

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

In the Matter of Motorola Mobility LLC and Google Inc.

FTC File No. 121-0120

January 3, 2013

I voted against this consent agreement and dissent from imposing liability on an owner of a standard essential patent (“SEP”) merely for petitioning the courts or the International Trade Commission (“ITC”). The Commission announced this enforcement policy in *In re Robert Bosch GmbH*, stating that in “appropriate circumstances” it will sue patent holders for seeking injunctive relief against “willing licensees” of a SEP.¹ I dissented then in large part because I question whether such conduct, standing alone, violates Section 5² and because the *Noerr-Pennington* doctrine³ precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction⁴ or any threats incidental to it,⁵ outside of a handful of well-established exceptions not alleged there. Not only does today’s decision raise many of the same concerns for me as did *Bosch*,⁶ the Commission is now expanding its new policy to impose both competition *and* consumer protection liability on Google for the same type of conduct alleged in *Bosch*.⁷

Because I fear the legacy of our actions in this area will be greater uncertainty for patent holders about their contractual obligations, intellectual property protections, and Constitutional

¹ *In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Commission, at 2 & n.7 (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf>.

² *See In re Robert Bosch GmbH*, FTC File No. 121-0081, Statement of Commissioner Ohlhausen (Nov. 26, 2012), available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>. The Commission has historically required evidence of deception or other similar conduct harming the standard-setting process before taking action. *See, e.g., In re Rambus, Inc.*, Dkt. No. 9302 (FTC Aug. 2, 2006) (Commission opinion) (finding deception that undermined the standard-setting process), *rev’d*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2003) (Commission opinion) (same); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order) (alleging same).

³ *See Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁴ *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (applying *Noerr-Pennington* doctrine to petitioning of judicial branch).

⁵ *See, e.g., ABA SECTION OF ANTITRUST LAW, MONOGRAPH 25, THE NOERR-PENNINGTON DOCTRINE* 60-65 (2009) (collecting cases regarding protection of conduct incidental to petitioning).

⁶ A federal court has addressed this issue on the same nucleus of facts and held that *Noerr* immunizes Google’s predecessor-in-interest, Motorola, from competition claims based on its litigation against Apple. *See Apple, Inc. v. Motorola Mobility, Inc.*, No. 3:11-cv-00178-BBC, 2012 WL 3289835, at *12-14 (W.D. Wis. Aug. 10, 2012) (dismissing Apple’s Sherman Act and state unfair competition claims and holding that Motorola’s filing of litigation in the federal courts and ITC on its FRAND-encumbered SEPs was immune under *Noerr*). I disagree with the majority’s interpretation of the cases it relies on to preclude *Noerr*’s application here. “The *Noerr-Pennington* doctrine derives from the Petition Clause of the First Amendment and provides that ‘those who petition any department of government for redress are generally immune from *statutory liability* for their petitioning conduct.’” *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643-44 (9th Cir. 2009) (quoting *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006)) (emphasis added). The Commission today is not pursuing a private breach of contract claim against Google but seeking to impose statutory liability under Section 5 on Google (and presumably other SEP-holders) merely for petitioning the government.

⁷ *See Complaint* ¶¶ 31-32.

rights, as well as conflict between the Commission and other institutions with authority in these matters, I decline to join in another undisciplined expansion of Section 5. I outline my chief concerns below.

First, the Commission is offering ambiguous guidance to market participants.⁸ Although I believe strongly the courts and other stakeholders are generally better suited to define the use and treatment of SEPs,⁹ if the Commission insists on interposing itself here it should at least offer a clear position. However, the majority says little about what “appropriate circumstances” may trigger an FTC lawsuit other than to say that a fair, reasonable, and non-discriminatory (“FRAND”) commitment generally prohibits seeking an injunction.¹⁰ By articulating only narrow circumstances when the Commission deems a licensee unwilling (limitations added since *Bosch*),¹¹ and not addressing the ambiguity in the market about what constitutes a FRAND commitment, the Commission will leave patent owners to guess in most circumstances whether they can safely seek an injunction on a SEP. Moreover, the Commission gives no principled basis for expanding liability beyond an unfair method of competition to include an “unfair act or practice” on what is essentially the same conduct here as in *Bosch*. This expansion of liability sows additional seeds of confusion as to what can create liability and even the statutory basis of that liability.¹²

⁸ A brief mention of potentially relevant factors in a consent complaint or order is in my opinion not enough to meaningfully and comprehensively outline the Commission’s philosophy on enforcing pure Section 5 claims. The scope of Section 5 warrants more serious reflection and inquiry before being applied to the conduct of market participants. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 661 (7th ed. 2012) (“FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency’s legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.”).

⁹ Federal courts and the ITC rarely award injunctive relief on FRAND-encumbered patents, and any decision they make must follow sober, careful, and informed analysis. *See* *eBay v. MercExchange*, 547 U.S. 388, 391 (2006) (requiring plaintiff seeking an injunction to demonstrate (1) irreparable injury, (2) inadequacy of remedies at law, (3) that the balance of hardships weighs in favor of the plaintiff, and (4) that the public interest would not be disserved by a permanent injunction). The only potentially relevant case that has come to our attention relates to an injunction on use of a patent covered by certain wireless local area network standards. The court did not make it clear whether the patents at issue were declared “essential,” but from the opinion they are described as part of the core technology embodied in the standards. It also appears from the court’s opinion that the defendant would have been satisfied with a license for the patented technology. *See* *Commonwealth Scientific and Indus. Research Org. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600 (E.D. Tex. 2007) (applying *eBay* factors and holding that permanent injunction warranted for infringement of technology embodied in the 802.11a and 802.11g standards adopted by the Institute of Electrical and Electronics Engineers, despite arguments by the defendant that a compulsory license would be sufficient).

¹⁰ References to FRAND here encompass “RAND” or “reasonable and non-discriminatory” terms as well.

¹¹ These limitations include when the potential licensee (a) is outside the jurisdiction of the United States; (b) has stated in writing or sworn testimony that it will not license the SEP on any terms; (c) refuses to enter a license agreement on terms set in a final ruling of a court – which includes any appeals – or binding arbitration; or (d) fails to provide written confirmation to a SEP owner after receipt of a terms letter in the form specified by the Commission. *See* Decision and Order at 7-8 (hereinafter “Order”). They also include certain instances when a potential licensee has brought its own action seeking injunctive relief on its FRAND-encumbered SEPs. *See* Order at 11-12.

¹² Former Commissioner Kovacic dissented similarly from the *N-Data* consent in 2008, objecting to, among other things, the lack of clarity provided by the Commission as to the basis of liability, given the simultaneous use of unfair method of competition and unfairness claims in that consent. *In re* Negotiated Data Solutions LLC, FTC File

Second, the consent agreement creates doctrinal confusion. The Order contradicts the decisions of federal courts, standard-setting organizations (“SSOs”), and other stakeholders about the availability of injunctive relief on SEPs and the meaning of concepts like willing licensee and FRAND. For example, the Complaint alleges that Google breached its SSO commitments by seeking injunctive relief on its SEPs.¹³ However, a federal judge in the Western District of Wisconsin held Motorola did not breach its contract with two of the relevant SSOs:

There is no language in either the ETSI or IEEE contracts suggesting that Motorola and the standards-setting organizations intended or agreed to prohibit Motorola from seeking injunctive relief. In fact, both policies are silent on the question of injunctive relief. Moreover, in light of the fact that patent owners generally have the right to seek injunctive relief both in district courts, 35 U.S.C. § 283, and in the International Trade Commission, 19 U.S.C. § 1337(d), I conclude that any contract purportedly depriving a patent owner of that right should clearly do so. The contracts at issue are not clear. Therefore, I conclude that Motorola did not breach its contracts simply by requesting an injunction and exclusionary order in its patent infringement actions.¹⁴

The Commission also treats Apple as a willing licensee, disregarding a federal judge’s decision that Apple revealed itself as unwilling on the eve of trial.¹⁵ As the judge wrote: “[Apple’s intentions] became clear only when Apple informed the court . . . that it did not intend to be bound by any rate that the court determined.”¹⁶ The judge further concluded Apple was trying to use the FRAND rate litigation simply to determine “a ceiling on the potential license rate that it could use for negotiating purposes”¹⁷

No. 051-0094, Dissenting Statement of Commissioner William E. Kovacic, at 2-3 (Jan. 23, 2008), *available at* <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

¹³ See Complaint ¶ 1. Notably, Research in Motion Corp., whom Motorola sought to enjoin from using SEPs and with whom Motorola settled its litigation, recently explained to the ITC that “[t]he FRAND concept, which dates back to the development of the GSM wireless networks roughly 20 years ago, was never understood among industry participants to preclude a patent holder from seeking injunctions in appropriate situations.” Submission of Research in Motion Corporation, *In re* Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745, at 4 (Int’l Trade Comm’n July 9, 2012).

¹⁴ *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 29 (W.D. Wis. Oct. 29, 2012).

¹⁵ *Compare Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 5 (W.D. Wis. Nov. 8, 2012) (dismissing matter after finding Apple was not willing to accept court’s FRAND rate) *with* Complaint ¶¶ 25-27 (identifying Apple and Microsoft as willing licensees).

¹⁶ *Motorola*, No. 11-cv-178-bbc, slip op. at 5 (W.D. Wis. Nov. 8, 2012).

¹⁷ *Id.* These events highlight another issue that the Commission does not address: the possibility that companies who need to license SEPs can engage in opportunistic conduct by delaying paying a license fee to a SEP holder for many years or by colluding to pay the SEP holder a low rate. See, e.g., *Sony Elecs. v. Soundview Techs.*, 157 F. Supp. 2d 180 (D. Conn. 2001) (denying motion to dismiss where plaintiff alleged conspiracy by potential licensees to fix price of patent license); *Golden Bridge Tech. v. Nokia Inc.*, 416 F. Supp. 2d 525 (E.D. Tex. 2006) (denying motion to dismiss where plaintiff alleged per se violation of Sherman Act arising from a boycott ousting a patented

In light of this decision, the majority is walking a fine line to claim Google should not be able to seek injunctive relief on these facts. The Order allows Google to seek injunctive relief if a party “has stated in writing or in sworn testimony that it will not license the FRAND Patent on any terms”—as Apple did in federal district court.¹⁸ But the Complaint attempts to skirt this issue by vaguely claiming that “[a]t all times *relevant to this Complaint*, these implementers [including Apple] were willing licensees”¹⁹ I believe it is quite “relevant” that Apple told a federal judge after years of negotiation and litigation with Motorola that it would only abide by the court-determined royalty rates to the extent it saw fit.²⁰ I cannot endorse characterizing this conduct as that of a willing licensee and in so doing contradict the finding of a federal judge and create further confusion about the meaning of the term.

Third, the allegations in the complaint that Google and Motorola’s conduct constitutes an “unfair act or practice” fail this agency’s unfairness standard. To show an unfair act or practice, the Commission must prove that the challenged conduct “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”²¹ In this matter, we are essentially treating sophisticated technology companies, rather than end-users, as “consumers” under our consumer protection authority. That runs counter to the historical, and in my view correct, approach that we have taken in pursuing our consumer protection mission, which is to protect end users of products or services. Departing from this approach makes the FTC into a general overseer of all business disputes simply on the conjecture that a dispute between two large businesses may affect consumer prices, which is a great expansion of our role and is far afield from our mission of protecting consumers. Further, the unfairness count in the complaint alleges merely speculative consumer harm, at best, and thus fails to comply with the Commission’s Unfairness Statement.²²

technology from an industry standard); U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 50-55 (2007), *available at* <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

¹⁸ Order at 7.

¹⁹ Complaint ¶ 25 (emphasis added).

²⁰ *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 2 (W.D. Wis. Nov. 2, 2012) (stating “[i]n its response to Motorola’s motion for clarification on the specific performance issue, Apple states that it will not commit to be bound by any FRAND rate determined by the court and will not agree to accept any license from Motorola unless the court sets a rate of \$1 or less for each Apple phone. Apple’s Resp. Br., dkt. #448 at 8. In other words, if Apple is unsatisfied with the rate chosen by the court, it ‘reserves the right to refuse and proceed to further infringement litigation.’ *Id.* at 2.”).

²¹ 15 U.S.C. § 45(n).

²² *See* FTC Policy Statement on Unfairness, Appended to Int’l. Harvester Co., 104 F.T.C. 949, 1070 (1984) (“First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms.”). As an initial matter, consumers do not have a right to purchase a good that a court or the ITC has found to infringe a patent. Thus, the only possible cognizable harm is the risk that the threat of an injunction may raise prices or reduce innovation through deterring the adoption of beneficial technologies. There is no compelling evidence that either type of harm exists in this matter, and it is far from certain that such harm is likely to occur in the future, particularly because it is so rare for the courts or the ITC to issue injunctions or exclusion orders for SEP-encumbered technologies.

Fourth, even taking the much-criticized *N-Data* consent decree as a starting point, it is unclear whether this case meets the requirements identified by the Commission in that matter. In *N-Data*, the Commission alleged that there was a clear promise to license by N-Data's predecessor-in-interest, which N-Data subsequently broke.²³ The evidence presented to me in the instant matter does not reveal a clear promise by Motorola not to seek an injunction on the SEPs at issue and at least one court has found there was no such promise. Nor does there appear to have been any reasonable expectation on the part of members of the relevant SSOs—the Institute of Electrical and Electronics Engineers (“IEEE”), the European Telecommunications Standards Institute (“ETSI”), and the International Telecommunications Union (“ITU”)—that SEP holders, including Google and Motorola, had waived their right to seek injunctions on their SEPs. At least one of the SSOs at issue in this matter, ETSI, went so far as to explicitly reject an outright ban on injunctions.²⁴ And the one federal court that has issued an injunction against what appears to have been a willing licensee on a RAND-encumbered patent (not identified expressly as a SEP but a core technology embodied in the standards) did so five years ago on the 802.11a and 802.11g IEEE-adopted wireless local area network standards.²⁵ Thus, it should have been a reasonable expectation since that time to IEEE members (including the affected parties here) that an injunction could issue in certain situations even on a RAND-encumbered SEP against a potentially-willing licensee.

In sum, I disagree with my colleagues about whether the alleged conduct violates Section 5 but, more importantly, believe the Commission's actions fail to provide meaningful limiting principles regarding what is a Section 5 violation in the standard-setting context, as evidenced by its shifting positions in *N-Data*, *Bosch*, and this matter. Because I cannot ignore the jurisdictional conflicts and doctrinal contradictions that we are inviting with this policy and its inconsistent application, I dissent.

²³ *In re* Negotiated Data Solutions LLC, FTC File No. 051-0094, Complaint (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf>.

²⁴ See, e.g., Submission of Qualcomm Incorporated in Response to the Commission's Request for Written Submissions, *In re* Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745, at 5 (Int'l Trade Comm'n July 9, 2012) (“Language whereby a patentee making a FRAND commitment would have waived all right to injunction was debated and briefly included in an [intellectual property rights] policy adopted in 1993. However, when the current policy was adopted in 1994, that provision was removed. The only permissible inference from this sequence is that the ETSI membership turned their minds to the question of waiver of injunction and affirmatively decided to exclude any such waiver from the content of the FRAND commitment.”) (footnotes omitted).

²⁵ See *Commonwealth*, 492 F. Supp. 2d at 602 (applying *eBay* factors and holding that permanent injunction warranted for infringement of technology that was “core technology” for the 802.11a standard and “embodie[d]” in the 802.11g standard).