



February 22, 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 Motorola Mobility LLC and Google Inc., File No. 121-0120*

Dear Secretary Clark:

Ericsson Inc. and its related companies (“Ericsson”) welcome this opportunity to provide their views with respect to the Decision and Order (“the Order”) in the above-referenced case on which the Commission has solicited public comments. Ericsson is particularly concerned by the Commission’s statement that it hopes to use the Order as a “template for resolution of SEP licensing disputes across many industries.”¹ Ericsson has extensive experience with standard essential patents (“SEPs”) in the telecommunications industry as a member of standard setting organizations and as both a licensee and a licensor of SEPs. Based on this experience, Ericsson believes that the Google template may adversely affect the standard setting process and may inhibit innovation. Ericsson is also concerned that the assumptions about potential competitive harm underlying the Google template may not be supported by actual industry experience. From Ericsson’s perspective, the existing standard setting process in the telecommunications industry, which contemplates the availability of injunctive relief, has encouraged the development of an extremely competitive and innovative industry.

Ericsson therefore urges the Commission to limit the Order to the unique circumstances of this case and to refrain from identifying the resolution as a template with broader applicability. Ericsson also requests that the Commission conduct further empirical investigation and analysis based on input from standard-setting organizations, and industry participants before reaching any further conclusion regarding the appropriate use of injunctive relief with respect to standard-essential patents.

Although Ericsson agrees with the Commission that, in general, injunctive relief should be available against an unwilling licensee who refuses to accept a license on fair, reasonable, and non-discriminatory (“FRAND”) terms, Ericsson believes that the specific procedures described in the Order, if widely adopted, may cause unintended and undesirable consequences, particularly within the telecommunications industry. For example, unnecessary restrictions on

¹ <http://www.ftc.gov/video-library/transcripts/130103google-pc.pdf>.



the availability of injunctive relief against unwilling licensees may discourage companies such as Ericsson from contributing to open standards, with their demonstrated benefits of improving consumer choice, lowering prices, and encouraging ongoing innovation.

Due to these concerns, Ericsson advocates a more deliberate and consensus-oriented approach to any changes to FRAND licensing practices within the telecommunications industry and beyond. Ericsson believes that the facts of this case should not be extrapolated into wider policy guidance by the Commission on how FRAND licensing should be done. Rather, any changes to FRAND policies should involve industry wide consultation with key stakeholders – both implementers of and contributors to the standards – in order to ensure that the right balance between open access to the standards and proper incentives to contribute to the standards is reached.

1. Ericsson's Interest in this Decision

As a leading supplier of wireless network equipment and also a leading contributor to standardized technologies, Ericsson is both a licensor and a licensee of standard-essential patents. Ericsson employs more than 100,000 employees who have pioneered the development of the modern cellular network. Over 1,000 networks in more than 180 countries use Ericsson equipment, and a significant portion of the world's mobile traffic passes through its networks. In the United States, Ericsson employs more than 10,000 people and supplies network equipment and/or services to every major U.S. telecommunications operator from offices in California, Colorado, Georgia, Illinois, Kansas, New Jersey, New York, Texas, and Washington, among others.

Looking to the future, Ericsson sees an even more connected world, in which there will be more than fifty billion connected devices, all of which will require better networks and greater capacity. To meet that need, Ericsson currently devotes more than twenty thousand employees and almost 15% of its net sales to research and development, much of which is focused on creating open standards for telecommunications. For example, Ericsson has been a major contributor to the development of the enabling global standards for mobile telecommunications over the last 25 years, and has invested tens of billions of dollars in this effort. Ericsson's contributions to open standards are widely recognized, including awards in 2010 and 2011 for its contributions to the 4G LTE standards by Informa Telecoms & Media.

Ericsson's innovations have been rewarded with 30,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio, with more than 100 patent license agreements in place primarily involving standard-essential patents, and the associated royalties assist Ericsson's continued contribution to the development of tomorrow's telecommunications standards.

2. Open Standards and FRAND Licensing Benefit Consumers

Open standards ensure worldwide interoperability between networks, devices, and network operators. This is true for both data communication protocol standards and telecommunications standards, such as the 2G, 3G, and emerging 4G LTE cellular standards to which Ericsson heavily contributes. FRAND licensing, as required by the intellectual property



policies of various standard-setting organizations, enables the success of the standards by ensuring open access to the standards while providing a reasonable reward to the companies that contribute intellectual property during the formation of the standards. Under this FRAND regime, the ecosystem around cellular standards has grown tremendously over the last 25 years to embrace ever new markets and industries, offering new products and services to the benefit of all consumers.

a. Open Standards Increase Choice, Improve Performance, and Reduce Cost

Open standards within the telecommunications standards comprise a set of specifications that specify complete “blueprints” for commercial networks and products. Here, standardization does not involve a standards-setting organization merely adopting an existing standard. Rather, the standardization process more closely resembles a collaborative selection process among industry players to find the best solutions to the technical challenges underlying the standards, such as increased data rates, faster response times, reliability, and security. The participants invest significant time and resources in conceptualizing, modeling, and testing the solutions that they offer to contribute to the standard. In a typical situation, Ericsson and other innovating companies make competing technical proposals, each protected by the contributor’s patent filings, to overcome the challenges. Importantly, this is a risky investment of precious research and development resources; the expenditures must occur years, even decades, before any products are actually manufactured or sold, and without any guarantee that the solutions will be incorporated into the standard. This process results in a state-of-the-art complete system specification for complete commercial networks and end user devices, and only the very best technical solutions are actually incorporated into the standard.

The open standards that result from this process hugely benefit consumers and the competitive economic conditions in the United States. The continuous developments of cellular standards have enabled new product types to become mobile. With the evolution of 3G and introduction of 4G, it has become possible to connect devices with larger screens while offering high quality end-user services, such as video, online gaming and other media services. Ericsson agrees with the Federal Trade Commission that open standards create wider choices for consumers, reduce prices, and improve product quality. More choices are available to consumers because the FRAND commitment applies outside of the relevant standard body’s membership; anyone who wishes to implement a standard can rely on innovators’ FRAND commitments for access at a reasonable cost. Therefore, the market is accessible for new players to launch competitive and successful products without any investment in the multi-year process to develop the enabling standards. And many new vendors have taken advantage of the system and emerged as market leaders, even though they had not previously invested in the sector.

As a result of the increased choices, consumers pay less for better telecommunications products and services. The telecommunications sector has enjoyed remarkable growth in the last two decades, providing affordable communication to approximately 6.3 billion users worldwide.²

² http://www.ericsson.com/res/docs/2012/traffic_and_market_report_update_august_2012.pdf.



As the sector has moved from multiple domestic standards to truly global standards, prices have fallen and, at the same time, products and services have continuously improved with new standardized technologies generating enhanced performance and new features for consumers, such as mobile broadband Internet access, music and video streaming, social networking, location-based services, and online gaming. One such example comes from the Japanese cellular market, which moved from a Japanese-only second generation standard, which was called the Personal Digital Cellular or PDC standard, used in the 1990s to an international third generation standard, named WCDMA, in the last decade. While local Japanese brands heavily dominated the sale of second generation infrastructure and mobile devices, the adoption of a global third generation standard led to an increase in competition from global brands in Japan and a corresponding reduction in cost greatly benefitting all consumers. This example is just one of many showing that open standards have increased competition and benefitted consumers.

b. FRAND Licensing Incentivizes Contributions to Open Standards

FRAND licensing facilitates the standardization process and is a critical element of future standards development. As explained above, the standardization process requires major and early investments in collaborative, rather than proprietary, research and development. The early investment, although risky and costly to the participants in the standard-setting process, must be maintained to continue development of open global standards in the future.

FRAND licensing, with the possibility of using injunctive relief to protect standard-essential patent holders' rights, has provided the necessary incentives for innovators to direct research and development resources to standardization efforts, and will continue to do so in the future if left unchanged. It is a prerequisite for the underlying business models of participants in standard-setting, as recognized by key standard-setting organizations, such as the European Telecommunications Standards Institute³ ("ETSI"):

IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.⁴

Removing or limiting possibilities for a fair return on investments in standardization would undermine incentives for technology developers to invest in open, standardized technology and instead encourage a shift towards proprietary technologies. Eventually, this could threaten interoperability between equipment from different vendors, leading to consumer lock-in, reduced consumer choice and higher costs (both for equipment manufacturers and consumers). As the Commission has recognized, "[i]f firms forego participation in the standard-setting process, consumers will no longer enjoy the benefits of interoperability that arise from standard setting, manufacturers have less incentive to innovate and differentiate product offerings, and new

³ Although ETSI is based in France, the FRAND commitments made within ETSI are frequently the subject of patent litigation in the United States.

⁴ ETSI Intellectual Property Rights Policy at 3.2, *available at* <http://www.etsi.org/WebSite/document/Legal/ETSI%20IPR%20Policy%20November%202011.pdf>.



manufacturers will be deterred from entering the market.”⁵ This harm may arise if technology developers withdraw from the standards-setting process.

c. Government Intervention in the FRAND Process Should be Based on Demonstrable Harm and Avoid Actions that May Inhibit Future Standards Development

The Order in this case, which limits Google’s right to obtain injunctive relief, is based on assumptions, *e.g.*, that “seeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the integrity and efficiency of the standard-setting process”⁶ and may result in “patent hold-up,” *i.e.* the possibility that royalties will be based on the transaction costs of switching from one standardized technology to another rather than a more appropriate measure of the value of the patented inventions. While these theoretical concerns may be an appropriate starting point for analysis, Ericsson is concerned that the Commission has not fully considered whether the empirical record demonstrates any substantial harm, including reduced innovation or higher consumer prices, arising generally in any industry or in any specific case. As described above, from Ericsson’s perspective, the standard-setting process in the telecommunications industry, at least, has promoted extraordinary innovation and competition. And FRAND licensing practices have encouraged the exchange of technology essential to the standards, as evidenced by Ericsson’s track record of cross-licensing technology with minimal litigation.

To avoid inhibiting the rapid development of open standards and to maintain the balance between access and the incentive to contribute, the Commission should carefully consider (1) whether limits on injunctive relief are necessary to remedy actual competitive harm and (2) whether such limits may reduce the value of standard-essential patents to the point that companies can no longer justify long-term investment in developing technology for open standards.

3. The Order, If Widely Adopted, May Upset the FRAND Balance Between Implementers and Contributors

Although Ericsson agrees with the Commission that, in general, injunctive relief should be available against an unwilling licensee who refuses to accept a license on FRAND terms, Ericsson believes that the specific procedures described in the Order may cause unintended and undesirable consequences. Ericsson does not present these concerns as an exhaustive list, or necessarily advocate that the Commission should address these concerns in the context of this case. Rather, Ericsson urges the Commission to continue its analysis and consultation with key stakeholders to address these and other concerns in any further action it takes with respect to FRAND issues.

As one specific example, Ericsson believes that the Order includes a cumbersome and potentially lengthy mechanism to adjudicate FRAND issues in the federal court system. As

⁵ Motorola Mobility LLC and Google Inc.; Analysis of Proposed Consent Order to Aid Public Comment, File No. 121-0120, (FTC, Jan 10, 2013).

⁶ *Id.*



defined in section I.Y., the Order contemplates a procedure, called a “Request for FRAND Determination,” under which a putative licensee may request that a federal district court determine at least the royalty terms of a global license to standard-essential patents subject to a FRAND undertaking. Despite its intended purpose, Ericsson believes that this procedure could foster litigation, delay the resolution of FRAND licensing disputes, and potentially result in sub-FRAND licensing agreements if applied beyond the facts of this specific case.

Specifically, the requirement of reaching a “Final Ruling” (*see, e.g.*, section II.E.3) will significantly delay the resolution of licensing disputes. If an unwilling licensee files a request for a FRAND determination, exhausts all appeals, but then refuses to accept a license on the terms adjudicated by the court, only then could a licensor seek injunctive relief, despite spending years and millions of dollars in litigation already. Moreover, unwilling licensees may try to leverage the potential delay introduced by this procedure into licensing terms that compensate the patent holder at sub-FRAND rates. Even more problematic, this procedure may encourage an otherwise willing licensee to seek the same advantage in licensing negotiations.

In short, Ericsson is concerned that the FRAND dispute resolution process encompassed by the Order will be overly complex, lengthy and expensive, and may encourage reluctant licensees to unduly delay agreement regarding FRAND terms. As a result, licensors may face a form of reverse patent hold-up, in which they accept royalty rates artificially suppressed by the costs and uncertainty of litigating FRAND disputes in which injunctive relief is not a realistic remedy.

4. Conclusion

Ericsson appreciates the opportunity to be heard on these issues. We urge the Commission to keep these points in mind before seeking to extend the rationale of the consent decree to other situations. In particular, Ericsson advocates a more deliberate and consensus-oriented approach to any changes to FRAND licensing practices.

Sincerely,

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