Federal Trade Commission
Washington, DC

In the Matter of ***FTC File Number 121-0081***
Robert Bosch GmbH

BSA | The Software Alliance's Comments On The Proposed Settlement

INTRODUCTION

Pursuant to the request for public comments in the above-captioned matter, the BSA | The Software Alliance[1] respectfully submits the following to discuss the discrete issue of FRAND (fair reasonable and non-discriminatory) [2]-encumbered standard essential patents (SEPs) and to applaud the manner in which the Commission's proposed consent agreement addresses the potential for competitive harms resulting from Bosch's acquisition of SPX.

BSA believes all patentees should be free to exercise their intellectual property rights as they see fit. It should be their choice, for example, whether or not to submit their patented technologies to become part of internationally recognized standards. But if they make the choice to participate in the creation technology standards and in the process commit to licensing their technologies on FRAND terms, then absent very limited exceptions they should not be allowed to circumvent their original commitment by seeking to obtain an injunction or exclusion order as a means of extracting unreasonable royalties or other unreasonable licensing terms.

The proposed consent decree (and supporting rationale) makes clear that that seeking injunctions on SEPs against a willing licensee runs afoul of Section 5. BSA strongly supports the consent decree's requirement that Bosch withdraw any pending injunction requests based on the SEPs, it is acquiring from SPX, and its limiting the circumstances in which Bosch can seek injunctions to cases where an implementer (1) indicates in writing that it refuses to take a license on FRAND terms or (2) refuses to take such a license after final adjudication or arbitration of a FRAND terms. This framework sets a clear standard, and in considering future

[1] BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, Intel, McAfee, Microsoft, Minitab, Oracle, Parametric Technology Corporation, Progress Software, Quest Software, Rosetta Stone, Siemens PLM, Symantec, TechSmith and The MathWorks.
[2] For purposes of these comments, BSA makes no distinction between FRAND and RAND (reasonable and non-discriminatory) commitments.

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SEP-related cases the FTC should continue to adhere to it and not permit greater leeway by owners of SEPs.

Internationally recognized technical standards play a critically important role in today's technology-driven society. Allowing patentees who commit to FRAND licensing to renege on such commitments where there is a willing and able licensee would have a chilling effect on competition, and it would harm consumers. We commend the Commission for recognizing the importance of enforcing FRAND licensing commitments and for taking action in the proposed consent agreement to preserve fair competition by requiring Bosch to license FRAND-encumbered SEPs gained through the proposed acquisition of SPX under FRAND terms and without the threat of injunctive relief against prospective licensees.

BACKGROUND

BSA is the leading global advocate for the software industry. It is an association of more than 70 world-class companies whose technology solutions spark the economy and improve modern life. Our members invest billions of dollars a year in research and development. Those investments depend on intellectual property protections and internationally recognized standards-setting systems that are predictable, transparent, and fair. When these core values are compromised, it harms innovation, businesses, and the production of new products in an ecosystem that adds value and provides choices for consumers.

BSA members hold hundreds of thousands of patents around the world, and they have adopted corporate policies that respect others' intellectual property rights. BSA members also participate widely in standards-setting organizations.

WHY STANDARDS ARE IMPORTANT FOR INNOVATORS AND CONSUMERS

Internationally recognized standards are part of the foundation of today's competitive technology marketplace. They allow firms to develop competing, but interoperable, products and technologies. Promoting standards does not mean that all products will contain the same features, functions, or performance standards. Quite the opposite.

Consider, for example, the case of two international standards that are built on a foundation of SEPs: Wi-Fi and the Universal Serial Bus, or USB. Because of these two standards, technology companies have had a predictable basis on which to create new and innovative products that give consumers a dazzling variety of choice. The Wi-Fi standard lets consumers connect a range of wireless devices to the same wireless router — from laptops and printers, to smartphones, wireless medical devices and much more. Similarly, consumers can connect many of those same devices using cables and standards-enabled USB ports. The creation and adoption of these and other standards has given rise to tremendous diversity and richness in today's marketplace. The benefits are immeasurable, as would be the consequences of undermining them. Without standards, innovation would slow, the market would balkanize, and consumers would be stuck in a world of incompatible technologies — a different port or router for every device, creating less value at greater cost.

In order for companies to commit resources to creating and adopting standards, they must trust that their efforts will not be displaced by a patentee attempting to exclude them from the market. If patented technology is essential to a standard, then by definition it is impossible

for a company to work around it. This is precisely why standards-setting bodies require that participants in the process commit to licensing their SEPs to all users of the standard under FRAND terms before those SEPs are included in a standard. For example, the European Telecommunications Standards Institute ("ETSI") requests parties who have SEPs to make them available under FRAND terms. The ETSI policy states:

> When an ESSENTIAL IPR [Intellectual Property Right] relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses ***on fair, reasonable and non-discriminatory terms*** and conditions under such IPR to at least the following extent:
>
> - MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
> - sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
> - repair, use, or operate EQUIPMENT; and
> - use METHODS.[3]

These FRAND commitments give companies the confidence they need to make the necessary investments to implement the standard in their products. Without such commitments, companies would make these investments, become "locked into" the standard and related SEPs, and then be at the mercy of the SEP holders who could make unreasonable licensing demands and/or seek to exclude these products from the marketplace. This is exactly what FRAND commitments were intended to prevent.

PUBLIC INTEREST POSITIONS

Allowing Patent Owners to Seek Inunctions or Exclusion Orders for SEPs That Are Subject to a FRAND Commitment Absent Limited Exceptions Would Have a Chilling Effect on Competition and Harm Consumers

The standards-setting environment is somewhat unique. The resulting standards typically provide significant societal value and many pro-competitive benefits to industry and consumers. But at the same time, such collusive conduct in effect becomes a substitute for competition and therefore inherently raises legitimate competition law concerns. Such collective activity by industry players can enable opportunistic conduct by companies who use the process or the resulting standards to seek an unfair commercial or competitive advantage. This is especially true when patented technology is included in standards.

[3] ETSI's IPR Policy (Nov. 30, 2011) (emphases added). Other prominent standards setting organizations also have similar requirements, *e.g.,* IEEE, ITU, ANSI, JEDEC. In fact, a 2002 study found that twenty-nine of the thirty-six standards setting bodies studied that had written intellectual property policies required participants to license under FRAND terms. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1906 (2002).

> "Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a 'fundamental building block for international trade. Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate. The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical problems….
>
> Firms that choose to work through an SSO to develop and adopt standards may be competitors within their particular industry. Thus, agreement among competitors about which standard is best suited for them replaces consumer choice and the competition that otherwise would have occurred in the market to make their product the consumer-chosen standard. In many contexts, this process can produce substantial benefits. By agreeing on an industry standard, firms may be able to avoid many of the costs and delays of a standards war, thus substantially reducing transaction costs to both consumers and firms. Recognizing that collaboratively set standards can reduce competition and consumer choice and have the potential to prescribe the direction in which a market will develop, courts have been sensitive to antitrust issues that may arise in the context of collaboratively set standards. They have found antitrust liability in the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals."[4]

As noted by the Commission in connection with the consent decree in the *N-Data* case, "[t]he process of establishing a standard displaces competition; therefore, bad faith or deceptive behavior that undermines the process may also undermine competition in an entire industry, raise prices to consumers, and reduce choices." *In the Matter of Negotiated Data Solutions LLC*, FTC Statement, File No. 0510094.

Without question, consumers benefit immensely from the creation and use of internationally recognized standards. These standards allow consumers to have advanced technology broadly implemented in a variety of devices that work together. This is why, for example, consumers have a plethora of choices when they shop for a printer to use with their computers. It is also one of the main reasons why consumers' transition costs are low when switching or upgrading a device: they can be sure the new device will work with rest of their personal technology, and the rest of their technology can be upgraded or replaced independently.

In making a FRAND licensing commitment, a SEP holder is assuring all users of the standard that they will provide reasonable licenses to all and that reasonable monetary compensation will always suffice. If holders of SEPs are able to seek injunctions or exclusion

[4] U.S. Department of Justice and the Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33 (April 2007), *available at* http://www.usdoj.gov/atr/public/hearings/ip/chapter_2.pdf, footnotes omitted.

orders despite these FRAND agreements, then companies likely will respond either by (a) forgoing the development or adoption of new standards or (b) acceding to demands from the SEP holder for unreasonable licensing terms so that they will be able to provide the standardized technology (such as wireless connectivity) to consumers, who may bear the ultimate costs.

The Proposed Consent Agreement Appropriately Addresses the Potential Competitive Harms Resulting From the Proposed Transaction

Based on the foregoing, we endorse the conclusion that "SPX's suit for injunctive relief against implementers of its standard essential patents constitutes a failure to license its standard-essential patents under the FRAND terms it agreed to while participating in the standard setting process, and is an unfair method of competition actionable under Section 5 of the FTC Act." Robert Bosch GmbH; Analysis of Agreement Containing Consent Orders To Aid Public Comment, 77, No. 232 Fed. Reg. 71593-99 (Dec. 3, 2012). We also strongly support the Commission's proposed remedy, which precludes abuse of the acquired FRAND-encumbered SEPs by requiring that the FRAND commitments made with respect to SPX's patents be satisfied through licensing on reasonable terms.

CONCLUSION

When a patentee makes a commitment to license its SEPs under FRAND terms, the patent owner should be held to its promise. Allowing companies to circumvent their promises by seeking injunctions or exclusion orders would have a detrimental effect on internationally recognized standards systems. The ultimate result of a less robust standards system will be fewer choices for consumers, higher prices, and diminished innovation. Thus, we support the proposed consent decree as we believe that it will curtail anti-competitive conduct based on the use of possible injunctive relief and/or exclusion orders in connection with FRAND-encumbered SEPs.

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