

## AAI petitions FTC over patent hold-up

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The American Antitrust Institute has petitioned the US Federal Trade Commission to investigate digital technology company Rembrandt's alleged anti-competitive conduct in the digital television sector.

The petition, filed on Wednesday, was written by antitrust lawyers **Richard Wolfram** and **David Balto**. It alleges that Rembrandt violated policies of the US Federal Communications Commission and the Advanced Television Systems Committee (ATSC), a private standard-setting body, which cover the reasonable and non-discriminatory - or "RAND" - licensing of intellectual property. The institute claims that Rembrandt has "repudiated an obligation" to license the property on a RAND basis, and initiated lawsuits over patent infringement against television networks and cable television systems.

The patent covers digital signal interleaving technology, intellectual property originally owned by AT&T, and latterly acquired by Rembrandt, which forms part of the federally mandated standard adopted by the ATSC. The technology increases the performance of digital transmission. Effectively, any company wishing to provide digital television services is obliged to use this intellectual property through the technology used in transmitters that it purchases from manufacturers. In seeking "excessive royalties" for licensing the property, Rembrandt will "significantly raise the cost of digital television for millions of consumers," the petition alleges.

Rembrandt argues that undertakings made by AT&T, the original patent holder, do not stop it from licensing the technology as it sees fit.

**Scott Sher**, partner at Wilson Sonsini Goodrich & Rosati in New York, says that issues like this are becoming increasingly common, as standard setting is critically important to the adoption and proliferation of new technology. "In some instances, you see companies engaged in market distorting behaviour designed to ensure that their technology is adopted into the standard, or activity that is designed to squeeze more profits than should be allowed out of their patent grant, by, for example, reneging on RAND promises."

Says **Mark Alexander**, partner at Axinn Veltrop & Harkrider LLP in Hartford, Connecticut: "The AAI complaint alleges that Rembrandt is demanding half a per cent royalty on all revenues generated from use of the ATSC standard, which could be an enormous number in which the commission will likely be interested."

The petition further alleges that Rembrandt, rather than offering licenses to manufacturers of commercial-grade transmitters and receivers on RAND terms, as required by its commitment to the ATSC, is instead suing the manufacturers' customers, the major

television networks (ABC, CBS, NBC and Fox) and major cable companies, for patent infringement.

Says institute president **Albert Foer**: "In less than 330 days, by act of congress, the entire US television market place will convert to digital systems - Rembrandt's patent hold-up will cause substantial harm to consumers purchasing new equipment and, ultimately, to all consumers of television."

The commission has investigated similar matters in the past, notably in the Negotiated Data Solutions case, a matter involving Ethernet patents. The commission narrowly voted to accept a settlement with the company, but acknowledged that the conduct had not violated the Sherman act, and instead was covered by section five of the FTC act, which covers unfairness that doesn't rise to the level of a Sherman act violation. The current and former heads of the commission, **William Kovacic** and **Deborah Majoras**, were the two dissenters in that case.

Says Alexander: "Normally enforcement actions require that competitive injury is proved under the primary antitrust statutes, but if the commission continues to enforce on the basis of vaguer notions of 'unfair competition,' as it did in the N-Data action, however, such an approach is likely to be controversial." However, the commission is actively involved in the digital changeover, especially where it concerns consumers, so "this is the kind of complaint that will get attention," he adds.

The institute's complaint goes beyond section five, alleging that Rembrandt's conduct amounts to "unlawful monopolisation," which would be covered under the Sherman act. One Washington, DC-based competition specialist says this definition will be "absolutely key" to the course that any commission investigation might take.

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