The American Antitrust Institute

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**

Date: March 26, 2008


Albert A. Foer
President
American Antitrust Institute
2919 Ellicott Street, NW
Washington, DC 20008
202-276-6002
bfoer@antitrustinstitute.org

**TABLE OF CONTENTS**

**Page**

ATSC standard" – an amount that would dramatically increase the cost of digital television equipment and the cost of digital television generally. All consumers will pay substantially more for digital and terrestrial television services unless this conduct is enjoined.

At issue in this matter is U.S. Patent No. 5,243,627 (the "'627 patent"), a patent for signal interleaving transmission in digital television. The patent was originally issued to AT&T and, after several assignments of the patent to AT&T spin-offs, ultimately was assigned to Rembrandt, the current owner. Rembrandt claims that the '627 technology is essential to practicing the ATSC standard.[3] In the ATSC standards setting process, AT&T committed to license on RAND terms any patent rights claimed to be essential to the ATSC standard to any applicant seeking to implement the ATSC standard. In adopting the ATSC standard, the FCC required that any intellectual property rights should be licensed on RAND terms. The RAND obligation adopted by the ATSC and FCC was crucial to creating a system of conversion to digital television that could not be held hostage by an owner of relevant patent rights violates its obligation of good faith and fair dealing to carry out the commitment and has had the effect of distorting competition for the affected transmission technology.

FTC intervention is consistent with the Commission's past enforcement actions in *Unocal*,

## II. FACTS

Rembrandt Technology LP is a limited partnership organized and existing under the laws of New Jersey with a principal place of business in Bala Cynwyd, Pennsylvania. Rembrandt is a patent holding and licensing company whose principal purpose and activity is to acquire patents and pursue and secure revenue from such patents, and it does not manufacture or sell any products.

### <u>The Conduct at Issue</u>

The facts leading up to Rembrandt's alleged exclusionary conduct and illegal monopolization follow three converging lines of developments in communications transmission technology, manufacturing and standardization, dating back at least since 1987. One trajectory begins with the issuance of the patent at issue in this matter to AT&T Bell and follows its multiple assignments, ultimately to Rembrandt. The second trajectory is the development and adoption of a digital television standard by the Advanced Television Systems Committee (ATSC), a private standard setting organization in which AT&T Bell was a significant participant. The third trajectory was an eight-year Federal Communications Commission proceeding regarding advanced television systems, which concluded with the FCC mandating the adoption of the ATSC standard as the exclusive standard for digital television (DTV).

These three trajectories have converged in Rembrandt's denial that it has any ATSC RAND obligation with respect to the patent at issue, its refusal to license any manufacturer on RAND terms, and its initiation of numerous patent infringement actions seeking injunctions against, and corresponding royalty demands from, various end-users – broadcast networks and cable companies in particular – based on their revenues from ATSC-compliant digital transmission, which Rembrandt claims infringes the '627 patent.

***(1) The patent trail:*** U.S. Patent No. 5,243,627 describes a technology for signal interleaving transmission used in television (the "'627"). The application for the '627 was filed with the U.S. Patent and Trademark Office in August 1991. The inventors assigned their rights in the pending patent to American Telephone and Telegraph Company ("AT&T Bell") and the patent issued on September 7, 1993. AT&T Bell changed its name to AT&T Corp. in 1994. AT&T spun off Lucent Technologies Inc. and assigned the '627 to Lucent in March 1996. Lucent subsequently spun off AT&T Paradyne Corp. ("Paradyne") and assigned the '627 to Paradyne in July 1996. Finally, on December 10, 2004, Paradyne assigned the '627 to Rembrandt.

**ynged its4on for the 6Amun off 10us1 ("  in Aug-17-1e, 010c05rp. in 14o and Trademar5TJ199Cus s**

the implementation of the Standard." AT&T IPM further committed to grant such licenses "under reasonable terms and conditions on a non-discriminatory, non-exclusive basis." Further evidencing AT&T's intent and understanding with respect to ATSC participants' licensing obligations – and well pre-dating the January 1995 letter commitment – in 1993 an AT&T executive testified before a House subcommittee that "[w]hatever standard is adopted by the FCC, the technology behind it will be required to be licensed to anyone on reasonable terms."[11]

***(3) FCC proceeding and adoption of the ATSC standard:*** In 1987 the FCC commenced a formal proceeding relating to the introduction of advanced television (ATV) and established an Advisory Committee on Advanced Television Communications (ACATS) to provide recommendations on technical, economic and public policy issues. The proceeding is explained in and was formally concluded by a report and order in 1996 adopting the ATSC DTV standard ("FCC Fourth Report and Order").[12]

On December 24, 1996, just three months after the ATSC had published its DTV standard, and based on a formal recommendation by the ACATS, the FCC issued the Fourth Report and Order, mandating the adoption of the ATSC DTV standard as the sole standard for digital television broadcasting.[13] The legal and practical competitive import of this FCC mandate was to require use of the once-voluntary ATSC standard as the exclusive, government-mandated standard for digital television transmission, thereby precluding any competing standard or any competing or different non-ATSC-compliant technology.[14] The ATSC standard is thus the established, mandatory standard for digital television broadcasting throughout the U.S.

The FCC's adoption of the ATSC standard in the Fourth Report and Order was explicitly conditioned upon all ATSC particip

> reasonable nondiscriminatory basis and we stated that we intended to condition selection of a DTV system on such commitments. [. . . ]
>
> We reiterate that *adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents.*[15]

***The three trajectories have now converged.*** Based on the ATSC commitment and the FCC policy manufacturers, broadcast networks and cable networks made significant investments based on the ATSC standard. Soon after it acquired the rights to the '627 patent, Rembrandt unequivocally denied that it has – or that AT&T ever had – any RAND commitment to the ATSC, refused to license on RAND terms, and began pursuing extensive litigation in which it alleges that various end-users, including cable companies and the broadcast networks, are infringing the'627, demanding royalties from such end-users based on their total digital television revenues.

- ***Infringement Litigation.*** Beginning in September 2005, with the filing of an infringement suit against Comcast Corporation, Rembrandt has commenced some 14 patent infringement actions against broadcast networks and cable companies and one manufacturer. Rembrandt has sued the four major networks – CBS, NBC, ABC and Fox – (in Delaware federal district court), cable companies Cablevision (in the District of Delaware), Adelphia (Southern District of New York) and Comcast, Charter Communications, Time Warner Cable and Comcast (Eastern District of Texas), and digital television manufacturer Sharp Corporation (Eastern District of Texas). Each of the suits alleges, *inter alia*, that compliance with the ATSC standard relating to cable modems and equipment and the receipt and transmission of certain digital broadcast signals necessarily infringes the '627. On June 21, 2007, the suits were consolidated for pre-trial multi-district litigation proceedings in the District of Delaware.[16]

- ***Letters to Broadcast Networks.*** On February 15, 2007, Rembrandt wrote identical letters to the four major networks, stating that the '627 is "directed toward and essential to the implementation of the Standard" and proposing to license the '627 for "a license fee of one-half percent (0.5%) of all revenues derived from use of the ATSC standard

---

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
dinawthe collaborative effort by br oadcasters, consumer equipment manufacturers and
cessc6l ov9(y)11.7( to int)-7.5(r)2.6(oduce )-7.5(DTV), an)-7.4(d "s)]TJ27.7368 0 TD0.0005 Tc-0.0001 Tw[(plinter)8." (a breakdown of the consensus or agreemenw to
e Fourth Report and Order
ndard. The FCC was
option of more than one
erally mandated standard,
n to consumers and creating
use some consumers and
ition to DTV; and make it

16 , MDL 1848 (D. Del.).

by your company as a broadcaster licensee."[17] Similarly, on or about the same date, Rembrandt sent a letter to one or more cable companies that were substantially identical to the letters to the networks except in the wording of the license proposal: here, Rembrandt proposed "to license the '627 for a license fee of one-half percent (0.5%) of all revenues your company derives from use of the ATSC standard for digital broadcast over a cable network by your company as an MSO [Multi-System Operator] licensee."[18]

- ***Litigation with Harris.*** Harris is a manufacturer of digital transmission devices. Faced with Rembrandt's refusal to license the '627 on RAND terms, Harris filed suit in May 2007 in federal district court in Florida against Rembrandt for breach of contract.[19] Rembrandt moved to dismiss on the theory that the ATSC patent policy and AT&T IPM's RAND letter did not create an enforceable contract, and also for lack of personal jurisdiction. In September 2007, the court granted the motion for lack of personal jurisdiction, without addressing Rembrandt's argument on the contract. On the same day as the dismissal in Florida, Rembrandt filed a declaratory judgment action against Harris in Delaware state court for non-breach of any contract with Harris.[20] Rembrandt asserts in the complaint that "*[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*."[21]

## III. LEGAL ANALYSIS

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

Standard setting is a cooperative process designed to ensure open competition for the standard. It can trigger the application of antitrust and unfair competition law because it leaves room for distortion of that competition through deception or other bad faith conduct, with anticompetitive effects.[22] Standard setting supplants market competition with a process of controlled competition for a standard. The success of this process depends on good faith adherence by standard setting participants to obligations designed to prevent the acquisition or exercise of market power otherwise conferred by the choice of a standard.[23] SSO obligations typically require ex ante disclosure of proprietary technology essential to the standard and a commitment to RAND licensing.[24] The failure to abide by these rules creates the potential for competitive harm through distortion of competition for the

17 Identical letters dated February 15, 2007 from John Garland, Rembrandt, to ABC, CBS, NBC and Fox.
18
19

Rembrandt's conduct not only distorted competition for the standard but is now harming manufacturers, cable companies and broadcast networks, and also (prospectively) all television viewers, through higher costs and increased uncertainty regarding compatibility with the standard. Taken as a whole, Rembrandt's conduct threatens to undermine the efficient introduction of DTV by the federally mandated date of February 17, 2009 and, more generally, undermines the efficiencies that collaborative standard setting is intended to achieve.

We turn now to a discussion of the following core claims: (i) Rembrandt succeeded to AT&T's RAND commitment; (ii) Rembrandt's conduct constitutes monopolization or at least attempted monopolization under Section 2; (iii) the conduct constitutes a violation of Section 5 as an unfair method of competition and unfair act or practice; and (iv) the conduct is threatening harm to competition and antitrust injury to consumers.

### B. <u>Rembrandt Succeeded to AT&T's RAND Commitment.</u>

First, we address the predicate question of successor obligation – that is, why Rembrandt should be deemed bound to the RAND commitment. Rembrandt assumed the obligations of AT&T IPM with respect to the ATSC upon the assignment of the '627 by Paradyne to Rembrandt on December 24, 1994.[27] The RAND commitment followed the patent and Rembrandt thus had at least constructive if not actual knowledge of the commitment upon the assignment of the patent. Rembrandt in essence stepped into AT&T IPM's shoes and committed – just like AT&T IPM – to license the '627 on RAND terms.[28]

The FTC recently dealt with a similar set of facts involving successor licensing obligations in *In re Negotiated Data Solutions ("N-Data")*.[29] The Commission found that the respondent, N-Data, a patent licensing company – i.e., non-practicing entity ("NPE") – violated Section 5 of the Federal Trade

Based on the common law principle that the assignee of a patent takes subject to any licenses of its assignor[31] and the Commission's *N-Data* action, it is clear that Rembrandt assumed AT&T IPM's RAND licensing commitment to the ATSC, no less than N-Data assumed National's licensing commitment.

### 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.

The FTC's enforcement authority under Section 5 of the FTC Act reaches conduct that violates the Sherman Act.[32] Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[33] Monopolization requires proof that the defendant (1) possesses monopoly power in the relevant market and (2) has acquired, enhanced, or maintained that power by the use of exclusionary conduct.[34] Exclusionary conduct within the meaning of Section 2 is understood to be "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [35] The use of exclusionary conduct to obtain or maintain monopoly power is thus the very opposite of competition on the merits, which the antitrust laws are intended to promote.

Attempted monopolization requires proof that the defendant (1) engaged in exclusionary conduct (the same exclusionary conduct in kind and degree as required for monopolization), (2) with a specific intent to monopolize, and (3) with a "dangerous probability" of achieving monopoly power.[36] Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."[37]

#### 1. Monopolization

Rembrandt has willfully acquired and maintained monopoly power in the technology market for DTV signal interleaving and encoding through exclusionary conduct by claiming the '627 is essential to the ATSC standard and then clearly repudiating and breaching the RAND commitment. Rembrandt's unlawful monopolization is established with proof that (1) Rembrandt engaged in exclusionary conduct, (2) it acquired monopoly power, (3) it did so as a result of exclusionary conduct, and (4) this conduct harmed competition and consumers harm.

---

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 <u>Commitment Constitutes Exclusionary Conduct Under Section 2.</u>**

The analysis of the exclusionary conduct at issue consists of two parts. First, we briefly show how Rembrandt's license 'offers' and its multi-front litigation against some 14 parties – end-user networks, cable companies and manufacturers – constitute a clear repudiation and breach of the RAND commitment. Second, we explain how Rembrandt's repudiation and/or breach of the RAND commitment – despite the apparent absence of any deceptive inducement by AT&T itself with respect to its RAND commitment – meets the standard for bad faith conduct *qua* exclusionary conduct, as highlighted in such cases as *Rambus*, *Unocal*[38] and *Qualcomm.*[39]

Taken as a whole, Rembrandt's bad faith repudiation and breach had the effect of subverting the normal process of competition for the standard. By this conduct, Rembrandt exploited the monopoly which had been conferred first on AT&T (as predecessor) through the selection of technology for the ATSC standard that Rembrandt now claims infringes the '627 patent and then by adoption of the ATSC standard as a federally mandated standard.

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

Rembrandt has repudiated and breached the RAND commitment. The main points are as follows:

***Rembrandt has unequivocally repudiated the RAND commitment.*** In the litigation described above Rembrandt has claimed the '627 is essential to practicing the ATSC standard and then unequivocally denied any obligation to comply with the ATSC RAND commitment, stating as follows: "None 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."[40] Rembrandt took the same position in the breach of contract action filed by Harris in federal court in Florida – a position which now underlies its multidistrict litigation against end-users, networks, cable companies and manufacturers. These words and actions constitute a clear repudiation of the RAND requirement.

***Rembrandt's position is inconsistent with the FCC policy.*** The FCC's adoption of the ATSC standard as a federally mandated, exclusive standard for digital television was explicitly conditioned on "rea *manufacturing companies* on reasonable and nondiscriminatory terms."[42] The subsequent

same effect as deception or bad faith in the inducement.[53] Had the other ATSC members known that the technology they selected could lead to patent holdup, they doubtless would have chosen an alternative technology.

Several authoritative commentators have explained that a bad faith repudiation or breach of a RAND commitment can violate the antitrust laws, even absent evidence of deceptive inducement. As Professor Farrell and his co-authors explain in a recent article,

As Professors Hovenkamp, Janis and Lemley explain in their treatise, "the competitive risk [in the consensus process that characterizes standard setting] is that the misrepresentation will cause a standard-setting organization to adopt a standard it otherwise would have rejected, and it would not otherwise have obtained."[64] Thus, what matters is the outcome – the distortion of competition for the standard through the obscuring of cost and pricing information that SSO participants needed to make an informed selection of a standard from competing, alternative technologies – and the fact that the SSO relied on a commitment that was ultimately breached and repudiated.

***Special concerns of the conduct of NPEs.*** Finally, as a general matter, a narrow test for exclusionary conduct in this context would promote intellectual property transfers that would undermine the standard setting process and harm consumers. Intellectual property transfers can be used as a ruse to avoid the obligations of a standard setting process. NPEs in particular can significantly undermine standard setting by acquiring intellectual property rights at a premium with the goal of enhancing licensing revenues by repudiating RAND obligations. A legal test requiring deception or bad faith at the time a RAND commitment is given would countenance such exclusionary and competitively harmful conduct. Thus, the test of exclusionary conduct must be interpreted with sufficient flexibility – or, more precisely, in reliance on the core principle of good faith and fair dealing as articulated in *Allied Tube* – to capture repudiation or breach of a RAND commitment.

Given NPEs' business incentives, such conduct may become more widespread unless the opportunity is taken on the appropriate set of facts, such as here, to establish that such conduct can be "exclusionary" under Section 2. NPEs pose a far more significant threat of patent holdup and other types of opportunistic conduct. The business model of NPEs is vastly different than that of the typical participants in standard setting – technology development companies and manufacturers. NPEs do not need to cooperate with other holders of intellectual property and do not need to license intellectual property. The fear of reprisal from fellow technology or manufacturing companies, which may animate the good faith conduct of many SSO participants, does not inhibit NPEs. The increasing opportunities for NPEs to engage in patent hold-up, as NPEs continue to expand their role in patent licensing today, and the absence of the usual constraints on such conduct, therefore suggest the need for heightened scrutiny of NPEs, to ensure that they adhere to standard setting rules, such as RAND commitments.[65]

---

[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 By Repudiating and Breaching the RAND Commitment.

The selection of patented technology for inclusion in a standard clearly augments the potential power of the owner of the selected technology. Here, there has been no determination that practicing the ATSC standard infringes the '627 and, as noted above, the defendants in the respective intellectual property actions take the position that their products do not infringe the '627. Nevertheless, the *assertions* by Rembrandt that the '627 technology is essential to the ATSC standard, and its multiple lawsuits based on those assertions, combined with the FCC's order mandating the ATSC standard as the sole commercial standard for DTV, have conferred on the owner of the '627 a monopoly in the technology market for DTV RF transmission modulation technology.

Monopoly here, however, must be distinguished from monopoly power. The prior owners of the '627, assuming they claimed the '627 to be essential to the standard, and until assignment to and repudiation by Rembrandt, had a monopoly in the relevant market because of the adoption of the standard; but they did not have monopoly *power*, because their power to exploit the monopoly through supracompetitive pricing, or even through declining to license the technology, was constrained by the RAND commitment.[66] When Rembrandt then rejected this constraint, it engaged in illegal monopolization. Once having been assigned the patent and acceded to the monopoly position corresponding to it because of the adoption of the standard, Rembrandt opportunistically exploited the monopoly when it repudiated and breached the RAND commitment. In this way, Rembrandt willfully acquired and exercised monopoly power in the relevant market in violation of Section 2.

The RAND commitment, to which Rembrandt is bound,[67] is thereby causally linked to the adoption of the ATSC standard by the FCC: the commitment materially contributed to the adoption of the standard.[68] Assuming AT&T asserted that the '627 was essential, then the federally mandated ATSC standard in turn would have conferred monopoly power on AT&T and its successors *but for* the RAND commitment and the accompanying obligation of good faith and fair dealing to satisfy its terms. It therefore follows that when a successor repudiates or breaches the RAND commitment, that successor achieves and exercises monopoly power precisely through its repudiation and breach. Thus, Rembrandt acquired monopoly power as a result of its exclusionary conduct – the repudiation and breach. Antitrust causation is thereby established between the exclusionary conduct and the acquisition of monopoly power.[69]

---

[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.**

the FTC Act, which prohibits "unfair methods of competition" and "unfair acts or practices."[74]

The FTC's recent proposed complaint and consent order with licensing company N-Data for alleged patent hold-up offers a useful guide for application of Section 5 to this type of patent holdup.[75] The proposed consent order in *N-Data* is based on allegations that N-Data repudiated certain licensing commitments that its predecessor gave to a standard setting organization. The Commission found that N-Data violated Section 5 by reneging on a 1994 letter commitment by National Semiconductor Corporation to the IEEE to license on specified terms certain patented technology relating to Ethernet. National had assigned the relevant patents to Vertical Networks, which in turn assigned them to N-Data in November 2003. For substantially the same reasons that the Commission found that N-Data's conduct constituted an "unfair method of competition" and an "unfair act or practice" under Section 5 in *N-Data,* Rembrandt's conduct here would also violate these provisions of Section 5.

First, Rembrandt's conduct – bad faith behavior that distorts competition for the standard and so undermines the standard setting process and raises prices – constitutes an unfair method of competition even if it were found for some reason not to infringe either the letter or spirit of the antitrust laws.[76] The conduct also satisfies the commonly accepted limiting principles for application of the 'unfair method of competition' prong of Section 5: the patent hold-up is "coercive" and "oppressive" with respect to firms locked into the standard[77] and the conduct is having or threatens to have an adverse impact on competition.[78]

---

[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

Second, Rembrandt's conduct constitutes an unfair act of practice under Section 5(n).[79] As interpreted by the Eleventh Circuit in *Orkin Exterminating Co. v. FTC*,[80] Section 5(n) requires a showing that (1) the conduct caused "substantial consumer injury," (2) the injury is "not . . . outweighed by any countervailing benefits to consumers or competition that the practice produces" and (3) it is an injury that "consumers themselves could not reasonably have avoided." Just as the Commission found that N-Data's conduct satisfied these criteria, so here, Rembrandt's conduct also would support a finding of a Section 5 violation on the 'unfair act or practice' prong: Rembrandt opportunistically exploited the RAND commitment on which the ATSC members relied in selecting the ATSC standard; the industry has become locked in to the technology which Rembrandt now asserts is essential to the standard and for which it is now demanding exorbitant royalties; this conduct threatens to cause substantial consumer injury in the form of higher prices for the relevant equipment (set forth in more detail below); the conduct produces no articulable benefits to consumers or competition; and neither the ATSC members who reasonably expected the RAND commitment to be honored by AT&T IPM and its assignees, nor the end-user networks and cable companies, nor television viewers could reasonably avoid the injury they face as a result of Rembrandt's conduct.

## IV. HARM TO COMPETITION

Rembrandt's conduct threatens severe harm to competition and harm to the ultimate consumers – television viewers. Rembrandt's conduct threatens to increase the price and reduce the output of products and services that implement the ATSC standard for use in digital television, thus raising prices and reducing output of digital television to the consuming public. In particular, the threatened harm includes the following:

Rembrandt's conduct is subjecting digital equipment manufacturers to the threat of having to pay royalties that would far exceed the entire cost of their equipment that implements the ATSC standard. Those increased costs will be passed on to the ultimate consumers in higher prices.

End-users are also being threatened with having to pay exorbitant royalties based on their use of such equipment, where demands for royalties from end-users are inconsistent with the RAND commitment both in terms of the identity of prospective licensees (i.e., end-users rather than manufacturers) and in royalty amount. Those excessive royalties will be passed on to the ultimate consumer.

Every time a network or cable company increases the amount of digital broadcasting territory or content utilizing ATSC equipment, it is increasing its financial exposure and risk, due to the threat from Rembrandt. Thus, the networks and cable companies may have an incentive to slow down or cease transition to DTV altogether,

---

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 ($11^{th}$ Cir. 1988).