

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Rulemaking and Request for Declaratory Ruling Filed by the Coalition United to Terminate Financial Abuses of the Television Transition, LLC)	MB Docket No. 09-23

**Reply Comments of Public Knowledge, Consumers Union, Free Press, Media
Access Project, and New America Foundation**

SUMMARY

The Commission should investigate allegations that existing licenses for patents essential to the DTV standard are unreasonable or discriminatory. To that end, the Commission should require disclosure of essential patents, the grounds by which the patents are essential, and the terms under which they are licensed.

DISCUSSION

The above-listed organizations submit these Reply Comments to address the need for increased openness in the process of complying with federally-mandated technical standards. By requiring manufacturers to abide by certain standards, the Commission will often also be requiring that manufacturers obtain licenses for the use of patented technology. To prevent mandatory standards from encouraging anticompetitive rent-seeking, the Commission should maintain policies requiring disclosure of essential patents and reasonable and nondiscriminatory licensing.

A number of legal commentators have observed complications involving patents in the technology sector, noting that a prevalence of patents, often combined with unclear

patent scope, leads to patent thickets that can impede adoption and slow innovation.¹ Under its public interest obligations, the Commission should attempt to lessen the risk of such holdups by maximizing the transparency surrounding patents that are essential to mandatory standards. Therefore, prior to adopting a mandatory standard, the Commission should require all participants claiming essential patents in the standard to disclose those patents they believe essential to implementation and how they are essential. This requirement would not affect the rights of any patentee in its technology, and would allow licensees and the Commission to better assess the state of the licensing market.

The Coalition United to Terminate Financial Abuses of the Television Transition (CUTFATT) has alleged that the holders of patents essential to the mandatory digital television (DTV) standard are failing to offer patent licenses on a reasonable and nondiscriminatory (RAND) basis.² These allegations merit further investigation by the Commission. As a part of this inquiry, the Commission should account for the various patents essential to the DTV standard and royalties charged for their use. Should the Commission find that licenses issued by standard proponents are unreasonable or discriminatory, it is well within its inherent authority under 47 U.S.C. 501 *et seq.* to enforce the RAND requirements outlined in the Commission's rules.³

CUTFATT's petition asks for a variety of findings and actions in addition to those set forth in the Fourth Report and Order. First, CUTFATT asks the Commission to issue a declaratory ruling in five parts: (i) that royalty rates are presumed non-RAND if they exceed comparable rates by more than fifty percent; (ii) that any party holding essential patents had the burden of proving their necessity and compliance with RAND

¹ Carl Shapiro, *Navigating the Patent Thicket: Cross Licensing, Patent Pools, and Standard Setting*, in 1 INNOVATION POLICY AND THE ECONOMY 119, 120-21 (Adam B. Jaffe et al. eds., 2001); James Bessen, *Patent Thickets: Strategic Patenting of Complex Technologies* (2003) available at <http://www.researchoninnovation.org/thicket.pdf>; Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1614 (2003).

² CUTFATT *Petition for Rulemaking and Request for Declaratory Ruling (Petition)*.

³ In adopting the DTV standard, the Commission noted:

We reiterate that adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents, but believe that greater regulatory involvement is not necessary at this time. We remain committed to this principle and if a future problem is brought to our attention, we will consider it and take appropriate action.

In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, 11 FCC Rcd. 17771 (1996) ("*Fourth Report and Order*") at ¶ 55.

requirements; (iii) that all essential patentees must disclose the terms of all licenses lest they be found presumptively discriminatory; (iv) that the Commission assess forfeitures for unreasonable or discriminatory licenses; and (v) that the Commission levy fines for the blocking of imports based on patents that do not offer RAND licensing terms.⁴ Second, CUTFATT asks for a Notice of Proposed Rulemaking in which the Commission would require all holders of essential patents to disclose their patents and licenses, as well as encourage patentees to form a patent pool.⁵

A number of these proposals could assist the public, manufacturers, and the Commission in determining whether or not patentees are issuing RAND licenses. However, the Commission's authority to issue these orders and rulings differs from one proposal to another, and in many cases, would vary depending upon the identity of the patentee. For the purposes of this Reply Comment, we address only the Commission's ability to require disclosure of patents and licensing agreements.

The Commission has direct authority over patentees who have participated in the standard setting process. As part of the adoption of the DTV standard, the Commission required that proponents of the standard were required to submit a statement that they would comply with ANSI patent policies, which, among other things, require licensing for free or under RAND terms.⁶ By virtue of that agreement, and through their participation in the process, these parties are subject to the Commission's determination that their licenses are reasonable and nondiscriminatory. To make this determination, the Commission must necessarily have knowledge of what patents are claimed, how essential they are to the standard, and what licensing fees are being charged.

To ensure that licenses remain reasonable and nondiscriminatory, and to further the public notice function of the patents at issue, the results of these disclosures should be made public. Open publication of licensing terms will help to ensure that licensing terms

⁴ *Petition* at 12.

⁵ *Petition* at 15.

⁶ *Fourth Report and Order* at ¶ 54 (citing *Notice of Proposed Rule Making* in MM Docket No. 87-268, 6 FCC Rcd 7024, 7035 (1991); *Second Report and Order/Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 3340, 3358 (1992); *Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 6924, 6982-83 (1992)).

remain RAND as time goes by, allowing potential licensees to compare the terms they are offered with the publicly disclosed terms, with the ability to complain to the Commission should there be substantial differences.

Patentees who were not privy to the standard setting process (non-proponent patentees) may be asked to make disclosures under the Commission's authority as granted in subsections (g) and (s) of section 303 of the Communications Act.⁷ The Commission's section 303(g) mandate to encourage the larger and more effective uses of spectrum in the public interest allow it to regulate to prevent competitive restraint.⁸ Subsection (s) grants the Commission authority to ensure that devices can adequately receive television signals, which are directly at issue in this case. If the standard reads upon any patent, any user of the standard could be enjoined by the patentee from receiving a DTV signal. Rules ensuring that users of the standard are not so caught unawares would function directly in service of the goal of 303(s).

Ancillary authority also allows the Commission to require patent and license disclosure of non-proponent patentees. Ancillary jurisdiction applies when (1) the regulated subject matter is covered by the general jurisdictional grant of Title I, and (2) the regulations are reasonably ancillary to the Commission's performance of its statutorily mandated responsibilities.⁹ Regulation of broadcast signals, and the apparatus receiving those signals, is clearly within Title I jurisdiction. Ensuring that previously undisclosed patents or non-RAND licenses do not prevent the transmission of the DTV signal (or its reception by devices) implicates the Commission's duties. Requiring disclosure would thus be reasonably ancillary to this objective.

This presents a situation distinct from that in *ALA*, in which the Commission sought to regulate not the quality of a signal, but what a device could later do with the information contained within that signal. In *ALA*, the Commission's rules attempted to regulate the operation of devices *after* they had received the DTV broadcast signals.¹⁰

⁷ 47 U.S.C. § 303.

⁸ See *Metropolitan Television Co. v. F.C.C.*, 289 F.2d 874 (D.C. Cir. 1961).

⁹ *American Library Association v. F.C.C.*, 406 F.3d 689, 691-92 (D.C. Cir. 2005) (*ALA*).

¹⁰ 406 F.3d at 700.

Such a rule reached far beyond the delegated authority of the Commission. By contrast, rules on patent disclosure apply directly to the standard for transmission, and are extremely limited in scope.

CONCLUSION

The public interest requires that the scope and cost of any mandatory standards be clear to those who would adhere to them. When patent royalties can be openly investigated and compared against known benchmarks, manufacturers and consumers can be assured that licenses, and the costs that go with them, are reasonable and non-discriminatory. Not only does disclosure prevent cost-raising abuses, but ensuring that essential patents are known and disclosed will prevent users of the DTV standard from being drawn into disputes over patent scope and validity. The time, uncertainty, and cost involved in navigating unanticipated patent disputes would also be minimized by further transparency and disclosure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2009, a copy of the foregoing Reply Comments of Public Knowledge, Consumers Union, Free Press, Media Access Project, and New America Foundation was mailed, via First Class mail, postage prepaid to:

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