



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

February 22, 2013

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

Dear Mr. Clark:

The Application Developers Alliance (“Alliance”) respectfully submits the following comments on the Commission’s proposed consent order in the above-captioned proceeding (“the *Google* case”). The Alliance takes no position on the factual specifics of the *Google* case. The Alliance, however, supports the proposed consent order as an appropriate, balanced and limited generally applicable model for addressing the issues that arise when a holder of a standards-essential patent (“SEP”) subject to a fair, reasonable and non-discriminatory (“FRAND”) licensing commitment seeks injunctive relief against alleged infringement of such a patent. The Alliance also urges the Commission and other antitrust enforcers to actively police other forms of competitively troublesome conduct with respect to patents on smartphone and other mobile technologies.

**The ADA’s Interest**

The Alliance is a non-profit professional and industry organization dedicated to advancing the interests of app developers and publishers as innovators, and promoting the growth of the app economy generally. We have a broad membership, including more than 20,000 individual members and more than 100 corporate members (including Google and some of Google’s competitors).

Our mission is closely aligned with that of the Commission: to support innovation, to encourage competition, openness and opportunity, and to enable the growing app economy to flourish. We support competition, transparency and open standards, because it is under those conditions that app developers flourish and bring to market diverse, innovative, quality products that consumers can value and trust.

App developers are creators and innovators, and they appreciate the value of intellectual property protection. But they are also well aware of the dangers of “intellectual property abuse.” In particular, our members are acutely concerned about the harm caused by the ongoing smartphone patent wars.

The smartphone patent wars divert developers’ attention and investment from innovation to anticipating and defending against rent-seeking litigation; undermine the platforms and standards on which our members rely; and replace transparency with thickets of obscure, overlapping, and vague patent claims. These claims are often asserted by secretive,

unaccountable patent assertion entities that do not produce anything (“PAEs,” also known as patent trolls), and that exist solely for the purpose of catching our members (and, indirectly, consumers) in the cross-fire of wasteful litigation.

The Alliance believes that measured and even-handed antitrust enforcement that ensures transparent and competitive markets is vitally important to preventing anti-competitive abuses of mobile technology patents. The model established in this case accomplishes these goals, and should be applied to other cases of alleged SEP abuse.

More broadly, the Alliance encourages the FTC and other enforcers and policy-makers to take vigorous action against the full panoply of anti-competitive abuses of intellectual property in these markets. In that regard, the Alliance welcomes the Commission’s recent Patent Assertion Entity Workshop (with the U.S. Department of Justice), which should provide a basis for enforcement against one of the most troublesome forms of patent abuse. The Alliance also appreciates the U.S. Patent and Trademark Office’s recently-announced Partnership for Enhancement of Quality of Software-Related Patents.

### **SEPs and the *Google* Consent**

The Alliance believes that the proposed consent order in the *Google* case represents an appropriate and balanced model for addressing the general problem of efforts by holders of SEPs to secure injunctive relief (whether in court or before the International Trade Commission (“ITC”)). As the Commission notes in its Analysis to Aid Public Comment, “SSOs [standard-setting organizations] and the standards they promulgate have procompetitive benefits; they encourage common technological platforms that many different manufacturers ultimately incorporate into their respective products.” Those procompetitive benefits are vital to app developers, who rely on those standards to develop products that consumers value and trust. Therefore, it is essential that there be clear, transparent and consistently applied rules that protect app developers, consumers and other parties from abuse by holders of SEPs, while, at the same time, encouraging holders of valuable patents to contribute their technology to open standards on a FRAND licensing basis.

The proposed consent order strikes an appropriate balance. It allows patent holders to enforce their rights and collect royalties based on the merits and value of their technology, and thus preserves their incentives to contribute the technology to an open standard. A more draconian remedy, by contrast, could be counter-productive, by discouraging the contribution of the most valuable technologies to the open platforms on which the apps economy is built.

On the other hand, the order preserves an active role for antitrust enforcement in preventing the abuse of SEPs, ensuring that FRAND licensing commitments are kept, and discouraging wasteful litigation. Antitrust enforcement is important in this context because individual victims of SEP abuse often lack the resources and incentives to defend ruinously expensive patent litigation and to enforce FRAND licensing commitments. The order also creates a much-needed mechanism to clarify the meaning and application of FRAND licensing commitments in particular contexts, and thus to engender the transparency and predictability on which innovators and investors rely.

Two features of the proposed consent order merit particular note. First, while the proposed consent order would generally prohibit Google from seeking injunctive relief against alleged infringers of SEPs, it creates an exception to that prohibition in the limited circumstance that Google or its patent licensees are themselves the subject of claims for injunctive relief with respect to infringement of the opposing party’s SEP. While injunctions enforcing SEPs are generally undesirable, this provision for reciprocity is critically important. The practical reality

of the smartphone patent wars is that each platform and group of complementary innovators – Google and its licensees, Microsoft and its licensees, Apple and its licensees, *etc.* – defends against competitively harmful patent litigation in large part by means of patent infringement countersuits. Licensees and downstream competitors, including app developers, depend on the major firms that provide platforms and control large patent portfolios to defend them vigorously in the patent wars, because patent litigation is often too expensive and too onerous for a small licensee that lacks its own patent portfolio to defend on the merits. Accordingly, even-handedness and reciprocity in the rules that govern patent litigation by the various major players is not merely a matter of fairness; it is essential to deter abusive litigation that directly harms app developers.

Second, the proposed consent order prohibits Google from transferring its FRAND-encumbered SEPs to third parties who do not agree to be bound in the same manner as Google. That provision is essential to prevent a form of patent abuse that is of great and increasing concern to our members – transfer of patents to unaccountable PAEs whose interest lies in anticompetitive litigation rather than in cross-licensing that brings products to market.

The Alliance recognizes that the proposed consent order would resolve a specific matter involving a specific party. We urge, however, that its terms and its philosophical foundation be applied consistently as a model to all SEP holders. As the fusillade of lawsuits and threats of lawsuits by PAEs have demonstrated, the competitive impact of patent abuse does not depend on the size or productivity of the plaintiff. Even a non-productive, non-practicing entity with no assets beyond a patent can imperil the work of thousands of developers with a single lawsuit; indeed, because PAEs produce no products that can be made the subject of infringement countersuits, their lawsuits can be especially onerous to defend. Moreover, as we have emphasized above, transparency and consistency of rules in this area are essential to innovators', investors', and consumers' confidence, and even-handed application of rules is essential to ensure that the smartphone patent wars are not imbalanced in a manner that tilts the market toward a dominant proprietary technology. The proposed consent order is a sound and balanced model, and should be applied uniformly by the Commission, courts and SSOs.

### **The Broader Context: The Need for Vigorous Enforcement Against Mobile Technology Patent Abuses**

SEP abuse is an important issue, and the ADA commends the Commission for taking the lead in addressing it. The problem of patent abuse in mobile technology markets, however, is substantially broader, and the app economy depends on vigorous efforts to combat all aspects of that problem. Addressing SEP abuse alone is insufficient, and a one-sided solution that addresses only those abusers who contribute their technologies to an SSO on FRAND terms would risk empowering and encouraging abusers to adopt other strategies that offer no prospect of FRAND licensing and open platforms.

The ADA therefore urges the Commission and other enforcers and policy-makers to view this case as an early step towards a broader goal of combating the whole range of abuses that burden the app economy. As a top priority, we urge the Commission to build on the lessons of the recent Patent Assertion Entity Workshop, and on the model of the prohibition in the proposed consent order against transfer to PAEs that are not bound by Google's commitments. PAEs are increasingly being used to hold patents for other entities, to shield the patent transferors from accountability and countersuits, and to evade FRAND and other licensing and openness commitments made by those entities, thus harming competition. Enforcement against PAE abuse should be a top antitrust priority going forward, and, at a minimum, enforcers should

uphold the simple principle that once a patent has been made the subject of a FRAND licensing commitment, it cannot be released from that commitment by transfer to a third party. In addition, the Commission and other enforcers and policy-makers should act vigorously to address other anti-competitive abuses such as failures to disclose patents and patent applications to SSOs; assertion of vague, overbroad and invalid patent claims; litigation and threats of litigation asserting irrelevant and non-infringed patents; unreasonable refusals to join in standard-setting and cross-licensing; and abuses of the ITC process.

Through vigorous, balanced and even-handed enforcement, the Commission can protect the app economy and the consumers it serves from patent abuses, while allowing innovators to reap the rewards of their innovation. The Google consent represents a sound model for addressing one significant aspect of the patent abuse problem, and for these reasons the Alliance supports it.

Respectfully submitted,

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Jon Potter  
President