January 9, 2013

Federal Trade Commission
Office of the Secretary
The Honorable Donald S. Clark
Room 159-H 600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Mr. Clark:

Apple Inc. ("Apple") submits this statement in response to the Federal Trade Commission's ("FTC") request for public comments to the proposed consent agreement in *In the Matter of Robert Bosch GmbH*, File No. 121-0081 (November 26, 2012).

The FTC's consent agreement reflects an important, and much needed, next chapter in the Commission's standard setting efforts. The FTC found that SPX Service Solutions U.S., Inc.'s practice of seeking injunctive relief against implementers of its standard essential patents ("SEPs") following its commitment to license those patents on fair, reasonable, and non-discriminatory terms ("FRAND") terms violated the antitrust laws. Declaring this practice "a form of FRAND evasion" that "reinstate[s] the risk of patent hold-up that FRAND commitments are intended to ameliorate," the FTC issued a straightforward order that:

(1) requires Bosch to offer the same royalty-free terms to all marketplace participants that wish to license the SPX standard essential patents;

(2) prohibits Bosch from seeking injunctive relief against third parties unless those third parties explicitly refuse to license the SEPs on FRAND terms; and

(3) requires Bosch to abandon any ongoing efforts to seek, obtain or enforce injunctions.

This decision and order is a template for future actions. We applaud the FTC for issuing a simple and direct order that provides needed guidance to the standard setting community and starts to tackle the meaning of FRAND.

The FRAND commitment should be a *shield* that preserves open access to standardized technologies rather than a *sword* to bully companies into either paying excessive royalties or extracting concessions, like obtaining access to product-differentiating innovations. As long as a holder of FRAND-encumbered SEPs can hold the threat of an injunction over a standard implementer's head, any negotiation, arbitration, or litigation between the parties will be corrupted by the SEP holder's impermissible exercise of collectively generated market power. Indeed, as the FTC observes, the "high switching costs combined with the threat of an [injunction] [can] allow a patentee to obtain unreasonable licensing terms despite its [F]RAND commitment, not because its invention is valuable, but because implementers are locked into practicing the standard."[1]

The power of SEPs does not stem from the intrinsic value of the underlying inventions. Rather, it stems from the collective action of the standard setting organization and the subsequent evasion of the FRAND safeguards that the antitrust laws require of participants in collective standard setting. The hold-up concerns that the FTC identifies in the Bosch consent order are real and significant. As a new entrant into the mobile phone space, Apple has been forced to expend considerable resources to defend against injunction claims brought by holders of FRAND-encumbered SEPs. In many cases, the SEP holders that target Apple have not kept up with the pace of innovation. As a result, they have thus seen their fortunes decline in the marketplace and now seek to use declared SEPs to either exclude Apple from competing or raise its costs of doing so. Holders of FRAND-encumbered SEPs recently have sought injunctions against Apple, Microsoft, Research in Motion, and others in U.S. federal courts, at the International Trade Commission, and in numerous foreign jurisdictions.[2] While commercially successful innovators (like Apple today) have the resources needed to contest these claims, smaller innovators (like the company Apple once was) do not.

Apple has publicly committed to comply with FRAND by recognizing that injunctions against implementers of FRAND-encumbered SEPs are not appropriate, except perhaps in exceptional circumstances. And Apple has never sought such an injunction.[3] Under the proper meaning of FRAND, the holder of FRAND-encumbered SEPs is limited to seeking damages from standard implementers. Injunctions distort the FRAND bargain. An injunction threat presents would-be licensees with the dilemma of (i) having its products enjoined from sale, or (ii) agreeing to excessive licensing fees or conditions.

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1 Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Robert Bosch GmbH*, File No. 121-0081 at 5 (November 26, 2012) (quoting Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices*, Computers and Components Thereof, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf).

2 As the FTC recently observed, "a survey of ITC patent investigations filed between 1997 and 2007 found that the ITC awarded an exclusion order in 100% of the cases in which it found a violation." Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition at 240 (Mar. 2011) (citing Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Comm'n*, 50 WM. & MARY L. REV. 63, 68 (2008) (emphasis added). Thus, "unlike the situation in district court, a finding of infringement in the ITC leads to a nearly automatic exclusion order." *Id.*

3 "Transparent and Consistent Application of FRAND Licensing," Submission of Apple (UK) Limited to ETSI (March 20, 2012).

The FTC's position in *Bosch* is largely consistent with this view, declaring that injunctions sought by holders of FRAND-encumbered SEPs are not appropriate except in the following circumstances:

(a) a court determination that the SEPs in question are not being used to implement the standard;

(b) a written refusal by a standard implementer to enter into license agreement on FRAND terms; or

(c) a refusal by a standard implementer to accept a license "on terms that have been determined to comply with [FRAND] through a process agreed upon by both parties or through a court."[4]

The FTC's rule against injunctions, combined with the three enumerated, narrow exceptions reflects that the purpose of the FRAND commitment is to "mitigate the risk of patent hold-up."[5] Holders of FRAND-encumbered SEPs must be limited to enforcing their patent rights through arbitration or by bringing a suit for FRAND-royalties or damages against implementers in a court of competent jurisdiction. The proposed consent agreement properly places the burden of bringing a lawsuit or initiating arbitration on the holder of the FRAND-encumbered SEPs and bearing the burden as the patentee of proving its case.[6]

The proposed consent agreement reflects an emerging consensus from competition regulators in the United States and Europe.[7] It is also consistent with the judicial recognition of

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4 *In the Matter of Robert Bosch GmbH*, File No. 121-0081, Decision and Order, Section IV(E) (November 26, 2012).

5 *In the Matter of Robert Bosch GmbH*, File No. 121-0081, Analysis to Aid Public Comment, 4 (November 26, 2012).

6 The FRAND-declaration waives the right of a SEP holder to seek injunctive relief and limits the SEP holder's remedies against infringement to monetary damages. It does not impose obligations on third parties such as having to initiate legal proceedings against a SEP holder.

7 *See also* European Commission, Press Release, Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents, IP/12/1448 (December 21, 2012) ("[W]here 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 license for the SEPs, then recourse to injunctions harms competition."); Renata Hesse, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Six "Small" Proposals for SSOs Before Lunch*, 9 (October 10, 2012) ("it would seem appropriate to limit a patent holder's right to seek an injunction to situations where the standards implementer is unwilling to have a neutral third-party determine the appropriate F/RAND terms or is unwilling to accept the F/RAND terms approved by such a third-party.")

"the tension between offering a FRAND commitment and seeking injunctive relief."[8] The role of government enforcement has been critical because effective standard setting is dependent on consistent expectations among a large number of constituents and respect for rules designed to ensure that standard-setting does not become a vehicle for anticompetitive conduct. The FTC's positions, as reflected, for example, in the FTC's 2003 Report,[9] the FTC/DOJ 2007 Report,[10] the FTC's 2011 Report,[11] the FTC's public interest statement to the ITC (2012)[12] and the proposed consent agreement in the present matter, have helped protect the integrity of the standard setting process and thus promote innovation and rapid dissemination of technology to the benefit of consumers everywhere. Going forward, Apple encourages the FTC not to depart from this significant progress.

This is an important chapter in government antitrust enforcement of standard setting but by no means can it be the last chapter. Here, for example, the FTC weighs in on the meaning of

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8 *In the Matter of Robert Bosch GmbH*, File No. 121-0081, Statement of the Federal Trade Commission, 2 (November 26, 2012). *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012) ("Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made."); *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation) ("I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the '898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?").

9 Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* Ch. 3, 43 (2003) (observing benefits of standard setting organizations in eliminating patent hold-up).

10 U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 37-38, 46-47 (2007) (noting that in the ex post standard setting environment "the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives").

11 Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, 234-35 (2011) ("A prior RAND commitment can provide strong evidence that denial of the injunction and ongoing royalties will not irreparably harm the patentee.").

12 Third Party United States Federal Trade Commission's Statement on the Public Interest, filed on June 6, 2012, *in In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers & Components Thereof*, Inv. No. 337-TA-745, 5 ("A RAND commitment provides evidence that the SEP owner planned to monetize its IP through broad licensing on reasonable terms rather than through exclusive use.").

FRAND, declaring that a royalty-free license offered to all licensees to be appropriate to ensure that the remedy for breach of a FRAND commitment ensures non-discriminatory treatment of all standard implementers. This is not the first time that the Commission has offered a view on meaning of FRAND.

In *Rambus*, the Commission observed that "[w]e also find it appropriate to define the scope of Rambus royalties when products such as memory controllers become integrated into larger products" and then went on to articulate the terms of a reasonable royalty rate.[13] As *Bosch* and *Rambus* establish, there is an important role for antitrust enforcers to play in offering guidance on the circumstances in which a SEP-holder's offer would clearly (or clearly *not*) qualify as FRAND. Moreover, in its 2011 Evolving IP Marketplace Report the FTC noted that "[t]he proper base is 'the smallest priceable component containing the invention.'" Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, at 25 (2011). *See also Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283 (N.D.N.Y. 2009) (reasoning Cornell "did not develop an entire computing system" rather the subject patent was infringed by one component that was itself part of a computer processor, and concluding "[i]n the anatomy of [the accused HP] server, the processor is the smallest salable patent practicing unit ... the claimed invention is a small part of the [instruction reorder buffer], which is a part of a processor, which is a part of a CPU module, which is part of a 'brick,' which is itself only a part of the larger server").

Going forward, the FTC should consider combining this guidance with the type of template that it proposes in the *Bosch* decree. Such direction would be invaluable to industry participants, like Apple, who seek to negotiate FRAND licenses outside of the costly forum of litigation, but find themselves stymied by SEP holders who have a very different view as to the meaning of their FRAND commitment and the associated value of a FRAND license. Quite simply, the royalty rate should be calculated off of a royalty *base* that reflects the value of the

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13 Opinion of the Commission on Remedy, *In re Rambus, Inc.*, Docket No. 9302 (July 2, 2005), http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf. The Commission explained:

> Absent some limitation, our remedy could have unintended consequences if product integration were to markedly raise the selling price of the unit subject to the percentage royalty. This is best avoided by articulating a rule that specifies controller royalties in terms of dollars per unit, based on historical experience. Using terms derived from existing RDRAM licenses, our Order limits Rambus to the controller royalties per unit that would result from applying the .5% or 1% royalty rate to the average net sales per unit for SDR Controllers and DDR Controllers, respectively, [redacted]. Such an approach places a cap on these royalties consistent with historical experience and based on reported and verifiable information.

Id.

component(s) embodying the standardized functionality—not unrelated components, or entire multi-component devices.

The Commission's efforts here are a significant step forward, but much work remains to be done.

Sincerely,

Bruce Sewell
General Counsel, Apple Inc.