

Case No. 20-11032

United States Court of Appeals
for the
Fifth Circuit

CONTINENTAL AUTOMOTIVE SYSTEMS, INCORPORATED,
a Delaware corporation,

Plaintiff-Appellant,

v.

AVANCI, L.L.C., a Delaware corporation; AVANCI PLATFORM
INTERNATIONAL LIMITED, an Irish company; NOKIA CORPORATION,
a Finnish corporation; NOKIA OF AMERICA CORPORATION, a Delaware
corporation; NOKIA SOLUTIONS AND NETWORKS U.S., L.L.C.,
a Delaware corporation; NOKIA SOLUTIONS AND NETWORKS OY, a
Finnish corporation; NOKIA TECHNOLOGIES OY, a Finnish corporation;
CONVERSANT WIRELESS LICENSING SARL, a Luxembourg
corporation; OPTIS UP HOLDINGS, L.L.C., a Delaware corporation;
OPTIS CELLULAR TECHNOLOGY, L.L.C., a Delaware corporation;
OPTIS WIRELESS TECHNOLOGY, L.L.C., a Delaware Corporation;
SHARP CORPORATION, a Japanese corporation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, NO. 3:19-CV-02933,
HONORABLE BARBARA M. G. LYNN, CHIEF JUDGE

BRIEF OF MPEG LA, L.L.C. AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Continental Automotive Sys., Inc. v. Avanci L.L.C., et al.
Case No. 20-11032

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those disclosed in the parties' statements of interested persons, have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF AUTHORITIES

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Letter from Joel I. Klein, Asst. Atty. Gen., U.S. Dep't of Justice to Gerrard R. Beeney, Sullivan & Cromwell (June 26, 1997), https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent	5

Pursuant to Federal Rule of Appellate Procedure 29, *Amicus Curiae* MPEG LA, L.L.C. (“MPEG LA”) submits this brief in support of Defendants-Appellees and affirmance. All parties have consented to the filing of this brief.¹

INTEREST OF AMICUS CURIAE

MPEG LA is the world’s leading packager and provider of one-stop patent pool licenses for standards and other technology platforms. Starting in the 1990s, it pioneered the modern-day patent pool with the introduction of the MPEG-2 patent pool license vetted by the Antitrust Division of the U.S. Department of Justice. Since then, MPEG LA has operated licensing programs for a variety of technologies encompassing more than 24,000 patents in 94 countries with some 260 patent holders and more than 7,200 licensees. MPEG LA currently administers over a dozen patent pool programs, with other pools for groundbreaking technologies in development.

The licensing model pioneered and employed by MPEG LA for nearly a quarter-century has features similar to the licensing pool offered by Defendants-Appellees Avanci L.L.C. and Avanci Platform International Limited (“Avanci”). As a convenience to the market, both allow users to acquire essential patent rights from

¹ No party or party’s counsel authored this brief in whole or in part, and no party, its counsel, nor any person or entity other than *Amicus Curiae* contributed money that was intended to fund preparing or submitting this brief.

multiple patent holders in a single transaction *as an alternative to negotiating separate licenses with individual patent owners*. And both license at the end product level as opposed to other levels in the supply chain. To the extent a potential licensee desires a license at another level in the supply chain, it is free to negotiate separate licenses directly with individual patent owners without interfering with the structure and efficiencies of the pool.

MPEG LA's licensing model has provided access, freedom to operate, incentive, predictability, reduced litigation risk and innovation around the market's technology choices, helping to produce some of the most widely employed standards in consumer electronics history such as the MPEG-2 and AVC/H.264 digital video compression standards. One or both of these standards are commonplace in televisions, set-top boxes, personal computers, tablets, mobile phones, DVD and Blu-ray Disc players, game machines, media players, digital cameras, and other everyday products. In addition to bringing ubiquity to the digital media age with the development of a commercially competitive, interoperable ecosystem, they have accounted for trillions of dollars in product and content sales, to say nothing of creating whole new industries and countless jobs. MPEG LA's interest is in the continued ability to structure pool licenses, including selecting a single point in the supply chain to issue licenses, to achieve market efficiencies and successes.

SUMMARY OF ARGUMENT

The modern-day patent pool as pioneered by MPEG LA provides a standardized, convenient, one-stop, non-exclusive alternative to negotiating separate licenses with individual patent holders. When allowed to proceed efficiently with licensing at a single point in the supply chain, patent pools have proved to be successful market-driven alternatives to negotiating licenses with individual patent holders and to foster widespread adoption of new technology and technological innovation. This has been MPEG LA's experience for the last 25 years as exemplified by its MPEG-2 and AVC/H.264 patent pools.

Others who may desire patent rights are free to negotiate separate licenses with the individual patent holders. Though they may lose the efficiencies of a pool license, those efficiencies would not exist for the benefit of others if pools were required to license everyone at all levels of the supply chain. Among other things, required licensing at all levels would increase administration costs, cause confusion in the market, encourage avoidance of responsibility for royalties, generate a multitude of otherwise unnecessary litigation, and threaten the viability of patent pools to deliver their benefits to the market at large.

In any case, patent pool licenses are offered in the discretion of pool licensing administrators under authority given by patent owners. While there is nothing that requires a pool licensing administrator to offer pool licenses, as an alternative to

negotiating separate licenses with individual patent holders, the business judgment of whether and where in the supply chain they will be offered must be in the discretion of the pool licensing administrator on whom the business risk for their viability falls, not potential licensees.

ARGUMENT

POINT I

LICENSING AT THE END PRODUCT LEVEL IS INTEGRAL TO THE STRUCTURE OF MODERN-DAY PATENT POOLS AND THE MARKET BENEFITS THEY PROVIDE

MPEG LA's experience demonstrates that the freedom to select a single point in the supply chain to license, *e.g.*, at the end product level, is an integral part of a successful patent pool program and the market benefits it provides.

A. MPEG LA and the Development of the Modern-Day Patent Pool

MPEG LA formed in 1996 to provide a one-stop shop for patents essential to implementation of the MPEG-2 video compression standard. The Moving Picture Experts Group, an ISO/IEC JTC-1 set of working groups, in 1995 promulgated the MPEG-2 standard for the coding of moving pictures and associated audio information for use in broadcast-quality television and other applications across a variety of digital implementations. The single biggest challenge to adoption of the standard was access to the many essential patents underlying the MPEG-2 standard owned by many patent holders. It was costly and inefficient for users to negotiate

the number of licenses required to practice the standard, which would otherwise have threatened the technology's adoption, interoperability, and use. As a convenient alternative in response to the market's need for transactional efficiency, MPEG LA developed its "many-to-many" pool licensing model and sought review by the Antitrust Division of the U.S. Department of Justice ("DOJ").

The DOJ concluded that MPEG LA's licensing model has "features designed to enhance the usual procompetitive effects and mitigate potential anticompetitive dangers" and is "likely to provide significant cost savings to Licensors and licensees alike, substantially reducing the time and expense that would otherwise be required to disseminate the rights to each MPEG-2 Essential Patent to each would-be licensee." Letter from Joel I. Klein, Asst. Atty. Gen., U.S. Dep't of Justice to Gerrard R. Beeney, Sullivan & Cromwell (June 26, 1997), <https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent>. Following the DOJ's Business Review Letter, MPEG LA began offering a patent pool license for the MPEG-2 standard enabling "many" users to acquire essential patents from "many" patent holders in a single transaction as an alternative to negotiating separate licenses.

MPEG LA later expanded its business to offer other patent pools, including the AVC/H.264 patent pool. The AVC/H.264 (MPEG-4 Part 10) standard was created in 2003 by the Moving Picture Experts Group and the ITU-T Video Coding

Experts Group as a technically superior video compression standard over previous standards like MPEG-2 with its ability to be implemented with the same or greater quality and greater bandwidth efficiency including the enablement of mobile and other video streaming applications. Today, MPEG LA administers over a dozen patent pools for various technology standards with others in development. Its licensing programs have encompassed more than 24,000 patents in 94 countries owned by some 260 patent holders and licensed to more than 7,200 licensees. Each patent pool is independent and distinct, involving a collection of standard essential patents (“SEPs”) owned and licensed to MPEG LA on a non-exclusive basis by diverse patent holders in order for MPEG LA to offer a one-stop pool license to individual licensees. The licensing model pioneered and employed by MPEG LA has become the template for the modern-day patent pool.

B. Structure of the Modern-Day Patent Pool

Patent pools generate efficiencies and procompetitive benefits by aggregating complementary intellectual property rights with decreased transaction time and costs. To create a patent pool, SEP holders must voluntarily come to a series of common agreements that grant the licensing administrator a worldwide, non-exclusive license under their SEPs enabling the administrator to grant worldwide, non-exclusive sublicenses to the pool of patents (collectively and not individually) on a nondiscriminatory basis under terms of a standard patent portfolio license.

The administrator offers the portfolio sublicense for a user's convenience in acquiring patent rights necessary to the standard in a single transaction as an alternative to negotiating separate license agreements with individual SEP holders. Key structural features contributing to the efficiencies and procompetitive benefits of a pool include: (i) having a set and readily identifiable license point in the supply chain at the end product level, which avoids confusion as to royalty reporting and payment responsibility, (ii) a standardized license offered on a non-discriminatory basis, (iii) uniform royalty rates applicable to all licensees, including those who are licensors, who use one or more of the pooled patents, (iv) transparency as to the pooled patents and licensing terms, (v) self-reporting of royalties with independent audit rights, and (vi) worldwide licensing.

Efficiently structured patent pools can contribute to the success and widespread adoption of new standards as shown by the MPEG-2 and AVC/H.264 pools discussed below. It is one thing to develop a technology standard, but it is another to get it adopted in the marketplace. One hurdle to market adoption is uncertainty regarding royalty rates, patent holders and SEP licensing terms. A patent pool (1) allows end product suppliers to efficiently access the technology in a single pool license, and (2) removes uncertainty concerning the SEP licensing terms. A user is free to negotiate separate licenses directly with individual SEP holders under any or all of the pooled SEPs, however. Thus, a user who is not eligible for a pool

license because it operates at a different point in the supply chain may still obtain the intellectual property rights necessary to practice the standard outside the pool structure if it wishes to, but with the pool license offered at the end product level, it may not need to because the pool license clears the supply chain upstream from the end product of infringement liability.

C. Success of the MPEG-2 and AVC/H.264 Patent Pools and Resulting Widespread Adoption and Innovation of the Underlying Technologies

The MPEG-2 and AVC/H.264 patent pools, both of which license at the end product level, are prime examples of successful patent pools. *See* Jonathan M. Barnett, *From Patent Thickets to Patent Networks: The Legal Infrastructure of the Digital Economy*, 55 *Jurimetrics J.* 1, 2 (2014) (hereinafter *Patent Thickets to Patent Networks*) (describing the MPEG-2 patent pool as “one of the oldest and most successful patent pools currently in operation”). This success, in turn, has allowed the underlying standards to become ubiquitous. *Id.* at 32-44 (describing how MPEG LA’s patent pools have succeeded in commoditizing the technology covered by their pools’ patents and relevant standards).

MPEG LA’s introduction of the MPEG-2 patent pool helped produce the most widely employed standard in consumer electronics history. The MPEG-2 patent pool started in 1997 with 8 patent owners and 102 patents. By 2020 the program had 28 patent owners and 1,083 patents in 57 countries. *See* MPEG LA, MPEG-2 ATTACHMENT 1 (April 1, 2021), <https://www.mpegla.com/wp-content/uploads/m2->

att1.pdf (last visited April 23, 2021). There have been over 2,000 licensees under the program. It is estimated that more than 12 billion devices and 75 billion video discs incorporated the MPEG-2 standard.

By making MPEG-2 video widely available, the MPEG-2 pool enabled an explosion of innovative new products for delivering digital video to consumers, including digital televisions, DVD and Blu-ray Disc players, personal computers, set-top boxes, game machines, and cameras. The vast majority of such products are licensed through MPEG LA's MPEG-2 patent pool. *Patent Thickets to Patent Networks*, at 3 (“Without knowing it, any consumer who uses a DVD player or Blu-ray player, watches high definition television, or views an audio or video file on the internet likely has been using a technology that is covered by the MPEG-2 pool.”).

AVC/H.264 (MPEG-4 Part 10) is also a digital video compression standard. The AVC/H.264 patent pool started in 2004 with 14 patent owners and 20 patents. By 2020 the program had 39 patent owners and 6,679 patents in 63 countries. *See* MPEG LA, AVC ATTACHMENT 1 (April 1, 2021), <https://www.mpegla.com/wp-content/uploads/avc-att1.pdf> (last visited April 23, 2021). The number of licensees increased yearly through 2019. It has had over 2,000 licensees. The standard is used in set-top boxes, media player and other personal computer software, mobile devices including telephones and mobile television receivers, Blu-ray Disc players and recorders, Blu-ray video optical discs, game machines, personal media player

devices, still and video cameras, video streaming services, and other products. MPEG LA estimates that approximately 90% of worldwide products incorporating the AVC/H.264 standard are licensed under its pool.

POINT II

REQUIRING PATENT POOLS TO LICENSE ALL LEVELS OF THE SUPPLY CHAIN WOULD THREATEN THE VIABILITY OF PATENT POOLS TO BENEFIT THE MARKET

The private market initiative and efficiency of the modern-day patent pool would be undermined if patent pools were compelled to license at all levels of the supply chain as sought by Plaintiff-Appellant Continental Automotive Systems, Inc. (“Continental”). Not only does Continental seek a standard pool license at a different level of the supply chain, it also seeks a customized pool license at a lower royalty rate. (ROA. 1754:8-1755:24.) If pools were compelled to issue licenses at all levels of the supply chain, it would lead to increased litigation and delays in licensing, to say nothing of the endless litigation that would ensue over whether patent rights are exhausted when licensing occurs at points upstream from the end product.

More fundamentally, customized licensing is contrary to the basic structure and purpose of a modern-day patent pool. The savings in transaction time and costs that come with a standardized license would be lost, with commensurate decreases in consumer welfare due to higher costs. Neither SEP holders nor users would have incentive to participate in a patent pool if there were no efficiencies. Further, if SEP

holders who make their SEPs available for separate licensing outside of a pool still face the possibility of protracted antitrust litigation for participation in the pool, SEP holders would be discouraged from participating in patent pools.

In addition, compelling patent pools to license at all levels of a supply chain represents a radical departure from all past practice and precedent that would create inefficiencies even if all licensees were required to pay the same standard rate. Some users would refuse to take a license claiming that others in the supply chain have or should have taken a license instead. Those that do take a license would seek to avoid their royalty obligations by similarly claiming that others in the supply chain have or should have paid the royalties. Licensee reporting of royalties would become unreliable as licensees try to parcel out their royalty obligations from those of others in their supply chain and determine which patents have yet to be licensed.

Licensing administrators, too, would face similar difficulties. They would require burdensome reporting information from licensees, such as the source and subsequent purchasers of each unit. On top of that, licensing administrators would not be able to cross-check reported sales against industry figures because that information is not available at all levels of the supply chain. As a result, royalty audits, along with the time and cost they bring for all concerned, would become more frequent and take longer to complete.

In sum, compelling patent pools to issue pool licenses to all levels of the supply chain through the threat of antitrust litigation would undermine the viability of procompetitive patent pools. It would result in increased litigation, increased transaction time and costs, increased administration costs, and decreased accuracy in royalty reporting. Ultimately, the cost of these decreased efficiencies would be passed onto consumers. It would likely also result in insufficient compensation to inventors for their research and development efforts and disincentivize their future efforts.

If patent pools become inefficient and unreliable, licensors will cease to participate in them, the interoperability of the standards they enable will be lost, and the competitive market benefits including convenience for licensees and savings to consumers that they provide will disappear. Licensing administrators, which bear the business risk in the event of failure, have the most incentive to ensure that the pools they design in their discretion license at the most efficient point in the supply chain and are otherwise structured to deliver the most value to participants. Individual licensees should not be permitted to interfere with these competitive market forces and a business' freedom to make these decisions.

CONCLUSION

For the foregoing reasons, patent pool administrators should not be compelled to license all levels of the supply chain and the district court's order should be affirmed.

Dated: April 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2021, I electronically filed the foregoing Brief of MPEG LA, L.L.C. as *Amicus Curiae* in Support of Defendants-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I certify that all interested parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: April 26, 2021

/s/ John D. Holden
John D. Holden

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,754 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft® Word 2016 and 14-point Times New Roman font.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

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