January 31, 2013

The Honorable Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: In the Matter of Motorola Mobility, LLC and Google Inc., File No. 121-0120

Dear Mr. Clark:

Intellectual Property Owners Association (IPO) welcomes this opportunity to provide its views with respect to the Decision and Order in the subject proceeding (*Google* case) on which the Commission has solicited public comments.

IPO is a highly diversified trade association based in the United States. Its members include more than 200 companies with an interest in intellectual property rights. Approximately 12,000 individuals are involved in the activities of the association, either through their companies or as IPO inventors, authors, executives, law firms or individual attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property covering all areas of technology, many of whom are involved in various formal and informal standards development organizations around the world. The broad diversity of IPO gives it an informed perspective regarding the issues before the Commission in this case.

IPO expresses no views with respect to the underlying merits of the specific relief sought by the Commission in the *Google* case. We recognize that the individual disputes over patent enforcement that have become intertwined with the existence of interoperability standards and FRAND commitments can be complex. The issues may not be readily understood by outsiders and they are frequently controversial. This makes it difficult for a widely diversified organization such as IPO to arrive at a consensual or even a fully informed point of view.

IPO opposes the unrestricted use of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as a standalone basis for intervention by the Commission in situations where the agency cannot rely on a violation of the antitrust laws as the basis for exercising governmental power to restore or preserve competition. The Complaint in the *Google* case purports throughout to reflect the Commission's concern about diminished competition resulting from a patent owner's efforts to enforce its patents (*e.g.*, Paragraphs 2 – 4, 13 – 14 and 30). Yet, the Complaint makes no mention of an antitrust statute nor does it allege facts that purport to satisfy either the Sherman Act or

the Clayton Act.[1] Instead, the Complaint appears to be based solely on Section 5, alleging in essence that any effort to enforce a patent subject to a FRAND commitment is both an "unfair method of competition" and an "unfair act or practice," as those terms are used in Section 5.

Trying to define prohibited conduct in terms of what is "unfair" is inherently subjective and predictably influenced by the predispositions and biases of the particular regulators charged with reviewing a particular matter. IPO believes that the use of "unfair" as a legal standard for prohibiting certain types of conduct must necessarily be accompanied by well-defined limits that apprise market participants as to what is permitted and what is not. This is especially so where actions expressly authorized by Acts of Congress[2] are purportedly "unfair." No such limiting principles or definitions are discernible from the Complaint and the Statement of the Commission in this matter.

In his separate statement in the *Google* case, Commissioner J. Thomas Rosch calls attention to a number of ways in which the Complaint might have alleged essential facts that would assist in establishing an appropriate outer boundary to the scope of Section 5. He concludes that without such limiting principles "Section 5 is not properly circumscribed." Similarly, Commissioner Maureen K. Ohlhausen, in her dissenting statement in the case, calls attention to the absence of limiting principles underlying the Complaint and the "ambiguous guidance to market participants" that it fosters.

This critique of the proposed Decision and Order is of particular concern to IPO, many of whose members are large companies with many products and many employees who participate in numerous and diverse standard setting activities. For these companies, the exercise of governmental power in the absence of clearly defined legal standards by which permissible conduct can be defined in advance seriously impedes proper compliance with the law. Without such legal standards, companies increase their risk of inadvertently breaking the law and precipitating an enforcement action. There is greater risk of becoming embroiled in private litigation and the burdensome costs that accompany such eventuality. Decisions of governmental agencies such as the Commission – indeed, even complaints that are filed and later dismissed – often precipitate private antitrust claims that would not otherwise have been filed. The Dissenting Statement of then Commissioner William Kovacic in the *N-Data* case[3] emphasized this danger in the over expansive use of Section 5.

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[1] The vague and all-inclusive allegations of a relevant market and monopoly power set forth in the two sentences that constitute Paragraphs 20 and 21 hardly serve as an adequate basis for defining market conditions necessary for a violation of the Sherman Act. The relevant market is sweepingly defined in terms of all technology encompassed by any patent that may be essential for the practice of any standard established by a Standards Setting Organization (SSO) in which the respondent ever participated.

[2] The Patent Act, 35 U.S.C. § 283, authorizes a court of competent jurisdiction to grant injunctions against infringers of a U.S. patent. The Tariff Act of 1930, 19 U.S.C. § 1337, authorizes a domestic company to seek exclusionary orders barring the importation of goods that infringe a U.S. patent.

[3] *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094.

Beyond these practical concerns, there are some important policy issues implicated by a more expansive use of Section 5. In her separate statement and dissent in the *Bosch* case a few weeks ago, Commissioner Ohlhausen observed:

> The SEP allegations and consent in the instant matter suffer from many of the same deficiencies as the [consent decree in] the *N-Data* case. I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement emphasizes the context here (*i.e.* standard setting); however, it is not clear why the type of conduct that is targeted here (*i.e.* a breach of an allegedly implied contract term with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result. If the Commission continues on the path begun in *N-Data* and extended here, we will be policing garden variety breach-of-contract and other business disputes between private parties.[4]

In this respect, Commissioner Ohlhausen's views comport with some of the pointed criticism the Commission has fostered in the past in its efforts to push the application of Section 5, in matters involving only the maintenance or restoration of competition, beyond the limits imposed by the Sherman and Clayton Acts and their decisional progeny. Exemplary was the dissenting opinion of then Commission Chairman Deborah Majoras in the *N-Data* case.[5] She identified a number of such comments from respected commentators, judges and academics, arguing for restraint in the use of Section 5 beyond what is prohibited by the antitrust laws.

IPO appreciates the opportunity to be heard on these issues. We urge the Commission to keep these points in mind before seeking to extend the rationale of this consent decree to other situations.

Respectfully submitted,

Richard Phillips
President

[4] *In the Matter of Robert Bosch GmbH*, File No. 121-0081, Docket No. C-4377.

[5] *N-Data* Dissenting Opinion of Chairman Majoras, fn.9. A variation of the same point was articulated succinctly in Antitrust Law Developments (7th ed.) (ABA Section of Antitrust Law, 2012), p. 661:

> "FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not."