁵ The framework included all of the pro-competitive elements upon which the DOJ has focused, as outlined above. In analyzing the patent pool, the DOJ examined the effect on rivals, collusion threats and the effect on innovation. It concluded that the patent pool provided significant cost savings; reduced the risk of eliminating rivalry by introducing an independent expert to evaluate essentiality; and did not prevent licensors/ees from developing alternative technologies.⁶

DVD-3

In 1998, the DOJ evaluated a patent pool for the manufacture of Digital Versatile Discs (DVDs) and DVD players. Three manufacturers (Philips Electronics, Sony Corporation, and Pioneer Electronics) desired to pool essential patents in compliance with the DVD-ROM and DVD-video standards for the manufacture of discs and players. While the pool contained most of the pro-competitive features noted above, DOJ expressed in its business review letter several reservations regarding the licensing framework. Unlike the MPEG-2 framework requiring the inclusion of only "technically essential" patents, the DVD-3 framework includes "necessary patents." According to the DOJ, "this latter standard is inherently more susceptible to subjective interpretation."⁷ If the expert liberally interprets "necessary," substitutes may be included thereby leaving open the possibility

of foreclosure of competition between alternative viable technologies.⁸

In addition, the DOJ stated that it had concerns with the expert's ability to apply the essentiality criterion entirely independent of the Licensors, because the Licensors as a group had an economic incentive to combine in the pool their competing DVD-related patents.⁹ However, this concern was adequately addressed by the provisions on expert independence.¹⁰ In the end, the DOJ approved the patent pool, stating that it was "not likely to impede competition, either in the licensing or development of technology ... or in the markets in which DVDs, players and decoders compete."¹¹

DVD-6

In 1999, the DOJ granted approval for a patent pool to manufacture products in compliance with the DVD-ROM and DVD-Video Standards. The DOJ approved the patent pool, finding that it was likely to combine complementary patent rights, which would in turn lower costs to manufacturers of DVD discs, players and decoders. In addition, the DOJ found that the pool would not impede competition since the royalty amount was sufficiently small relative to the cost of manufacture.

The DOJ, however, questioned the process pursuant to which the expert selected patents for inclusion in the pool, and the related factor of the independence of the expert. Much of the DOJ analysis focused on the evaluation of whether a patent was essential. The proponents of the pool proposed that a patent was essential if there was "no realistic alternative," but that definition added a degree of subjectivity to the process.¹² If the expert interprets 'realistic' to mean economically feasible and evaluates patents scrupulously and independently, only complementary patents would be included in the pool. Although the licensors retain and pay the expert, the DOJ noted that it is likely that the expert will remain independent because the expert's determinations are conclusive and non-appealable; the expert can be terminated for malfeasance and nonfeasance; and the expert is

paid hourly regardless of essentiality determination. Another factor that tended to prevent over-inclusion of non-essential patents was that the royalty formula provided an incentive for licensors to encourage the critical review of other licensors' patents. The DOJ approved the patent pool, while cautioning that it could become anti-competitive if "realistic" is interpreted so broadly as to encompass patents for which economically feasible alternatives exist.¹³

II. Background on 3G

Wireless communication technology continues to evolve. First-generation wireless networks used analog technology to transmit voice during the 1970's and 1980's. In the 1990's the second generation (2G)¹⁴ utilized digital technology, which added capacity, increased voice quality and allowed data transmission. From there, improvements dubbed "2.5G" enabled transmission of packets of data facilitating 'always-on' data connections. 3G is expected to increase data transmission speed and capacity.¹⁵

Today's wireless networks reflect significant investments in promoting GSM, TDMA or CDMA technology. According to an industry trade association report, wireless carriers reported over \$34 billion in total cumulative capital investment as of June 2003.¹⁶ With companies leveraged so deeply in one technology they have become path dependent.¹⁷ Moreover, the wireless technologies are mutually incompatible, making it cost prohibitive to switch technologies.

In 1998, the International Telecommunications Union (ITU)¹⁸ and major regional and national standards making bodies began working with the 3G partnership project.¹⁹ The collaboration formulated the International Mobile Telecommunication 2000 (IMT-2000) Systems²⁰ that set forth five 3G Standards (CDMA-2000, W-CDMA, TD-CDMA, TDMA-EDGE, and DECT). The 3G Standards embody a family of five radio interfaces, two core networks,²¹ and a single network interface.²² These five standards promise commonality of design and worldwide

compatibility.²³ Rather than adopting a single standard, five were chosen in order to afford wireless companies the opportunity to continue to capitalize on their prior path dependent investments. While each wireless company will have to make modifications to its systems to accommodate 3G, each can continue to use its existing technologies to transition to 3G.

It soon became clear that an innovative mechanism to reduce patent licensing costs and delays would be necessary in order to make 3G widely available. If 3G patents were licensed on an individually negotiated basis, it was estimated that the number of licenses could exceed 15,000, exceeding existing bilateral agreements.²⁴ The Universal Mobile Telecommunications System (UMTS) Intellectual Property Rights Working Group and the UMTS Intellectual Property Association (UIPA), developed a proposed 3G Patent Platform.²⁵ The 3G Patent Platform Partnership was then formed to develop a legally acceptable structural framework and obtain clearance from the major antitrust authorities. It was comprised of nineteen major wireless system operators and telecommunications equipment manufacturers (Partners),²⁶ four Promoters,²⁷ and two Associate Partners.²⁸

III. 3G Patent Platform and DOJ Evaluation

As originally proposed in 1999, the 3G Patent Platform contemplated establishment of a single NewCo responsible for governance of the entire platform, a Licensing Administrator ("LA") that would perform administrative functions in connection with the licensing program, and a Patent Evaluation Organization that would select an independent Evaluation Panel to assess what patents were essential to the 3G Patent Platform.

The original 3G Patent Platform was announced in June 1999, as a means "to create favourable market conditions ensuring rapid growth of 3G Systems."²⁹ The 3GPP was a "voluntary collective industry arrangement implemented for the cost effective and efficient management and administration of all concerned Essential Patents."³⁰ The partnership formulated a method

to address blocking and infringement concerns,³¹ lower transactional costs associated with individual licensing,³² and reduce uncertainty over licensing availability.³³ The partnership expected that by participating in the regime, licensors would facilitate faster, easier, and more widespread implementation of 3G.

The 3GPP was designed as a patent platform rather than a pool. 3GPP differs in several ways from the patent pools examined above. Typically, patent pools create a single body to oversee the licensing process for technologies essential to one new standard. There are, however, five different standards under 3GPP. Unlike the other patent pools discussed, 3GPP involves over 100 essential patent holders.³⁴ By way of contrast, the number of members in the other patent pools ranged from 3-7 with 27-210 patents. Moreover, the complexity of the 3G systems—multiple technologies, global reach, and widely distributed patent rights—required a new approach to the characteristic package-licensing scheme.³⁵

Since the MPEG-2 letter in 1997, the business review process has been utilized several times to seek DOJ review in advance of implementation of proposed patent pools. The 3GPP felt it was “necessary to obtain approval for the platform from the antitrust and competition Authorities, initially in the United States, Japan and the European Community, without which the 3G Patent Platform [would] not be viable.”³⁶ The Japan Fair Trade Commission was the first to issue its approval for the patent platform, on December 14, 2000.³⁷ The DOJ had concerns regarding the competitive impact of the platform, but finally issued its approval for a significantly revised patent platform in a Business Review Letter dated November 12, 2002.³⁸ The European Commission issued a comfort letter a day earlier, also approving the reformed platform.³⁹

The original 3GPP proposal included a single platform framework in which a central licensing agent would license all five standards. The NewCo would be responsible for the governance of 3GPP. Licensees would be required to

grantback any essential patent to the entire platform regardless of the standard from which the patent derived. Licensees would have two options on how to obtain a license—they may license within the 3GPP framework (Standard or Interim Licensing Agreements) or they may license individually with each licensor. The “Maximum Cumulative Royalty” rates were set originally by the Licensing Administrator at 5% of the net sales of the licensed product. Licensees and licensors could both participate in the process to establish royalty rates. Applications for patent essentiality would be sent to the central licensing agent who would convene an expert panel. A licensee would have the option of licensing patents on an individual basis rather than in a package deal.

As explained by Ky Ewing, US counsel to the 3G Patent Platform Partnership, the DOJ had two main concerns with the initial 3G Patent Platform proposal. The first was that the Platform would restrict competition among the five radio interfaces by restricting royalty rates on patent licenses. The second was that the Platform would “allow for the exercise of monopsony power by licensees to lower royalty rates.”⁴⁰ In response to the DOJ’s concerns, 3GPP revised its original proposal in the following ways:

- Five separate platforms representing each of the five IMT-2000’s standards were created rather than a single platform, with five separate PlatformCos, each working with its own separate Licensing Administrator.
- A Management Company (ManCo), a Common Administrator (CA), and an Evaluation Service Provider (ESP), replaced the former central Licensing Administrator (LA) and the NewCo. These newly designated entities with functions spread across the full 3G Patent Platform retained the original central LA’s administrative tasks and were given additional responsibilities including educating 3rd parties and conducting industry-wide market analysis. The five LA’s retained only licensing related functions. Governance responsibilities were not redesignated.
- Grantbacks were required to be specific by PlatformCo (and not be across

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- PlatformCos); and apply only if parties are under either the Standard or Interim License.
 - Each PlatformCo was allowed to set its own parameters for dispute resolution as opposed to the single platform as originally proposed.
 - The royalty rates formula was revamped. Originally the Maximum Cumulative Royalty (MCR) rates were set at 5%. Under the revised structure, the individual PlatformCo Boards of Directors determine the royalty rate using a new formula and may change it as required so long as it remains under the to be determined MCR.
 - Licensees are no longer involved in setting royalty rates unless they are also licensors of essential patents for that platform. Licensees are no longer eligible to be members of the PlatformCos Board of Directors.
 - Essentiality evaluation procedures were completely changed. Rather than the single LA working with an evaluation policy committee, the CA processes applications and the ESP certifies and convenes expert panels. These experts are currently drawn from nominated attorneys within thirteen approved patent law firms located in France, Germany, UK, Italy, Japan, South Korea, China and the U.S.A..⁴¹ Each essentiality evaluation is taken by a panel comprised of one Lead Evaluator and two Assistant Evaluators.⁴²

The most significant change desired by the DOJ was the splitting of the platform into five separate entities.⁴³ The original proposal stated that a single entity overseeing all five standards would have been more efficient. However, each of the five standards carries with it specific technical requirements, is on different frequencies and is monitored differently by the various governments. There are too many regulations, licenses, patents, and companies for a single entity to effectively manage. One pool would have been such a behemoth that any efficiencies found in a single pool would be overshadowed by bureaucratic weight. And having a single entity would violate the cardinal lesson taught by each of the prior patent pool business review letters: competing technologies may not be pooled, only patents essential to allow use of technology may be pooled. Each

one of these standards is a potential competitor for the other radio interface technologies that can be used in conjunction with the common 3G network-to-network interface.

The 3GPP is now an elaborate 3-tiered framework. The top tier is ManCo/CA/ESP, which oversees the PlatformCos. There are five separate PlatformCo's representing each of the standard technologies and run by a board of directors whose members include only licensors. The third tier consists of the individual licensors who may hold patents across the different standards.

On the first level of the 3-tiered organization are the Management Company (ManCo), a Common Administrator (CA), and an Evaluation Service Provider (ESP). This level acts primarily as a coordinating body for the PlatformCos activities. ManCo members are licensors and interested members of the industry. ManCo's functions include: outsourcing patent evaluation and evaluation service to ESP and CA respectively; educating third parties about 3GPP; and conducting industry-wide market research and analysis.⁴⁴ The CA and ESP retain and coordinate payment for experts to evaluate essentiality of patents for each PlatformCo.⁴⁵ The CA effectively acts as an evaluation administrator providing suggestions for licensing agreement forms; guidance on the usage of essential patent for real products and services; and general 3G information to third parties. PlatformCos activities are coordinated through ManCo, CA and ESP. However, ManCo, CA and ESP are restricted from playing a role in suggesting royalty rates and any other competitively sensitive functions.⁴⁶

On the second level are five separate Platform Companies ("PlatformCos") representing each of the five 3G standards.⁴⁷ Each PlatformCo has its own Licensing Administrator (LA) and a separate and independent board of directors. The LA's functions include: processing licensing applications; publishing the standard royalty rate; maintaining a database of all licenses granted (within or independent of the platform); handling PlatformCo membership and

dispute resolution matters. The LA cannot grant individual licenses; engage in royalty collection or distribution;⁴⁸ or share competitively sensitive licensing or royalty information with other LAs.⁴⁹ Apart from the LAs are the boards of directors made up of licensors holding patents within the respective standard. Each Board determines and sets royalty rates and licensing terms.

On the third level are the individual licensors. As is typical, each 3GPP member must possess at least one essential patent and is required to grantback any 3G related patents to the platform. The platform's recommended Standard or Interim Licensing Agreement reduces licensing costs. Also, licensees may request a platform Standard license and follow the grantback provisions. In contrast to other patent pools, it is the licensor, not the LA, who collects royalties. Licensors may negotiate bilateral licenses outside the platform—relieving them of any grantback requirement—and are free to leave the PlatformCo on one year's notice.⁵⁰

IV. DOJ Business Review Letter

The DOJ approved the pool on November 12, 2002. In reviewing the 3GPP, the DOJ examined whether the platform would integrate only essential patents and whether the competitive benefits outweighed competitive harm. The DOJ approved the patent platform based on the above discussed revisions and assurances that only essential patents would be included in the pool.⁵¹ The letter stated that the specific common activities performed by the 3GPP are “justified by their relationship to an integration of complementary resources and do not significantly restrain competition among intellectual property rights for differing, substitutable 3G technologies.”⁵² The DOJ concluded its letter by stating that “[t]he proposed arrangement is likely to facilitate the availability of complementary patent rights related to each of the five 3G standards, and could lower search and transaction costs for manufacturers and service providers who need access to these patent rights in order to provide 3G products and services.”⁵³

V. Observations about the DOJ Analysis

The DOJ analysis raises several questions. The original approach of a larger more inclusive pool would seem to be consistent with the general efficiency approach of *BMI*⁵⁴ and the more recent patent pool letters. The more restrictive approach adopted by DOJ seems to be based on a vision of competition between the various platforms. Thus, DOJ limited integration as much as possible. One could characterize this as the type of “least restrictive alternative” approach eschewed in more contemporary joint venture analysis.

On the other hand, to the extent that each of the five technologies comprising the 3G Patent Platform is separately viable for certain functions, including backward compatibility to legacy 2G systems and radio interface through different methods in conjunction with 3G systems, and any one of the five can be used in conjunction with the other aspects of the 3G technology, the desire to preserve competition among those five competing technologies is as natural and appropriate as the industry's collective desire to preserve the value of capital invested in these competing technologies. Whereas, weeding out competing technologies was left to the independent experts in MPEG-2, and the DVD pools, the industry's own characterization and definition of the five-headed 3G Patent Platform was highly suggestive of competing technologies coexisting in what was originally proposed as a single pool. Nevertheless, similar to the situation in *BMI* and the prior approved patent pools, some level of coordination was necessary to allow development and licensing of standardized aspects needed for superior products and function.

The 3G platform brought together all the potential licensees of the technology. With respect to concerns about collective licensee (buyer-side) market power and the establishment of maximum cumulative royalty rates, the revised platform facilitated variation in rates among the five platforms and kept licensees without essential patents out of the pricing

process. Such variation, coupled with the ability of licensors to negotiate licenses individually, to withdraw from a Platform, and to limit grantbacks by platform, all moderated concerns, such as they were, about exercise of buyer-side market power.

The concerns that licensees might exercise monopsony (or oligopsony) power, however, seem very speculative. Typically the exercise of buyer power is procompetitive, since it will lead to lower prices and better service. Monopsony can be harmful only in extremely limited circumstances and it is difficult to see how there would be monopsony concerns in the development of a new technology. How the licensees might exercise monopsony power or what the anticompetitive effects might be are unstated.

Finally, the 2 ½ year wait for the business review letter is problematic. In high tech industries prompt antitrust review is a necessity. Delay of even several months can seriously harm the ability of a new technology to be effectively developed. The DOJ has a goal of answering Business Review requests in 90 days and that goal should be a high priority in requests in high technology markets. Presumably, some portion of the delay may have been occasioned by the need of the proponents of the platform to revise the structure, but 2 ½ years is longer than should be necessary to work through such issues.

Ultimately we will have to see how the platform works and whether it is more or less effective than the earlier patent pools approved.

VI. The Future of 3G

Commercial evaluation and certification services for the 3GPP began in January 2003.⁵⁵ Licensing services commence once patents have been certified as essential.⁵⁶ However, commentators dispute the future viability of 3G, especially with the decline in spending in telecom markets.

3G promises to offer higher speeds in high mobility, pedestrian, and indoor traffic; interoperability and roaming capabilities; common billing and user profiles; GPS capabilities; asymmetrical data rates in both directions; multimedia mail; and broadband access up to 2 mbps.⁵⁷ However, some believe that 2.5G is sufficient for current technological needs. 2.5G provides email and services consumers want. Like 3G, 2.5G is “always on” but is limited to a maximum speed of 115Kbps. While 2.5G is not broadband for your phone, the market has yet to demand such capabilities or provide applications that would utilize broadband functions. The evolution of wireless technology has led us to the potential of 3G. Impediments to the full realization of 3G will continue to exist until each country can agree on specific bandwidth and wireless applications and content improves. Market forces are at play and it might take years to realize the potential of 3G or 3G may be leaped over altogether by more powerful and adaptable technologies. Time will tell whether the 3GPP exercise will serve a useful purpose.

Notes- - - -

¹ November 5, 2002 Letter to Ky P. Ewing, Esq. (the "3G Business Review Letter"), available at <http://www.usdoj.gov/atr/public/busreview/200455.htm>

² CDMA-2000 is a trademark of Qualcomm. (CDMA stands for Code Division Multiple Access). WCDMA (Wideband CDMA) is another name for Universal Mobile Telecommunications System or UMTS. It is based on CDMA technology but will allow for migration of GSM (Global System for Mobile Communication) handsets (dual mode GSM and W-CDMA handsets). TD-CDMA (Time Division-CDMA is a hybrid of CDMA and TDMA (Time Division Multiple Access). TDMA-EDGE (Enhanced Data Rates for Global Evolution) is a hybrid of digital AMPS (Advanced Mobile-Phone System) in the U.S. and GSM in Europe. And DECT (Digital Enhanced Cordless Telecommunications) is a European standard for limited-range wireless services such as PBX, telepoint and residential cordless telephony. Each of these standards (other than CDMA-2000) has yet to become fully operational. See Glossary at <http://www.itu.int/osg/spu/ni/3G/technology/SPU%20Mobile%20Glossary%202003.pdf> For background information on this alphabet soup in wireless telecommunications, see the online tutorials posted by the International Engineering Consortium at <http://www.iec.org/online/tutorials/> See also n.14 below.

³ "A grantback is an arrangement under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvements to the licensed technology." Department of Justice-Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property ("IP Guidelines"), § 5.6 (1995).

⁴ "Necessity" has been interpreted by the DOJ as a more subjective standard than "essentiality." DVD-3 Business Review Letter. DOJ, Dec. 16, 1998, p. 9, available at <http://www.usdoj.gov/atr/public/busreview/2121.htm>.

⁵ MPEG -2 Business Review Letter. DOJ, June 26, 1997, p. 1, available at <http://www.usdoj.gov/atr/public/busreview/1170.htm>

⁶ *Id.* at 15.

⁷ DVD-3 Business Review Letter, DOJ, Dec. 16, 1998, p. 9, available at <http://www.usdoj.gov/atr/public/busreview/2121.htm>

⁸ *Id.*

⁹ *Id.* at 10.

¹⁰ *Id.*

¹¹ *Id.* at 13.

¹² DVD-6 Business Review Letter, DOJ, June 10, 1999, p. 10, available at <http://www.usdoj.gov/atr/public/busreview/2485.htm>

¹³ *Id.*

¹⁴ GSM TDMA and CDMA are the 2G standard digital mobile services. TDMA transfers data/voice by allocating time slots in a specified band or channel. CDMA transfers data/voice in packages called spread spectrum, which was invented in part by Hedy Lamar in 1941. GSM is a mix of

TDMA and FDMA (Frequency Division Multiple Access) (transfers data/voice within specific frequency slots or channels in a bandwidth)

¹⁵ 3G: *Don't believe the hype.* Wharton Business School. <http://news.com.com/2009-1033-938522.html>

¹⁶ Celular Telecommunications & Internet Association. Semi-Annual Wireless Industry Survey, available at http://www.wow-com.com/pdf/MidYear_2003_survey.pdf

¹⁷ The car engine can illustrate path dependency. The common engine is gasoline dependent but may change, as electric engine technology becomes more accessible and economical. Innovations on the engine depend on the path first taken-- either gas or electricity. As technology advances hybrids are possible, much like wireless technologies, where dual-use is now possible.

¹⁸ The ITU is an international organization under the United Nations System in which 189 countries participate in coordinating public and private sector global telecom networks and services. See <http://www.itu.int/>

¹⁹ The partnership project was created to develop standards for the third generation wireless systems based upon the evolved GSM core network and radio access technologies they supported. See *Newton's Telecom Dictionary*. CMP Books. New York. 2002.

²⁰ The IMT is the ITU's vision of global wireless access in the 21st century.

²¹ The two networks are ANSI-41 based that evolved from the network infrastructure technology in the United States and the GSM-MAP which is in use with GSM systems found outside the United States.

²² "3G Patent Platform for Third Generation Mobile Communications Systems: Definition, function, structure, operation, governance." UMTS IP Association and 3G Patent Platform Partnership doc. 02/03. Version 7.2. May 28, 2002 ("May 28, 2002 3G Patent Platform"), p. 13, available at <http://www.3gpatents.com/3g3p/9977qwebsite.pdf>.

²³ "Third Generation Wireless: 3G Information." FCC. <http://www.fcc.gov/3G/#sec2>. For example, global wireless compatibility would allow individuals to travel without having to change handsets.

²⁴ Ky P Ewing, Jr. "EC and DoJ approval of the 3G Patent Platform." *Global Competition Review*, Vol. 6, Issue 2, February 2003 ("Ewing"), p. 12, available at [http://www.3gpatents.com/news/03%20-%203G%20\(p12-14\)%20f.pdf](http://www.3gpatents.com/news/03%20-%203G%20(p12-14)%20f.pdf)

²⁵ *Id.* at 13.

²⁶ The Partners are Alcatel, Bosch, ETRI, Fujitsu, LG Electronics, NEC, Matsushita, Mitsubishi Electric, Siemens, Samsung, Sony, Cegetel, France Telecom, KPN, Korea Telecom, NTT DoCoMo, Telecom Italia Mobile, SK Telecom, and Sonera.

²⁷ The Promoters are Huawei Technologies, Kyocera, Sharp, and Telit Mobile Terminals.

²⁸ The Associate Partners are the GSM Association and ETNO.

²⁹ “3G Patent Platform for Third Generation Mobile Communications Systems: Definition, function, structure, operation, governance.” UMTS Intellectual Property Association. Version 5.0. June 30, 1999 (“June 30, 1999 3G Patent Platform”), p. 12.

³⁰ *Id.*

³¹ Letter to Honorable Charles A. James, Assistant Attorney General, US DOJ. July 12, 2001. p. 10.

³² 3G Business Review Letter, supra n.1, p. 8.

³³ June 30, 1999 3G Patent Platform, supra n.29, p. 13.

³⁴ May 28, 2002 3G Patent Platform, supra n.22, p. 3.

³⁵ *Id.*

³⁶ June 30, 1999 3G Patent Platform, supra n.29, p. 4.

³⁷ An English Translation of the FTC’s “Views on the Consultation” is available at <http://www.3gpatents.com/news/2000158e.pdf>

³⁸ See Ewing, supra n.24, p. 14.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ These firms are Cabinet Grynwald (France), Cabinet Schmit et Associés (France), Eisenfuhr, Speiser & Partner (Germany), FJ Cleveland (UK), Gottlieb, Rackman & Reisman (USA), Botti & Ferrari (Italy), Shinsung International Patent & Law Firm (Korea), Connolly, Bove, Lodge & Hutz (USA), Nihei & Associates (Japan), Sanada Patent Firm (Japan), Kisaragi Associates (Japan), Unitalen (China), and Bae, Kim & Lee (Korea). Peter Berg, “Evaluation and Certification Processes and Modus Operandi”, Presentation at Seminar on the 3G Patent Platform. March 13, 2003. Beijing, China. Available at <http://www.3gpatents.com/news/2003041c.ppt>.

⁴² *Id.*

⁴³ See DOJ Press Release, Nov. 12, 2002. (“These modifications principally involved the separation of the original proposal’s single patent platform into five largely independent platforms, one for each competing 3G wireless technology.”)

⁴⁴ 3G Business Review Letter, supra n.1, p. 5.

⁴⁵ *Id.* After the first year, PlatformCos may opt out of the ESP process by adopting comparable measures to assure continued independence of the evaluation process.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 5. The PlatformCos are organized as Companies registered in England and Wales with member liability limited to one pound sterling. Makoto Kijima, “Platform Company (technology-specified): a licensor-governed company”, Presentation at Seminar on the 3G Patent Platform. March 13, 2003. Beijing, China. Available at <http://www.3gpatents.com/news/2003041c.ppt>.

⁴⁸ 3G Business Review Letter, supra n.1, p. 5.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 6.

⁵¹ Four specific arrangements provide such reassurances: 1) “the limitation of patents to those ‘technically’ essential to compliance, 2) the provisions for review of essentiality by competent experts without conflicts of interest and payment of the costs of evaluation through fees assessed on applicants, 3) retention of the experts by the ESP rather

than directly by licensors, and 4) the financial incentives of licensors to object to the inclusion of others’ non-essential patents that could lower per-patent compensation under the royalty formula....” 3G Business Review Letter, supra n.1, p. 10.

⁵² *Id.* at 11.

⁵³ *Id.* at 13.

⁵⁴ In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the Supreme Court recognized that blanket licenses at fixed prices were not anticompetitive, because the arrangement was necessary to in order to make a new product – the blanket licenses – available. Compare 3G Business Review Letter, supra n.1, p. 3 (due to the large number of firms claiming to have patents essential to compliance with one or more 3g radio interface standards, operators of 3G wireless systems and manufacturers of 3G equipment “will need to acquire licenses from multiple patent holders, and for some standards may need licenses for a large number of patents”).

⁵⁵ “Background History of the 3G Patent Platform”. <http://www.3gpatents.com/history/history.htm>

⁵⁶ Brian Kearsey, “Accessing the Platform services and other 3G IPR related services”, Presentation at Seminar on the 3G Patent Platform. March 13, 2003. Beijing, China. Available at <http://www.3gpatents.com/news/2003041c.ppt>.

⁵⁷ “3G Information” Federal Communications Commission. <http://www.fcc.gov/3G/#sec2>

