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COMMENTS OF NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE

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New America's Open Technology Institute ("OTI") thanks the Federal Trade Commission (FTC) for seeking input on the important issue of intellectual property and competition policy, and how it affects innovation. Recently, OTI detailed how the lack of enforceable reasonable and non-discriminatory (RAND) licensing requirements in a Federal Communications Commission (FCC) broadcasting order could facilitate the ability of the Sinclair Broadcasting Group to dominate the future of the broadcasting industry.¹ OTI submits this introduction to its paper on the issue, with the paper attached, in response to the FTC's request for comments regarding the "identification of contemporary patent doctrine that substantially affects innovation and raises the greatest challenges for competition policy." OTI's paper explores important issues around patents and the ability—or lack thereof—of standards-setting organizations and regulatory agencies to enforce RAND licensing requirements that ensure fair access to the patented technology.

Last year, the FCC approved a new broadcasting transmission standard, known as ATSC 3.0, to allow broadcasters to begin moving toward what is known as "Next Generation TV." This new transmission standard features upgrades to the viewing experience that the current broadcast standard is incapable of offering, including ultra high-definition picture quality and audio quality that is more personalized and immersive. Broadcasters also say that the new transmission standard will enable the integration of broadcast programming with other Internet Protocol (IP) services, advanced emergency alert information, the ability to target news and weather by geolocation, and enhanced picture quality streamed to mobile devices. With the FCC-mandated transition, ATSC 3.0 is integral to the broadcasting industry, which is currently battling a changing over-the-top video market, cord-cutting, and the streaming revolution.

Sinclair, through a subsidiary, owns a patent that is a critical part of the ATSC 3.0 technology. The company's patent is for the "bootstrap signal," which serves as the universal entry point on ATSC 3.0 receivers, and alerts the receiver when data is about to come in so that programming can be immediately decoded. Without this technology, ATSC 3.0 does not work. In the order approving the ATSC 3.0 standard, the FCC deemed the bootstrap technology so central to Next Generation TV that it is the only technological standard that is required to be included in an ATSC 3.0 signal. Sinclair is already a central player in the broadcasting industry as one of the biggest broadcasters in the U.S., and as a patent holder of a crucial part of the FCC-mandated technology, it holds gatekeeper status over rivals through its ability to dictate prices for access to a technology that broadcasters will need to continue competing in the video market.

The FCC declined to adopt RAND licensing requirements in the ATSC 3.0 transmission standard, enabling Sinclair to unilaterally set prices and collect royalties from any and all interested parties looking to join the ATSC 3.0 revolution. As OTI details in the attached paper, this failure to adopt enforceable RAND requirements not only threatens the competitive broadcasting market but also breaks with decades of precedent set by the FCC in previous TV standard transitions. Any and all companies seeking to bring the benefits and new features of

¹ See *Authorizing Permissive Use of the 'Next Generation' Broadcast Television Standard*, Report and Order, 32 FCC Rcd 9930 (Nov. 20, 2017).

Next Generation TV to their customers will have to pay a toll to Sinclair in the form of royalties for the bootstrap signal. Sinclair will have the power to boss around not only broadcasters, but also multi-video programming distributors (MVPDs), including cable companies and over the top services such as Sling TV, that have to pay Sinclair a royalty for equipment that can carry ATSC 3.0 signals.

The failure of the FCC to adopt RAND licensing requirements for Sinclair in ATSC 3.0 serves as a prime example for how important enforcement over intellectual property is to fostering a competitive marketplace. In the coming years, as the ATSC 3.0 rollout intensifies and consumers begin to reap the benefits of Next Generation TV, the case of Sinclair and its bootstrap signal will be an area that agencies such as the FCC and FTC should keep a close eye on. OTI submits this paper for the FTC staff to review this case, which demonstrates a substantial challenge for competition policy: how to ensure fair and reasonable access to technological innovations.

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TV Royalty

How Patents Could Help Sinclair Rule the Broadcasting Market

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We are dedicated to renewing America by continuing the quest to realize our nation's highest ideals, honestly confronting the challenges caused by rapid technological and social change, and seizing the opportunities those changes create.

About Open Technology Institute

OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. We promote universal access to communications technologies that are both open and secure, using a multidisciplinary approach that brings together advocates, researchers, organizers, and innovators.

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Introduction

Sinclair Broadcasting Group is the largest broadcaster in the United States, as it currently owns or operates 173 television stations across the country.¹ Sinclair currently seeks to acquire Tribune Media Company, which owns 42 stations in markets from New York to Los Angeles. The deal, which would expand Sinclair's reach to 72 percent of U.S. households, is currently pending at the Federal Communications Commission (FCC) and the Department of Justice.² The deal has received public scrutiny for its potential to give Sinclair excessive power over the broadcasting market. In response, Sinclair recently announced plans to divest 23 Tribune stations in 18 markets, although the company could still maintain joint sales agreements with these stations.³ It's no wonder that the proposed merger has been criticized by Democrats and Republicans alike, including Newsmax CEO Christopher Ruddy and former House Majority Leader Tom DeLay (R-Texas), who warn that the combination of Sinclair and Tribune would harm competition and choice for news across the United States.⁴

Sinclair's market power in the broadcasting space rests not only on the number of American households served by the broadcasting giant, but also on its ability to dominate the future of broadcast television. The broadcasting market is on the brink of a major shakeup, and Sinclair is already positioned as a primary beneficiary. The new technology driving these fundamental shifts is known as Next Generation TV, a new transmission standard that promises many new features including ultra-high definition, immersive audio, and enhanced emergency alerts. The new transmission standard serves as an important step forward for the broadcasting industry, allowing it to keep pace with online streaming and over-the-top services.

Sinclair, through a subsidiary, owns key patents for components that serve as the basis for this new broadcast transmission standard. These patents give Sinclair substantial market power and the potential to collect billions in royalties from other broadcasters, equipment manufacturers, and cable companies that are looking to bring their customers the benefits of Next Generation TV. While this market power would only grow if Sinclair's acquisition of Tribune is approved, Sinclair without Tribune would still hold an anti-competitive advantage over other broadcasters, equipment manufacturers, and cable operators.

When the FCC approved the new transmission standard in 2017, they declined to impose any requirements for patent holders to license their patents in a reasonable and nondiscriminatory fashion. Instead, the FCC ceded its oversight role to the Advanced Television Systems Committee (ATSC), a non-governmental body with ambiguous authority, which calls into question its ability to punish unfair licensing deals. The ATSC is a standard-setting organization whose authority only extends to its members. While the ATSC requires its

members to grant licenses to essential patents on reasonable and non-discriminatory terms, the ATSC lacks the mechanisms to enforce this requirement beyond potentially barring participation in the organization's processes.

The decision to forego a reasonable and non-discriminatory licensing requirement is a gift to Sinclair—and a stark break in precedent from how the Commission handled earlier television transitions. The failure to impose such a requirement leaves uncertainty for entities that would need to pay royalties to Sinclair for access to must-have technology. Sinclair, for example, could gain disproportionate power in the broadcasting market, as the company would benefit from the new transmission standard itself at the same time as it collects royalties from all other parties participating in Next Generation TV as well—royalties at rates that Sinclair has the power to indiscriminately set, unchecked by the FCC.

FCC Chairman Ajit Pai is now reportedly under investigation by the Commission's inspector general for potentially improperly changing media ownership rules to benefit Sinclair, which raises serious questions about the processes in place to protect consumers from harm in this space.⁵ In this paper, we take a look at how the FCC's ATSC 3.0 Order gives Sinclair unprecedented power in the new frontier for the broadcasting market.

First, this paper will discuss the importance of the new transmission standard to the broadcast industry as streaming services gain popularity. Next, it will review the importance of strong licensing requirements that bar entities with essential patents from price gouging all other players in the broadcast and cable ecosystem. Then, it will explain why Sinclair's patent gives the company such a strong foothold to dominate the broadcast industry through Next Generation TV, and how the FCC's failure to institute conditions mitigating the abuse of this market power will harm competition and consumers. Finally, this paper recommends imposing reasonable and non-discriminatory licensing requirements on Sinclair and other patent owners to mitigate harms to the market and American TV viewers.

ATSC 3.0 Is the Future of Broadcasting

In November 2017, the FCC voted to approve the ATSC 3.0 transmission standard that will serve as the basis for Next Generation TV. This new transmission standard, and several innovations that are slated to come with it, are a major part of broadcasters' efforts to keep up with the transformation of the television industry. This evolution is nearly upon us; the FCC's order, and with it, the transition to ATSC 3.0, went into effect on March 5, 2018, although the actual rollout of the transmission technology will take time.

ATSC 3.0 is essential for broadcasters to keep up with the quickly-evolving television ecosystem—one that is becoming increasingly influenced by internet-connected devices, over-the-top (OTT) video services, and other multi-video programming distributors such as cable companies. The National Association of Broadcasters, the Consumer Technology Association, America's Public Television Stations, and the Advanced Warning and Response Network (AWARN) Alliance argued that the new standard is needed to “enable television broadcasters to continue to serve viewers effectively, compete in the marketplace and innovate by voluntarily utilizing a new transmission standard permitting broadcasters to upgrade to an IP-based transport layer as other industries have already done.”⁶

The way Americans consume television is changing. Surveys show that the traditional broadcast and cable companies face increasing competition from streaming services.⁷ The Pew Research Center found that 61 percent of U.S. adults aged 18 to 29 years old reported that an online streaming service was the primary way they watch television.⁸ Just 31 percent of Americans in the same age bracket said a cable or satellite subscription was their primary way of watching television, and only 5 percent reported relying primarily on a digital antenna.⁹ More than half of 18- to 29-year-olds surveyed by Morning Consult said they use streaming services more than traditional television, as did 40 percent of 30- to 44-year-olds.¹⁰ The same report found that 40 percent of Americans said they watch more streaming services compared to two years ago.¹¹

Other reports have found that streaming services have almost as many viewers as traditional television. Last year, the Interactive Advertising Bureau reported that Americans spend 39 percent of their time on internet-connected televisions watching traditional live TV, and 24 percent streaming video.¹² Among internet users, 31 percent reported a streaming service as their primary way of accessing video content, compared to 35 percent who named their cable provider.¹³

Amazon,¹⁴ Facebook,¹⁵ and Twitter¹⁶ have secured deals to stream live sports on their platforms, expanding the battle for viewers to an arena that has traditionally been a major revenue source for the broadcast industry.¹⁷ The National Football

League has reportedly asked media companies to bid on seasons of Thursday Night Football and are signalling that if TV networks are not interested, the contract could go to an online streaming company.¹⁸ In 2017, Amazon won the digital streaming rights for Thursday Night Football, and Twitter, YouTube, and Verizon are competing with Amazon for the rights this year.¹⁹

The advent of streaming services and their growing popularity are precisely why ATSC 3.0's promised innovations are so vital to broadcasters. These new features include upgrades to the viewing experience unavailable in the current broadcast standard, such as ultra high-definition picture quality and audio quality that is more personalized and immersive.²⁰ Broadcasters also say that the new transmission standard will enable the integration of broadcast programming with other Internet Protocol (IP) services, advanced emergency alert information, the ability to target news and weather by geolocation, and datacasting.²¹ The new transmission standard will also bring enhanced picture quality to mobile devices.

ATSC 3.0 will also allow broadcasters to track viewers' habits and air targeted advertisements.²² Sinclair executive Mark Aitken said viewer data would give the company "tens of millions of extra dollars in [its] pocket."²³

The importance of ATSC 3.0 to the future of the broadcast industry makes Sinclair's power as a key patent holder in the space especially significant. Although broadcasters eagerly await the transition to the new transmission standard to retain and acquire more viewers, they will all have to pay royalties to Sinclair to participate in Next Generation TV.

Patents and the Importance of Reasonable and Non-Discriminatory Licensing in the ATSC 3.0 Transition

A patent issued by the U.S. government grants an entity exclusive property rights to an invention for a limited period of time.²⁴ A patent holder holds “the right to exclude others from making, using, offering for sale, or selling” the invention in the U.S., and may grant licenses for use of the patented invention to licensees in exchange for royalty payments.²⁵

The justification for requiring RAND licensing agreements is simple: it protects the market by curtailing patent holders’ ability to unilaterally set licensing fees for a patented technology that makes an entire system work, shielding both the industry and consumers from extortion. When the FCC adopts a new broadcasting standard, it implicitly forecloses other standards from being used.²⁶ When the FCC or any other standard-setting body adopts a new standard, the value of the patents essential to that standard is “significantly enhanced.”²⁷

Federal courts have addressed the anti-competitive and anti-consumer practices arising from the lack of a RAND licensing requirement for various technologies. The licensing terms around patents critical to the Digital TV standard are the subject of an ongoing antitrust lawsuit in New York federal court. Haier’s complaint in the suit explains the anti-competitive incentives that “lock in” other competitors and customers—in this case, an electronics manufacturer—to the patent holder’s pricing power over royalties:

“Once a standard has been selected, manufacturers will develop products that comply with it. The manufacturer that implements, or is required to implement, a standard therefore becomes ‘locked-in.’ Owners of patents that cover aspects of the standard can take advantage of lock-in by demanding exorbitant royalties from manufacturers because they know it would be less costly for the manufacturers to pay the excessive royalty than incur the cost of litigation, including the risk of an injunction, or developing products that utilize a different technology that does not meet the standard and thus cannot be imported, sold, or offered for sale in the relevant jurisdiction.”²⁸

Without a RAND requirement, patent holders are able to cash in on this increased value by charging “supracompetitive royalties” to competitors.²⁹ In the *Broadcom Corp. vs. Qualcomm Inc.* case, the Third Circuit called this practice an “anticompetitive patent hold-up.”³⁰ When a standard-setting body fails to require RAND licensing agreements, companies that hold patents are able to extort rents beyond their production costs from other entities using the technology; this mark-up for access to patented technology occurs at the expense of consumers,

who—in this case—would likely wind up paying higher prices for broadcast and cable services.³¹

The lack of a RAND licensing requirement is particularly dangerous for other entities in the broadcasting and cable ecosystem given that Sinclair already has significant size (with the potential to grow even bigger if its merger with Tribune is approved) *and* a critical patent for this new broadcasting standard. These factors could allow the broadcaster to control the market and hike up patent royalties on competitors while also benefiting from using the patent itself. Meanwhile, consumers will largely have to front the bill of these uncompetitive and exorbitantly high patent deals as prices increase to accommodate the growing prices of royalties.

Sinclair's Patent Gives Them Unique Market Power

Sinclair's patent is a vital part of the ATSC 3.0 transmission technology, which gives the broadcasting giant control over the market and the future of broadcasting. The patent, owned by Sinclair subsidiary ONE Media, is for the technology behind the "bootstrap signal," otherwise known as the System Discovery and Signaling standard.³² The signal serves as the universal entry point on ATSC 3.0 receivers, alerting the receiver when data is about to come in so that programming can be decoded immediately.³³

This technology, owned by Sinclair's ONE Media, is the backbone of the Next Generation TV broadcast standard. Without it, ATSC 3.0 does not function. The National Association of Broadcasters told the FCC in a joint filing with other petitioners seeking Commission approval of ATSC 3.0 that "by approving and adopting A/321, the FCC will have done all it needs to allow broadcasters and TV manufacturers to deliver compelling new content and services using Next [Generation] TV."³⁴ A/321 is the classification for the full standard given to the bootstrap technology when it was accepted by the Advanced Television Systems Committee (ATSC) in March 2016. When the committee voted to approve the technology as a full standard for ATSC 3.0, Sinclair put out a press release dubbing the bootstrap the "essential core of the new ATSC 3.0 standard," noting that it "serves as the universal entry point that allows all receiver devices to process and decode information."³⁵

In fact, the FCC deemed the System Discovery and Signaling bootstrap technology so essential to Next Generation TV that it is the *only* technological standard the Commission required be included in an ATSC 3.0 signal.³⁶ By making the A/321 standard the only mandatory aspect of Next Generation TV signals, the Commission gave ONE Media (and in turn, Sinclair) control over the most powerful tool in broadcasting. Under the FCC's order, ONE Media's bootstrap signal essentially *is* the ATSC 3.0 standard.³⁷ So if any other broadcasters want to compete with Sinclair (as well as other video providers) in the Next Generation TV market, they will have to pay whatever royalty Sinclair demands for the technology behind the ATSC 3.0 standard, as would all manufacturers of TV and broadcasting and cable equipment.

The threat to the marketplace is not merely how central Sinclair's ONE Media's patent is to ATSC 3.0. The FCC's lack of oversight of the licensing of patents for this technology allows Sinclair to unilaterally set prices and collect royalties from any and all interested parties looking to join the ATSC 3.0 revolution.³⁸ TVNewsCheck reported that ONE Media could earn billions of dollars from these royalties.³⁹ FCC Commissioner Jessica Rosenworcel similarly warned of the upcoming windfall for Sinclair: "We know that Sinclair Broadcasting—which holds essential patents for ATSC 3.0—has been one of the biggest champions of

this new standard... Before we authorize billions for patent holders and saddle consumers with the bills, we better understand how these rights holders will not take advantage of the special status conferred upon them by the FCC.”⁴⁰

Sinclair also dominates the market for ATSC 3.0 equipment. The American Television Alliance (ATVA) told the FCC that the equipment that will be used for ATSC 3.0 will impose higher costs on multi-video programming distributors (MVPDs), such as cable companies and over the top services such as Sling TV, because equipment built to receive ATSC 3.0 signals (the bootstrap being central to this) are subject to patent royalties.⁴¹ “If MVPDs had to purchase new equipment for ATSC 3.0 carriage, they would have to pay such royalties as part of the purchase price—just as they would if they purchased new ATSC 1.0 equipment,” ATVA argued (ATSC 1.0 makes up the Digital TV standard).⁴² In the filing, ATVA specifically cited ONE Media’s ownership of patents in the ATSC 3.0 transmission standard and how Sinclair has been “perhaps the most prominent proponent” of the Next Generation TV standard transition.⁴³ The increased costs for equipment would likely be passed onto consumers, creating a consistent pipeline of profits from broadcast TV viewers to Sinclair.

Further, as the essential patent holder for ATSC 3.0 technology and a broadcaster with a significant national footprint, Sinclair has the misaligned incentives to force the transition to ATSC 3.0 technology and pass the transition costs onto MVPDs and their customers. Though the transition to ATSC 3.0 is currently voluntary for consumers and competitors, Sinclair possesses the ability to withhold Digital TV signals and compel carriage of ATSC 3.0 signals in its retransmission consent (also known as “retrans”) negotiations.⁴⁴ Sinclair has already exploited its leverage against MVPDs before by bundling its Tennis Channel with must-have network programming in retransmission negotiations.⁴⁵ If an MVPD is unwilling to pay the high retransmission fees demanded by Sinclair for bundled programming, as Frontier did in 2016, it risks being “blacked out” by the broadcaster (the broadcaster pulls its networks from the MVPD).⁴⁶

Sinclair could similarly abuse its current market power in the ATSC 3.0 transition. Sinclair can take advantage of MVPDs, especially small and rural MVPDs that have significantly less bargaining power to push back on broadcaster demands, by demanding higher retransmission fees, effectively passing the costs of transitioning to ATSC 3.0 onto MVPDs and their customers.⁴⁷ The acquisition of Tribune would further enhance Sinclair’s leverage over small and rural MVPDs.

The FCC's Failure to Adopt a RAND Licensing Requirement Is a Gift For Sinclair That Breaks With Decades of Precedent

The importance of Sinclair's patent to the proliferation of Next Generation TV requires strong policies in place to ensure the broadcaster does not essentially control the entire ATSC 3.0 market through its royalty rates. However, the FCC's Order failed to adopt a reasonable and non-discriminatory (RAND) licensing requirement for patent holders, a move that breaks with precedent and leaves the enforcement of potential unfair licensing deals struck by Sinclair uncertain.

In the past, the FCC has consistently required licensing agreements to be reasonable and non-discriminatory. For the transition to Digital TV, the FCC explicitly imposed a RAND requirement for participants in the new transmission standard in a 1996 Order. The Commission stressed that the adoption of that standard was "premised on reasonable and nondiscriminatory licensing of relevant patents," and noted that despite not adding additional regulations on the subject, the Commission would "take appropriate action" if a future problem emerged.⁴⁸ In making this declaration, the FCC signaled to the industry that it would be watching over the marketplace to ensure licensing agreements were made on a RAND basis. The very adoption of the new broadcasting standard was based on the assumption that parties involved would uphold RAND licensing agreements.

The FCC has a detailed record of protecting competitive markets in the industries it oversees through RAND licensing requirements before ATSC 3.0. When the FCC established rules on the operation of distributed transmission systems for Digital TV service in 2008, it stated the expectation that the "licensing of the patents for DTS technology will be on RAND terms" and promised, as it did in the 1996 Digital TV Order, to address any future issues that arose on patent royalties.⁴⁹ When the FCC amended rules on AM Radio transmission equipment standards in 1993, the Commission conditioned the selection of Motorola's system as the AM stereo standard by requiring Motorola to license its patents to other parties under "fair and reasonable terms."⁵⁰ As part of amendments to the FM Radio standard in 1961, the FCC required commitments that proponents of the systems at issue would "grant non-exclusive licenses under any one or more of its patent applications" and that any patents would be issued with "reasonable royalties for the manufacture, use and sale of the apparatus covered thereby."⁵¹

However, the FCC broke with this long-standing precedent in the ATSC 3.0 proceeding by failing to make similar assurances to ensure action over discriminatory licensing deals in the final Next Generation TV Order. The FCC dismissed the entire issue without discussion in a footnote, concluding, "With no

evidence of patent licensing issues, we believe it is premature to impose regulations on the private licensing marketplace.”⁵² Even assuming this statement were true, it would likely be because the market for ATSC 3.0 is only just developing. Ultimately, ample historical evidence—evidence that the FCC has previously acknowledged and addressed—clearly demonstrates that the owner of a patent for vital technology like Sinclair has the market incentive to abuse its status and exploit the licensing process.

The FCC Has Outsourced Oversight to a Private Organization With Weak Enforcement Powers

In an attempt to justify the lack of antidiscrimination protections in the ATSC 3.0 order, the Commission fell back on the Advanced Television Systems Committee (ATSC), a private third party that requires RAND licensing but lacks any powers to enforce the requirement.⁵³ ATSC bylaws only require RAND licensing for member organizations, and only on a voluntary basis.⁵⁴ In addition, Section 3.8 of the ATSC’s bylaws stipulate that, “[w]henever a Voting Member or Observer is found in default of its financial or *other obligations to the Corporation, as set forth in the Articles of Incorporation, in these bylaws, or policies established by the Board of Directors* [emphasis added], the President of the Corporation shall take appropriate action which may include termination of Voting Member or Observer status.”⁵⁵ Other than terminating Sinclair’s status as a voting member of the Committee, it is unclear what actions the ATSC can take if the broadcaster violates the RAND licensing requirement.

Furthermore, ATSC does not actively police a RAND requirement or participate in licensing negotiations. The organization explicitly absolves itself of any responsibility to identify potential problems.⁵⁶ By exempting itself of responsibility in this regard, ATSC enables Sinclair to engage in anticompetitive behavior that leaves its competitors and customers subject to the patent holder’s unchecked demand for royalties in exchange for access to technology that the National Association of Broadcasters is billing as the future of the industry.⁵⁷

Sinclair may have incentives to adhere to the ATSC’s RAND licensing requirement simply because a failure to do so puts the standard in jeopardy; in other words, the ATSC may choose to withdraw the standard if Sinclair does not allow access to the necessary technology on RAND terms. However, history suggests that such a deterrent insufficiently protects pro-competitive RAND licensing. There have been well-documented instances of abuse by presiding patent holders in previous periods of transition. For example, in 2014, then-Representative Mike Pompeo (R-Kan.) expressed apprehensions about the ATSC patent pool, which he claimed had been a “government granted monopoly since the digital television transition (DTV).”⁵⁸ Pompeo raised concerns over the exorbitant licensing fees charged by essential patent holders, which were five

times as much as fees charged for similar technologies around the world.⁵⁹ As manufacturers are forced to pay the high royalties in order to abide by FCC-mandated regulations, these fees would translate into higher retail prices for consumers. Patent holders imposed these exorbitant royalty rates despite the FCC's adoption of the Digital TV standard with RAND licensing requirements in 1996.⁶⁰ These vulnerabilities should not be ignored in the FCC's regulations overseeing the transition to the Next Generation TV standard.

Alternative Enforcement Mechanisms are Insufficient to Protect Competitors and Consumers

Entities that are unable to gain access to Sinclair's patent on RAND terms may seek redress at the Patent and Trademark Office, the International Trade Commission, or in federal court, but those alternatives can be burdensome.⁶¹ When it opted into the ATSC's patent policy and disclosed ownership of patents relevant to the A/321 specification in the ATSC 3.0 transition, Sinclair's subsidiary, ONE Media, entered into a legally binding contract enforceable by third parties.⁶² This contract allows license seekers to pursue legal action, but the burden to seek redress is unfairly placed on the aggrieved third party rather than on the ATSC, the party that requires the RAND licensing terms. Civil lawsuits are costly and time-intensive, particularly for a third party on a FCC-mandated deadline for transitioning to the new technology.

An ongoing lawsuit by consumer electronics company Haier America underscores the complexity of ATSC patent litigation. Haier alleges that Samsung and LG abused several original ATSC digital standard patents they hold by violating promises to the ATSC and FCC that they would license ATSC standard-essential technology on a RAND basis. These grievances include unreasonable demands such as exorbitantly high royalties and forcing third parties to license additional, non-essential patents to gain access to the critical technology. Sinclair also possesses the potential to exploit its status as a patent holder of ATSC 3.0 technology in a similar manner. Sinclair is also under no obligation to license the technology at all. By foregoing a requirement for RAND licensing simultaneously with the transition to ATSC 3.0 technology, the FCC tilts the playing field heavily in Sinclair's favor.

The Federal Trade Commission (FTC) may be an additional venue for *ex post* enforcement action. Relying on the FTC is not optimal, however, as relief from violations would only come long after the harm has already occurred. For example, Motorola had a history of renegeing on its RAND licensing commitment to several standard-setting organizations, but it was not until Google acquired the company in 2012 and continued breaches of its RAND commitments that the Commission sought a remedy—one was eventually granted in July 2013.⁶³

Precedent in the Digital TV Standard

The FCC should adopt a RAND licensing requirement to ensure that all patent holders, not just the ones that belong to the ATSC, are subject to the requirement. Though Sinclair is currently a member of the ATSC, membership is non-binding and it may not be the case that Sinclair, let alone any member organization of the ATSC, remains the patent holder indefinitely. Either a member organization could leave the ATSC, making it no longer subject to the contractual requirement to grant access to the critical technology on RAND licensing terms, or the patent could be transferred to a non-member that never agreed to the ATSC's patent policy in the first place. The question of whether non-members were subject to a RAND licensing requirement overseen by the ATSC if they obtained ownership of relevant patents was a key issue that arose from a 2007 lawsuit involving Harris Corporation and Rembrandt. Rembrandt allegedly refused to license Digital TV technology on RAND terms after the company acquired the relevant patent from AT&T.⁶⁴ AT&T had been subject to the ATSC's patent policy as a member of the Committee. Rembrandt, however, was not a member, and it argued in a lawsuit that it was therefore not subject to the terms of AT&T's contract with the ATSC.⁶⁵ Although Rembrandt's contractual argument was ultimately not addressed, the case demonstrated a critical oversight in the FCC's rationalization of foregoing a RAND licensing requirement in its Next Generation TV Order: the ATSC only has authority over its membership, and the relevant patents may not always be held by a member of the Committee. Therefore, a RAND licensing requirement is needed to cover *all* patent holders, not just the ones that would be subject to the ATSC's authority.

Conclusion and Recommendations

The transition to ATSC 3.0 has the potential to promote competition if necessary protections are put in place. Sinclair and ONE Media's role as patent holder of this new technology is not on its own harmful. However, the FCC should be wary that this lack of oversight will likely enable Sinclair to dominate the market. Given the uncertainty of RAND licensing enforcement, the agency should explicitly require that the company, and any other party with crucial patents, license its patents on reasonable and nondiscriminatory terms to ensure the broadcaster is not able to charge anticompetitive royalty rates to any other competitor also using the Next Generation TV broadcast standard. The Commission should also make it clear that it will enforce these requirements to deter any anti-competitive behavior from patent holders such as Sinclair. An FCC requirement to do so would provide safeguards against anticompetitive harms to competitors and consumers.

Sinclair should not be able to “double-dip” in the ATSC 3.0 market by using and benefitting from the technology itself while also price-gouging its rivals in the space. Reinforcing fair licensing requirements will foster strong competition in the TV marketplace, mitigate the threat of unreasonably high royalty fees that would result in inflated consumer costs, and continue to allow Sinclair and other broadcasters to benefit from ATSC 3.0 and the promising innovations that could come with it.

Furthermore, if Sinclair's acquisition of Tribune is approved, creating a true broadcasting giant, the company would have even more ground to control the broadcasting market through ATSC 3.0 patent royalties as well as retransmission consent fees. The FCC should require Sinclair to RAND licensing with outside parties as a condition of the merger if it chooses to approve the deal.

Notes

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