



ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W 52ND STREET
NEW YORK, NEW YORK 10019-6142
tel +1-212-506-5000
fax +1-212-506-5151
WWW.ORRICK.COM

E. Joshua Rosenkranz
(212) 506-5380
jrosenkranz@orrick.com

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 and Google Inc., FTC File No. 121-0120

Dear Mr. Clark:

Apple Inc. (“Apple”) submits this statement in response to the Federal Trade Commission’s (“FTC”) request for public comments in *In the Matter of Motorola Mobility and Google Inc.*, FTC File No. 121-0120 (January 3, 2013).

I. APPLE’S INTEREST

Apple is widely recognized as a leading innovator in the mobile device markets. The innovative features of the industrial design, user interface, operating system, and software applications (among other features and functionalities) of the iPhone and iPad have revolutionized these markets. The iPhone and iPad also implement various standardized technologies, including cellular and WiFi communications protocols. These products function in a similar fashion as other mobile devices that support these same technologies. Apple shares a common interest with the suppliers of mobile devices in an open marketplace that encourages competition and innovation—and discourages exclusion and “patent hold-up.”

Apple has a keen interest in the FTC’s actions in this matter—and, more broadly, in the rigorous enforcement of “fair, reasonable, and non-discriminatory” (“FRAND”) terms to safeguard against patent hold-up. Apple owns a number of patents that are essential to various industry interoperability and technical standards. For example, Apple is a leading holder of patents that are essential to the LTE standard. Apple also implements standards in almost all of its products and it has licensed patents, from a number of firms, that are essential to various industry standards. As both a licensor and licensee of patents that are declared “essential” to wireless standards, Apple relies on industry commitments to license on FRAND terms.



Apple will not, however, capitulate to attempts at hold-up. As a new entrant into the mobile phone space, Apple has been forced to expend considerable resources to defend against injunction claims brought by MMI and other holders of FRAND-encumbered SEPs. Apple is not alone. Holders of FRAND-encumbered SEPs 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. 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 hopes that the Commission's efforts here, and in other cases like *Bosch*, will smooth the path for future innovators and new entrants.

II. COMMENTS ON THE COMPLAINT AND COMMISSION STATEMENT

The Complaint and Commission Statement provides clear reaffirmation of the nature and significance of FRAND commitments. SEP holders should not seek injunctions when they have made a FRAND commitment absent exceptional circumstances. In this respect, this action is a significant step forward in the Commission's efforts to ensure that consumers fully realize the promise of industry standards.

MMI has declared patents essential to several industry standards and committed to license those patents on FRAND terms to any party implementing such standards. Those commitments proved to be meaningless to MMI and later Google. Once the industry had adopted the standard and was locked in to using the technology, MMI sought—and continues, with its parent Google, to seek—to exclude competitors from the marketplace through injunctions based on the very patents they had previously committed to license to all standard implementers.¹ They used injunctions as leverage to (i) demand royalties well in excess of the value of their patents before standardization and/or (ii) extort licenses to the differentiating, non-standardized intellectual property of their competitors.

Google sought to justify its past unlawful behavior by labeling Apple and others as “unwilling licensees.” In particular, Google has accused Apple of being an unwilling licensee because it (1) questioned whether the patents Google had declared essential to various industry standards were actually valid, enforceable, infringed, and essential to a standard, and (2) asked Google to prove up its royalty request and portfolio value by sharing claim charts and discussing comparable licenses to comparable parties. The Commission rejected Google's mischaracterization of Apple. The Complaint and Commission Statement recognized that Apple had raised fundamental questions that are necessary for ensuring that the licensor's FRAND obligation is being met, like when Apple challenged MMI's claim for 2.25% of the average selling price of an iPhone. A willing licensee cannot be tarred “unwilling” merely by seeking to

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.



challenge in negotiations that the rate sought by an asserting licensor is indeed FRAND. It is the licensor who is the “unwilling” party when it refuses to engage and embrace its burden of proving its offer is FRAND.

The FTC has taken a principled stand against this behavior, declaring that “Google violated its FRAND commitments by seeking to enjoin and exclude willing licensees of its FRAND encumbered SEPs.”² The Commission has once again made it clear that firms violate the antitrust laws when they threaten or seek injunctions to hold-up standard implementers for non-FRAND licensing terms. The FTC’s positions, as reflected, for example, in the FTC’s 2003 Report,³ the FTC/DOJ 2007 Report,⁴ the FTC’s 2011 Report,⁵ the FTC’s public interest statement to the ITC (2012),⁶ 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. As the FTC correctly observes, “When participants breach their FRAND commitments by engaging in patent hold-up and threatening to keep products out of the market, consumers and the competitive process will likely be harmed.”⁷

² Complaint ¶ 2, *In the Matter of Motorola Mobility and Google Inc.*, FTC File No. 121-0120 (Jan. 3, 2013).

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

⁴ 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”).

⁵ 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.”).

⁶ 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, p. 5 (Dec. 18, 2012), available at www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf (“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.”).

⁷ Agreement Containing Consent Order ¶ 3, *In the Matter of Motorola Mobility and Google Inc.*, FTC File No. 121-0120.



The FRAND commitment, quite simply, is the key to ensuring that holders of declared standard essential patents do not abuse the collective process of standardization for anticompetitive ends. First and foremost, a FRAND commitment reflects a promise of access to standardized technologies. It is not a means for SEP holders to bully companies. 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. As long as a holder of a FRAND-encumbered SEP 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 monopoly power.⁸

The FTC Complaint and Commission Statement is consistent with the judicial recognition of "the tension between offering a FRAND commitment and seeking injunctive relief."⁹ 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.

All that said, Google's actions and public statements since the issuance of the FTC's Complaint raise concerns that it has yet to get the message. *First*, Google/MMI continues to deny that it engaged in hold-up and instead blames the victims of its anticompetitive conduct for "holding out." *Second*, Google continues to pursue injunctive relief against Apple in federal court and seeks to exploit the injunction it obtained and enforced against Apple in Germany. *Third*, Google/MMI continues to demand royalties (in the German rate-setting action and in ongoing negotiations) based on past licenses it negotiated while wielding the threat of injunction. Such licenses are the proverbial "fruit of the poisonous tree" and cannot be presumed FRAND.

⁸ Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Motorola Mobility and Google Inc.*, FTC File No. 121-0120 (Jan. 3, 2013).

⁹ *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Federal Trade Commission, 2 (Nov. 26, 2012). See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (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?").



Google's conduct cannot be squared with the spirit of the FTC's decision and order.¹⁰ Its position raises significant questions as to whether it will abide by the spirit and letter of the Proposed Decision and Order.

II. COMMENTS ON PROPOSED DECISION AND ORDER

The FTC embraced a straightforward and reasoned remedy in *In the Matter of Robert Bosch GmbH*. There, the FTC found that SPX Service Solutions U.S., Inc.'s practice of seeking injunctive relief against standard implementers following its commitment to license those patents on FRAND terms was "a form of FRAND evasion" that "reinstate[s] the risk of patent hold-up that FRAND commitments are intended to ameliorate" and concluded that the practice violated Section 5.¹¹ The FTC proposed a straightforward remedy that: (1) requires Bosch to offer the same royalty-free terms to all marketplace participants that wish to license the SPX SEPs; (2) prohibits Bosch from seeking injunctive relief against third parties unless they explicitly refuse to license the SEPs on FRAND terms; and (3) requires Bosch to abandon any ongoing efforts to seek, obtain, or enforce injunctions.¹² We believe that this simple, clear, and direct remedy is the right model for resolving this action and future actions addressing patentees that threaten exclusionary relief based on FRAND-encumbered patents.

The FTC has proposed a more complicated remedy here. Given the lack of precedent for the process outlined in the Decision and Order, there is a benefit to the FTC confirming the common-sense interpretation of its proposed decree to ensure that it will not be manipulated by Google or others.

¹⁰ Remarks of Chairman Jon Leibowitz, Google Press Conference (Jan. 3, 2013), *available at* <http://www.ftc.gov/speeches/leibowitz/130103googleleibowitzremarks.pdf> ("Google's settlement with the Commission *requires Google to abandon its claims for injunctive relief on any of its standard essential patents with a FRAND commitment, and to offer a license on FRAND terms to any company that wants to license these*") (emphasis added); Proposed Consent Order, *In the Matter of Google Inc.*, FTC File No. 121-0120, *supra* note 7 ("Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND-encumbered SEPs around the world, and to offer a FRAND license to any company that wants to license Google's SEPs in the future.").

¹¹ Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Robert Bosch GmbH*, FTC File No. 121-0081, pp. 4-5 (Nov. 26, 2012).

¹² Proposed Consent Order, *In re Robert Bosch GmbH*, File No. 121-0081 (November 26, 2012).

A. A SEP Holder, Like Any Other Patent Holder, Must Establish That It Is Entitled To A Royalty

A patent holder seeking to enforce its rights bears the burden of demonstrating that its patent (or patents) is infringed. If the assets asserted have been declared standard essential, the patentee may also demonstrate essentiality. The patentee must also withstand common defenses and counterclaims of invalidity, unenforceability, and exhaustion, among others.¹³ It is only after a patent holder has overcome these hurdles of proof that the question turns to value and the patentee's additional burden to demonstrate the amount of any damages due. In negotiations since the issuance of the FTC's Proposed Decision and Order, some SEP holders have suggested to Apple that the FTC's framework shifts the burdens of proof such that, among other things, the licensee bears the burden of proving non-infringement and that the royalty sought is not FRAND. This is not so. Nothing in the proposed order alters these traditional burdens of proof.

The only true check on essentiality today – at least in the context of cellular SEPs – occurs in court when a patent holder chooses to assert a SEP and seeks to demonstrate as part of its infringement claim that its asserted patent is standard essential. At most standard setting organizations, patentees unilaterally declare their patents to be essential to a standard. There is no independent verification that patents are truly essential. Further, patentees are often required to declare their potentially essential patents *before* the standard is determined, which necessarily will result in over-declaration. The incentives to disclose patents, the lack of independent verification, and the disclosure requirements of standard setting organizations have led to significant over-declaration. For example, over 7,300 patents have been declared as essential to UMTS, a 3G cellular standard. Independent third-party analysis suggests that the majority of these patents are not technically essential to the UMTS standard. *See* PA Consulting Group, *Essential Intellectual Property in 3GPP-FDD* 17 (May 2006) (finding that of patents studied that were declared essential to 3GPP-FDD standards, including UMTS, only 36% were actually essential); *see also* PA Consulting Group, *LTE Essential IPR: PA's 3GPP-LTE Database and Report* 13 (July 2012) (finding that of patents studied that were declared essential to LTE, only 40% were essential).

A SEP holder must also demonstrate that its patents are infringed by the implementer's product and rebut any counterarguments or defenses of invalidity, unenforceability, or exhaustion. Apple's experience has shown that declared-essential patent holders often fail to satisfy their burdens of proof on these issues in litigation. For example, MMI has asserted ten declared-essential patents against Apple in the United States and Germany. Nine of those patents have been found invalid or not infringed (or both). Similarly, Samsung has asserted over 20 allegedly essential patents against Apple. To date, Samsung has lost thirteen decisions (either

¹³ *Centricut, L.L.C. v. Esab Group, Inc.*, 390 F.3d 1361, 1367 (Fed. Cir. 2004) (“The patentee has the burden of proving infringement by a preponderance of the evidence.”); *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1123 (Fed. Cir. 1985) (“The patentee bears the burden of proving infringement by a preponderance of the evidence.”).



because of non-infringement or invalidity or both) and won only three. In addition, Samsung has dropped eight other declared-essential patents, tacitly recognizing the defects in those patents.

This record mirrors the general success rate for declared-essential patent assertions—and the repeated failures, when put to the test of litigation, to establish actual essentiality of valid patents. Such failures may be because the accused products, although operable on a standardized network, do not employ certain functionality recited in the standard (e.g., because it is optional); because the asserted patents, properly interpreted, do not cover the standard; or other reasons—including invalidity. In short, the only way to know whether a patent is truly infringed by a product that supports a standard is to follow the traditional approach of construing the scope of the patent claims and comparing them to the accused product.

Some have suggested that the critical questions of infringement, essentiality, validity, and enforceability fall solely on the shoulders of the Potential Licensee under this proposed decree. The Proposed Decision and Order recognizes a Potential Licensee’s right to make “arguments” related to validity, essentiality, infringement, and value but it is silent on who bears the burden of proof on these issues. *See* Proposed Decision and Order, § III.D and IV.E.6 (nothing in the Decision and Order restricts the ability of the parties to make any “arguments . . . regarding validity, [e]ssentiality, infringement or the value of the patents”). Some have seized on this to argue that a court or arbitrator may determine FRAND royalties without putting Google to its proofs that any asserted SEPs actually are valid, essential, enforceable, and infringed. If these issues are contested – and we believe they should be – then the traditional burdens of proof should apply.

Google and others may argue that infringement may be presumed from the mere fact that a patent is essential to a standard. Declared SEP holders routinely try to extract value for an entire portfolio of declared SEPs while shielding individual patents from scrutiny. Google does not meet its burden by simply stating that it has a portfolio of patents that it has *declared* essential to a standard and that it will license those patents for 2.25% of the average sales price of the Potential Licensee’s product. That should not be enough to shift the burden of proof on questions of essentiality, infringement, enforceability, and validity.

The Commission should confirm the common-sense view that its framework does not alter the traditional burdens of proof. For example, Paragraph III.D of the arbitration section states that “arguments regarding Validity, Essentiality, Infringement or the value of the patents” should be included within the “Contested Terms” for any arbitration. As an example, the Commission could acknowledge that nothing in the Order shall be read to shift the traditional burdens of proof on the questions of essentiality and infringement. Moreover, the definition of “Binding Arbitration” in Paragraph I.D should specify that these issues must be decided in any arbitration conducted under the FTC framework.

The Commission should also confirm that nothing in the Proposed Decision and Order is intended to create a presumption of infringement for declared-essential patents. Definition M currently states : “‘Infringement of (or Infringing) a FRAND Patent’ means a claim that a



FRAND Patent is infringed *based on the alleged infringer's compliance with a Standard* for which a FRAND Commitment including the FRAND Patent has been made” (emphasis added). The FTC should therefore reiterate that the Decision and Order does not allow Google to avoid its burden of proof on infringement and essentiality, which are burdens it would be required to meet in court.¹⁴ The Commission should publicly acknowledge that nothing in the Order is intended to create a presumption of Infringement simply because a patent is deemed essential to a standard.

B. The Proposed Decision And Order Should Protect Against The Possibility Of Injunctive Relief If Arbitration Fails

The intent of the Proposed Decision and Order is to limit the availability of injunctive relief (the primary source of hold-up value) and relies on binding arbitration as the backstop to ensure that the parties can come to terms on a standard essential patent license. Google may try to frustrate the arbitration process, cause it to fail in whole or in part, and then seek injunctions upon the claim that it complied with its duties under the Decision and Order.

Arbitration could fail at the outset because the parties are unable to agree on the terms or scope of arbitration. For example, Google might seek to condition its Offer to Arbitrate in unacceptable ways, e.g., through “creative” interpretations of “field of use” in Section I.D.4.a or by limiting the scope (and not just individual terms) of the Relevant Licensing Agreement in Section III. Alternatively, in line with the discussion above, Google may decline to participate in an arbitration where it has the usual burden of proof on the question of infringement or another issue. If there is an impasse, Google should not be permitted to seek injunctions. Otherwise, Google has a rational incentive to undermine the process to regain its ability to extract hold-up value. To eliminate this possibility, the Proposed Decision and Order should include a process to resolve an impasse and require the arbitration to go forward.

C. Additional Comments

There are a handful of additional comments that would ensure the goals of the FTC’s action here are realized:

- **“Representative set” approach to portfolio adjudication:** A representative set of patents from a large SEP portfolio can be used as a proxy to test the merits and value (if any) of the entire SEP portfolio in an arbitration or declaratory-judgment action. The representative set could be tested for actual essentiality/infringement, validity, performance benefits of the technology for the accused product, and other issues (e.g., patent exhaustion). The results could be used to help set a portfolio rate, if any, recognizing that (as discussed above) the patent holder

¹⁴ Of course, a licensee would be held to the same standard as to its own FRAND-encumbered SEPs if Google seeks Reciprocity.

would bear the burden of proving that the potential licensee needs any license at all. This representative-set approach would allow for broad resolution of disputes without requiring the court or arbitrator to address the details of every patent in a large portfolio.

- **Meaningful discovery:** The licensee should be entitled to meaningful discovery into the terms of the patent holder’s other licenses, among other evidence critical to determining FRAND license terms in both arbitrations and declaratory-judgment actions under the proposed framework. Only with meaningful discovery will the licensee be able to properly test the patent holder’s claims of patent essentiality, non-discrimination, and reasonableness.
- **Transparent, reasoned decision by arbitrators:** Where parties pursue arbitration, the arbitrator’s decision should be public (to the greatest extent possible), with written reasoning—rather than confidential and perfunctory. At a minimum, the arbitrator should outline the methodology used to establish the value of the SEPs. Transparency will create a body of decisions—which will assist arbitrators in deciding future cases and help parties have clear expectations (which will promote resolutions without litigation or arbitration).
- **Meaningful appellate review:** Because FRAND rate-setting cases are highly significant, both for the parties and industry participants more generally, substantive appellate review must be available. In the arbitration section, Paragraph IV.B.2(g) states that within 30 days after the arbitrator sets the terms of a final License Agreement, the parties shall enter into it. This does not allow for possible court review of the arbitrator’s award. Any arbitration process under the framework must include meaningful appellate review. There should be language adding “and any final court ruling with respect to the award,” or words to that effect. Moreover, this provision should explicitly recognize, “The arbitrator’s decision shall be subject to judicial review for errors of fact or law.”
- **Method of Appointment of Arbitrators:** The default approach to appointment should be that each party picks one arbitrator and the two appointed arbitrators pick a third arbitrator. This process would ensure some consistency in approach.
- **Additional Qualified Arbitration Organizations:** The Commission should consider naming additional qualified arbitration organizations to its list. The arbitration process outlined by the FTC is novel and unprecedented. Competition between these organizations to develop the best approach to adjudicating these issues would be beneficial.

* * * * *



We commend the Commission for its efforts to address abuses by holders of FRAND-encumbered patents, but this must be an ongoing process. Google is hardly the only declared SEP holder that has sought to abuse its position in ways that injure competition and consumers. The Commission should continue to pursue similar actions against declared SEP holders that engage in anticompetitive conduct.

The industry would continue to benefit from substantive guidance regarding the meaning of FRAND, as a further safeguard against abuses. In that regard, several principles are critical:

- FRAND royalties must be applied to a common royalty base that reflects the actual value of the standardized technology (for cellular standards, this most appropriate base is the baseband processor that performs the standardized functions in a mobile device), rather than the entire price of an end device—which also reflects other, non-standardized technology that varies from device to device. As the FTC noted in its 2011 Evolving IP Marketplace Report, the proper base is the “smallest priceable component” containing the invention.¹⁵
- FRAND royalties must be set at a level that would be reasonable if all declared-essential patent holders used the same approach to ensure that aggregate industry royalties do not create prohibitive cost burdens on device suppliers—thereby harming competition and consumers.
- FRAND royalties must be truly non-discriminatory. Although the precise terms may vary somewhat from license to license (e.g., because some licensees may prefer to “pay” in the form of non-monetary consideration rather than monetary royalties), a declared-essential patent holder cannot demand materially different consideration from different parties for the same technology—for example, by charging royalties on the price of an entire device (which varies widely), rather than just the portion of the device that incorporates the patented technology.

The FTC has long recognized that it plays a critical role in enforcing FRAND royalty principles. For example, in *Bosch*, the FTC declared that a royalty-free license offered to all licensees was appropriate to ensure that the remedy for breach of a FRAND commitment ensures

¹⁵ Fed. Trade Comm’n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 212 (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”).



non-discriminatory treatment of all standard implementers.¹⁶ Similarly, 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.¹⁷ 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. There is a risk that by leaving the evolution of FRAND royalty principles to arbitration that the process will not be sufficiently transparent to provide parties with guidance on these issues. There is also a very significant risk of inconsistent outcomes given arbitration decisions will not have a binding effect on Google. Going forward, we hope the FTC will continue to take a leadership role on this important topic.

* * * * *

In closing, Apple extends its gratitude to the FTC for its attention to the important and growing problem of declared-essential patent holders flouting their FRAND commitments and engaging in patent hold-up. This problem can only be solved through rigorous and unyielding enforcement of FRAND principles. The risk with the proposed Decision and Order is that Google and others may seize on it to make arguments that could undercut the necessary industry-wide compliance with FRAND. The FTC can further decrease the likelihood of this anticompetitive conduct by sending the unequivocal message that FRAND must be respected,

¹⁶ *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Decision and Order, Section IV(E) (Nov. 26, 2012).

¹⁷ Opinion of the Commission on Remedy, *In re Rambus, Inc.*, Docket No. 9302 (July 2, 2005), p. 25, available at <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.



without exception. This would reduce hold-up and promote innovation, to the benefit of competition, consumers, and the public interest.

Sincerely yours,

E. Joshua Rosenkranz