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February 22, 2013

Donald Clark
Secretary
Federal Trade Commission
Washington, DC 20580

Re: *In the Matter of* Motorola Mobility LLC; FTC File No. 121 0120

Dear Secretary Clark,

We respectfully submit the following public comments on the proposed Consent Order with Motorola Mobility, LLC. These comments are based on our years of experience in representing firms and standard setting bodies in intellectual property and antitrust issues.[1]

Our comments highlight four themes. First, the proposed Consent Order strikes an appropriate balance of protecting competition and establishing an important balance between potential licensors and licensees in standard essential patent ("SEP") negotiations. The specific circumstances surrounding the dispute between Google/MMI and its various competitors called for a balanced approach. Second, though effective in this instance, the FTC and other regulators must understand that all SEP negotiations are different, and must recognize that the process outlined in this proposed Consent Order may not be a prescription for all future SEP enforcement.

Third, anticompetitive use of patents is especially significant in the high-technology sector, and the FTC should marshal its enforcement resources to address other problematic practices involving patents that may not be involved in the standard-setting process. Finally, the FTC was correct in asserting its ability to regulate these questions under Section 5 of the Federal Trade Commission Act, and stress that this authority is not limited to the SEP context.

Sincerely,

David A. Balto
Brendan Coffman

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[1] Mr. Balto is the former Assistant Director for Policy and Evaluation in the Bureau of Competition of the Federal Trade Commission. Mr. Coffman is an associate with extensive experience counseling high-technology firms on IP licensing issues. These comments reflect the opinions of the authors and not of any clients of the law firm.

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I The Proposed Consent Order Strikes an Appropriate Balance of Protecting Competition While Not Unreasonably Disadvantaging One Party in a Negotiating Process Notorious for Gamesmanship and Opportunism

The proposed Consent Order represents a careful effort by the FTC to implement a remedy without creating a solution more harmful than the perceived problem. After a thorough investigation the FTC concluded that Google/Motorola violated the spirit of its FRAND commitments by seeking an injunction in federal court and an exclusion order through the International Trade Commission ("ITC") on certain standard essential patents. The FTC is correct in its assertion that the inclusion of a patented technology in a standard confers increased negotiating leverage on the patentee, and may result in ex-post facto patent hold-up in instances where competitors are "locked-in" to the technology. The FTC also correctly identifies FRAND commitments as a common method for preventing hold-up. Exchanging certain patent rights for participation in a standard setting organization ("SSO") is a routine occurrence, especially in industries dependent on interoperability between devices, hardware, software, and infrastructure. *See* Compl. ¶15. As such it is appropriate to bring an enforcement action when it is clear that the SEP holder is abusing its position by refusing to license with, or demanding exorbitant royalties from, a willing licensee.

The proposed Consent Order also recognizes another aspect of the standards-development and cross-licensing relationship between competitors in these industries: putative licensees are equally as incentivized to create and exploit competitive advantages to FRAND-encumbered patents (a process we describe below as "hold-out"). As such the primary public policy and enforcement consideration must be ensuring a standardization, licensing, and negotiating process that is insulated from gamesmanship and opportunism from all participants. The FTC's proposed Consent Order accomplishes this task by simultaneously outlining safe harbors for licensees to avoid injunctions and to trigger events for SEP holders that allow them to prevent rampant uncompensated willful infringement. Most importantly, the proposed Consent Order does not protect putative licensees who seek to engage in the very conduct the FTC is attempting to quash by refusing to license SEPs to Google on FRAND terms unless the putative licensee follows the same procedures as Google. This small carve-out prevents a chicken-and-egg scenario from resetting itself, and disincentivizes all parties from seeking injunctive relief.

A License Negotiations for Standard Essential Patents are Vulnerable to Both Hold-up and Hold-out

The proposed Consent Order appropriately defines hold-up as "the ability [of an SEP owner] to demand and obtain royalty payments based not on the market value of its patents over alternative technologies, but on the costs and delays of switching away from the standardized technology." Compl. ¶13. As described above the proposed Consent Order limits the ability of SEP owners to engage in hold-up.

But there is a parallel problem, of unwilling licensees, who may infringe the patents and are unwilling to negotiate on a reasonable basis. They employ the technology for commercial benefit, and reap the same rewards as others that participate in the standard setting process. However, rather than pay the demanded FRAND rate – even when there is evidence to demonstrate the royalty demanded is consistent with royalties paid by other SSO members or that the royalty is consistent with previously negotiated licenses – unwilling licensees choose to force an SEP holder to initiate litigation to collect its royalties. This strategy has two main benefits for the unwilling licensee. First, it drives up the costs for the SEP holder, who is often a competitor. Second, it affords the unwilling licensee the opportunity to make antitrust counterclaims based on a FRAND hold-up theory, regardless of whether the SEP holder is seeking an injunction.

The unwilling licensee is not a mythical creature. The District Court for the Western District of Wisconsin faced the behavior of an unwilling licensee firsthand. This case originated at the International Trade Commission as case 337-TA-745, in which Motorola sought an exclusion order for Apple's alleged infringement of six Motorola patents. Apple filed a Counterclaim alleging that Motorola failed to honor its commitment to license these patents on FRAND terms and that Motorola demanded excessive royalties for its SEPs. Judge Crabb resolved to determine the appropriate FRAND rate, and agreed with Judge Robart of the Western District of Washington that specific performance would be an appropriate remedy – meaning that after determining the correct FRAND rate, Motorola would be forced to license its patents at this rate.[2] Motorola responded by asking the court to declare the same for Apple – that Apple would be required to accept a license on the court-determined FRAND rate, and would not be able to refuse the license or pursue further patent litigation.[3] Apple replied the following day by insisting that it would not pay any more than $1 per device for the Motorola patents, regardless of the court's determination of the appropriate FRAND rate.[4] Judge Crabb then dismissed the entire case, exclaiming "Apple's request for a FRAND rate that may or may not resolve the licensing and infringement disputes between the parties and would likely be used simply as a starting point for future negotiations does not satisfy these basic requirements for an injunction."[5]

The proposed Consent Order attempts to prevent hold-up and hold-out alike. Judge Crabb determined early on in the Apple-Motorola litigation that Motorola's FRAND commitment to ETSI constituted a binding contract, and reasoned that Apple was a third-party beneficiary to the contract and thus able to enforce the contract.[6] This is the correct approach. But the third-party beneficiary logic should flow both ways – Apple should also be considered bound by its participation in an SSO and its use of technology that it knows is covered by a competitor's patents. Judge Crabb did not decide (and was not asked to decide) whether Apple entered into a contract to pay a FRAND royalty. If yes, then Motorola is a third party beneficiary and therefore should have been able to enforce the contract by demanding the FRAND rate for licensing the patent. The wise public policy answer is to recognize the dual commitments made by all participants in a standard setting organization, not just the patent holder. Judge Crabb implicitly reached this conclusion when she dismissed Apple's case.

B Pursuing an Injunction by an SEP Holder Encumbered with a FRAND Commitment is Anticompetitive if the Putative Licensee Negotiates in Good Faith, But is a Necessary Threat to Ensure Good Faith Negotiations

The proposed Consent Order in this case recognizes the mutual opportunity for anticompetitive conduct between an SEP holder and a putative licensee and appropriately equips all parties with means to defend against either hold-up or hold-out, whichever be the case. This includes Google's ability to pursue injunctive relief under certain circumstances (potential licensee not subject to US jurisdiction; potential licensee has stated in writing or sworn that it will not accept Google's FRAND license on any terms; the potential licensee refuses to enter into a licensing agreement on terms determined by an arbiter or a judge; the potential licensee fails to make adequate assurances to Google that it will accept a license on FRAND terms; and if the potential licensee seeks injunctive relief against Google for SEP-encumbered patents without first going through a FRAND determination procedure similar to that which Google must follow.)

[2] Opinion and Order, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Oct. 29, 2012).
[3] Motorola's Motion for Clarification, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Oct. 30, 2012).
[4] Apple's Opposition to Motorola's Motion for Clarification, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Oct. 31, 2012).
[5] Opinion and Order, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Nov. 2, 2012).
[6] Opinion and Order, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Aug. 10, 2012).

It is clear that the FTC understands that seeking an injunction or exclusion order by an SEP holder is not a *per se* violation of the antitrust law, and that SEP holders must have the right to seek injunctions in appropriate circumstances. This is an appropriate paradigm for a potentially harmful but commercially necessary alternative. The FTC goes to great lengths in its Analysis of Proposed Consent Order to Aid Public Comment[7] to stress that consumers may be deprived of the benefit of standards if hold-up continues unabated.

> [Seeking and threatening injunctions against willing licensees] reduces the value of standard setting, as firms will be less likely to rely on the standard-setting process. Implementers wary of the risk of patent hold-up may diminish or abandon entirely their participation in the standard-setting process and their reliance on standards. If firms forego participation in the standard-setting process, consumers will no longer enjoy the benefits of interoperability that arise from standard setting, manufacturers have less incentive to innovate and differentiate product offerings, and new manufacturers will be deterred from entering the market.

As the Wisconsin litigation demonstrates the opposite is also true – if companies continue to share their valuable and competitively sensitive technology with competitors, but are not able to collect royalties easily, then they will become "wary of the risk of" royalty hold-out and may consider abandoning standards groups altogether.

There has been recent controversy about the potential harm from SEP holders seeking injunctions, but we believe much of this controversy is overstated. With respect to injunctions at the federal court, it is important to remember that removing the ban on Google's ability to pursue an injunction is not at all the same as Google obtaining an injunction. Google must still satisfy *eBay*[8] by demonstrating 1) that it suffers irreparable harm; 2) monetary damages will not adequately remedy the infringement; 3) the balance of hardships favors the patent holder; and 4) the public interest would be served by an injunction.[9] Furthermore, the International Trade Commission has never granted an exclusion order against smartphones or other mobile telecommunications devices based upon infringement of standard essential patents. The FTC highlighted this point in its Third Party Statement in the ITC Motorola-Apple investigations, stating "These investigations appear to present an issue of first impression for the ITC that has significant implications for the public interest: the propriety of granting an exclusion order in favor of a standard essential patent (SEP) holder that has committed to license on reasonable and non-discriminatory (RAND) terms."[10] The FTC's statement goes on to outline numerous options available to the ITC short of issuing an exclusion order, including finding "public interest factors support denial of an exclusion order unless the holder of the RAND-encumbered SEP has made a reasonable royalty offer"[11] or delaying the effective date of an exclusion order until "the parties mediate in good faith for damages for past infringement and/or an ongoing royalty for future licensed use, with the parties facing the respective risks that the exclusion order will (i) eventually go into effect if the implementer refuses a reasonable offer or (ii) be vacated if the ITC finds that the patentee has refused to accept a reasonable offer."[12]

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[7] *Available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.
[8] *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).
[9] As Commissioner Ohlhausen points out in her Dissent, the *eBay* standard has been applied to patent litigation involving "core technology." *See* Commonwealth Scientific and Indus. Research Org. v. Buffalo Tech. Inc., 492 F. Supp. 2d 600 (E. D. Tex. 2007).
[10] United States International Trade Commission Investigation 337-TA-745 and 337-TA-752, Federal Trade Commission, Third Party United States Federal Trade Commission's Statement on the Public Interest, June 6, 2012, *available at* http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.
[11] *Id.* at 4.
[12] *Id*.

II The Proposed Consent Order is Effective in the Google/Motorola Investigation, but Suffers Limitations as a Prescription for Future SEP Enforcement

The proposed Consent Order in Google/MMI functions well as a roadmap for regulatory enforcement of SEP negotiations, but it is not a panacea to all SEP disputes. No two disputes are identical, and the analyses of competitive effects or negotiating asymmetries that define many SEP negotiations may demand different remedies. Furthermore, it would be incorrect to assume that every SEP dispute is tantamount to patent hold-up or tantamount to anticompetitive activity. Quite to the contrary, these bilateral and/or multilateral negotiations are different in every circumstance, and the regulatory agencies must be careful not to disrupt or exacerbate normal course-of-business negotiations.

A Every Instance of Bilateral Negotiations is Different

1 History and Future Expected Interactions Color Negotiations

Negotiations do not occur in a vacuum. Many different factors influence the terms companies will ultimately agree to implement. Some of the factors that will impact these negotiations include whether the potential licensee also holds SEPs on the same standard; whether the potential licensee and the SEP holder have a history of licensing agreements; and the relative size and market clout of each participant.

Anticipated future negotiations also play a role in SEP licensing. If two firms anticipate dealing with each other in the future, they will be more likely to reach a mutually agreeable solution, as the risk of losing a business partner in the future will outweigh the marginal gain from a slightly better licensing deal. On the contrary, if either or both of the negotiating parties do not anticipate a significant business relationship in the future, there will be more incentive to engage in either hold-up or hold-out. This is particularly true for large established companies negotiating with smaller, potentially entry-level competitors. More importantly, bilateral negotiations between two large entities may break down when one of these has not invested heavily in SEPs. Take, for instance, Apple and Microsoft who hold very few SEPs covering technology in the telecommunications sector. Instead, these firms have an incentive to maximize the royalties on proprietary features covering commercially essential components of technology that were never contributed to a standard setting organization while simultaneously devaluing SEPs. When competitors who hold commercially essential patents are able to drive down the value of their competitors' SEPs merely because the competitor participated in a standard setting process, this not only results in disproportionate bargaining power but threatens to disrupt the entire course of negotiations in the future. The result is the perpetuation of patent warfare, rather than the patent peace the FTC is seeking.

This complexity reveals only that the rigid mechanics of the Google settlement may not always be appropriate. On one hand the requirements may prove to be little more than a formality, and the need for scrutiny may be higher. Conversely, the requirements may prove excessive and inadvertently create an opportunity for rent-seeking and delay where negotiations otherwise would have flourished. The proposed Consent Order is most didactic in its demonstration that the FTC can analyze a specific negotiation and tailor a remedy that addresses the dynamic problems on both sides.

2 The Question of Cross-Licenses is Still Unresolved

One complicated question that has permeated FRAND negotiations is the SEP owner's right to demand a cross-license to the potential licensee's patents. The proposed Consent Order addresses the question of demanding a cross-license for other patents pertaining to the same standards[13] as the SEPs, but often firms will seek to package FRAND-encumbered SEPs with other patents as part of an effort to obtain a broad license from its negotiating partner. This issue is made even more complex given the likely implications of this proposed Consent Order, as patent holders will be much less likely to declare their patents as standard-essential. Judge Crabb opined on this complex issue, stating "[The ETSI IPR policy] does suggest that Motorola cannot be found to have made an unreasonable or discriminatory offer simply because it demanded that Apple provide a reciprocal license to Apple's standards-essential patents... In other words, evidence that Apple refused to provide a license to its own patents or refused to engage in negotiations related to its own patents would be relevant to whether Motorola breached its contract with ETSI."[14]

Whether or not an offer is FRAND is a moving target, and often subject to the relationship between the negotiating parties. It is not plausible to create a set of rules that completely neutralizes this reality. As a result the FTC and other enforcement agencies should be aware of the varying dynamics when assessing the viability of an enforcement action against an SEP holder.

B Ten Years is an Excessive Amount of Time to Limit Negotiating Power in High-Technology Industries

A ten-year ban on Google's ability to seek an injunction is unreasonable and excessive. In other contexts the Commission recognizes how quickly high-technology markets evolve and that intellectual property rights are of a limited duration. The restoration and/or preservation of competition that the FTC seeks will be complete within several years of this order. Ten years unreasonably restrains Google from reacting in an industry where technologies change constantly, and where competitors are becoming more adept at using patents as weapons. Other high-tech firms may continue to amass patent portfolios to distort negotiating relationships, or deploy valuable patents through a network on patent assertion entities ("PAE"). It is in the consumers' best interest that no firm be left in a position where it is unduly vulnerable to opportunism and strategic conduct.

III. Standard Essential Patents Represent Only One of Many Patent-Related Competition Concerns

The FTC and enforcement agencies must continue to monitor the use of patents to target competitors, raise production costs, and deprive consumers of new products. Perceived abuses of SEPs through hold-up and/or the pursuit of injunctions and exclusion orders are just one of many patent issues facing the high-tech community. It is imperative that the FTC continue monitoring how firms assert patent rights in a way consistent with their purpose. Both antitrust law and patent law share the goal of promoting innovation and consumer welfare, but through different mechanisms. It is the FTC's and regulators' domain to ensure that patent rights are not expanded or distorted at the cost of competition and innovation.

A Operating Entities Jointly Acquire Patent Portfolios

The joint purchase and administration of a patent portfolio by competitors poses numerous antitrust concerns. The competitors claim they are able to pool resources and efficiently distribute licenses without the trouble of litigation. However, a joint acquisition inherently leaves competitors outside of the group.

Depending on the patents, this could create a hold-up problem similar to the one perceived by the FTC in Google/MMI. It is not necessary that the patents in the portfolio are FRAND-encumbered – only that they are commercially necessary. This concern is further amplified if the patents are acquired from a non-

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[13] The Decision and Order refers to this as "Reciprocity" Compl. Definition X.
[14] Opinion and Order, *Apple, Inc. v. Motorola Mobility, Inc.*, 3:11-cv-00178 (W.D. Wis. Oct.29, 2012).

competitor. In this scenario, the original portfolio holder had every incentive to license out his patents to maximize revenue. However, once a group of firms that compete in the market where the patents apply controls the portfolio, incentives may change. Instead of maximizing revenue from the patents, the group may instead choose to turn the portfolio into an entry barrier. Even if the patents are still of questionable value, they may still serve as a tool for controlling cross-licensing negotiations or as ammunition for a campaign of frivolous lawsuits.

The Department of Justice Antitrust Division has investigated two instances of joint purchases in the past two years. In 2011, the Division cleared a joint purchase by Microsoft, Oracle, Apple, and EMC of patents held by leading open source competitor Novell after the companies agreed to restructure the terms of the purchase to include, among other things, making the patents in the portfolio available under pertinent open source licenses.[15] The Division acknowledged that the deal would jeopardize the ability of open source software, such as Linux, to continue to innovate and compete. In 2012, the Division cleared an acquisition by Microsoft, Apple, Sony, Ericsson, and RIM of Nortel patents; in large part because it concluded that some of the consortium members (Microsoft and RIM) had low market shares in "mobile platforms."[16]

These transactions raised significant competitive concerns. It is not clear why a high market share in a market of "mobile platforms" would be necessary to enable a group of competitors to wield patents in a way that harms competition, nor is it clear that this is a cognizable market for antitrust review. Furthermore, the statements suggested that the Division focused on SEPs in the portfolio and whether the group of competitors would have the incentive and/or ability to seek injunctions against competitors. The Google/MMI proposed Consent Order may go a long way in ensuring that injunctions and exclusion are not the result of future joint purchases for SEPs, but it does not address the question of wielding the patents as either a tool to raise rivals costs or to prevent entry and expansion.

To put it more simply, the Department of Justice recognizes the incentive and ability to deploy patents as a means of undermining competition, but the Google/MMI proposed Consent Order provides an opportunity to impact only one possible manifestation of this practice. Whether or not a patent is encumbered with a commitment to a FRAND license does nothing to change the incentive of the patent holder to leverage the patent against competitors. In fact, it may be the case that FRAND-encumbered patents are less of a concern because there is a presumption that the firm is willing to accept monetary payment. Commercial essential patents, on the other hand, pose the same exclusionary and anticompetitive threat.

B Established Operating Entities Transfer Patents to Subsidiaries or Business Partners to Avoid Licensing Commitments or to Drive up Costs

Another pervasive business practice that may harm competition is selling or assigning patents to PAEs. For instance, companies may license patents to certain competitors with whom they maintain good relationships, retain a license for themselves, and then sell the patents to assertion entities. The PAE then demands exorbitant fees from competitors, and allows the original patent owner to avoid the threat of a patent counterclaim. Like the unwilling licensee, the profiteering model is not a myth. Just recently, on

[15] Press Release, US Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns* (April 20, 2011), *available at*: www.justice.gov/opa/pr/2011/April/11-at-491.html.

[16] Press Release, US Dep't of Justice, Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp., and Research in Motion Ltd. (February 13, 2012), *available at*: www.justice.gov/atr/public/press_releases/2012/280190.htm.

January 30, 2013 mobile tech competitor Ericsson announced that it sold 2,185 patents relating to 2G, 3G, and LTE Technologies to Unwired Planet.[17]

The proposed Consent Order may have the effect of further encouraging patent holders to harm competition by selling or transferring patents to PAEs because the litigation value of non-FRAND patents increases with additional requirements on SEP patents. Only a portion of the patents covering modern and developing technologies are encumbered with FRAND commitments. Those that have not openly committed patents to FRAND rates have every incentive to leverage patents, but will want to do so without subjecting themselves to countersuits or to reputational harm. As discussed above, the mechanism for identifying and declaring SEPs is not as clear or foolproof as the industry would like. Thus there are likely to be many commercial-essential but not standard-essential patents granted by the patent system (itself a reflection of a patent-granting model that over-emphasizes quantity and under-emphasizes quality).

Furthermore, PAEs use economies of scale in litigating cases, as University of Santa Clara Law Professor Colleen Chien explains, "PAEs use contingent fee lawyers and assert the same patents in the same venues to capture economies of scale.[18] PAEs only need several commercial-essential patents, and may combine them with dozens, hundreds, or even thousands of less valuable patents. The result is the enablement of predatory conduct and the creation of barriers to entry that pose considerable harm to competition and consumers.

With respect to the Google/MMI proposed Consent Order, there are two important lessons. First, the FTC must not limit its understanding of competitive harm solely to practicing entities. Second, the FTC must be aware of collateral effects of this settlement. The FTC has resolved a difficult dispute involving some very successful competitors, but it has also unveiled a complex and potentially risky system for patent holders. The result may be further gamesmanship to avoid being susceptible to a similar regulatory action. The FTC must remain vigilant and learn with the industry as new ways to wield patents anticompetitively develop and become sophisticated.

IV. The Commission Correctly Uses the "Unfair Methods of Competition" Prong of Section 5 of the Federal Trade Commission Act.

A Section 5 of the FTC Act Reaches Conduct the Sherman Act May Not

The FTC's complaint alleges that Google/MMI violated the FTC Act by engaging in both 1) unfair methods of competition and 2) unfair acts or practices. We address the appropriateness of utilizing "unfair methods of competition" under Section 5 as a standalone cause of action. This is a correct and appropriate application of Section 5 to business practices that may-or-may-not fall under the purview of traditional Sherman Act claims. As preeminent antitrust scholars Areeda and Turner explain, "'Congress expected the Commission to build up its own administrative law of unfair trade practices and not be limited rigidly to what had been already held to be unfair trade practices at common law.'"[19] History suggests that Congress intended the broad mandate of Section 5 to be flexible, and for the Commission to determine what constituted "unfair methods of competition" under the provision. When the Commission identifies business practices or other behavior that has the effect of harming competition, but does not fall

[17] Tim Cushing, *Ericsson Sells 2,185 Mobile Tech Patents To Newly Minted Troll, Unwired Planet*, TECHDIRT, Jan. 30, 2013.
[18] *See, e.g.* Presentation by Professor Colleen Chien, *Patent Assertion Entities*, to the Joint FTC/DOJ Patent Assertion Entities Activities Workshop, *available at* http://www.ftc.gov/opp/workshops/pae/docs/cchien.pdf.
[19] *Id.* at 22-23 (quoting II AREEDA & TURNER, ANTITRUST LAW 11 (§ 305) (1978)).

strictly under the rigid confines of the Sherman Act, Section 5 is an appropriate tool for rectifying this behavior.[20]

Many commentators have argued that the proposed Consent Order's use of Section 5 authority "fail[s] to provide meaningful limiting principles"[21] and that the FTC is "charting a dangerously unprincipled course on Section 5, particularly with respect to its interpretation of its unfairness jurisdiction."[22] We believe that their views are misguided.

What the FTC's action and the commentary suggesting a lack of limiting principles illuminate is an inherent tension in the FTC's mission. The FTC is tasked both with providing guidance and leadership to the business community, and with providing redress when the Commission identifies business practices with anticompetitive effects. To limit enforcement authority only to harmful practices that the FTC has anticipated ties the Commission's hands unnecessarily. Conversely, to apply Section 5 *carte blanche* and arbitrarily to any business practice places an unreasonable burden and creates intolerable business risk.

Ultimately, when faced with the dilemma of extending the jurisprudence of Section 5 versus the need to rectify harmful conduct, the Commission must ultimately step back and assess the long-run impact on consumers. If, in the Commission's determination, the benefit to consumers from action outweighs the burden placed on companies, then action may be warranted under Section 5.

B This Authority is Not Limited to SEPs or FRAND Agreements

The Statement of the Federal Trade Commission emphasizes, "Where opportunistic behavior of the sort involved here (and in Bosch) harms, or threatens to harm, competition, the competitive process, and consumers, Commission intervention is justified."[23] It would be poor public policy if the Google/MMI enforcement action were to be interpreted to mean that only a certain circumscribed set of conduct relating to SEPs is reachable through Section 5. Anticompetitive conduct does not need to be "of the sort" in that it relates to FRAND promises, or allegations that conduct will harm an intermediary process such as the standard setting process.

We fear that the Commission only intends to elaborate and expand the regulatory oversight of SSOs because the "Commission has a long history of using its enforcement authority to safeguard the integrity of the standard-setting process."[24] As we explained above, the FTC must be aware of the possible collateral effects of this proposed Consent Order. The Commission should adopt a broad focus to monitor patent litigation and business practices that have the ability and effect of harming competition, to preserve competition and enhance consumer welfare.

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[20] *See* David Balto & Richard Wolfram, Comments for Public Inspection, *In the Matter of* Negotiated Data Solutions, LLC, FTC File No. 051-0094, *available at* http://www.ftc.gov/os/comments/negotiateddatasol/534241-00022.pdf.

[21] Dissenting Statement of Commissioner Maureen K. Ohlhausen at 2.

[22] Geoffrey Manne, *The Price of Closing the Google Search Antitrust Case: Questionable Precedent on Patents*, TRUTH ON THE MARKET, Jan. 4, 2013, *available at* http://truthonthemarket.com/2013/01/04/the-price-of-closing-the-google-search-antitrust-case-questionable-precedent-on-patents/.

[23] Statement of the Federal Trade Commission at 3, *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

[24] *Id*. at 1.

Conclusion

The FTC's Consent Decree is an appropriate resolution to a difficult dispute, and signals a deeper understanding of the complexities and nuances of SEP negotiations. Although we believe the proposed Consent Order will be effective in the present action, it is important to remember that all SEP negotiations are different, and that the process described in this proposed Consent Order may not work in other SEP disputes. There is no one-size-fits-all solution to fears of anticompetitive practices involving SEP holders and SEP licensees. Furthermore, the FTC and other regulators should keep in mind that anticompetitive use of patents is rampant in the high-tech space, and must not limit their willingness to address competitive concerns to issues of SEPs. Finally, we emphasize that Section 5 of the FTC Act fully empowers the FTC to investigate potential competition concerns involving both SEPs and non-SEPs.