



February 22, 2013

Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex D)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: *In the Matter of Motorola Mobility LLC, a limited liability company, and Google Inc.*  
(FTC File No. 121-0120)

Dear Commissioners and FTC Executive Staff:

Microsoft appreciates the opportunity to provide comments regarding the Complaint and proposed Order against Motorola Mobility LLC (Motorola) and Google Inc. (together, Google).

This is a matter of considerable public import. Microsoft shares the Commission's conclusion that the type of patent hold up described in the Complaint harms consumers, competition and the effectiveness of the global technology standardization system. Standard setting organizations (SSOs) want to attract the contribution of innovative technologies, including patented technologies, to new standards under development. But they also want to ensure that any firm can implement the resulting standards so that the standards will be useful. That is why it is so important that every participant in the standard-setting process live up to its promise to make its standard-essential patents (SEPs) available to all implementers on fair, reasonable and non-discriminatory (FRAND) terms. That promise is, after all, "a guarantee" (as the Ninth Circuit recently put it) "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." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012).

As the Complaint describes, Motorola, and once it was acquired, Google, repeatedly sought to obtain injunctions and exclusion orders against other firms (including Microsoft) on the basis of SEPs that it promised to make available. The Commission's Complaint and Statement in this matter provide welcome guidance that this practice is anticompetitive and unlawful.

Microsoft is an interested third party. We offer software, services and, increasingly, devices, and we also are an intellectual property company. We've entered into hundreds of patent licensing arrangements over the past few years, as a licensor and as a licensee. We are a key contributor to the development of technical standards, and this often entails contributions of our patented technology. We implement a broad range of technical standards in our diverse products and services. Given these interests, we believe we have a broad and balanced perspective on the proper treatment of SEPs and the development of a vibrant and effective standardization system.

The Commission’s Analysis of Proposed Consent Order to Aid Public Committee (Analysis) observes that “[s]eeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the integrity and efficiency of the standard-setting process and decreases the incentives to participate in the process and implement published standards . . . .” The Analysis explains that “[t]he Proposed Consent Order is tailored to prevent Google – through its wholly owned subsidiary, Motorola – from using injunctions or threats of injunctions against current or future potential licensees who are willing to accept a license on FRAND terms.”

We believe that the type of relief described in the Analysis would go a long way toward meeting this salutary objective. We are concerned, however, that in several material respects the language of the proposed Order may not fully reflect the relief described in the Analysis and in other public statements by the Commission. We urge the Commission to make clarifying edits to the Order to conform it to the Commission’s Analysis. Three areas are particularly consequential in this regard.

***1. The Commission should require Google to withdraw all pending injunctive relief actions.***

The Analysis states that “the Proposed Consent Order further prohibits Google and Motorola from continuing or enforcing existing claims for injunctive relief based on FRAND-encumbered SEPs.” This makes sense: the Complaint explains that a company making a FRAND commitment “*relinquishes* its right to exclude a willing licensee from using technologies covered by its SEPs to implement a standard.” (Emphasis added.) The Order indeed appears to ban Google from continuing to pursue its pending injunctive relief actions.

Nevertheless, Google has not withdrawn all of its pending injunctive relief actions based on FRAND-encumbered SEPs. This is true even though these actions were filed against “willing licensees,” and this anticompetitive conduct by Motorola, and then Google, is the basis for the Complaint in this matter. We assume that Google’s refusal to withdraw its pending claims for injunctive relief means that it interprets the proposed Order to permit it to continue its existing claims for injunctive relief, notwithstanding the Commission’s public statement to the contrary. Clarification of the decree in this regard would be appropriate.

***2. Google never should be able to seek injunctive relief against a “willing licensee.”***

As noted above, the Complaint makes it clear that a company making a FRAND commitment “relinquishes” its right to seek injunctive relief against a “willing licensee.” The Analysis explains that the Order is “tailored to prevent Google . . . from using injunctions or threats of injunctions against current or future potential licensees who are willing to accept a license on FRAND terms.” The Analysis states that before seeking an injunction Google must follow certain steps that are intended to give the potential licensee an opportunity to secure a FRAND license.

It appears, however, that Google may indeed seek injunctions against willing licensees, and it may do so without necessarily following the steps referenced above. That appears to be the import of the “defensive use” provision (IV.F), which by its terms trumps all other provisions in the proposed Order (“[n]otwithstanding any other provision of the Order . . .”).

Under this provision, Google apparently may seek injunctive relief against certain firms implementing standards even though (as the Commission explained) it relinquished that right when it made a FRAND promise. In particular, under this provision Google apparently may seek injunctive relief on any and all of its FRAND-encumbered SEPs against a potential licensee who pursues an injunction based on that potential licensee’s FRAND-encumbered SEPs in connection with any Google product or service. It appears that Google may do so even if the potential licensee is a “willing” one—and would readily demonstrate its willingness to take a license to Google’s SEPs in writing (such as by signing a version of the letter that is annexed to the Order as Exhibit B and otherwise engaging in the process outlined in the Order for willing licensees). The Order, however, does not appear to require Google to make this option available to the potential licensee in this situation.

This defensive use provision should not affect Microsoft’s patent position vis-à-vis Google because Microsoft pledged publicly a year ago that it will not seek an injunction against any firm (including Google) on the basis of Microsoft’s FRAND-encumbered SEPs. Microsoft is concerned about this provision in the proposed Order, however, because it will leave Google with discretion to continue to abuse its SEPs to the detriment of the international standards system and because it may set a precedent for similar anticompetitive conduct by other firms.

The defensive use exception to Google’s obligation to adhere to its FRAND “guarantee” is especially concerning because of its apparent breadth. First, the Analysis states that the defensive use provision applies when a potential licensee files a claim for injunctive relief “against Google,” but the Order could be read to enable Google to seek injunctive relief unilaterally *even if the potential licensee brings an action against a company other than Google* (namely, any of the many companies that distribute any undefined Google product or service). Google should not be permitted to invoke the defensive use provision simply because a potential licensee sues an unrelated third party that happens to incorporate elements of Google technology. Given that it was Motorola’s assertion of its FRAND-encumbered SEPs, as then continued by Google, that forms the basis of the Complaint, the defensive use exception should extend to just those products owned and distributed by Google and its subsidiaries like Motorola. Google is the party to the decree, and the defensive use provision (if there is to be one) should extend no further than Google. We believe this is the appropriate reading of the proposed Order and that the Commission should clarify this potential ambiguity to avoid future confusion.

Second, the defensive use exception is not limited to a circumstance where Google (or its distributors) and a potential licensee disagree as to fair terms for cross-licensing each other’s SEPs in a particular standard and the potential licensee seeks injunctive relief. Rather, it appears that if a firm sues Google (or any Google distributor) for an injunction on a SEP on one standard, then Google may sue that firm for an injunction on *any* SEP on *any* standard. In other words,

once Google invokes the defensive use exception, it can pursue injunctive relief based on its entire portfolio of FRAND-encumbered SEPs. If the Order is to include some type of defensive use exception, at a minimum it should be invoked within the parameters of Reciprocity only (as that term is defined in the proposed Order and as reflected in IV.B).

Further, most decrees impose obligations solely on the respondent. The proposed Order's defensive use provision is unusual in that it appears to create obligations for third parties if they wish to shield themselves from the injunctive relief actions that Google already relinquished under the reasoning of the proposed Complaint. As the proposed Order currently stands, if a firm wishes to file an injunctive relief action on any patent against any firm that distributes any Google product, device or service, the patent holder must first assess whether the relevant patent is a FRAND-encumbered SEP. The answer to this question is often subject to considerable doubt. If there is any possibility that Google could argue that the relevant patent *is* a FRAND-encumbered SEP, then the patent holder must either abandon its right to seek injunctive relief or meet the requirements set forth in the proposed Order, with which the firm may or may not have familiarity. If the patent holder chooses to meet the requirements of this decree (to which it is not a party), it must either (a) make "Qualified Offers" and undergo the process in the proposed Order or (b) obtain a court ruling that its proposed terms are FRAND.

With the uncertainty often inherent in determining whether a particular patent is a SEP, a patent holder may sue Google or one of its distributors on what is truly a non-SEP, and nevertheless find itself subject to injunctive relief lawsuits from Google on SEPs based solely on *Google's claim* that the patent holder's non-SEP is a SEP. Given the nature of agency enforcement proceedings, it could take the patent holder months or years to establish that Google indeed sued on a non-SEP, so that Google's injunctive relief suit should have been barred by the Order. In practice, many firms likely will settle and even accept unfavorable terms rather than endure months or years of uncertainty and the risk of a Google injunction—the very harm that the Commission seeks to avoid.

We believe that the best approach is to delete the proposed defensive use provision because it sends the wrong message to the industry about the importance of abiding by FRAND licensing commitments. With this exception (and especially with its broad implications given its current wording), the Commission appears to endorse the notion that holders of FRAND-encumbered SEPs may indeed sue each other for product injunctions and exclusion orders. The notion that the desire to avoid so-called "mutually assured destruction" will inhibit firms from seeking injunctive relief on their FRAND-encumbered SEPs is belied by the many ongoing SEP-related lawsuits in the mobile technology space. The best approach is consistent enforcement, not Commission-endorsed mutual abandonment of licensing commitments.

If the final Order is to include a defensive use provision, it ought to be substantially narrowed and should include a process to enable the potential licensee of Google's SEPs to attempt to secure a license on FRAND terms. For the avoidance of doubt, the Order should include a sentence underscoring that Google is required to offer a willing licensee a FRAND license even under circumstances when the Order permits Google to seek injunctive relief.

***3. Google should never be able to seek injunctive relief if there is pending litigation with a potential licensee to resolve a dispute as to whether licensing terms are FRAND.***

The Analysis states that “if a potential licensee seeks judicial relief for a FRAND determination, Google must not seek an injunction during the pendency of the proceeding, including appeals.” But under the proposed Order, it appears that Google can seek injunctive relief even if there is pending litigation to resolve a dispute as to whether proposed licensing terms are FRAND. That is because the defensive use provision in section IV.F trumps any other provision in the decree and operates irrespective of pending or prospective litigation to resolve FRAND-related disputes between the parties.

We suggest that the final Order clearly establish that Google cannot seek or enforce injunctive relief during ongoing litigation as to whether Google is complying with its FRAND commitment, regardless whether such litigation is commenced before or after Google invokes the defensive use provision.

We urge the Commission to clarify the proposed Order along the lines suggested above so that it more closely maps to reasoning of the Complaint and the understanding of the Order as reflected in the Analysis.

One other point is worth noting, and it could be addressed without edits to the Order. The proposed Order imposes certain requirements on potential licensees if they wish to avoid injunctive relief actions by Google. Firms seeking injunctions on SEPs (however wrongfully) might cite this approach as Commission endorsement of an argument that a holder of a FRAND-encumbered SEP is free to seek injunctive relief and freed from its FRAND commitments anytime a potential licensee does not meet the procedural requirements set forth in the Order. Similarly, firms seeking injunctive relief may argue that they are free to seek injunctions on their FRAND-encumbered SEPs anytime they (or any of their business partners) have been sued on any patent on any standard that they can claim is a FRAND-encumbered SEP. It would be helpful if the Commission clarified that the proposed Order represents a negotiated settlement with one party and is not intended to alter the usual burdens of proof in connection with disputes over the effect of a FRAND licensing commitment and related obligations of the parties.

Thank you for the opportunity to submit these comments.

Sincerely,

Vice President &  
Deputy General Counsel, Corporate Standards & Antitrust Group  
Microsoft Corporation