Tuesday, March 26, 2008

Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington, D.C. 20580

Re: Petition Regarding Patent Holdup in Digital Television Marketplace

600 Pen-55 2600 Pen-55 2j 882

REQUEST FOR INVESTIGATION

OF REMBRANDT, INC. FOR ANTICOMPETITIVE

CONDUCT THAT THREATENS DIGITAL TELEVISION CONVERSION

American Antitrust Institute
Petition to the Federal Trade Commission

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[3] As described herein, there is ongoing intellectual property litigation between Rembrandt and other firms about whether certain products infringe the '627. Some of the defendants in those cases have taken the position that the technology is not essential to the ATSC standard and that although they are practicing the standard, they are not infringing the '627. (The determination in court of whether the patent is infringed and/or essential will likely require several years of litigation and many millions of dollars in defense fees and costs.) Rembrandt asserts that the technology is essential to the ATSC standard and, as explained in further detail below, that assertion should provide a basis for an investigation.

[4] , FCC Dkt. No. 87-268, Fourth Report and Order (Dec. 24, 1996) ("FCC Fourth Report and Order") (http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96493.txt).

[5] FTC File No. 051-0094, Agreement Containing Consent Order (Nov. 9, 2007), Statement of the Commission (Jan. 23, 2008), and Proposed Complaint.

Unocal

II. FACTS

The Conduct at Issue

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(3) FCC proceeding and adoption of the ATSC standard:

adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents.

The three trajectories have now converged.

- ***Infringement Litigation.***

inter alia

Letters to Broadcast Networks.

[15] Fourth Report and Order at ¶ 54-55 (emphasis added). Central to the FCC proceeding concluding in the government's mandating the ATSC standard were questions over the need for and wisdom of a federally mandated rather than entirely market-driven standard for digital television transmission. The FCC received a wide range of comments from broadcasters, equipment manufacturers, consumer groups, and cable and computer interests, about "whether and how to adopt technical standards for digital broadcast and the proper role of government in the standard setting process." Fourth Report and Order at ¶ 8. There was widespread agreement among these diverse interests that DTV is particularly characterized by network effects, i.e., the increased benefits that accrue to other DTV users when any particular user adopts DTV. There was some disagreement, however, especially from cable and computer interests, over the severity of potential problems rel(w)8.4(oe" bc6l over)0.1(up" (i.e., everl overyo)-7.3(ne)-7.5(w)]TJ24.5113 0 TD[(ould be bett)-7.4(e)0.3(r off adop)-7.3(w)8.4D
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[16] , MDL 1848 (D. Del.).

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- ***Litigation with Harris.***

[n]one of AT&T's or AT&T IPM's actions with regard to the ATSC standard or ATSC patent policy created a contractual right or other right, directly or as third party beneficiaries, between AT&T and Harris or Harris' customers to license the '627 patent

III. LEGAL ANALYSIS

A. Overview of Rembrandt's Patent Hold-Up.

17 Identical letters dated February 15, 2007 from John Garland, Rembrandt, to ABC, CBS, NBC and Fox.
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19

B. Rembrandt Succeeded to AT&T's RAND Commitment.

In re Negotiated Data Solutions ("N-Data").

C. Rembrandt's Conduct Constitutes Monopolization And Attempted Monopolization under Section 2 of the Sherman Act And Unfair Competition Under Section 5 of the FTC Act.

1. Monopolization

[31] fn. 27, .

[32] , 2006 FTC LEXIS 60 at *58 n.125 (citing, , , 333 U.S. 683, 694-95 (1948)).

[33] 15 U.S.C. § 2. The Commission's authority under Section 5 of the FTC Act reaches conduct that violates the Sherman Act.

[34] , LLP, 540 U.S. 398, 407 (2004).

[35]

(a) Rembrandt's Clear Bad Faith Repudiation and Breach of the RAND Commitment Constitutes Exclusionary Conduct Under Section 2.

Rambus Unocal[38] *Qualcomm.*[39] *qua*

(i) Rembrandt has repudiated and breached the RAND commitment.

Rembrandt has unequivocally repudiated the RAND commitment.

Rembrandt's position is inconsistent with the FCC policy.

to other

[38] , No. 9305, 2005 FTC LEXIS 116 (F.T.C. July 27, 2005) (" ") (consent order) (resolving allegations under Section 5 that Unocal made deceptive and bad faith misrepresentations to a state standards-determining board concerning the status of Unocal's patent rights; that the board relied on these misrepresentations in promulgating new standards for low-emissions gasoline; that Unocal's misrepresentations led directly to its acquisition of monopoly power and harmed competition after refiners became locked in to regulations requiring the use of Unocal's propr

manufacturing companies

Special concerns of the conduct of NPEs.

Allied Tube

[64] Herbert Hovenkamp et al., , v. II, § 35.5(6) at 35-48 (2008 Supp.).

[65] William Blumenthal (General Counsel, FTC), "Some Discussion Questions on Standard Setting and Technology Pools," ABA Antitrust Section Fall Forum (Nov. 15, 2007) (questioning whether there should be heightened scrutiny when the successor owner of technology included in a standard is an NPE, and citing as possible reasons for heightened scrutiny the fact that (i) NPEs frequently do not participate in SSOs and so are not concerned about their reputations within SSOs and (ii) NPEs do not need to obtain patent licenses from others and so are not subject to retaliation for bad conduct. , Statement of the Commission (Jan. 23, 2008) (regarding allegations of patent hold-up in proposed consent agreement with NPE N-Data, majority Statement that "if N-Data's conduct became the accepted way of doing business, even the most diligent standar

(b) Rembrandt Willfully Acquired and Maintained Monopoly Power <u>By Repudiating and Breaching the RAND Commitment.</u>

assertions

power

but for

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[66] In this sense, it may be said that the prior owners of the '627, in giving and/or abiding by the RAND commitment, 'negotiated away' the monopoly power they otherwise would have derived from the asserted inclusion of their intellectual property in the standard.

[67] The RAND commitment follows the patent. fn. 42, supra. Accordingly, Rembrandt must be viewed legally as stepping into the shoes of AT&T, as if Rembrandt had made the commitment itself.

[68] Rembrandt was able to accede to a monopoly position as a result of a commitment that the ATSC members expected to be fulfilled: but for AT&T's commitment and the reasonable expectation that it would be fulfilled, the ATSC members would not even have considered the technology that Rembrandt now asserts is essential to the standard for inclusion in that standard.

[69] To the extent any small gaps may be found in this chain of causation, although we submit that there are none, it should be noted that exclusionary conduct need not be the exclusive cause of a monopoly position found to result from monopolization. Areeda and Hovenkamp explain why in these circumstances Section 2 monopolization should nonetheless apply: "because monopoly will almost certainly be grounded in part on factors other than a particular exclusionary act, no government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from an exclusionary act to the presence of monopoly. And so it is sometimes said that doubts should be resolved against the person whose behavior created the problem." Areeda and Hovenkamp,

2.

N-Data

N-Data

[74] Section 5 prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

[75] , FTC File No. 051-0094, Agreement Containing Consent Order (Nov. 9, 2007), Statement of the Commission (Jan. 23, 2008), and Proposed Complaint.

[76] , 405 U.S. 233 (1972); (Analysis to Proposed Consent Order to Aid Public Comment).

[77] , 630 F.2d 920 (2d Cir. 1980) ("OAG") (spelling out coercion requirement), and , 729 F.2d 128, 139-40 (2d Cir. 1984) ("Ethyl") ("oppressiveness")

[78] See (Analysis of Proposed Consent Order to Aid Public Comment). It should be noted that if Rembrandt were demanding royalties from the manufacturers, even though on a non-RAND basis, at the same time that it is demanding royalties from the end-user broadcast networks and cable companies (as described herein), this conduct arguably would itself constitute unfair competition within the meaning of Section 5. Recovery of royalties from two (vertically situated) licensees of patent rights for the same use of those rights has been held to constitute an impermissible extension of patent rights, triggering the affirmative defense of patent misuse to an infringement claim and rendering the patent unenforceable. , 26 F. Supp.2d 505, 510 (W.D.N.Y. 1998) (holding that Symbol Tech.'s rights under the patents at issue were extinguished and that Symbol forfeited its right to collect any additional royalties on any product that practiced any claim under the relevant patents and that used a device manufactured by PSC based on those same patents); , 846 F. Supp. 522, 539 (E.D. Tex.) (noting that the purpose of the exhaustion doctrine is to "prevent [. . .] patentees from extracting double recoveries for an invention . . . ."), , 42 F.3d 1411 (Fed. Cir. 1994). (It should also be noted that the exhaustion doctrine, also known as the "first sale doctrine," and the exception to that doctrine, the conditional sale doctrine, are under review by the Supreme Court in , No. 06-937, although the precise issue before the Court in that case is permissible conditioning of subsequent use or resale following an authorized sale.)

Here, Rembrandt's efforts to secure royalties from the manufacturers for their alleged use of the '627 in manufacturing ATSC-compliant transmitters and also from the networks for their use of the transmitters in television broadcasting (and as a percentage of their revenues) would constitute patent misuse (and also possibly an independent ground for a violation of Section 2, if the requisite effects on competition are shown). The theory is that the patentee's rights are extinguished, under the doctrine of patent exhaustion, once the patentee has obtained royalties from the manufacturer, who allegedly uses the patent in making a product. Here, as explained above, Rembrandt is required to offer a license, on RAND terms, to the manufacturers; thus, any demand for royalties simultaneously from the manufacturers' customers arguably triggers the exhaustion doctrine. Furthermore, even if there is no patent misuse until

IV. HARM TO COMPETITION

there has been an actual recovery of 'double royalties', any such simultaneous demands for royalties from the manufacturers and their customers can be considered unfair competition under Section 5.

[79] Section 5(n) states: "The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S. C. § 45(n) (1992).

[80] 849 F.2d 1354, 1364 (11th Cir. 1988).