February 22, 2013

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

Re: ***In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120**

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 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 and extolled the pro-innovation and pro-competitive benefits of voluntary standardization efforts and the bilateral negotiation of licenses and cross-licenses among standardization participants.

The Commission's Proposed Order follows, and expands upon, its Decision and Proposed Consent Order in *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081. IA raised certain concerns with the Proposed Consent Order in *Bosch*, as reflected in its comments in that proceeding. (A copy of IA's comments in *Bosch* are attached and incorporated herein by reference to avoid burdening the Commission with unnecessary duplication of arguments.) Applying the rule announced in *Bosch*, the Proposed Order finds a request for an injunction by an owner of an assumed standard-essential patent ("SEP") who has committed to license its essential patents on fair, reasonable, and non-discriminatory ("FRAND") terms, pursuant to a standard-setting organization's ("SSO") policies, to be a violation of Section 5 of the FTC Act.

The Commission bases that conclusion not only upon the unfair methods of competition prong of Section 5, which was relied on in *Bosch*, but also upon Section 5's unfair acts and practices prong.

As a result, IA's concerns with the Proposed Consent Order in *Bosch* are heightened here. The Proposed Order not only raises significant constitutional concerns, as in *Bosch*, but it also threatens to expand the Commission's authority under Section 5 even further than the troubling scope reflected in *Bosch*. Moreover, the remedies set forth in the Proposed Order in the form of a detailed negotiation protocol, if understood to apply beyond the strict confines of this proceeding, may inhibit efficient and procompetitive licensing negotiations among private parties with respect to FRAND-encumbered SEPs and, potentially, other patents. For these reasons, IA respectfully recommends that the Commission modify or withdraw the Proposed Order.

I. The Proposed Order Would Impose Liability on Google Solely Because it Exercised its Constitutionally Protected Right to Petition the Courts.

A. As in *Bosch*, the Commission's Decree Infringes on Core First Amendment Activity.

In its *Bosch* comments, IA demonstrated that FRAND-encumbered SEP owners are no less entitled to protection under the *Noerr-Pennington* doctrine than other citizens, and that the Commission's stated intent to impose Section 5 liability on patentees who make requests to enjoin infringement of their SEPs was contrary to basic First Amendment principles. (*Bosch* Comments at 2-4.) The Proposed Order suffers from the same infirmities with respect to Google.

"[E]nshrined in the First Amendment[] is the 'right of the people . . . to petition the Government for a redress of grievances.'" *Hollister v. Soetoro*, 258 F.R.D. 1, 1 (D.D.C. 2009); *accord United Mine Workers of Am., Dist. 12 v. Ill State Bar Ass'n*, 389 U.S. 217, 222 (1967); *see also Ca. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (declaring the right to petition includes "[t]he right of access to the courts."). To protect that fundamental right, the Supreme Court established the *Noerr-Pennington* doctrine, which immunizes citizens who seek judicial relief from antitrust liability. *E.g., Prof'l Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1996) ("Those who petition government for redress are generally immune from antitrust liability.").

The *Noerr-Pennington* doctrine operates to shield litigants from liability under Section 5 of the FTC Act to the same extent that it applies under the Sherman Act. *See, e.g., Ehlinger & Assocs. v. La. Architects Ass'n*, 989 F. Supp. 775, 786 (E.D. La. 1998) (finding *Noerr-Pennington* immunity may be asserted as a defense to liability under Section 5 of the FTC Act); *see also F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394 (1953) ("It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act."). Indeed, "*Noerr-Pennington* principles apply with full force in other statutory contexts outside antitrust." *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009) (internal quotation marks and citation omitted).

B. The Proposed Order Does Not Resolve the First Amendment Infirmities.

The Commission seeks to address the First Amendment concerns raised in *Bosch* based on its finding that "MMI [Motorola] willingly gave up its right to seek injunctive relief when it made the FRAND commitments at issue." As a result, the Commission posits that the Proposed Order, as it applies to Google, is not contrary to *Noerr*.[1] The Commission bases this conclusion on evidence, not apparent from the record, that it believes is sufficient to "show that a violation of Google and MMI's FRAND commitments occurred." *Id.* at 4.

However, FRAND obligations are creatures of contract. *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 Proposed Order does not reflect any contract analysis upon which a finding could be made that Google (or Motorola) violated any of the relevant SSO policies–ETSI, IEEE, and the Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC (the "Common Patent Policy").[2] That omission is particularly troubling because basic principles of contract law dictate that Motorola did not covenant away its right to request injunctive relief.

First, the relevant agreements reflect no express waiver. In the only judicial consideration of this issue to date, a federal judge recently explained that "[t]here is no language in either the ETSI or IEEE contracts suggesting that Motorola and the standards-setting organizations intended or agreed to prohibit Motorola from seeking injunctive relief. In fact, both policies are silent on the question of injunctive relief." *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012). Further, the record does not reflect evidence that suggests the Common Patent Policy prohibits or otherwise addresses injunctive relief. Indeed, "most major SSOs . . . are utterly silent on the issue of injunctive relief." Cmts. of Qualcomm, Inc., *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 at 9.

Second, the record reveals no implied waiver. An implied waiver "of substantial rights . . . must be clear, decisive, and unequivocal of a purpose to waive the legal rights involved. Otherwise there is no waiver." *Grover v. Prickett*, 420 F.2d 1119, 1125-26 (9th Cir. 1970). The right to seek injunctive relief is undoubtedly "substantial" as it is both protected by the First Amendment and guaranteed by statute. *See* 35 U.S.C. § 283. Consistent with these principles, the Western District of Wisconsin determined that Motorola had not implicitly waived its rights, reasoning that "any contract purportedly depriving a patent owner of th[e] right [to seek injunctive relief] should clearly do so." *Apple*, 2012 WL 5416941, at *15.[3]

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[1] Statement of the FTC, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 4-5.

[2] Proposed Order, *In the Matter of Motorola Mobility and Google Inc.*, FTC File No. 121-0120 at 6.

[3] *Accord* Dissenting Statement of Commissioner Ohlhausen, *In the Matter of Motorola Mobility LLC and Google, Inc.*, FTC File No. 121-0120 at 5 ("Nor does there appear to have been any reasonable expectation on the part of members of the relevant SSOs . . . that . . . Google and Motorola[] had waived their right to seek injunctions on their SEPs.").

The significance of the court's holdings in *Apple* cannot easily be distinguished or ignored on the ground that they were made "on a motion *in limine*" that concerned "the application of Wisconsin contract law."[4] These are distinctions without consequence. The waiver issue was properly presented to—and decided by—the district court. Accordingly, the litigation vehicle used to raise the issue is irrelevant. Moreover, that Wisconsin contract law governed the court's decision is of no moment. The court relied on basic contract principles, and not on any nuances peculiar to Wisconsin law.

In any event, even if contract principles dictated that Google had waived its right to seek injunctive relief, that alone would not remove its request for an injunction from the sphere of conduct *Noerr* protects. There are only two exceptions to the *Noerr-Pennington* Doctrine—the sham litigation and *Walker Process* exceptions. (*Bosch* Comments at 3-5.) The Proposed Order does not invoke either of these exceptions, but instead, it appears to carve out a third exception for which there is no legal support. Indeed, *Powertech Technology, Inc. v. Tessera, Inc.*, 872 F. Supp. 2d 924 (N.D. Cal. 2012)—which the Commission cites to support its argument around *Noerr*[5]—is not to the contrary. The *Powertech* court held that *Noerr* does not immunize a patentee from breach of contract liability if the patentee contractually agrees to not seek an exclusion order unless certain conditions are met, and then subsequently fails to satisfy those conditions before seeking such relief. *Id.* at 932. The court did not, however, conclude that the patentee's contractual obligations abrogated its First Amendment right to petition the courts. In fact, unlike the Proposed Order here, the court carefully avoided that holding by explaining that *Noerr* did not apply in that case because the licensee "accuse[d] the [patentee] of breaching the contract between the parties by failing to comply with the requirements of the agreement . . ., not simply by instituting [the] proceeding [for an exclusion order]." *Id.*[6]

Thus, the Proposed Order reflects no reasoned basis for precluding SEP holders from seeking injunctive relief simply because they have committed to license on FRAND terms. And for all the reasons explained here and in IA's *Bosch* Comments, the Commission's rule is contrary to the First Amendment and outside the bounds of the Commission's authority under Section 5.

II. The Proposed Order Will Impermissibly Expand the Commission's Powers Under Section 5 of the FTC Act.

The *Bosch* Decree improperly expanded the Commission's authority under Section 5 of the FTC Act by declaring requests for injunctive relief on the basis of a SEP to be unfair methods

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[4] Statement of the FTC, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 4.

[5] *Id.* at 5.

[6] *See also Apple, Inc. v. Motorola Mobility, Inc.*, --- F. Supp. 2d ---, 2012 WL 3289835, at *15 (W.D. Wis. Aug. 10, 2012) (finding Apple's request for a declaration that "Motorola is not entitled to injunctive relief on its patent infringement claims" to be "immune under *Noerr*" insofar as it was "based on an antitrust theory," but allowing the claim to proceed "[t]o the extent that [it was] based on Apple's breach of contract theory").

of competition under that statute. (*See Bosch* Comments at 4-7.) The Proposed Order here would further enlarge the Commission's Section 5 powers: "Not only does [the Commission]'s decision raise many of the same concerns . . . as did *Bosch*, the Commission is now expanding its new policy to impose both competition *and* consumer protection liability" upon FRAND-encumbered SEP holders who request injunctive relief.[7]

Liability under Section 5's unfair competition prong is inappropriate here for the same reasons as it was in *Bosch*. (*See Bosch* Comments at 4-7.) Imposing liability on Google under the "unfair acts and practices" prong furthers the application of Section 5 without limiting principles sufficient to properly circumscribe the Commission's authority.[8] Indeed, as Commissioner Ohlhausen observed, the Commission has left "patent owners to guess in most circumstances whether they can safely seek an injunction on a SEP."[9]

Basing liability under an "unfair acts or practices" theory is a particularly overbroad application of Section 5 in the instant matter because such liability is properly imposed only where the challenged conduct "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The injury to consumers "must be substantial," and the "Commission is not concerned with trivial or merely speculative harms." Letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. Under these standards, seeking to enjoin infringement of a FRAND-encumbered SEP should not be considered an unlawful unfair act or practice.

First, the primary injury outlined in the Proposed Order is not actionable under Section 5's unfair acts and practices prong. The Proposed Order states that "[t]he threat of an injunction . . . harm[s] incentives for the development of standard-compliant products . . . [and] can also lead to excessive royalties . . . ."[10] However, sophisticated technology companies are not "consumers" within the meaning of Section 5. *See, e.g.*, *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 937 n.5 (N.D. Ill. 2008).[11] Employing Section 5's consumer protection purpose to assist such high-tech product manufacturers, particularly where there is no evidence—and none is reflected in the public record—of increased prices or other harm to end-user consumers is unwarranted.

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[7] Dissenting Statement of Commissioner Ohlhauesn, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 4 (emphasis in original).

[8] *See* Concurring Statement of Commissioner Rosch, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 4 (finding the Commission's use of Section 5 in this case "is not properly circumscribed").

[9] Dissenting Statement of Commissioner Ohlhausen, *In the Matter of Motorola Mobility LLC and Google, Inc.,* FTC File No. 121-0120 at 2.

[10] Statement of the FTC, *In the Matter of Motorola Mobility LLC and Google, Inc.*, FTC File No. 121-0120 at 2.

[11]*Accord* Statement of Dissenting Commissioner Ohlhausen, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 4 ("[O]ur consumer protection mission . . . is to protect end users of products or services.").

Moreover, even assuming that higher royalties in a specific case would result from a SEP-owner seeking an injunction, it is far from certain that such alleged higher royalties will be passed along to consumers. Licensees face a variety of incentives to absorb additional costs of production. For example, the higher royalty might represent so small a percentage of the finished product's total cost that it would be inefficient for the licensee to raise its sales price. Similarly, a licensee who absorbs higher royalty costs may gain a competitive advantage over a licensee who does not. Rational consumers will choose to purchase the same product at a lower price, and thus, end-user consumers might never suffer any actual economic injury, assuming a non-FRAND royalty were obtained by the licensor.

In addition, if the price of the finished product increases, it does not necessarily follow that a FRAND royalty caused the price increase. Standard-compliant products generally incorporate a number of patented technologies, which are protected by a variety of patents (both SEPs and other patents). Thus, even where end-users may incur an identifiable impact in the form of higher prices, liability for that harm cannot easily be traced to the holder of a particular FRAND-encumbered patent. Greater certainty is necessary to avoid discouraging lawful, constitutionally protected conduct.

Second, the Proposed Order refers to only unproven and speculative harm to end-user consumers. The Commission contends that "the threat of an injunction *can* . . . lead to excessive royalties that *may* be passed along to consumers."[12] "Alternatively," the Commission asserts, "an injunction or exclusion order *could* ban the sale of important consumer products entirely."[13] Conjecture about what "could" or "may" occur is not proper evidence of actual harm or of an economic likelihood of harm to consumers. More must be required if there is to be any certainty regarding what conduct may be subject to consumer protection liability.

Third, as IA expressed in *Bosch*, there is no plausible reading of "unfair" in Section 5 that would permit the Commission to include within its meaning FRAND-encumbered SEP owners' efforts at seeking injunctive relief from the courts. (*Bosch* Comments at 5.)

In addition to the foregoing legal grounds suggesting the inappropriateness of applying an "unfair acts and practices" theory to the instant circumstances, the Proposed Order raises serious policy questions. Specifically, the Commission's analysis threatens to inject substantial uncertainty and therefore costs into the standards-setting process. For example, whether a potential licensee is "willing," instead of opportunistically trying to gain an advantage in licensing negotiations, is an inherently fact-dependent inquiry for which the Commission has identified no objective criteria. Merely assuming that all licensees are "willing" unless they expressly state that they are not leaves too much room for inefficient gamesmanship and unbalanced negotiations. Similarly, it is only clear that a patent is actually "essential" after a court resolves complex and contentious issues of claim construction and contract interpretation. (*See Bosch* Comments at 3.) Indeed, the determination of whether proposed license terms are

[12] Statement of the FTC, *In the Matter of Google Inc.*, FTC File No. 121-0120 at 2 (emphasis added).

[13] *Id.* (emphasis added).

consistent with FRAND may not even occur until well after a legal proceeding seeking injunctive relief is commenced. In short, the fact-intensive and indeterminate nature of these questions, together with the substantial doubt concerning the Commission's application of contract law principles as reflected in the *Apple* decision, strongly supports reconsideration of the Proposed Order's application of Section 5 on a stand-alone basis.

III. The Potentially Broad Scope of the Proposed Order's Procedural Remedy Threatens to Undermine the Regulatory Scheme, Discourage Procompetitive Conduct, and Foster Confusion.

The Proposed Order could be interpreted as imposing negotiating procedures in which the owner of a FRAND-encumbered SEP may seek injunctive relief for infringement in all circumstances.[14] However, if construed to apply to all FRAND-encumbered SEP holders—and not just Google—the procedures risk: (a) interposing the Commission as a regulator of contract negotiations; (b) undermining the procompetitive benefits of licensing freedom; and (c) imposing unclear and potentially conflicting obligations upon SEP holders. To avoid these risks, the Commission should expressly clarify that the procedures only apply to the circumstances of this case and are not intended to have broader application.

A. The Proposed Order Could Be Interpreted as Establishing the Commission as the Regulator of Private Contract Negotiations.

As a general matter, the Commission is ill-suited to police the minutia of contract negotiations, and it should not assume such a role. The antitrust agencies may not—and should not—substitute their own business judgment for that of private parties simply because they believe an agreement may prove anticompetitive. *See, e.g.*, *Official Airline Guides, Inc. v. F.T.C.*, 630 F.2d 920, 927 (2d Cir. 1980); *see also Verizon Commc'ns Inc. v. Trinko, LLP*, 540 U.S. 398, 408 (2004) (rejecting a practice that would "require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited"). Indeed, "[c]ompetition law enforcers . . . are not in the business of price control. [They] protect a competitive process, not a particular result, and particularly not a specific price." Gerald F. Masoudi, *Intellectual Property & Competition: Four Principles for Encouraging Innovation*, Dep't of Justice (Apr. 11, 2006).

However, the Proposed Order's procedures might be viewed as the Commission taking on an improper supervisory role, especially if they are interpreted as requirements necessary in *all* circumstances to avoid Section 5 liability. The procedures imposed by the Commission raise the risk that counterparties in licensing negotiations may threaten complaints to the Commission if the procedures are not strictly followed. Therefore, the Commission should make clear that it does not intend to moderate the details of all FRAND licensing negotiations.

B. If Applied to All FRAND License Negotiations, the Procedures Might Diminish the Procompetitive Benefits that Flow From the Freedom to License.

[14] *See* Proposed Order, *In the Matter of Google Inc.*, FTC File No. 121-0120 at 8-12.

Licensing patents, including SEPs, is a presumptively procompetitive practice. *E.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 2.3 (1995) (hereafter "DOJ/FTC 1995 Guidelines"); U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation & Competition, at 2.VI (2007). To realize procompetitive benefits, patent holders should have sufficient "licensing freedom" to negotiate with potential licensees and settle on terms that promote their self-interest. Gerald F. Masoudi, *Intellectual Property & Competition: Four Principles for Encouraging Innovation*, Dep't of Justice (Apr. 11, 2006). "[L]icensing freedom" promotes efficiency by, for example, allowing a patentee "to combine with another firm that is more skilled" in areas apart from innovation, such as manufacturing and marketing. *Id.* "Such arrangements increase the value of intellectual property to consumers and to the developers of the technology." DOJ/FTC 1995 Guidelines § 2.3.

Licensing also "encourage[s] patent holders to contribute their best technology to the standardization process." U.S. Dep't of Justice & U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments*, at 5 (Jan. 8, 2013) (hereafter "DOJ/USPTO Policy Statement"). Accordingly, "the United States continues to encourage systems that support voluntary F/RAND licensing . . . rather than the imposition of one-size-fits-all mandates for royalty-free or below-market licensing, which would undermine the effectiveness of the standardization process and incentives for innovation." *Id.* at 5-6. However, construed broadly, the procedural remedy is a "one-size-fits-all mandate" that may undermine the benefits that flow from licensing freedom for at least two reasons.

First, arbitration is not always the most efficient or cost effective method of resolving FRAND license disputes. Parties should be free to identify alternative, more efficient and less costly means of resolving disputes, including whether a prospective licensee is, in fact, a "willing" licensee. Those means may or may not involve arbitration, which may or may not be more efficient than court proceedings to resolve disputes. Thus, the selection of the tribunal to resolve licensing-related disputes should be left to the ingenuity of the negotiating parties.

Second, a broad reading of the procedural remedy could, contrary to the expressed purpose of the Commission's Order, inhibit good faith licensing negotiations between licensors and potential licensees. For example, licensees who agree to license terms early in the standards process assume greater risks than licensees who come to terms later. Early adopters who commit to license terms before the downstream market has matured risk little or no return for their confidence in the standardized technology that includes SEPs, and offset such risks by being first to market in making authorized sales of products incorporating the standardized technology based on SEPs. If, once early adopters propel the maturation of downstream markets through their authorized sales of SEP-based products, later-comers are able to enter the market by making unauthorized - *i.e.*, non-licensed - sales of the SEP-based products without any fear of being enjoined, the ability of early adopters to offset their risks and recover on their investments in developing the markets will be undermined, and their incentives to move early and develop new markets for products and services based on standardized technology for which patented technology is essential will be diminished.

Thus, to ensure that it does not impose an inefficient "one-size-fits-all" approach to FRAND licensing, the Commission should make clear that the procedures do not apply beyond the confines of the Google case.

C. Broad Application of the Negotiation Procedures May Subject FRAND-Encumbered SEP Holders to Confusing and Conflicting Obligations.

Prescribing procedures for licensing negotiations beyond the facts of the Google case may result in several other inefficiencies. *First*, often the most difficult and contentious aspects of licensing negotiations concern non-monetary terms, such as the scope of cross-grants, fields-of-use limitations, and capture periods defining the scope of patents that will be included in the grants and cross-grants between and among parties. The Proposed Order's procedures, which are focused on resolving FRAND disputes, may be entirely inappropriate for resolving these or other important issues.

Second, licensing negotiations often involve diverse patent portfolios that contain both SEPs and non-SEPs. This fact highlights the need for procedural flexibility regarding dispute resolution. Uncertainty and contentiousness between a licensor and a potential licensee will only be exacerbated if the Commission mandates separate proceedings for FRAND-encumbered SEPs on the one hand, and all other patents included in an offered portfolio, on the other. The parties should be free to decide whether or not separate license negotiations would be more efficient and appropriate.

Third, the development of applicable standards is an increasingly globalized process. The specified negotiations procedures, unless expressly confined to the instant proceeding, may lead to the adoption of mandatory procedural requirements in connection with FRAND-encumbered SEPs by non-U.S. standards bodies and competition law authorities, all without the context and circumstance of this proceeding.

Finally, as the DVB Project highlights in its comments, IPR policies may contain arbitration clauses.[15] However, the procedural remedy may be inconsistent with those (or other) contractual provisions, leaving SEP holders to guess to which legal obligation they must adhere. Thus, in addition to expressly stating that the procedural remedy only applies to this case, the Commission should also clarify that the procedures are not intended to supersede or otherwise abrogate SEP holders' existing contractual obligations.

In short, commercial license negotiations take many forms and involve an array of interconnected issues. The negotiating parties—not the Commission–should have an opportunity to determine the most effective means for addressing commercial, and potentially legal, disputes arising out of licensing negotiations. Clarification that the Proposed Order's procedural remedy only applies to Google and its conduct at issue in this proceeding would both preserve procompetitive benefits that flow from the freedom to license, as well as avoid imposing unclear

[15] Cmts. of Digital Video Broad. Project, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120.

and conflicting obligations upon FRAND-encumbered SEP holders that may cause other inefficiencies.

IV. The Commission Should Clarify That Injunctive Relief May Be Appropriate With Respect to FRAND-Encumbered SEPs In Certain Circumstances.

While the Proposed Order would permit Google to seek injunctive relief in a few limited situations,[16] the Commission should make clear that requests for injunctive relief may be appropriate in other circumstances, including for example where a potential licensee is acting outside the scope of the SEP owner's commitment to license on FRAND terms. Such an example would exist, as acknowledged by the Department of Justice ("DOJ") and the U.S. Patent and Trademark Office ("USPTO") in their joint Policy Statement, exclusionary relief may be appropriate where a potential licensee refuses to engage in a negotiation to determine FRAND terms or invariably insists on terms clearly outside the bounds of what could reasonably be considered to be FRAND compliant in an attempt to evade its obligation to fairly compensate the SEP owner.[17]

The requested clarification would be consistent with prior Commission writings in which the Commission carefully avoided the position that injunctive relief in a district court or an exclusion order in the International Trade Commission should be conclusively prohibited. For example, the Commission recently urged the ITC to refrain from issuing only those exclusion orders that "conflict with the public interest." Third Party U.S. Fed. Trade Comm'n's Statement on the Public Interest, *In the Matter of Certain Gaming & Entertainment Consoles, Related Software, and Components Thereof*, ITC Inv. No. 337-TA-752 at 4. The Commission suggested that the ITC could find that "public interest factors support denial of an exclusion order unless the holder of the RAND-encumbered SEP has made a reasonable royalty offer." *Id.* (footnote omitted). Alternatively, the Commission recommended that the ITC "delay 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." *Id.* In the latter scenario, the Commission opined that the exclusion order should either (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." *Id.*

Because each case presents a unique set of circumstances, both the courts and the ITC are well-positioned and well-equipped to determine whether an injunction or exclusion order is warranted in a particular case. (*Bosch* Comments at 7.)

Moreover, IA recommends that the Commission expressly harmonize its views with those most recently stated by the DOJ and USPTO in their joint Policy Statement, and most specifically with the DOJ/ USPTO acknowledgement that "determinations of the appropriate remedy in cases involving F/RAND-encumbered, standard-essential patents should be made

[16] *See, e.g.,* Proposed Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 at 7-8.

[17] Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (January 8, 2013) ("DOJ/USPTO Policy Statement") at 7. *See also id* at 9 ("exclusion order[s] for infringement of F/RAND encumbered patents" may be appropriate in some circumstances and inappropriate in others).

against the backdrop of promoting both appropriate compensation to patent holders and strong incentives for innovators to participate in standards-setting activities."[18]

Conclusion

The Proposed Order poses serious concerns regarding the Commission's efforts to impinge upon SEP holder's First Amendment rights as well as the breadth of its lawful authority. For all of the foregoing reasons, IA recommends that the Commission modify the Proposed Order in a manner that avoids declaring Google's and other SEP holders' mere requests for injunctive relief a violation of Section 5 of the FTC Act. IA further recommends that the Commission limit the prescribed negotiation procedures to the particulars of this case. Alternatively, IA recommends that the Commission withdraw the Proposed Order in its entirety.

Respectfully Submitted,

INNOVATION ALLIANCE

/s/ Brian Pomper

Brian Pomper
Executive Director

[18] *Id.* at 10.