ICLE International Center for Law & Economics

In the Matter of Motorola Mobility LLC
and Google, Inc., File No.121-0120

Comment Regarding the Proposed Consent Order

International Center for Law & Economics

Geoffrey A. Manne
Executive Director, International Center for Law & Economics
Lecturer in Law, Lewis & Clark Law School

February 22, 2013

ICLE | 4850 SW Scholls Ferry Rd, Suite 102 | Portland, OR 97225 | 503.770.0650
icle@laweconcenter.org | @LawEconCenter | www.laweconcenter.org

Introduction

We appreciate this opportunity to comment on the proposed Consent Agreement and Order in this matter. The Order is aimed at imposing some limits on an area of great complexity and vigorous debate among industry, patent experts and global standards bodies: the allowable process for enforcing FRAND licensing of SEPs. The most notable aspect of the Order is its treatment of the process by which Google and, if extended, patent holders generally may attempt to enforce their FRAND-obligated SEPs through injunctions.

As an initial and highly relevant matter, it is essential to note that the FTC's enforcement action in this case has no proper grounding in antitrust law. Under the doctrines set down in *Trinko*[1] and *NYNEX*,[2] among other cases,[3] there is no basis for liability under Section 2 of the Sherman Act because the exercise of lawfully acquired monopoly power is not actionable under the antitrust laws. Even under Section 5 of the FTC Act the action has no basis: The Commissioners who supported the action could not agree whether its legal basis rested in unfair acts or practices or unfair methods of competition, and under an unfair methods of competition analysis (which was supported by most of the commissioners), the action is unsound because there is no evidence of consumer harm.

With respect to the terms of the Order itself, we believe that superimposing process restraints from above is not the best approach in dealing with what is, in essence, a contract dispute. Few can doubt the benefits of greater clarity in this process; the question is whether the FTC's particular approach to the problem sacrifices too much in exchange for such clarity. FRAND terms are inherently indeterminate and flexible. Indeed, they often apply precisely in situations where licensors and licensees need flexibility because each licensing circumstance is nuanced and a one-size-fits-all approach is not workable. Enforced "certainty" by the Commission, without proper grounding in antitrust principles and doctrine, may impose costly constraints on innovation without commensurate gains.[4]

Instead, we believe that parties should be held to the agreements they make with SSOs, whose role is to ensure that standards are workable and that the licensing of patents that read on them is not abused. This approach has worked in the past and still functions well today. The proposed Order alters the current incentive structure, encourages infringement by lowering its costs, and creates a disincentive to standardize and to license. Where anticompetitive practices occur, as with unlawful collusion, the FTC clearly has authority to act. However, blanket constraints without antitrust grounding on a crucial method of patent enforcement will weaken the very structure the FTC is trying to strengthen.

Lack of Basis for Antitrust Liability under Section 2

[1] *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 411 (2004).
[2] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998).
[3] *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1078 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 223 (1993).
[4] On the problem of error costs in antitrust, particularly in innovative markets, see Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010). *See also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

The Commission's antitrust concerns about Google (Motorola) seeking injunctions have no Section 2 basis, as made clear by the Supreme Court in a line of cases including most importantly the *NYNEX* and *Trinko* decisions. The facts of this case show that Motorola willingly licensed its standards-essential patents on customary FRAND terms, in accordance with SSO policies and in the absence of any allegations of deception. It also attempted to enforce its properly acquired patents by means of an injunction, in accordance with US patent law and SSO policies. Although, as we will discuss below, the seeking of an injunction is not a violation of Motorola's FRAND commitments, even if it were, that fact would not trigger antitrust liability. As Professor Bruce Kobayashi and now-Commissioner Joshua Wright explain:

> The Court's holding in NYNEX appears to be fatal to these arguments as price increasing conduct by a lawful monopolist, even when post-acquisition conduct involves fraud or deceit, is not exclusionary. . . .
>
> [I]n *NYNEX*, the Supreme Court considered and rejected the underlying economic foundations of the FTC's theory and, for that matter, any other theory that would assign Section 2 liability for a breach of a FRAND commitment made in good faith and without evidence of deception or other exclusionary conduct. . . .
>
> Specifically, the view that ex-post deviations, breaches or renegotiations of ex-ante pricing commitments that result in consumer welfare losses are antitrust violations is based on an erroneous interpretation of the "exclusionary conduct" requirement under Section 2 of the Sherman Act as articulated by the Supreme Court. . . .
>
> [T]he Court distinguished the attempt to evade the pricing constraint from the unlawful acquisition or exercise of monopoly power by pointing out that "consumer injury flowed . . . from the exercise of market power that is lawfully in the hands of a monopolist." [5]

Seeking injunctions as Motorola did, without deception, even more clearly does not rise to the level of exclusionary conduct required by the law. The fact that license terms may shift in the patentee's favor or that licensed products may be more expensive is immaterial to the analysis. Not only is the existence of welfare losses insufficient to establish exclusionary conduct, but the mere fact that prices might be higher under one set of legal rules and contractual obligations than another does not even establish welfare losses in the first place.

Prices negotiated in an environment where injunctions are available may indeed be higher than those negotiated without the threat of injunction, but there is no legitimate basis for holding out prices under the one legal regime as "efficient" and thus the other as "supracompetitive." Rather, as Supreme Court jurisprudence makes clear, the relevant test is "harm to the competitive process,"

[5] Kobayashi & Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 26 (George Mason University Law and Economics Research Paper Series 08-32), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1143602 (quoting *NYNEX*, 525 U.S. at 129).

not the existence of higher prices.[6] That one party to a contract negotiation has greater bargaining power, whether because of a lawfully acquired monopoly or because of helpful aspects of civil procedure rules, does not create liability under the antitrust laws.

These very same conditions may also increase innovation, the willingness to license generally and the willingness to enter into FRAND commitments in particular—all to the likely benefit of consumer welfare. Notably, the FTC itself has recognized this. Discussing the role of ITC exclusion orders, which are functionally similar to injunctions, the Commission notes:

> We agree that an appropriately granted exclusion order preserves the exclusivity that forms the foundation of the patent system's incentives to innovate, and the threat of an exclusion order can provide a significant deterrent to infringement.[7]

Even if Motorola were in breach of SSO policies or specific licensing agreements by seeking injunctions (although there is no evidence that this is the case), the Commission fails to explain how that constitutes an exclusionary act leading to competitive harm rather than a mere breach of contract.

One argument claims that contract law is insufficient to protect implementers because they are not parties to the FRAND agreement and are not protected by contract law.[8] This, however, is mistaken. Implementers become beneficiaries of the SSO agreement when they use the standard in their products.[9] Thus implementers have both the interest and ability to assert breach of contract claims based on SSO policies—and, of course, based on the terms of their particular licensing agreements.

Deputy Assistant Attorney General Renata Hesse has noted that some commentators believe that Section 2 is applicable in

> a situation where the patent holder honestly promised to encumber its patents with F/RAND commitments but later changed course. For

---

[6] *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'").

[7] Third Party United States Federal Trade Commission's Statement on the Public Interest, filed June 6, 2012, *In re Certain Wireless Communications Devices, Portable Music & Data Processing Devices, Computers & Components Thereof*, Inv. No. 337-TA-745 at 5, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

[8] *See* Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 Antitrust L. J. 913, 941 (2011) (arguing that contract law is insufficient because implementers are not parties to the FRAND contract and, therefore, cannot assert a breach of contract claim).

[9] DOJ & PTO, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, 7 n.14, Jan. 8, 2013, *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf ("As courts have found, when a holder of a standards-essential patent makes a commitment to an SDO to license such patents on F/RAND terms, it does so for the intended benefit of members of the SDO and third parties implementing the standard. *These putative licensees are beneficiaries with rights to sue for breach of that commitment.*") (*citing Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1030-33 (W.D. Wash. 2012); *Microsoft Corp. v. Motorola, Inc.*, 854 F. Supp. 2d 993, 999-1001 (W.D. Wash. 2012)) (emphasis added).

> whatever business reason, the firm—now armed with SEPs—intentionally violates its F/RAND commitments after the standard is set.[10]

This line of thought makes the same mistake and misses a major step, as there is no discussion of whether contract law could adequately deal with a breach of the FRAND *contract* and thus avoid overstretching antitrust jurisprudence and economics. Patent implementers are not without recourse, and patent holders cannot wield their monopoly power in the way those commentators fear.

Another theory of liability would argue that Motorola was attempting to evade the FRAND pricing constraint, and that this confers the necessary exclusionary conduct to trigger antitrust liability.[11] But this is a similarly weak argument.

In the first place, SSOs are intentionally structured to permit SEP holders to gain from ex post negotiation of licenses, fully able to capitalize on whatever monopoly power participation in the standard confers. As one commenter notes:

> SSOs have chosen to forgo ex ante negotiations. So even though an SSO may possess all the information needed to make informed decisions, which ensures that implementers are not surprised about having to negotiate royalties ex post, patentees can nonetheless rationally demand fees in excess of the value underlying the technology after an industry locks into a standard.[12]

Moreover, in terms of antitrust liability, as Kobayashi and Wright explain:

> Consider the application of *NYNEX* to the theory of patent holdup without deception in *N-Data*. The Commission's theory of antitrust liability was not that N-Data acquired monopoly power when [its technology was adopted into the standard]. Rather, the theory was that N-Data unlawfully acquired monopoly power at the moment that it violated [a] contractual pricing constraint with its attempt to renegotiate those prior $1,000 licensing commitments. The proponents of this theory cannot argue that monopoly power was acquired at the time the technology was incorporated into the standard because *Trinko* clearly allows the setting of monopoly prices after monopoly power was lawfully obtained. The alternative is to rely on the evasion of pricing constraint theory, which asserts that the exclusionary conduct and acquisition of monopoly power occur at the moment N-Data attempts to evade its licensing commitments. However, the Court's reasoning in *NYNEX* indicates that it would have concluded that N-Data lawfully obtained monopoly power at the time its technology was

---

[10] Renata Hesse, Deputy Assistant Attorney Gen., DOJ, Global Competition Review, 2nd Annual Antitrust Law Leaders Forum (Feb. 8, 2013), *IP, Antitrust and Looking Back on the Last Four Years*, 21, *available at* http://www.justice.gov/atr/public/speeches/292573.pdf.

[11] See, e.g., Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603 (2007).

[12] Rafael Rivera Jr., *Antitrust Law, Variant Patent Holdup Theories, and Injunctive Relief in Standard Setting Organizations*, 2, Illinois State Bar Association Section of Antitrust and Unfair Competition Law Newsletter, Vol. 50, Issue 2, Jan. 2013, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186037.

> included in the standard and would characterize the renegotiation as the exercise of that power. Indeed, *NYNEX* concludes that regulatory fraud by a monopolist, conduct far less economically meritorious than breach of contract, which can be efficient, is not exclusionary even when it generates actual harm to consumers. In sum, there should be little doubt that the Court's decision in *NYNEX* compels the conclusion that ex-post opportunism without deception is not exclusionary conduct and not actionable under Section 2.[13]

Simply put, Section 2 does not, as the Commissions claims, permit a case based on "the exercise of leverage acquired solely through the standard-setting process"[14] where there is no deception and where monopoly power was lawfully attained:

> This is all to say that antitrust law plays an important role in cases where a party unlawfully acquires market power by engaging in a deception during the SSO process. But . . . in cases involving ex post opportunistic behavior undertaken after a good-faith RAND assurance, the resulting harm from patent holdup does not flow so much from a less competitive market as from the exercise of lawfully acquired market power.[15]

Lack of Basis for Antitrust Liability under Section 5

Perhaps even more significant, the Commission's settlement continues the agency's recent trend of expanding its Section 5 authority. As Commissioner Ohlhausen has noted once before, in dissenting from the Commission's settlement in *In re Bosch*,[16] the FTC is charting a dangerously unprincipled course on Section 5, particularly with respect to its interpretation of its unfair act or practice jurisdiction. In his Separate Statement in *Google,* Commissioner Rosch sounds a similar concern about the absence of "limiting principles" on the scope of the Commission's authority to bring Section 5 cases under the Act's unfair methods of competition prong.[17]

In the *Google* case, the Commission asserts unfairness jurisdiction without even the minimal limitations the agency itself has adopted. As Commissioner Ohlhausen pointedly notes:

> [T]he 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. . . . The allegations in the complaint that Google and Motorola's conduct constitutes an "unfair act or

---

[13] Kobayashi & Wright, *supra* note 5, at 30.
[14] Statement of the FTC, *In the Matter of Google Inc.*, File No. 121-0120, 4, *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.
[15] Rivera, *supra* note 12 at 6.
[16] Maureen Ohlhausen, FTC Commissioner, Dissenting Statement, *In the Matter of Robert Bosch GmbH*, File No. 121-0081, 2-3, *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf.
[17] J. Thomas Rosch, Separate Statement Regarding Google's Standard Essential Patent Enforcement Practices, *In the Matter of Google Inc.*, File No. 121-0120, 3, *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolaroschstmt.pdf.

> practice" fail this agency's unfairness standard. . . . In this matter, we are essentially treating sophisticated technology companies, rather than end-users, as "consumers" under our consumer protection authority. . . . 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.[18]

The Commission's *N-Data* decision presented very similar concerns about unprincipled expansion of authority under Section 5. And like *N-Data*, this case mirrors prior Commission actions and presents the same serious concerns that such cases predicated on Section 5 amount to nothing more than attempts to evade the judicial constraints under Section 2, are without merit and are potentially costly:

> [T]he truth is that there was little chance the FTC could have prevailed [in *N-Data*] under the more rigorous Section 2 standard that anchors the liability rule to a demanding standard requiring proof of both exclusionary conduct and competitive harm. One must either accept the proposition that the FTC sought Section 5 liability precisely because there was no evidence of consumer harm or that the FTC believed there was evidence of consumer harm but elected to file the Complaint based only upon the Section 5 theory to encourage an expansive application of that Section, a position several Commissioners joining the Majority Statement have taken in recent years. Neither of these interpretations offers much evidence that *N-Data* is sound as a matter of prosecutorial discretion or antitrust policy.[19]

Precisely the same could be said of the *Google* settlement in regard to the issue of SEP injunctions, and the Commission's action in this case demonstrates its willingness to continue to operate in this realm without meaningful limits.

And this is a problem. Following Sherman Act jurisprudence, traditionally the FTC has understood (and courts have demanded) that antitrust enforcement under Section 5 requires demonstrable consumer harm to apply. But this case and others before it reveal an agency pursuing an interpretation of Section 5 that would give it unprecedented and largely-unchecked authority. In particular, the definition of "unfair" competition wouldn't be confined to the traditional antitrust measures—reduction in output or an output-reducing increase in price—but could expand to just about anything the agency deems improper.

Modern antitrust analysis, both in scholarship and in the courts, quite properly rejects the reductive and unsupported sort of theories that undergird recent Section 5 actions. That the FTC might have a better chance of winning a Section 5 case, unmoored from the economically sound limitations of Section 2 jurisprudence, is no reason for it to pursue such cases. Quite the opposite: When consumer welfare is disregarded for the sake of the agency's power, it ceases to further its mandate.

Former Chairman Kovacic has voiced similar concerns, noting that:

---

[18] Maureen Ohlhausen, Dissenting Statement in the Matter of Motorola Mobility LLC and Google Inc., FIle No. 121-0120, 2-4, *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.
[19] Kobayashi & Wright, *supra* note 5, at 27.

> More generally, it seems that the Commission's view of unfairness would permit the FTC in the future to plead all of what would have been seen as competition-related infringements as constituting unfair acts or practices.[20]

Noting that courts are likely to look on such unprincipled Section 5 actions with disapproval, Kovacic (along with Mark Winerman) further suggests that:

> [Unfair methods of competition] should be a competition-based concept, in the modern sense of fostering improvements in economic performance rather than equating the health of the competitive process with the wellbeing of individual competitors, per se. It should not, moreover, rely on the assertion . . . that the Commission could use its [unfair methods of competition] authority to reach practices outside both the letter and spirit of the antitrust laws.[21]

It is a problem that some in Congress, as well, have begun to notice.[22]

But it isn't only antitrust experts and congressmen who point to this limitation: *The FTC Act itself* contains such a limitation. Section 5(n) of the Act, the provision added by Congress in 1994 to codify the core principles of the FTC's 1980 Unfairness Policy Statement,[23] says that:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair *unless the act or practice 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*. [Emphasis added].[24]

The Commission has tried—and failed—to bring similar Section 5 cases before the courts in recent years. But the judiciary has not been receptive to an invigoration of Section 5 for several reasons. Chief among these is that the agency has failed to define the scope of its power over unfair competition under the Act, and the courts are hesitant to let the Commission set the limits of its own authority. As Kovacic and Winerman have noted:

> The first [reason for judicial reluctance in Section 5 cases] is judicial concern about the apparent absence of limiting principles. The tendency of the courts has been to endorse limiting principles that bear a strong

[20] William E. Kovacic, Dissenting Statement, *In the Matter of Negotiated Data Solutions, LLC*, File No. 051-0094, *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

[21] William E. Kovacic & Mark Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 945 (2010).

[22] Hittinger, Esposito, & Huh, *FTC's Use of Section 5 Under Attack*, DLA Piper (Nov. 29, 2012), http://www.dlapiper.com/ftc-use-of-section-5-under-attack/.

[23] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), r*eprinted in International Harvester Co*., 104 F.T.C. 949, 1070, 1073 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm.

[24] 15 U.S.C §§ 45(n) (2006).

> resemblance to standards familiar to them from Sherman Act and Clayton Act cases. The cost-benefit concepts devised in rule of reason cases supply the courts with natural default rules in the absence of something better.
>
> The Commission has done relatively little to inform judicial thinking, as the agency has not issued guidelines or policy statements that spell out its own view about the appropriate analytical framework. This inactivity contrasts with the FTC's efforts to use policy statements to set boundaries for the application of its consumer protection powers under Section 5.[25]

SSO Policies, Royalty Rates and Injunctions

A significant problem with the SEP settlement as configured by the FTC is that it seems to make illegal the use of injunctions even to enforce perfectly reasonable royalty rates. Motorola has, since before it was purchased by Google, sought a royalty rate of 2.25% for the relevant SEPs. That is an amount well in-line with rates charged by others with SEPs that read on the same standards.[26] In its litigation with Microsoft, it is precisely this royalty that Motorola was seeking to enforce—and Microsoft was refusing to pay. But Microsoft itself licenses its relevant SEPs on similar terms, and it is no more inherently inappropriate for Microsoft to rake in similar royalties on Android devices than it is for Motorola to net 2.25% of the price of each Windows-operated computer sold.[27] If these rates are common and reasonable, where is the crucial Section 5 element of consumer harm?

There is a legitimate dispute over how the royalty amount is to be calculated, but this is the very definition of a contract dispute, and both Motorola's past practice as well as overall industry practice suggest it is perfectly consistent with Motorola's FRAND obligation to seek such royalties.

Importantly, it is not even clear that the SSO disallows injunctions, weakening the argument that a contractual breach occurred. For example, "European Telecommunications Standards Institute (ETSI) policies do not contain any provision precluding members from seeking injunctive relief when an infringer and potential licensee has rejected a FRAND licensing offer from the patent holder."[28] What's more, ETSI and other SSOs have considered such limitations and determined that they were inappropriate:

> Most of the SSOs and their stakeholders that have considered these proposals over the years have determined that there are only a limited number of situations where patent hold-up takes place in the context of standards-setting. The industry has determined that those situations generally are best addressed through bi-lateral negotiation (and, in rare

[25] Kovacic & Winerman, *supra* note 21 at 942.

[26] *See, e.g.*, Eric Stasic, *Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunication Standards*, 115, http://www.investorvillage.com/uploads/82827/files/LESI-Royalty-Rates.pdf.

[27] Geoff Duncan, *Book Smarts: Why Barnes & Noble is Wheeling Out Big Legal Guns to Back the Nook*, Digital Trends (December1, 2011), http://www.digitaltrends.com/mobile/barnes-noble-bets-on-nook-and-big-legal-guns/.

[28] James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 6, https://bspace.berkeley.edu/access/content/group/db8af46b-36ab-4076-00b0-dff64449708e/Ratliff-Rubinfeld%20_injunctions_in_RAND_setting.pdf.

> cases, litigation) as opposed to modifying the SSO's IPR policy [by precluding injunctions or mandating a particular negotiation process].[29]

Even if an SSO agreement (or a specific license) did disallow them, seeking an injunction would therefore be a simple breach of contract. Reading a limitation on injunctions into the SSO agreement is in severe tension with the normal rules of contract interpretation, such as emphasizing intent of the parties and plain language, which point away from the limitation.[30] To turn Motorola's effort to receive a reasonable royalty for its patents by means of an injunction against a willing, but not willing enough, licensee into an antitrust problem seems directly to undermine the standard-setting process. It also seems to have no basis in law.

The risk of making such conduct—essentially, any breach of contract—into an antitrust offense is substantial. But as Kobayashi and Wright point out, such reasoning under Section 5 would do exactly that:

> What is left is the view that the theory in *N-Data* could be extended to any breach of a contractual commitment that might result in increased royalties, or even a good faith modification of a FRAND commitment to the same effect, always violates the antitrust laws. . . . The breach itself is the exclusionary act and evidence of the requisite monopoly power. No evidence of consumer harm is required. An attempt to renegotiate higher royalty rates is all that is needed. This is unsound antitrust policy. A basic lesson of the holdup literature is that the very asset specificity creating the potential for ex-post opportunism also creates the incentives for parties to build flexibility into their contractual relationships, which allows them to reasonably deal with unanticipated post-contractual shocks. However, even good faith modifications of SSO contractual commitments, whether those commitments relate to pricing or other elements of the agreement, would satisfy the *N-Data* standard for liability. Thus, there is no principle that would prevent the extension of the *N-Data* theory to the breach of any contractual commitment by a firm resulting in higher prices to some consumers.[31]

This seems to be precisely the case here, made all the more notable by the fact that, arguably unlike N-Data, Motorola was seeking not an increase from previously agreed-to royalty rates, but rather the enforcement of royalty rates perfectly consistent with its past practice.

One of the clearest statements of the need for antitrust restraint in the standard setting context comes from a June 2011 comment filed with the FTC, authored by Microsoft:

---

[29] Microsoft, Comment for Patent Standards Workshop, Project No. P11-1204, 13-17, *available at* http://www.ftc.gov/os/comments/patentstandardsworkshop/00009-60523.pdf.

[30] Brooks & Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, 34, Cravath, Swaine, & Moore, http://www.cravath.com/files/Uploads/Documents/Publications/Interpreting%20and%20Enforcing%20Vol%20Frand%20Commitment_Brooks%207.20.10.pdf ("Our research shows that, if a FRAND commitment is taken seriously as a contract – as it should be – then efforts to look to FRAND as a source of cumulative royalty caps, particular formulas for calculating or apportioning royalties, or limitations on remedies against unlicensed infringers are not only without basis, but are contradicted by the ordinary methods of contract interpretation.").

[31] Kobayashi & Wright, *supra* note 5, at 27.

> [T]he existence of a RAND commitment to offer patent licenses should not preclude a patent holder from seeking preliminary injunctive relief. . . . Any uniform declaration that such relief would not be available if the patent holder has made a commitment to offer a RAND license for its essential patent claims in connection with a standard may reduce any incentives that implementers might have to engage in good faith negotiations with the patent holder. . . .[32]

Patents are an important tool for encouraging the development and commercialization of advanced technology, as are standard setting organizations. Antitrust authorities should exercise great restraint before intervening in the complex commercial negotiations over technology patents and standards. In Motorola's case, the evidence of conduct that might harm competition is absent, and all that remains are, in essence, allegations that Motorola is bargaining hard and enforcing its property rights. These are not antitrust offenses.

The Role of Injunctions

The crux of our concern with this consent decree, and the most controversial aspect of SEP licensing negotiations, is the role of injunctions. The consent decree requires that, before Google seek to enjoin a manufacturer from using its SEPs without a license, the company must follow a prescribed path in licensing negotiations.

To the extent that the settlement reinforces what Google and other licensors already do, and even to the extent that it imposes nothing more than an obligation to inject a neutral third party into FRAND negotiations to assist the parties in resolving rate disputes, there is little of concern. Indeed, this is the core of the agreement, and importantly it seems to preserve Google's right to seek injunctions to enforce its patents, subject to the agreement's process requirements.

As noted above, industry participants and standard-setting organizations have supported injunctions, and the seeking and obtaining of injunctions against infringers is not in conflict with SEP patentees' obligations.[33] Even the FTC, in its public comments, has stated that patent owners should be able to obtain injunctions on SEPs when an infringer has rejected a reasonable license offer.[34]

Nevertheless, U.S. regulators, including the FTC, have sometimes opined that seeking injunctions on products that infringe SEPs is not in the spirit of FRAND. Those partaking in the debate seem to agree that more certainty is preferable; the real matter at issue is whether and when injunctions further that aim or not, and whether and when they are anticompetitive.

---

[32] Microsoft, *supra* note 29.

[33] Wellford & McCutchen, *Reasons to Reject a "No Injunctions" Rule for SEP's and Other FRAND-Obligated Patents*, 3, *available at* http://www.bingham.com/Publications/Files/2012/04/No-Injunctions-Rule ("FRAND commitments sometimes contain a no-injunction pledge but, if so, they do so as the result of a patent holder's voluntary commitment. Such a commitment is not the result of merely participating in the activities of a standard setting organization ("SSO"). Adding a new no-injunction pledge to a FRAND obligation by regulatory fiat, where it has not been accepted voluntarily, would be a departure from the law's usual respect for commercial agreements.").

[34] FTC, Public Interest Statement, *supra* note 7.

In its own 2011 report on the "IP Marketplace," the FTC acknowledged the fluidity and ambiguity surrounding the meaning of "reasonable" licensing terms and the problems of patent enforcement.[35] While noting that injunctions may confer a costly "hold-up" power on patentees that wield them, the FTC nevertheless acknowledged the important role of injunctions in preserving the value of patents and in encouraging efficient private negotiation:

> Three characteristics of injunctions that affect innovation support generally granting an injunction. The first and most fundamental is an injunction's ability to preserve the exclusivity that provides the foundation of the patent system's incentives to innovate. Second, the credible threat of an injunction deters infringement in the first place. This results from the serious consequences of an injunction for an infringer, including the loss of sunk investment. Third, a predictable injunction threat will promote licensing by the parties. Private contracting is generally preferable to a compulsory licensing regime because the parties will have better information about the appropriate terms of a license than would a court, and more flexibility in fashioning efficient agreements. . . . But denying an injunction every time an infringer's switching costs exceed the economic value of the invention would dramatically undermine the ability of a patent to deter infringement and encourage innovation. For this reason, courts should grant injunctions in the majority of cases. . . .[36]

Consistent with this view,

> [t]he European Commission's Deputy Director-General for Antitrust Cecilio Madero Villarejo expressed concern that some technology companies who complain of being denied a license on FRAND terms never truly intended to acquire a license, but rather "wanted to create conditions for a competition case to be brought." This reflects a more sophisticated understanding of the relationship between SEP holders and potential licensees, and bodes well for consumers who increasingly use products that rely on standards."[37]

But with the *Google* case, the Commission appears to back away from its seeming support for injunctions, claiming that:

> Seeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the integrity and efficiency of the standard-setting process and decreases the incentives to participate in the process and implement published standards. Such conduct reduces the value of

---

[35] FTC, *The Evolving IP Marketplace*, 192, *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf ("However, there is much debate over whether such RAND or FRAND commitments can effectively prevent patent owners from imposing excessive royalty obligations on licensees. Panelists complained that the terms RAND and FRAND are vague and ill-defined–particularly with regard to what royalty rate is 'reasonable.'").
[36] *Id*. at 26.
[37] David Balto, *Agencies Right to Expand Scrutiny of Patent Transfers and Acquisitions*, Huffington Post (Oct. 23, 2012), http://www.huffingtonpost.com/david-balto/antitrust-patents_b_2002799.html.

> standard setting, as firms will be less likely to rely on the standard-setting process.[38]

However, it is rarely mentioned that "an implementer's decision to reject a certifiably RAND license and continue to infringe is contrary to the spirit of the RAND framework as well."[39] In such situations, the threat of an injunction is plainly important. But it is worth noting what it is important for.

It is not likely the case that a negotiation process would ever end with an injunction and a refusal to license, as critics allege. Rather, the threat of an injunction is important in hastening an infringing implementer to the table, ensuring that protracted litigation to determine the appropriate royalty (which is how such disputes *do* actually end) is costly not only to the patentee, but also the infringer. As Ratliff and Rubinfeld note:

> [T]he existence of that threat does not lead to holdup as feared by those who propose that a RAND pledge implies (or should embody) a waiver of seeking injunctive relief. If RAND terms are reached by negotiation, the negotiation is not conducted in the shadow of an injunctive threat but rather in the shadow of knowledge that the court will impose a set of terms if the parties do not reach agreement themselves. The crucial element of this model that substantially diminishes the likelihood that the injunctive threat will have real bite against an implementer willing to license on RAND terms is the assumption that an SEP owner maintains its obligation to offer a RAND license even if its initial offer is challenged by the implementer and, further, even if the court agrees with the SEP owner that its initial offer was indeed RAND. Thus any implementer that is willing to license on court-certified RAND terms can avoid an injunction by accepting those RAND terms without eschewing any of its challenges to the RAND-ness of the SEP owner's earlier offers.[40]

Concerns about the hold-up threat of injunctions are unfounded because the implementer can always accept a royalty rate that is either offered by the patent holder or certified by a court, without waiving its right to contest whether such a rate is RAND. If it will not do either, then it is an unwilling licensee, appropriately enjoined from implementing the patent.

Properly Defining the Willing Licensee

Reconciling the FTC's seemingly disparate views turns on the question of what a "willing licensee" is. And while the proposed *Google* Order itself may not *magnify* the problems surrounding the definition of that term, it certainly does nothing to provide any additional clarity.

The problem is that even in its 2011 report, in which FTC noted the importance of injunctions, it defines a willing licensee as one who would license at a hypothetical, ex ante rate absent the

---

[38] FTC, Analysis of Proposed Consent Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, 2, available at http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[39] Ratliff & Rubinfeld, *supra* note 28, at 14.

[40] *Id.* at 7.

threat of an injunction and with different information and a different risk profile than an after-the-fact infringer.[41] In other words, the FTC's definition of willing licensee assumes a willingness to license *only* at a rate determined when an injunction is not available, and under the unrealistic assumption that the true value of a SEP can be known ex ante. Not surprisingly, then, the Commission finds it easy to declare an injunction invalid when a patentee demands a higher royalty rate in an actual negotiation, with actual knowledge of a patent's value and under threat of an injunction.

The FTC's definition of willing licensee ignores a crucial difference between the two situations. One should expect that a patent will be worth more when its value is clear from its use in the market, it has been determined to be valid and there is a threat of injunction. "[A]verage 'reasonable royalty' damage awards set rates more than double estimated average negotiated patent royalties. [T]his difference is at least in part attributable to the uncertainty surrounding the strength and value of untested patents."[42]

As Richard Epstein, Scott Kieff and Dan Spulber discuss in critiquing the FTC's 2011 Report:

> In short, there is no economic basis to equate a manufacturer that is willing to commit to license terms before the adoption and launch of a standard, with one that instead expropriates patent rights at a later time through infringement. The two bear different risks and the late infringer should not pay the same low royalty as a party that sat down at the bargaining table and may actually have contributed to the value of the patent through its early activities. There is no economically meaningful sense in which any royalty set higher than that which a "willing licensee would have paid" at the pre-standardization moment somehow "overcompensates patentees by awarding more than the economic value of the patent. . . .
>
> Even with a RAND commitment, the patent owner retains the valuable right to exclude (not merely receive later compensation from) manufacturers who are unwilling to accept reasonable license terms. Indeed, the right to exclude influences how those terms should be calculated, because it is quite likely that prior licensees in at least some areas will pay less if larger numbers of parties are allowed to use the same technology. Those interactive effects are ignored in the FTC calculations."[43]

[41] FTC, *The Evolving IP Marketplace*, *supra* note 35, at 190 ("A reasonable royalty damages award that is based on high switching costs, rather than the ex ante value of the patented technology compared to alternatives, overcompensates the patentee. It improperly reflects the economic value of investments by the infringer rather just than the economic value of the invention. To prevent damage awards based on switching costs, courts should set the hypothetical negotiation at an early stage of product development, when the infringer is making design decisions.").
[42] Brooks & Geradin, *supra* note 30, at 28.
[43] Epstein, Kieff, & Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 21-23 (Stanford Law and Economics Olin Working Paper No. 414), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907450.

In fact, equating the ex-ante potential licensee with the ex-post infringer creates a serious probability of opportunism *by the infringer*, not, as is usually feared, the patentee:

> There is no a priori reason that retrospective damages must be calculated according to the same "reasonable royalty" that the SEP owner offered for a prospective license. This is particularly true in the case of willful infringement. More generally, if implementers knew with certainty that the greatest royalty rate they would pay retrospectively if they delayed taking an offered RAND license until it had been found RAND by a court is the RAND rate they were originally offered, there would be little incentive for an implementer to take a license earlier: The implementer could litigate and hope for a finding that the patent is invalid, unenforceable, or not infringed. Failing that, the implementer would avail itself of the RAND license terms originally offered.[44]

With this circular logic, all efforts by patentees to negotiate royalty rates after infringement has occurred can be effectively rendered anticompetitive if the patentee uses an injunction or the threat of an injunction against the infringer to secure any increase in its royalty—or even the same royalty rate—even if reasonable.

The idea behind FRAND is rather simple: rewarding risky innovation and protecting competition.[45] But the practice of SEP licensing is much more complicated. Circumstances differ from case to case, and, more importantly, so do the parties' views on what may constitute an appropriate licensing rate under FRAND. A single company may have very different views on the meaning of FRAND depending on whether it is the licensor or licensee in a given negotiation and depending on whether it has already implemented a standard or not.[46] In fact,

> with the notable exception of some SSOs that require royalty-free licensing of SEPs, many SSOs appear to expressly envision bilateral negotiation between the patentee and implementers of the specific terms that will apply to each license. While such license negotiations are constrained by the non-discrimination component of RAND, it is recognized that specific arrangements (including how much royalty is paid in cash, what cross-licenses are included, etc.) may vary not just from patentee to patentee, but even among different licensees of the same patent.[47]

This variance should come as no surprise, given that the standard at issue, and any particular patent that reads on that standard, may be either a more or less valuable component of the implementer's product. For example, the function that the standard supports could be merely a

[44] Ratliff & Rubinfeld, *supra* note 28, at 12.
[45] Mario Mariniello, *Fair, Reasonable, and Non-Discriminatory (FRAND) Terms: A Challenge for Competition Authorities*, 7 J. COMPETITION L. & ECON. 3 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186052 (noting that "[t]he price of a successful innovation should also cover the risk of failed research attempts").
[46] Geoffrey Manne, *Europe Shouldn't Intervene In Microsoft-Motorola Patent Dispute*, Forbes (Apr. 5, 2012), http://www.forbes.com/sites/beltway/2012/04/05/europe-shouldnt-intervene-in-microsoft-motorola-patent-dispute/.
[47] Ratliff & Rubinfeld, *supra* note 28, at 10.

secondary aspect of a particular product. That implementer would have less demand, and a lower willingness to pay, than an implementer whose product focuses directly on the function the standard supports.

Meanwhile, for the same reasons and also because different patents have different possible work-arounds, some patents are likely worth significantly more than others and one should expect to find that license rates are a complicated function of the contracting parties' particular negotiating positions and circumstances. As one court looking at the very SEPs at issue in the *Google* case has pointed out:

> [T]he court is mindful that at the time of an initial offer, it is difficult for the offeror to know what would in fact constitute RAND terms for the offeree. Thus, what may appear to be RAND terms from the offeror's perspective may be rejected out-of-pocket as non-RAND terms by the offeree. Indeed, it would appear that at any point in the negotiation process, the parties may have a genuine disagreement as to what terms and conditions of a license constitute RAND under the parties' unique circumstances.[48]

The fact that many firms engaged in SEP negotiations are simultaneously and repeatedly both licensors and licensees of patents governed by multiple SSOs further complicates the process. However, it also helps to ensure that it will reach a conclusion that promotes innovation and ensures that consumers reap the rewards—no matter how "unwilling" licensees (or patentees) may seem at various points in the negotiating process.

This is because for firms that both license out their own patents and license in those held by other firms, which is the majority of IT firms and certainly the norm for firms participating in SSOs, continued interactions on both sides of such deals help to ensure that licensing, and not withholding, is the norm. In fact, an important issue in assessing the propriety of injunctions is the recognition that, in most cases, firms would rather license their patents and receive royalties than exclude access to their IP and receive no compensation and perhaps incur the costs of protracted litigation.

These realities significantly diminish the risk of patent hold-up, and support the notion that the mere existence of higher prices cannot establish the existence of exclusionary conduct or consumer harm necessary to support antitrust intervention.

SEPs and the Smartphone Market

While some commentators make it sound as if injunctions threaten to cripple smartphone makers by preventing them from licensing essential technology on viable terms,[49] companies in this space have been perfectly capable of orchestrating large-scale patent licensing campaigns. That these

---

[48] *Microsoft Corp. v. Motorola Inc.*, No. C10-1823, Order on Plaintiff's Motion for Partial Summary Judgment, 15 (W.D. Wa. Feb. 27, 2012).

[49] See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard-Setting*, *in* 1 INNOVATION POLICY AND THE ECONOMY 119–26 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2001); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698 (1998).

may increase costs to competitors is a feature, not a bug, of the system, representing the return on risk and innovation that patents are intended to secure. Nevertheless, the theoretical fear of patent hold-up (or "royalty-stacking" or "patent thickets") and the costs it may impose are not ridiculous and, of course, while innovation in this space is legion, there is no way to know how much more there might be if the laws and policies governing licensing practices were different.

> Given [the] diversity of SEPs and SEP owners (let alone the diversity of standards that, for example, a single smartphone or computer might implement), patent holdup can have far-reaching consequences. If each of the many patent owners were to attempt to win a disproportionately large share of the patents' collective value, a "royalty-stacking" problem could arise in which excessive licensing costs discourage reliance on an otherwise efficient standard. Conversely, if courts or regulators put substantial limitations on the ability of innovators to appropriate value from their investment in technologies that are essential to a standard, the incentives of firms either to invest in innovative technologies or to participate in the standard-setting process may be reduced.[50]

There are trade-offs, to be sure. But there is no basis for the one-sided presumption that patentees, not implementers, have the upper hand and merit antitrust-based restraint on their conduct. For one thing, the empirical literature on the topic is inconclusive, at best.[51] Moreover, as experience suggests,

> it is possible for private-ordering solutions to be formed in the face of patent thickets, and . . . it is unnecessary to eliminate or "creatively adapt[] property rights" secured to inventors by the patent system. . . . The fact that the very first patent thicket in American history was resolved by the very first patent pool in American history is dramatic evidence of how private-ordering problems and private-ordering solutions go hand-in-hand between property owners.[52]

Companies are coming to the SEP debate with very different track records on SSO participation. Apple, for example, is relatively new to the mobile communications space and has relatively few SEPs.[53] Other firms, like Samsung and Motorola, are long-time players in the space with histories of extensive licensing in both directions. But, current posturing aside, all of these firms have an incentive to license their patents. As one commenter notes:

> Apple's best course of action will most likely be to enter into licensing agreements with its competitors, which will not only result in significant

---

[50] Ratliff & Rubinfeld, *supra* note 28, at 2.

[51] *See, e.g.*, David E. Adelman & Kathryn L. DeAngelis, *Patent Metrics: The Mismeasure of Innovation in the Biotech Patent Debate*, 85 TEX. L. REV. 1677, 1679– 82 (2007); James Bessen, *Patent Thickets: Strategic Patenting of Complex Technologies* 1–4 (Research on Innovation Working Paper, 2003), *available at* http://www.researchoninnovation.org/thicket.pdf.

[52] Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZ. L. REV. 165, 209, 211 (2011).

[53] Mark Summerfield, *Apple v Android Part V: Open Standards, IP Strategy, Resolution?*, Patentology (Apr. 23, 2012), http://blog.patentology.com.au/2012/04/apple-v-android-part-v-open-standards.html.

> revenues, but also push up the prices (or reduce the margins) on competitive products.[54]

Microsoft has wielded its sizeable patent portfolio to drive up the licensing fees paid by Android device manufacturers,[55] and some commentators have even speculated that Microsoft makes more revenue from Android than it does from Windows Phone.[56] But while Microsoft might prefer to kill Android with its patents, given the unlikeliness of this,

> the next best option is to catch a free ride on the Android train. Patent licensing deals already in place with HTC, General Dynamics, and others could mean revenues of over $1 billion by next year, as Forbes reports. And if they're able to convince Samsung to sign one as well (which could effectively force every Android partner to sign one), we could be talking multiple billions of dollars of revenue each year.[57]

The risk of consumer harm from conduct by patentees in the standards space can't be ruled out completely, but its existence is by no means assured. More important, the procompetitive justifications for injunctions, the absence of evidence of consumer harm, the absence of SSO restrictions against injunctions and the incentives for negotiation by the very sorts of companies targeted by this action all counsel strongly against the enforcement action at issue in this case.

Why the Constraint on Injunctions Is Harmful

Concern about patents is the norm, but so is licensing. It is precisely because licensing is the norm that smartphones exist, even with the allegedly thousands of patents that read on the devices, and at prices consumers afford. The inability to seek an injunction against an infringer, however, would ensure instead that patentees operate with reduced incentives to invest in technology and to enter into standards because they are precluded from benefiting from any subsequent increase in the value of their patents once they do so. As Epstein, Kieff, and Spulber write:

> The simple reality is that before a standard is set, it just is not clear whether a patent might become more or less valuable. Some upward pressure on value may be created later to the extent that the patent is important to a standard that is important to the market. In addition, some downward pressure may be caused by a later RAND commitment or some other factor, such as repeat play. The FTC seems to want to give manufacturers all of the benefits of both of these dynamic effects by in effect giving the manufacturer the free option of picking different focal points for elements of the damages calculations. The patentee is forced to

[54] Id.

[55] M.G. Siegler, *Microsoft's Android Plan: Evil Genius or Just Evil?*, TechCrunch (July 13, 2011), http://techcrunch.com/2011/07/13/scott-you-just-dont-get-it-do-ya/.

[56] *See, e.g.*, Woody Leonhard, *Microsoft Makes More from Android than Windows on Smartphones*, Inforworld (June 1, 2011), http://www.infoworld.com/t/android/microsoft-makes-more-android-windows-smartphones-707.

[57] Siegler, *supra* note 54.

> surrender all of the benefit of the upward pressure while the manufacturer is allowed to get all of the benefit of the downward pressure.[58]

Therein lies the problem with even the limited constraints imposed by the *Google* Order: To the extent that the FTC's settlement amounts to a prohibition on Google seeking injunctions against infringers unless the company accepts the infringer's definition of "reasonable," the settlement will harm the industry. It will reinforce a precedent that will likely reduce the incentives for companies and individuals to innovate, to participate in SSOs, and to negotiate in good faith.

Some point to open-source software as proof that IP will still be produced without any, or with much less, patent protection.[59] Such software is supported instead by other forms of monetization or no monetization at all. Although it is true that unpatented software does exist, this argument does not explain why implementers or SSOs do not choose such software. If the products were sufficient or comparable, there is no reason why any participant would use the more expensive patented options.

Contrary to most assumptions about the patent system, it needs stronger, not weaker, property rules. With a no-injunction rule, whether explicit or de facto depending on how the definition of "willing licensee" unfolds, a potential licensee has little incentive to negotiate with a patent holder. Instead, it can refuse to license, infringe, try its hand in court, avoid royalties entirely until litigation is finished, and in the end never be forced to pay a higher royalty than it would have if it had negotiated before the true value of the patents was known.

This sort of strategic behavior by licensees is precisely why injunctions are necessary and appropriate in such cases. To turn them into antitrust violations seriously threatens to undermine the licensors' appropriate bargaining power and the efficient functioning of SEP licensing. Flooding the courts and discouraging innovation and peaceful negotiations hardly seem like benefits to the patent system or the market. Unfortunately, the FTC's approach to SEP licensing exemplified by this case may do just that.

Undesirable strategic behavior is not limited to licensees, though.

> [B]y establishing elaborate procedures that Google must follow before invoking an "unwilling licensee" exception to the general rule, the decree might have the unintended consequence of encouraging opportunistic behavior by SEP owners in an attempt to portray companies as "unwilling licensees."[60]

In her dissent, Commissioner Ohlhausen articulates the problems with this aspect of the FTC's proposed settlement. First, writes Commissioner Ohlhausen,

> the majority says little about what "appropriate circumstances" may trigger an FTC lawsuit other than to say that a fair, reasonable, and non-

---

[58] Epstein, Kieff, & Spulber, supra note 43, at 21.

[59] *See, e.g.*, Eric Goldman, *The Problems with Software Patents (Part 1 of 3)*, Forbes (Nov. 28, 2011), http://www.forbes.com/sites/ericgoldman/2012/11/28/the-problems-with-software-patents/.

[60] David Smith, et al., *FTC-Google Consent Decree Provides Important Lessons Regarding Standards-Essential Patents*, JD Supra (January 7, 2013), http://www.jdsupra.com/legalnews/ftc-google-consent-decree-provides-impor-44359/?utm_source=jds&utm_medium=twitter&utm_campaign=banking.

> discriminatory ("FRAND") commitment generally prohibits seeking an injunction. By articulating only narrow circumstances when the Commission deems a licensee unwilling (limitations added since *Bosch*), 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.[61]

The FTC's treatment of Apple as a "willing licensee" betrays the complexity of such issues and the confusion this settlement may engender. In treating Apple as a willing licensee the Commission

> disregard[s] a federal judge's decision that Apple revealed itself as unwilling on the eve of trial. 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." 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. . . . 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. 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. . . ." 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. I cannot endorse characterizing this conduct as that of a willing licensee.[62]

While the FTC acknowledges that injunctions are appropriate when a patentee is faced with a licensee who is unwilling to license its patents at a reasonable rate, if even Apple is here considered a "willing licensee," then such an acknowledgement is a null set.

The definition of "willing licensee" is central for parties to determine appropriate conduct in this area and for everyone to assess the propriety of the FTC's action and Order in this case. But the immense uncertainty that remains following this case, coupled with the "circular reasoning" noted above that seems to inform the Commission's understanding of the term, suggest that confusion, rather than clarity, will prevail.

The Defensive Use Exception

And confusion isn't limited to the "willing licensee" debate. Commissioner Rosch, for example, noted his concern with the Order's defensive use exception for seeking injunctions.[63] His comments indicate that he hopes it will not be included in the final Order, and some industry

---

[61] Dissenting Statement of Commissioner Ohlhausen, *supra* note 18, at 2.
[62] Id. at 3-4.
[63] Separate Statement of Commissioner Rosch, *supra* note 17, at n.1.

commentators share his concern.[64] Whatever the merits of the availability of defensive injunctions (which we support), apparently the language is, indeed, confusing. Microsoft, for example, states that under the exception,

> Google may abandon its promise to make its standard essential patents available on reasonable terms with regard to any firm that has tried to obtain an injunction against any product made by Google on the basis of that firm's standard essential patents. Google can seek a product injunction even if the other firm is willing to take a license to Google's patents on reasonable terms. . . . The Google loophole is of particular concern because it appears . . . to say that Google can sue for an injunction even when no firm has sued Google.[65]

However, this alarmism is unfounded; the Order doesn't seem to say that at all. Section IV.F states that if the potential licensee is seeking or has sought on or after the date of the Order an injunction against a Google product based on a FRAND-encumbered SEP, then Google may seek an injunction against the potential licensee *unless* the potential licensee first offered to license the underlying SEP and to enter binding arbitration to determine FRAND terms (the same process Google is required by the Order to follow before seeking injunctive relief on its FRAND-encumbered SEPs).[66]

As one observer noted, "[s]o, in Microsoft's reading, the order suggests that Google can seek an injunction against competitors that have brought any injunction claim based on any essential technology employed in a Google product, even if those suits are against third parties and not Google."[67] But even if that's true, there is nothing to indicate that Google is relieved of offering to license its RAND-encumbered patents on a RAND basis, as it is contractually obligated do.

In sum, the impact of this provision is to ensure that Google will be permitted to seek an injunction if its products are subjected to the same type of conduct that the FTC's Complaint has described as a violation of Section 5. Rather than increase the possibility of injunctions on SEPs, this provision in fact attempts to deter firms from seeking injunctions on their SEPs against Google products and permits Google to defend its products, still subject to its RAND obligations, if they do.

Conclusion

As explained above, the proposed settlement threatens to distort the standard-setting process which is so crucial to the innovation we enjoy today. Without a credible threat to those who infringe on SEPs, there will be less incentive to innovate, less certainty around licensing, and less

[64] *See, e.g.,* Florian Mueller, *Defensive Use Exception in FTC-Google Deal Identified as Primary Area of Concern*, Foss Patents (Jan. 9, 2013), http://www.fosspatents.com/2013/01/defensive-use-exception-in-ftc-google.html.

[65] Dave Heiner, *DOJ Patent Policy Means FTC Should Think Again about Google Patent Order*, Microsoft on the Issues (Jan. 8, 2013), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2013/01/08/doj-patent-policy-means-ftc-should-think-again-about-google-patent-order.aspx.

[66] Decision and Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, 2, *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

[67] Allison Frankel, *Loophole for Google Order on Essential Patent Injunctions?*, Thomson Reuters News and Insight (Jan. 8, 2013), http://newsandinsight.thomsonreuters.com/Legal/News/2013/01_-_January/Loophole_for_Google_in_FTC_order_on_essential_patent_injunctions_/.

incentive for patentees to submit patents to FRAND obligations. The FTC has acknowledged on multiple occasions that the SSO process benefits consumers, patent holders, and potential licensees. While the Commission has the authority to take enforcement action where anticompetitive harm occurs, there is simply no such evidence here. As such, the Commission's blanket restriction on an essential facet of the SSO process will weaken those institutions without commensurate benefit, harming consumers and competitors.