from Congress to deal with the specific antitrust problems of radio communications.[6]

In the case of telephone jacks and plugs, the Commission noted that AT&T patents could be used as a discriminatory and anti-competitive tool, but did not suggest mandatory licensing as a solution. Instead, it adopted the AT&T jack and plug designs on the condition that AT&T abide by its promise of voluntary licensing on a non-discriminatory basis.[7] Even this action was based on authority under Title 2 of the Communications Act not applicable to ATV.

Only once, in the case of Comsat, has the Commission actually proposed a mandatory patent licensing system. This would have covered patents resulting from work paid for out of INTELSAT funds. The FCC proposed it as a means of minimizing Comsat's competitive advantages over other U.S. companies due to its government-granted monopoly position in INTELSAT.[8] Here again, however, the Commission eventually decided to merely hold the patent owner to a pledge of voluntary, non-discriminatory licensing.[9]

Both in the case of AT&T and Comsat, the Commission exercised extensive regulatory oversight and authority under Title 2 of the Communications Act.

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[6]Amendment of Section 3.606 of the Commission's Rules and Regulations, 41 FCC 1, 41 (1950) at para. 126.
[7]Revision of Part 68 of the Commission's Rules, 62 FCC 2d 735, 738 (1976).
[8]Comsat Study, 77 FCC 2d 564, 650 (1980).
[9]Changes in Comsat Corporate Structure, 90 FCC 2d 1159, 1195 (1982).

By contrast, an ATV system proponent would be an entirely private entity that enjoys no government-granted monopoly, whose profits are not regulated by the Commission, and whose business activities are not regulated under Title 2.

The Commission Could Require Disclosure of Licensing Terms Prior To Choosing a Standard

As a policy matter, the Commission might be able to treat patent licensing terms as a decisional criterion in choosing an ATV system. It could require disclosure of the patent licensing terms and conditions, and then treat this as an input into the decision process, in the same way that consumer cost, technical quality and other factors might be decisional inputs. In this way, proponents with more generous licensing terms would receive a higher score than proponents with restrictive terms. Arguably, this approach would not actually compel the licensing of patents, while still most likely accomplishing the widespread licensing of proprietary ATV technology.

However, this approach further complicates the Commission's decisionmaking job, by adding an additional tradeoff into the decisional process. Moreover, it presents a possible problem if any proponent desires to hold its patent licensing terms as confidential information, a practice which is not uncommon. In this case, while the Commission might be able to treat the licensing terms and conditions as trade secrets and could grant confidentiality, it is not clear whether the Administrative Procedures Act would permit the Commission to use such confidential information as the basis for a rulemaking decision.