Protecting Small Business Innovation

January 9, 2013

By Electronic Filing

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

Re: *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081

Secretary Clark:

On behalf of the Association for Competitive Technology (ACT), I write to submit this letter in response to the request of the Federal Trade Commission ("Commission") for public comment on the Decision and Proposed Consent Order in the *Bosch* proceeding as published in the December 3, 2012 issue of the *Federal Register*, 77 Fed. Reg. 71593. We respectfully request and recommend that the Commission uphold the Decision and Proposed Consent Order with regard to commitments to license patents under fair, reasonable, and non-discriminatory terms ("FRAND") terms.

ACT's membership includes more than 5,000 small and medium sized software and "mobile app" companies, including more than 4,000 based in the United States. The mobile app industry has grown from non-existent just five years ago to a $20 billion dollar industry today. The industry continues to grow rapidly and is projected to reach $100 billion by 2015.[1] Today billions of apps are downloaded all over the world, ranging from games, business, and even healthcare. The app ecosystem affects millions of Americans and has provided real, tangible benefits to people's lives.

The app ecosystem is predominantly a small business community. According to a study conducted by ACT, 78 percent of top app developers in the app categories of business, education, productivity and games are small businesses. The number is likely even higher, as many apps developed for large businesses were not built internally, but by small contract app development companies, like Zco, based in New Hampshire, or Vertigo from California.

[1] Egle Mikalajunaite, "The Application Development Market Will Grow to $US100bn in 2015" Research2Guidance (July 6, 2011) *available at* http://www.research2guidance.com/the-Application-Development-Market-Will-Grow-to-US100bn-in-2015/.

Association for Competitive Technology

WASHINGTON, DC | 1401 K Street NW | Suite 502
Washington, DC 20005 | P +1.202.331.2130 | F +1.202.331.2139

BRUSSELS | Square de Meeus, 35
B-1000 Brussels | Belgium | P +32.(0)2.513.0524

www.ACTonline.org
www.innovators-network.org

Given the economic and public value of our industry, ACT's members are deeply concerned about the impact of a ruling by the Commission on "Standard Essential Patents" ("SEP") and FRAND agreements.

Technology Standards are Critical for Small Business App Developers and the Public

SEPs are critical to the creation of dynamic, interoperable technological ecosystems on which small businesses, like app developers, rely and from which the public benefits. They are particularly important in promoting the rapid adoption of technologies that require interoperability. Standards effectively increase the adoption velocity of new technologies by removing uncertainties about interoperability now and in the future and lowering costs for those technologies.

As network theory dictates, the value of a networked device increase in direct proportion to the number of devices on the network. The rapid adoption enabled by standards provides a more fertile environment for small business to build solutions, ensuring that these devices are more valuable to the public. In fact, our members often make key decisions about the long-term viability of a product by looking at its use of standards.

Bosch's Decision to Include Its Patents in a FRAND Agreement was a Rational, Binding Business Decision

The modern standards system, with its extensive patent pools and FRAND agreements, functions precisely because participants know that they can access standard technology without fear of being individually excluded. Companies have a choice whether to participate in a standards body and an additional choice whether to commit to FRAND licensing of any technology that reads on those standards. Standard setting organizations have differing rules governing how FRAND will be implemented, but all require non-discriminatory terms. Simply put, the choice to commit to FRAND licensing is a choice to forgo the option of injunction or exclusion order for devices that read on the patent.

Companies, like Bosch, understand this and make the decision to license a SEP on FRAND terms based on a very simple question: Do we gain more value from having our patent adopted widely through standards, or by retaining the ability to individually set prices for patented intellectual property and to exclude? In this instance, "SPX [before it was acquired by Bosch] issued a letter of assurance to SAE International acknowledging that it held patents that were potentially essential to both standards and committing to license them under FRAND terms."[2] As part of the proposed consent decree, Bosch has agreed to submit its own FRAND licensing

---

[2] *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Analysis of Agreement Containing Consent Orders to Aid Public Comment, at 5 (Nov. 26, 2012) *available at* http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf.

commitment to SAE and withdraw SPX's pending lawsuit seeking injunctive relief with regard to its FRAND-encumbered SEPs.

An understanding of these tradeoffs is key to the success of standards overall. Bosch is not alone in making strategic business decisions regarding whether or not to place patents as part of a standard and commit to FRAND licensing for all users of the standard. A comparison of another company's decision-making around whether or not to include patents in standards may serve as a case study.

Motorola is a successful technology company with extensive patent holdings. Looking at Motorola's treatment of SEPs in GSM versus 802.11 (Wi-Fi) demonstrates the strategic decision-making that goes into the process. In the early 1990s, technology was evolving to product what is now known as the GSM standard. During that time Motorola actively chose to negotiate individual cross-licensing agreements instead of broad FRAND terms during the initial development phase of the GSM standard -- precisely so it could seek additional revenue from independently arrived at licensing terms.[3] The majority of participants paid Motorola and GSM was eventually successful. In the case of 802.11, Motorola's 1994 document for patent terms is a simply one page announcement covering all patents that may read on the standard. [4] According to news reports at the time, this was done because Motorola did not see a similar economic opportunity as it did with GSM.

Companies make a choice to engage in standards and RAND terms based on business opportunities and future revenue. Those that enter into a standards agreement are bound by its terms just as they would be bound by entering into high-priced and exclusive licensing agreements. A business that chooses one direction and is contractually bound cannot then change horses mid-race to the disadvantage of companies who reasonably relied on those licensing agreements.

The proposed order does not prevent Bosch from seeking justifiable relief in enforcing its patent rights.[5] It simply precludes them from attempting to disadvantage competitors by going back on agreements to license patents under royalty-free or FRAND terms. However, when a company is

---

[3] Rudi Bekkersa, Bart Verspagenb, Jan Smitsb, *Intellectual property rights and standardization: the case of GSM* Telecommunications Policy 26, 171–188 (2002). "Motorola presumably expected its GSM sales opportunities in the European market to be restricted and saw licenses as its main source of income in return for its research efforts."

[4] Letter from Motorola, Inc., IEEE 802.11 Intellectual Property Statement (March 1, 1994) *available at* http://standards.ieee.org/about/sasb/patcom/loa-802_11-motorola-01Mar1994.pdf

[5] The proposed order makes clear that where "an SPX Essential Patent (other than an SPX ACRRR Patent or an SPX Patent Lawsuit Patent) is being used for a purpose other than as required to comply with the SAE … or" a third party fails to comply with terms of the licensing of the SPX Essential Patents, Bosch can seek injunctive relief. [5] *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Decision and Order [Public Version], at 14 (Nov. 26, 2012) *available at* http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf.

using an SPX Essential Patent under the terms to which SPX agreed to license those patents, its successor Bosch should not seek injunctive relief.

The FTC Clearly Has the Authority to Enjoin Bosch from Seeking Injunctive Relief

The Commission's proposed order requiring Bosch not pursue any actions for injunctive relief on the patents at issue against implementers of the relevant SAE standards in the ACRRR market falls under its power under Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC §45) to prohibit "unfair or deceptive acts or practices in or affecting commerce." The FTC stated that "while a royalty-free license may not be an appropriate remedy in every case involving evasion of a FRAND commitment," because Bosch elected to license these patents to the buyer of its divested assets on a royalty-free basis, "a license to other market place participants on the same terms is necessary to ensure that the merger remedy is not inequitable in application."[6] By preventing Bosch from furthering SPX's failure to adhere to the FRAND patent terms to which it voluntarily agreed, the Commission is preventing the unfair and deceptive acts which would severely damage the sustainability of SEP in the ACRRR market. As the Commission states, preventing Bosch from continuing to seek injunctive relief is in accordance to its "FRAND obligations."[7]

Should the holder of a patent who is participating in a SEP even threaten to enjoin use of that patent, it can create a chilling effect on all businesses that rely on the patent standard. In this, we respectfully disagree with Commissioner Ohlhausen as to the impact of merely seeking an injunction.[8] Small businesses in particular make decisions about standards based on certainty and understand that a standard may not be the most innovative solution but it can serve as a neutral platform at different layers of products and markets. When companies believe they can no longer rely on use of a SEP under FRAND terms, it creates uncertainty in the market and results in economic harm to the industry. Small businesses that lack legal counsel or deep pockets are likely to flee a standard that has even a hint of uncertainty. Agreeing to a FRAND licensing approach for SEPs and then seeking injunctive relief is an unfair method of competition and an unfair act or practice under Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC §45).

---

[6] *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Analysis of Agreement Containing Consent Orders to Aid Public Comment, at 5 (Nov. 26, 2012) *available at* http://www.ftc.gov/os/caselist/1210081/121126boschanalysis.pdf.
[7] *Id.*
[8] *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012) *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf.

The *Noerr-Pennington* Doctrine May Not Be Applicable or the Case May Fall Under the "Sham Litigation" Exception

In the comments submitted by the American Intellectual Property Law Association ("AIPLA"), it asserts that the *Noerr-Pennington* doctrine may preclude the Commission's proposed order regarding SPX's ACRRR Patents. "The *Noerr-Pennington* doctrine derives from the *First Amendment's* guarantee of 'the right of the people … to petition the Government for a redress of grievances.'"[9] It prevents federal antitrust laws from interfering with First Amendment rights.

However, AIPLA's comments fail to address the scope of *Noerr-Penning* immunity under the FTC Act is not necessarily coextensive with the immunity under the Sherman Act, the act at issue in the case law cited by AIPLA. The *Noerr-Pennington* doctrine "stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause."[10] Given the differing language and underlying policy goals of the Sherman Act, the scope of *Noerr-Pennington* could be very different when applied to Section 5 of the FTC Act. Indeed, *Noerr*'s application to FTC decisions is an issue currently before the Supreme Court.[11]

Even should *Noerr-Pennington* doctrine apply, the instant case clearly falls under the "sham litigation" exception to the *Noerr-Pennington* doctrine.[12] The Eleventh Circuit has said that sham litigation has two elements: "(1) the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; and (2) the party bringing the allegedly baseless suit did so with a subjective motivation to interfere directly with the business relationships of a competitor."[13] SPX's letter stated that their patents were SEPs and issued letter of assurance to SAE International committing to license them under FRAND terms. SPX then proceeded to file suit against its competitors who used those patents under the terms that it agreed to. A request for injunctive relief in the wake of a commitment to license these patents under FRAND terms was prohibited by the contractual agreement (and thus objectively baseless) and such request was clearly intended to harm competitors.

The comments filed by AIPLA suggest that the sham litigation "exception exists only if the law suit is objectively baseless and the suit attempts to interfere directly with the business of a competitor through use of the governmental process rather than the outcome."[14] However, there

---

[9] *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (quoting U.S. Const. amend. I).
[10] Id. at 931.
[11] *See FTC v. Watson Pharmaceuticals, Inc., et al.*, 677 F.3d 1298 (11th Cir. 2012), *cert. granted,* 81 U.S.L.W. 3324 (U.S. Dec. 7, 2012) (No. 12-416).
[12] *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, (1993).
[13] Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1234 (2005) (internal quotation marks and emphasis omitted).
[14] AIPLA Public Filing In the Matter of Robert Bosch GmbH, FTC File No. 121-0081 (December 20, 2012) *available at* http://ftc.gov/os/comments/rboschgmbh/00005-85253.pdf.

is nothing in the underlying rationale of the *Noerr* line of cases that requires the sham litigation exception to be applied to an entire lawsuit rather a discrete element of the suit. The injunctive relief being sought in this case was precluded by the existing licensing agreement, was "an attempt to interfere directly with the business relationships of a competitor,"[15] and – at minimum – constituted an abuse of the judicial process. Given the underlying rationale of *Noerr* and its progeny, we do not believe that there is any clear reason why a plaintiff's pursuit of remedies that it knows it is not entitled to receive should not be deemed to be objectively baseless and potentially falling within the sham litigation exception.

For the reasons detailed above, the Commission's Proposed Order correctly addresses the issues with regard to SPX's SEPs. We urge the Commission not to alter its decision.

Sincerely,

Morgan Reed

[15] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, (1993) (citing *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 144 (1961)).