INNOVATION ALLIANCE
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January 9, 2013

Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: ***In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081**

Dear Secretary Clark:

The Innovation Alliance ("IA") respectfully submits these comments in response to the Federal Trade Commission's request for public comment on the Decision and Proposed Consent Order (the "Proposed Order") in the referenced proceeding. For the reasons set forth below, IA respectfully recommends that the Commission modify or withdraw the Proposed Order.

Introduction and Summary of Comments

IA is a coalition of companies that seeks to enhance America's innovation environment by improving patent quality and protecting the integrity of the U.S. patent system. IA represents innovators, patent owners, and stakeholders from a diverse range of industries who believe it is critically important to maintain a strong patent system. Many of IA's members also manufacture and/or sell products and services that utilize not only their own patents, but also those of third parties. IA has long supported a strong patent system, including the pro-innovation and pro-competitive benefits of voluntary standardization efforts and bilateral negotiation of licenses and cross-licenses among standardization participants.

Members of a standard-setting organization may commit to license their standard essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms, pursuant to the standard-setting organization's membership policies. The FRAND obligation, therefore, is a creature of contract between the member and the standard-setting organization. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1031 (W.D. Wash. 2012); *Apple, Inc. v. Motorola Mobility, Inc.*, --- F. Supp. 2d ---, 2012 WL 3289835, at *19 (W.D. Wis. Aug. 10, 2012); *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 797 (N.D. Tex. 2008); *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:06-CV-63, 2007 WL 1202728, at *1 (E.D. Tex. Apr. 20, 2007). The member's contractual commitment to grant licenses on FRAND terms, however, does not require it to tolerate infringement.

The Proposed Order threatens to challenge SEP-holders' attempts to enjoin infringement by "willing licensees" as stand-alone violations of Section 5 of the FTC Act. As explained fully below, the Commission's sweeping declaration would unlawfully interfere with rights guaranteed by the U.S. Constitution and would otherwise represent an impermissible expansion of the Commission's authority under Section 5. Indeed, the Proposed Order would permit the Commission to usurp the role of the courts and the International Trade Commission (the "ITC"). Moreover, the context of this matter—a consent decree concerning a proposed merger—independently raises serious concerns about using the Proposed Order to declare that requests to enjoin infringement of FRAND-encumbered patents violate Section 5. It would be imprudent at best for the Commission to adopt such a sweeping rule in the context of a matter that, at most, only tangentially implicates the issue and in which the Commission knows the parties have no serious incentive to oppose the rule.

I. The Proposed Order Would Unlawfully Impinge on Patent Holders' First Amendment Right to Petition The Government.

A. SEP-Holders, Like All Citizens, Have the Right to Petition Courts in Good Faith for Relief.

The First Amendment guarantees all citizens the right "to petition the Government for a redress of grievances." U.S. CONST. amend I. That fundamental right is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *accord Hollister v. Soetoro*, 258 F.R.D. 1, 1 (D.D.C. 2009) ("Our liberties are manifold and are the envy of the world. In the very top tier of those liberties, enshrined in the First Amendment, is 'the right of the people . . . to petition the Government for a redress of grievances.'"). The right to petition includes "[t]he right of access to the courts." *Ca. Motor. Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). For this reason, under what is commonly known as the *Noerr-Pennington* doctrine, the Supreme Court has unequivocally declared that good faith efforts to seek relief from courts cannot give rise to liability under antitrust or other laws, regardless of any anticompetitive impacts that may flow from the litigation or requested relief. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) ("Those who petition government for redress are generally immune from antitrust liability."); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 381 (1991) ("If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of the government action sought . . . does not foreclose protection."); *id.* at 379-80 ("The federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government.").

Holders of FRAND-encumbered patents are entitled to exercise their fundamental right to petition the courts and government agencies to the same extent as other citizens. *See, e.g.*, *Apple, Inc. v. Motorola Mobility, Inc.*, --- F. Supp. 2d ---, 2012 WL 3289835, at *11 (W.D. Wis. Aug. 10, 2012); *see also ERBE Elektromedizin GmbH v. Canaday Tech. LLC*, 629 F.3d 1279, 1291-92 (Fed. Cir. 2010). The District Court for the Western District of Wisconsin recently recognized this basic constitutional principle in *Apple v. Motorola* by rejecting Apple's argument that antitrust principles precluded Motorola from seeking injunctive relief related to FRAND-encumbered patents. *See Apple*, 2012 WL 3289835, at *14. Indeed, the court made clear that Motorola's request for injunctive relief was "immune under the *Noerr-Pennington* doctrine." *Id.*

Because of the First Amendment rights involved, not even Congress may enact laws that punish or prohibit good faith efforts to petition a court for injunctive or other relief by any citizen, including FRAND-encumbered patent holders. *See Prof'l Real Estate*, 508 U.S. at 56. The Commission may not do so either. Rather, as the Commission has recognized, it must consider and adhere to the *Noerr-Pennington* doctrine when deciding whether to engage in enforcement actions. *See* F.T.C., *Enforcement Perspectives on the Noerr-Pennington Doctrine* 3 (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf. Notwithstanding its general acknowledgment that it is bound by the First Amendment limitations inherent in the *Noerr-Pennington* doctrine, the Commission's Proposed Order threatens to impose liability for good faith efforts to petition courts for relief in direct contravention of settled First Amendment standards.

B. The Proposed Order Extends Far Beyond Constitutional Limits in Prohibiting SEP Holders from Petitioning Courts for Injunctive Relief.

IA finds particularly troubling the Commission's statement in the Proposed Order that "[p]atent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act." Statement of the F.T.C., *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 2.

First, only patents that are in fact "essential" to a standard are subject to a FRAND commitment. Whether a patent is in fact "essential," however, is a complicated and highly contentious issue. As an initial matter, courts must determine how that term is defined by the relevant standard-setting organization's IPR policy, as the definition of "essential" can vary from policy to policy. In addition, courts must conduct fact intensive inquiries to adjudicate heavily contested issues involving claim construction and infringement. Indeed, as seen in a number of recent court decisions, patents that are disclosed to a standard-setting organization (or otherwise alleged to be essential) may ultimately be deemed not essential after all of the relevant evidence is considered.[1] A rule making a request for injunctive relief a violation of a federal statute, here Section 5 of the FTC Act, would thus deprive a patentee of a statutorily available remedy even where the patent is not in fact "essential."

Second, the Commission's assurance that it will limit enforcement actions in this context to "appropriate cases" does nothing to limit constitutional concerns, given that the Commission makes no attempt to define appropriate cases in light of the clear First Amendment principles set forth in the *Noerr-Pennington* line of cases where conduct would fall within the prohibitions of Section 5. Indeed, the Commission nowhere addresses the two recognized exceptions to the *Noerr-Pennington* doctrine—the "sham" litigation exception and the *Walker Process* exception.

[1] *See, e.g., Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 912 (N.D. Ill. 2012). Even as to standard-setting organizations that require the disclosure of individual patents, their policies tend to provide for broad disclosures of patents that may be, or may become, essential. As such, a patent listed on a disclosure may not actually be essential at the time of disclosure and, therefore, cannot be presumed to be essential,

Nor does the Commission attempt to explain how those exceptions might apply to limit or vindicate its sweeping rule against merely seeking injunctive relief in the context of FRAND-encumbered patents. That glaring omission is unsurprising, however, because neither exception could possibly apply to the Commission's rule.

First, litigants who engage in "sham" litigation may not look to the First Amendment to avoid antitrust liability. *See, e.g.*, *Prof'l Real Estate*, 508 U.S. at 56. The "sham" litigation exception, however, applies only where the litigation itself is objectively baseless and pursued with subjective bad faith. *Id.* at 60; *accord E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (holding the First Amendment does not protect petitioning that is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor"). "The 'sham' exception . . . encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *City of Columbia*, 499 U.S. at 380. Accordingly, it is the abuse of judicial process, not the relief sought, that determines whether litigation is a "sham." That exception is clearly not what the Commission envisioned by "appropriate cases," since it is the ultimate relief (i.e., the injunction itself) and not the judicial process that imposes the supposed anticompetitive cost the Commission seeks to avoid.

Second, a patentee who knowingly attempts to enforce a fraudulently procured patent may also face antitrust liability. *See Walker Proc. Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). However, like the "sham" litigation exception, the fraudulent procurement exception is not triggered by the relief the patentee seeks, and so cannot be the focus of the "appropriate cases" the Commission suggests are covered by its rule against seeking injunctive relief.

Accordingly, neither of the *Noerr-Pennington* exceptions apply to a SEP-holder's request for injunctive relief, and neither can be properly invoked to abrogate the patent holder's First Amendment right to petition a court for injunctive relief. Therefore, regardless of any limiting language in the Proposed Order concerning "appropriate cases," the Commission's far-reaching rule cannot be sustained because it clearly violates the First Amendment.

In summary, the Proposed Order sets forth an unconstitutional rule that would inappropriately condemn a patent holder for exercising its First Amendment guaranteed right to petition the government. That unconstitutional rule cannot be justified on the ground that it purports to apply only to holders of FRAND-encumbered SEPs, who are unquestionably citizens whose rights are protected by the First Amendment.

II. The Proposed Order Fails to Properly Limit the Commission's Authority Under Section 5 of the FTC Act.

The Commission states that it will challenge any attempt by "[p]atent holders . . . [to] seek injunctive relief against willing licensees of their FRAND-encumbered SEPs . . . using a stand-alone Section 5" claim. Statement of the F.T.C., *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 2. It does not elaborate further about what conduct will expose patentees to a Section 5 action. Nothing in Section 5, however, grants the Commission authority to punish a patent holder for the mere act of seeking injunctive relief from a court, and the Proposed Order is inconsistent with Section 5 because it contains no appropriate limiting principles.

A. Nothing in Section 5 Permits the Commission to Prohibit Good Faith Efforts at Obtaining Judicial Relief.

Section 5 of the FTC Act prohibits "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(1).[2] Pursuant to its authority under Section 5, the Commission may challenge a method of competition "even though . . . it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character." *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 138 (2d Cir. 1984). However, the Commission's Section 5 authority is not limitless.

When challenging a method of competition as a stand-alone Section 5 violation, the Commission must prove some "identifiable, culpable conduct." Concurring Statement of Commissioner Leibowitz, *In re Rambus, Inc.*, FTC File No. 9302, (Aug. 6, 2006). The Commission must also formulate "standards for determining whether [the conduct] is 'unfair' within the meaning of" the statute. *E.I. du Pont de Nemours*, 729 F.2d at 138. "[T]he Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." *Id.* at 139. Moreover, specific limiting principles are necessary to constrain the Commission from administering Section 5 in an arbitrary and capricious manner. *Id.* at 138; *see also F.T.C. v. Abbot Labs.*, 853 F. Supp. 526, 535-36 (D.D.C. 1994).

There is no plausible reading of either "culpable conduct" or "unfair methods of competition" that would permit the Commission to include within their meanings good faith efforts at seeking injunctive relief from the courts. There is nothing "unfair" or otherwise nefarious about a patent holder bringing a good faith claim for injunctive relief. This is particularly the case where, as here, whether seeking an injunction violates the specific SSO IPR policy at issue is subject to significant question. Moreover, even if such a reading were possible, it would be foreclosed by the canon of constitutional avoidance, which favors reasonable interpretations of statutes that avoid serious constitutional questions. *See Nw. Austin Mut. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). Here, for the reasons explained above, any reading of Section 5 that would authorize the sweeping rule against seeking injunctive relief contained in the Proposed Order would raise serious constitutional concerns (and would in fact clearly violate the First Amendment). For this reason, Section 5 must be read as not to prohibit good faith petitions for judicial relief, even if such relief would have anticompetitive consequences.

B. The Proposed Order Contains No Appropriate Limiting Principles As Required By Section 5.

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[2] Section 45(a)(1) also prohibits unfair and deceptive acts and practices, but the Commission here proceeds only under an unfair method of competition theory.

In addition, as dissenting Commissioner Ohlhausen correctly observes, the Proposed Order lacks "any meaningful limiting principles," Statement of Comm'r Ohlhausen, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 3, and thus is inconsistent with Section 5. Appropriate limiting principles include: (i) coercive or oppressive conduct; (ii) an adverse effect on competition; and (iii) the inability of the injured parties to defend themselves. *See E.I. du Pont*, 729 F.2d at 139-40; *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980); *Boise Cascade v. F.T.C.*, 637 F.2d 573, 576-77 (9th Cir. 1980).[3] None of these principles are reflected in the Proposed Order.

First, as commented previously, absent sham litigation or the fraudulent procurement of a patent, petitioning a court for injunctive relief is neither coercive nor oppressive. *Second*, the Commission fails to identify a competitive harm that will result every time (much less a competitive harm that resulted in the *Bosch* matter) a FRAND-encumbered patent holder seeks an injunction. *Third*, it is illogical to suggest that a party defending against a claim for injunctive relief is unable to defend itself. Parties in litigation have every opportunity to address the court and contend that an injunction is not warranted. Accordingly, the Commission fails to set forth any appropriate limiting principles in the Proposed Order.

In an attempt to establish that "this action [is] well within [its] Section 5 authority," the Proposed Order points to the standard-setting context, the breach of contract issue, the presence of a FRAND commitment, and the need for a "willing licensee," as limiting criteria. *See* Statement of the F.T.C., *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 3. Even in this context and considering these factors, however, at best, a breach of contract theory is suggested, which is particularly dubious because the applicable standard-setting organization's IPR policy is silent on the issue of injunctive relief.[4] Furthermore, these purported justifications for applying Section 5—which are not appropriate limiting principles at all—fail to provide any meaningful guidance to SEP holders.

In particular, the standard-setting context and the presence of FRAND commitments offer only ambiguous guidance to the ultimate issue of whether the elements of Section 5 can be shown to have been violated. As Commissioner Ohlhausen comments, the Commission nowhere explains why it would target the "breach of an allegedly implied contract term" in the standard-setting context and not "in any other context where the Commission believes consumer harm may result." Statement of Comm'r Ohlhausen, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 3. Accordingly, the Commission's reference to the standard-setting context and FRAND obligations provide little assistance to SEP holders seeking to avoid Section 5 liability.

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[3] *See also* Analysis of Proposed Consent Order to Aid Public Comment, at 4-6, *In re Negotiated Data Solutions LLC*, File No. 0510094 (Jan. 23, 2008); Welcoming Remarks of Commissioner J. Thomas Rosch, FTC Section 5 Workshop at 3-5 (Oct. 17, 2008); Commissioner J. Thomas Rosch, Section 2 and Standard-Setting: Rambus, N-Data & the Role of Causation, LSI 4th Antitrust Conference on Standard Setting & Patent Pools (Oct. 2, 2008).

[4] *See Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2012 WL 5416941, at *15 (W.D. Wisc. Oct. 29, 2012) ("There is no language in either the ETSI or IEEE contracts suggesting that Motorola and the standards-setting organization intended or agreed to prohibit Motorola from seeking injunctive relief. Indeed, both policies are silent on the question of injunctive relief.").

Likewise, the Commission makes no effort to explain which licensees are to be considered "willing licensees," or how SEP-holders are to make that determination. Clarity on this issue is critical for FRAND-encumbered patent holders to determine when—and against which infringers—they may seek injunctive relief without risking, at a minimum, an alleged violation of Section 5 and the need to defend against an enforcement action by the FTC.

Accordingly, as written, the Proposed Order is vague and declares a broad class of undefined conduct violative of Section 5. The Commission has not provided sufficient limiting principles—traditional or otherwise—to either guide patentees or lawfully constrain its own authority. Thus, as observed by Commissioner Ohlhausen, the Proposed Order threatens to extend Section 5 to allow the Commission to "polic[e] garden variety breach-of-contract and other business disputes between private parties." Statement of Comm'r Ohlhausen, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 3. Such an expansion of the Commission's authority under Section 5 is both unwarranted and contrary to law, regardless of whether the challenged conduct affects competition. *See E.I. DuPont de Nemours & Co.*, 729 F.2d at 137-38 (holding that the mere fact that the conduct the Commission challenged under Section 5 affected competition did not render the conduct a violation of Section 5, and reasoning that a "line must . . . be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition"). Moreover, such a boundless use of Section 5 is bad policy. Any competitive effect that could possibly arise from a FRAND-encumbered patent holder's request for injunctive relief would be the result of its exercise of its statutory right to protect its patent. Thus, the Commission's expansive use of Section 5 would weaken patent rights, and thereby stunt innovation and its attendant benefits.

III. The Proposed Order Undermines the Role of Courts and the ITC and Frustrates the Standards Governing Injunctive Relief Set Forth by the Supreme Court.

By prohibiting SEP-holders from even seeking injunctive relief, the Commission has taken for itself powers lawfully committed to the courts and the ITC. When determining whether to enjoin patent infringement, courts must consider whether: (1) the patent holder has suffered irreparable harm; (2) there is an adequate remedy at law; (3) the balance of hardships between the patent holder and the infringer; and (4) the harm, if any, an injunction would cause to the public interest. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Similarly, the ITC may deny exclusion orders due to "the effect of such exclusion upon . . . competitive conditions in the United States economy." 19 U.S.C. § 1337(d)(1); *accord Spansion, Inc. v. ITC*, 629 F.3d 1331, 1358 (Fed. Cir. 2010) Indeed, the FTC recently acknowledged that the "district courts have the tools to address th[e] issue [of patent hold-up] by balancing equitable factors," and that the ITC "likewise has the authority . . . to address this concern and limit the potential for hold-up." Prepared Statement of the FTC before the U.S. Comm. on the Judiciary, at 1-2 (July 11, 2012), *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf. By the Commission's own admission, therefore, the courts and the ITC are already capable of considering the extent to which injunctive or exclusionary relief would negatively affect competition in the U.S., and there is no basis for the FTC to preempt the role of the courts and the ITC by punishing parties for the mere act of seeking injunctive relief.

Moreover, the sweeping rule contained in the Proposed Order is inconsistent with the standards governing courts and the ITC in determining whether to award injunctive relief. The Supreme Court has unequivocally declared that "[b]road classifications" and "categorical rule[s]"—like the one set forth in the Proposed Order—have no place in a court's equitable analysis. *See eBay*, 547 U.S. at 393. The Commission's rule, therefore, threatens to preclude injunctive relief in a manner that contravenes the equitable balancing required by *eBay*. The FTC has no basis or authority for barring a patent holder from even seeking such relief in the first place, let alone to fashion rules broader than those permitted by the Supreme Court.

IV. The Context of the Proposed Order Greatly Increases The Risk of Error.

In addition to the substantive concerns expressed above, IA is troubled by the context in which the Commission addresses FRAND-encumbered patent holders' rights to seek injunctive relief. That issue is only tangentially related to the principal issues presented by the Complaint and the Commission's Decision, which relate to a proposed acquisition. In issuing the matter for public comment, the Commission acknowledges that Bosch abandoned SPX's attempts to enjoin the infringement of its FRAND-encumbered patents. Statement of the F.T.C, *In the Matter of Robert Bosch*, FTC File No. 121-0081 at 1. Accordingly, Bosch had no stake in that aspect of the Commission's decision, and thus, it had no real incentive to vigorously oppose the Commission's rule.

At the very least, it is imprudent for the Commission to adopt such a broad-ranging rule in such a contentious and unsettled area without the benefit of a full airing of the constitutional, statutory, and policy issues implicated here. That flawed process provides an additional and independent reason for the Commission to modify or withdraw its Proposed Order in light of these and other comments.

Conclusion

The Proposed Order poses serious concerns regarding patentees' First Amendment right to petition the government as well as the breadth of the Commission's lawful authority under Section 5 of the FTC Act. For all of the foregoing reasons, IA recommends that the Commission modify the Proposed Order in a manner that avoids declaring a SEP holder's mere request for injunctive relief a violation of Section 5 of the FTC Act. Alternatively, IA recommends that the Commission withdraw the Proposed Order in its entirety.

Respectfully Submitted,

INNOVATION ALLIANCE

Brian Pomper
Executive Director