

STATEMENT OF THE FEDERAL TRADE COMMISSION
In the Matter of Robert Bosch GmbH
FTC File Number 121-0081

The Federal Trade Commission (“Commission”) has voted to issue for public comment a Complaint and Order against Robert Bosch GmbH (“Bosch”) designed to remedy the allegedly anticompetitive effects of Bosch’s acquisition of SPX Services (“SPX”), a division of SPX Corporation. The Commission has reason to believe that the proposed acquisition would cause significant anticompetitive harm to consumers by creating a virtual monopoly in the market for automobile air conditioning servicing equipment known as “air conditioning recycling, recovery, and recharge devices” or “ACRRRs.” The proposed Order eliminates the anticompetitive concerns raised by the proposed acquisition by requiring the divestiture of Bosch’s assets relating to the manufacture and sale of ACRRRs to Mahle Clevite, Inc. The proposed Order further requires Bosch to discontinue restrictive arrangements SPX maintained with wholesale distributors and independent service technicians.

The Complaint also alleges that, before its acquisition by Bosch, SPX reneged on a licensing commitment made to two standard-setting bodies to license its standards-essential patents (“SEPs”) relating to ACRRRs on fair, reasonable and non-discriminatory terms (“FRAND”) by seeking injunctions against willing licensees of those SEPs.¹ We have reason to believe this conduct tended to impair competition in the market for these important automobile air conditioning servicing devices. To its credit, Bosch has abandoned these claims for injunctive relief and agreed to license the SEPs at issue.

This case is another chapter in the Commission’s longstanding commitment to safeguard the integrity of the standard-setting process.² Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting also risks harm to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring standard setting works to the benefit of, rather than against, consumers.³ The Commission’s action today does just that.

As explained in the Commission’s unanimous filings before the United States International Trade Commission in June 2012, the threat of injunctive relief “in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition,

¹ The licensing obligation in this matter was a FRAND obligation, although RAND (reasonable and non-discriminatory) licensing obligations raise similar issues.

² See *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996); *In re Union Oil Company of California*, 2004 FTC LEXIS 115 (July 7, 2004); *In re Rambus, Inc.*, Dkt. No. 9302, 2006 FTC LEXIS 101 (Aug. 20, 2006), *rev’d*, *Rambus Inc. v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008); *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Decision and Order (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122do.pdf>.

³ See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988) (noting that “private standard-setting associations have traditionally been objects of antitrust scrutiny” because of their potential use as a means for anticompetitive agreements among competitors).

consumers and innovation.”⁴ By threatening to exclude standard-compliant products from the marketplace, a SEP holder can demand and realize royalty payments that reflect the investments firms make to develop and implement the standard, rather than the economic value of the technology itself.⁵ This can harm incentives to develop standard-compliant products. The threat of an injunction can also lead to excessive royalties that can be passed along to consumers in the form of higher prices.

There is increasing judicial recognition, coinciding with the view of the Commission, of the tension between offering a FRAND commitment and seeking injunctive relief.⁶ Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act.⁷ Importantly, stopping this conduct using a stand-alone Section 5 unfair methods of competition claim, rather than one based on the Sherman Act, minimizes the possibility of follow-on treble damages claims. Violations of Section 5 that are not also violations of the antitrust laws do not support valid federal antitrust claims for treble damages. There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.

In her dissent, Commissioner Ohlhausen claims that today’s decision imposes liability on protected petitioning activity and effectively undermines the role of federal courts and the ITC in the adjudication of SEP-related disputes. We respectfully disagree. As alleged in the Complaint,

⁴ 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 and Components Thereof*, Inv. No. 337-TA-745, available at www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment\ Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, available at <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>.

⁵ *Id.* at 3-4 (“[A] royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process.”).

⁶ *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (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?”).

⁷ We have no reason to believe that, in this case, a monopolization count under the Sherman Act was appropriate. However, the Commission has reserved for another day the question whether, and under what circumstances, similar conduct might also be challenged as an unfair act or practice, or as monopolization.

SPX committed to license its SEPs on FRAND terms. In doing so, we have reason to believe SPX voluntarily gave up the right to seek an injunction against a willing licensee. Moreover, the fact that both the federal courts and the ITC have the authority to deny injunctive relief where the SEP holder has broken its FRAND commitment does not mean that this conduct is not itself a violation of Section 5 or within our reach.

We also take issue with Commissioner Ohlhausen’s suggestion that the Commission’s action is “devoid of regulatory humility.” The Commission is first and foremost a law enforcement agency, and this consent decree, like all of our unfair methods of competition enforcement actions, is a fact-specific response to a very real problem that threatens competition and consumer welfare.

Indeed, we view this action as well within our Section 5 authority. The plain language of Section 5, the relevant legislative history, and a long line of Supreme Court cases all affirm that Section 5 extends beyond the Sherman Act.⁸ Moreover, this is not a circumstance where, as Commissioner Ohlhausen contends, there are no discernible limiting principles. SPX’s failure to abide by its commitment took place in the standard-setting context. In that setting, long an arena of concern to the Commission, a breach of contract risks substantial consumer injury. The standard setting context, together with the acknowledgment that a FRAND commitment also depends on the presence of a willing licensee, appropriately limit the Commission’s enforcement policy and provide guidance to standard-setting participants.

For these reasons, we find Commissioner Ohlhausen’s analogy of SPX’s conduct to a “garden variety breach-of-contract” to be unpersuasive. While not every breach of a FRAND licensing obligation will give rise to Section 5 concerns, when such a breach tends to undermine the standard-setting process and risks harming American consumers, the public interest demands action rather than inaction from the Commission.

⁸ See, e.g., *F.T.C. v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 310-313 (1934); *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 & n.6 (1948); *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241-244 (1972).