

Separate Statement of Commissioner J. Thomas Rosch Regarding
Google's Standard Essential Patent Enforcement Practices

In the Matter of Google Inc., FTC File No. 121-0120

January 3, 2012

A majority of the Commission has voted today to issue a Complaint and Order against Google Inc. ("Google") to remedy Google's breaking the commitments of Motorola Mobility, Inc. ("MMI") to license standard-essential patents ("SEPs") on terms that are fair, reasonable and non-discriminatory ("FRAND"). Google succeeded to MMI's FRAND commitments when it acquired MMI. Google has agreed in a consent decree not to seek an injunction against infringement of those SEPs and instead to license the SEPs on the FRAND terms to which MMI agreed. I concur in the Commission's decision to issue the Complaint and Order against Google. I issue this Separate Statement for four reasons.¹

First, I do not agree with the Complaint's allegation or the majority's assertion that an injunction enforcing SEPs would constitute "patent hold-up." (Compl. ¶¶ 2, 13-14, 19; Commission Statement at 2-3.) That allegation is superfluous. It does not add anything to the Commission's competition mission or jurisprudence. To the contrary, proof of such an allegation would only burden the staff, adding an element that the staff need not prove. There is increasing judicial recognition, coinciding with my own view, that a seeking an injunction is inherently antithetical to a commitment instead to license patents on fair, reasonable, and non-discriminatory terms.² Indeed, the Complaint itself describes Google's conduct at issue as being

¹ I am also troubled by Section IV.F of the Proposed Order, which provides for a limited "defensive use" exception to Google's commitment not to seek injunctive relief on its FRAND-encumbered SEPs. That is, under certain circumstances, Google may seek injunctive relief against a firm that itself files a claim for injunctive relief against Google based on the firm's FRAND-encumbered SEPs. However, my concerns in this regard are tempered by the Commission's ability to reconsider this aspect of the Proposed Order based on submissions received during the public comment period.

² *See, e.g., eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). The majority expressly acknowledges that in *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012), the Ninth Circuit stated that "[i]mplicit 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." And in *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012), Judge Posner, sitting by designation as a district court judge, stated that "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

simply a breach of a commitment to license its SEPs on FRAND terms. (Compl. ¶ 1, 25-27.) In other words, the concept of “patent hold up” has nothing to do with Google’s conduct. It is a construct that applies as a matter of theory.

Second, while the majority correctly asserts that the proposed Complaint in this matter alleges that Google’s practices in seeking an injunction “constitute unfair methods of competition and unfair acts or practices, in violation of Section 5” of the FTC Act, the lion’s share of the Commission’s Statement, as well as the Complaint, is devoted to analysis of Google’s conduct as a “standalone” unfair method of competition claim under Section 5. (Commission Statement at 1-3.) I would have given equal prominence to the unfair acts and practices claim.

“Unfair acts or practices” claims based on alleged breaches of contract have repeatedly been made by the Commission. *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988); *Negotiated Data Solutions LLC (N-Data)*, 73 Fed. Reg. 5,846 (FTC 2008) (aid to public comment); *see also C&D Electronics, Inc.*, 109 F.T.C. 72 (1987).

Moreover, the Commission has brought a number of consumer protection cases involving petitioning activity. *See, e.g., Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976) (upholding the Commission’s finding that the filing of lawsuits in distant locations was an unfair act); *J.C. Penny Co.*, 109 F.T.C. 54 (1987) (consent decree resolving similar concerns). *Noerr* was neither raised nor held to apply in these cases.

There is reason to believe that seeking an injunction on a SEP would be a breach of contract actionable as an unfair act or practice.³ More specifically, when there is a SEP, a FRAND commitment is given by the owner of the SEP in exchange for inclusion of the SEP in the standard, and seeking an injunction instead of a license if there is infringement of the SEP is a breach of that FRAND commitment.

That conclusion is not contrary to the Supreme Court’s decision in *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006). To be sure, a majority of the Supreme Court declined to rule in that case that injunctions were never permitted as a matter of law. *See id.* at 393-94. But a SEP was not involved in that case.

that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?”

³ As I have stated in the past, injunctive relief should be prohibited only when the potential licensee is a “willing licensee” under FRAND terms. *See also* Commission Statement at 1-2. That is not what the consent decree provides. Nor is it the relief I would agree to. The only exception to this is when a federal court or some other neutral arbitrator has defined those terms. *Cf.* Opinion of the Commission on Remedy at 8, *Evanston Northwestern Healthcare Corp.*, Docket No. 9315 (Apr. 28, 2008) (requiring disputes to be resolved through final offer arbitration, sometimes referred to as “baseball style arbitration”). In the event that a licensee refuses to comply with a federal court order or another neutral arbitrator’s order defining those terms, I think it is appropriate to enforce the court’s order against the licensee. (Compl. ¶ 16.)

The lack of any allegations in the Complaint of injury to consumers to date does not undercut the “unfair acts or practices” claim. (Compl. ¶¶ 4, 30.) Both Section 5(n) of the FTC Act and our Unfairness Policy Statement treat as an “unfair act or practice” any practice that not only actually harms consumers but also any practice that is “likely” to do so. 15 U.S.C. § 45(n); *Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984). Here, there is “reason to believe” that an injunction would “likely” harm consumers in the fashion described in *C&D Electronics* even if it did not actually do so. 109 F.T.C. at 80 (separate statement of Chairman Daniel Oliver: “[T]he activity here may provide disincentives that will result in services not being available to consumers at all.”). The Complaint alleges, for example, that Google’s conduct has a tendency to exclude products from the market, to cause higher consumer prices, and to diminish innovation. (Compl. ¶¶ 3, 28.)

If seeking injunctive relief were not challenged under the “unfair acts or practices” prong of Section 5, that would leave the “unfair methods of competition” prong as the only basis of liability. As discussed below, my colleagues and I disagree on which, if any, principles ought to limit liability based on that theory. My dissent to the consent decree in the Bosch case⁴ was mainly based on that decree’s treatment of “unfair methods of competition” as the sole basis of liability and the mischief that might cause.

Third, I do not agree to invoke a standalone unfair methods of competition claim under Section 5 because it is not clear what the “limiting principles” of such a claim would be. I joined Chairman Leibowitz in pleading a similarly unlimited claim in the Intel case. *See* Statement of Chairman Leibowitz and Commissioner Rosch, Intel Corporation, Docket No. 9341 (Dec. 16, 2009). But, at the time, I identified several “limiting principles” on our Section 5 authority. *See* Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, Intel Corporation, Docket No. 9341 (Dec. 16, 2009); *see also* *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

Since that time, I have described several other “limiting principles” that should be considered.⁵ For example, the requirement that a respondent have monopoly or near-monopoly power provides a limiting principle for the standalone use of Section 5 unfair methods of competition claims that the Commission could defend in an appellate court; it would also not unsettle “settled principles of Section 2 law” as defined by the Supreme Court case law under Section 2, *see, e.g., Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458–59 (1993), as

⁴ Robert Bosch GmbH, Docket No. C-4377, FTC File No. 121 0081, *available at* <http://www.ftc.gov/os/caselist/1210081/index.shtm>.

⁵ *See* J. Thomas Rosch, The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?, Remarks Before the New York State Bar Association (Jan. 27, 2011), *available at* <http://www.ftc.gov/speeches/rosch/110127barspeech.pdf>; J. Thomas Rosch, Promoting Innovation: Just How “Dynamic” Should Antitrust Law Be?, Remarks Before USC Gould School of Law (Mar. 23, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf>.

well as the language of Section 2 itself. Absent those limiting principles, which are not identified in the Complaint, I think Section 5 is not properly circumscribed.

To be sure, the potential anticompetitive harm that is threatened when injunctive relief is sought for alleged infringement of an SEP may be especially pernicious: a false FRAND commitment not only may cripple competition for inclusion in the standard (so-called “ex ante competition”); it may also cripple competition among those using the standard (so-called “ex post” competition). *See Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007). This may be a limiting principle. But the Complaint does not allege that standalone Section 5 actions are limited to especially pernicious practices, let alone the practices at issue here.

Beyond that, the Commission, with its expertise in identifying deception, brings something to the analysis that others cannot bring. As Commissioner and former Chairman Bill Kovacic observed, the FTC is a better competition agency because of its consumer protection mission.⁶ The fact that the Commission has a comparative advantage in identifying deception might also be a second “limiting principle.” But the Complaint does not allege that either.

The Complaint does allege that Google has monopoly power. (Compl. ¶ 21.) But the Complaint does not allege monopoly power as a limitation on the Commission’s use of a standalone Section 5 unfair methods of competition claim. *See* Concurring and Dissenting Statement of Commissioner Rosch, *Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>. This might be understandable if Google faced treble damage liability in a private action under Section 5 as long as there was any chance that Google would face an unlimited standalone Section 5 unfair competition claim. But Section 5 belongs to the Commission and the Commission alone, and even the Commission cannot seek treble damages for a standalone Section 5 unfair methods of competition violation.⁷

Fourth, I object to language in the Agreement Containing Consent Order that is tantamount to a denial of liability. Specifically, Google has refused to admit any facts other than jurisdictional facts and has refused to admit that a violation of the law has occurred. (ACCO ¶¶

⁶ *See* William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J. L. & Pol’y 101, 114 (2007) (observing that “consumer protection laws are important complements to competition policy”); *see also* Opinion of the Commission on Liability, *Rambus Inc.*, FTC Docket No. 9302 (2006), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

⁷ *See* Rosch, *The Great Doctrinal Debate*, *supra* note 5, at 8-10. Commissioner Kovacic expressed concern in his dissent from the N-Data settlement that such liability might lie under “little FTC Acts” at the state level. *See* Dissenting Statement of Commissioner William E. Kovacic, *In re Negotiated Data Solutions*, File No. 051-0094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>. However, an exhaustive study of state “little FTC Acts” had found that most of those statutes have such significant limitations that there is little likelihood of follow-on litigation. *See* Rosch, *The Great Doctrinal Debate*, *supra* note 5, at 12 n.27.

2, 4.) As I have previously explained,⁸ the Commission should require respondents either to admit or to “neither admit nor deny” liability in Commission consent decrees, and this change should be reflected in the Commission’s Rules of Practice. *See* Rule 2.32, 16 C.F.R. § 2.32.

⁸ *See* Dissenting Statement of Commissioner J. Thomas Rosch, In the Matter of Facebook, Inc., File No. 092 3184, Docket No. C-4365 (Aug. 10, 2012), *available at* <http://www.ftc.gov/speeches/rosch/120810facebookstatement.pdf>.