

January 9, 2013

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: *In the Matter of Robert Bosch GmbH (FTC File Number 121-0081)*

Dear Commissioners and FTC Executive Staff:

Microsoft appreciates the opportunity to provide comments regarding the Complaint and proposed Order against Robert Bosch GmbH in connection with its acquisition of SPX Services. Our comments are focused on the portion of the proposed Order that seeks to address SPX's alleged breach of its commitment to license standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms by seeking injunctions against implementers of industry standards. Efforts to obtain such injunctions are harmful to competition, innovation and consumers. The Commission's action in this matter provides clear guidance that this practice is anticompetitive and unlawful.

Microsoft is an interested third party. We are a product and services company, and we also are an intellectual property company. We invest billions of dollars each year in innovation and have been granted thousands of patents. We've entered into hundreds of patent licensing arrangements over the past few years—both as a licensor and a licensee. We are a key contributor to the development of technical standards, and that often entails contributions of our patented technology. We implement a broad range of technical standards in our diverse products and services. As a result, we believe we have a broad and balanced perspective on the proper treatment of SEPs.

SEPs are technically required in order to implement industry standards. Because companies implementing these standards cannot work around these patents, SEPs provide their owners with market power. Companies often find it necessary to implement these standards to satisfy marketplace demands for interoperability among competing products or to provide other consumer benefits. That is why firms contributing their patents to standards typically promise to make those patents available to all firms wishing to implement the standards on FRAND terms.

Without enforceable FRAND licensing agreements, SEP owners can try to use their patents to block competitors from shipping products that implement the relevant standard. SEP owners may use the threat of such a product disruption to extract unreasonably high royalties from implementers, or other unreasonable licensing terms. These demands can undermine the utility of industry standards, reducing both competition and innovation. They also can raise costs and reduce choice for consumers.

Enforceable FRAND licensing commitments are critical to the operation of the standards system and the realization of all the benefits it provides. Stated simply, if a firm promises to make its SEPs available on FRAND terms, it ought to do so. If a firm implements an industry standard without obtaining the necessary patent licenses, a SEP holder can sue for damages. That is the appropriate course because a SEP holder who has made a FRAND commitment has announced to the world that it will accept reasonable compensation from any user of the standard. Under such circumstances, there is no basis for such a firm to seek to extract unreasonable licensing terms, especially not by threatening to block another firm from shipping a product that implements the relevant industry standard.

Unfortunately, it has become increasingly evident over the past year or so that some firms will seek injunctive relief or exclusion orders on their FRAND-encumbered SEPs against companies who are implementing the related standard, even if such implementers are willing to enter into a FRAND license for those SEPs. Microsoft itself became the target of injunctive relief and exclusion orders based on FRAND-encumbered SEPs that would prevent the sales or importation of Xboxes and Windows. The SEP holder in question brought these actions even while a federal court was in the process of determining whether the licensing terms the SEP holder offered to Microsoft were in fact FRAND.

The competition regulators in both the United States and Europe have become increasingly concerned by this type of conduct. Among other things, they have asked firms who were acquiring a significant number of SEPs from other firms to provide assurances that these new owners will honor pre-existing FRAND licensing commitments associated with those SEPs. The regulators also sought acknowledgement that these new owners would not use these SEPs to seek injunctive relief that would result in unfair pressure being applied to prospective licensees.

As a result, Microsoft and a number of other large technology companies made public assurances in this regard. We said that we will adhere to our commitments made to standards-setting organizations to make our SEPs available on FRAND terms and that we would honor the FRAND commitments made by prior owners of such SEPs. We further stated that this means that we will not seek an injunction or exclusion order against any company on the basis of those SEPs. See

<http://www.microsoft.com/about/legal/en/us/IntellectualProperty/iplicensing/ip2.aspx>.

This is what FRAND commitments are all about. The firms who have made this type of public pledge—and now Bosch—all are confirming that injunctive relief is not needed and has no place in connection with FRAND commitments.

Microsoft supports the Bosch commitments because they have the following key elements:

1. Bosch terminated the pending lawsuit SPX had filed seeking injunctive relief against implementers and committed not to re-file it.

2. Bosch's commitment not to threaten or seek injunctive relief or exclusion orders is unequivocal. Bosch may seek such extraordinary relief only in the highly unlikely circumstance that either:
  - a. an infringer refuses, *in writing*, to take a license at all (as opposed to disputing that the terms are FRAND), or
  - b. an infringer refuses to license on terms that have been adjudicated to be FRAND by a court (or through some other agreed-to process).
3. These commitments do not impose any burden or requirement of any kind on firms wishing to implement industry standards free from the threat of injunctions or exclusion orders. For example, the commitments do not place a burden on the implementer to initiate any judicial or arbitration proceedings. Implementers are entitled to rely upon the FRAND promises that SPX (and now Bosch) have made.

We support this approach because an implementer should be able to have all related disputes (including FRAND, validity, infringement, etc.) adjudicated without any concern that it will be subject to injunctive relief on the underlying SEPs. While we believe that Bosch should be held to the same standard as other large technology companies and therefore never be permitted to seek injunctive relief in connection with FRAND-encumbered SEPs, we support the proposed consent decree given the three key elements listed above. More broadly, we agree that there is a role for competition law authorities when there appear to be abuses of FRAND-encumbered SEPs.

The purpose of the FRAND obligation is to place a check on the market power that is conferred on a SEP owner—market power that arises from the collective decision of the standards-setting participants to adopt that firm's technology as part of the industry standard. As a result, the intervention by the Commission in this case to ensure that a holder of a FRAND-encumbered SEP does not seek injunctive relief against willing licensees is warranted. Fiona Scott-Morton (former Deputy Assistant Attorney General of Economic Analysis with the U.S. Department of Justice's Antitrust Division) explained this well in remarks made last month:

One question that I have been asked is, "What's so special about standard essential patents versus other patents?" Standard essential patents achieve their status through the collective action at the SSOs. Harm can occur when companies come together and bestow market power on each other by agreeing on a common technology. F/RAND commitments are designed to reduce occurrences of opportunistic or exploitative conduct in the implementation of standards.... If the F/RAND commitments are so vague and ill-defined as to have little meaning, then consumers may not realize all the benefits of the standard, which may be efficient and create new products and services due to the patent

holders' exercise of market power, which may result in higher prices, less product choice and less investment in the overall network.<sup>1</sup>

We further note that, on December 21, 2012, the European Commission announced that it sent a Statement of Objections to Samsung under 102 TFEU in connection with Samsung's alleged misuse of injunctive relief in connection with its SEPs (see [http://europa.eu/rapid/press-release\\_IP-12-1448\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1448_en.htm)):

Today's Statement of Objections sets out the Commission's preliminary view that under the specific circumstances of this case, where a commitment to license SEPs on FRAND terms has been given by Samsung, and where a potential licensee, in this case Apple, has shown itself to be willing to negotiate a FRAND licence for the SEPs, then recourse to injunctions harms competition. Since injunctions generally involve a prohibition of the product infringing the patent being sold, such recourse risks excluding products from the market without justification and may distort licensing negotiations unduly in the SEP-holder's favour.

We appreciate the opportunity to submit these comments.

Sincerely,

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Vice President &  
Deputy General Counsel, Corporate Standards & Antitrust Group  
Microsoft Corporation

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<sup>1</sup> Fiona M. Scott-Morton, former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Dep't of Justice, *The Role of Standards in the Current Patent Wars*, Remarks Presented at Charles River Associates Annual Brussels Conference: Economic Developments in European Competition Policy (December 5, 2012), <http://www.justice.gov/atr/public/speeches/289708.pdf>.