

**Prepared Statement of
The Federal Trade Commission**

**Before the
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

**Concerning
“Standard Essential Patent Disputes and Antitrust Law”**

**Washington, D.C.
July 30, 2013**

Chairman Klobuchar, Ranking Member Lee and members of the Subcommittee, thank you for the opportunity to appear before you today. I am Suzanne Munck, Chief Counsel for Intellectual Property for the Federal Trade Commission (FTC) and Deputy Director of the Commission's Office of Policy Planning. I am pleased to testify on behalf of the FTC to discuss the impact of patent hold-up on competition and related issues involving standard-essential patents (SEPs).¹

The testimony focuses on SEPs that a patent holder has committed to license on reasonable and non-discriminatory (RAND) terms.² In this context, hold-up describes the potential that a SEP holder can use the leverage it may acquire as a result of the standard setting process to negotiate higher royalty rates or other favorable terms after the standard is adopted than it could have credibly demanded beforehand.³

To further discuss hold-up in this context, the statement: (1) outlines the dual roles that antitrust and intellectual property laws play in promoting innovation and enhancing consumer welfare; (2) addresses the competitive concerns associated with hold-up in the standard setting

¹ The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any Commissioner.

² The written statement uses the term RAND, but the analysis applies equally to intellectual property that a patent holder has committed to license on fair, reasonable, and non-discriminatory (FRAND) terms.

³ See Prepared Statement of the Fed. Trade Comm'n Before the U.S. Comm. on the Judiciary Concerning "Oversight of the Impact of Competition of Exclusion Orders to Enforce Standard-Essential Patents," at 1 (July 11, 2012) ("2012 Commission Testimony"), available at

<http://www.ftc.gov/speeches/ramirez/120711sep-stmttoftc.pdf>, and Third Party United States Fed. Trade Comm'n'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 Compone -1st fil. Of Cs & srin. 3 of the

context; and (3) highlights steps that the Commission has taken to address the threat of patent hold-up and its potential to harm innovation, U.S. consumers, and the standard setting process.

I. Antitrust and Intellectual Property Laws Promote Innovation and Enhance Consumer Welfare

America’s economic growth and competitiveness depends on its capacity to innovate. Innovation improves consumer welfare by bringing “greater income, higher quality jobs and improved health and quality of life to all U.S. citizens.”⁴ Intellectual property and competition

innovation and enhance consumer welfare. For example, in 2007 the FTC and the Antitrust Division jointly issued a report emphasizing the need to account properly for the pro-competitive benefits of patent rights in antitrust analysis and enforcement policy.⁶ In 2010, the FTC, Antitrust Division, and USPTO jointly sponsored a hearing addressing the role of competition policy and patent policy in promoting innovation, and in 2011 the FTC issued a report based, in part, on this hearing.⁷ Consistent with its policy role, the FTC continues to monitor how competition and intellectual property laws can promote i

volume, and they increase competition by eliminating switching costs for consumers who want to switch between products manufactured by different companies.⁹

Many standards, particularly in the high-tech sector, include a large number of patented technologies. For example, recent litigation between Microsoft and Motorola disclosed that complex industry standards such as the H.264 video coding standard or the 802.11 WiFi standard can require the use of hundreds or thousands of SEPs held by dozens of patent holders.¹⁰

Inclusion of patented technologies in a standard can benefit consumers because it allows SSOs and their members to choose from a broader set of available technologies. Industry participants also can obtain significant advantages when

adoption of the standard and limits the ability of those other holders to obtain appropriate royalties on their technology.”¹⁶

Several market-based factors may mitigate the risk of hold-up.¹⁷ For example, patent holders that are frequent participants in standard-setting activities may incur reputational and business costs that could be sufficiently large to deter fraudulent behavior. Patent holders may also enjoy a first-mover advantage if its technology is adopted as the standard. As a result, patent holders who manufacture products using the standardized technology “may find it more profitable to offer attractive licensing terms in order to promote the adoption of the product using the standard, increasing demand for its product rather than extracting high royalties.”¹⁸ Finally, patent holders that have broad cross-licensing agreements with the SEP-owner may be protected from hold-up.¹⁹

¹⁶ *Microsoft Corp.*, 2013 WL 2111217, at *10-11. Although the potential for hold-up by an SEP-holder has been the primary focus of concern, the conduct of licensees may also raise issues, such as the elimination of competition among potential licensees for the patented technology. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (noting that standard-setting organizations by their nature involve discussions among competitors about potential competitive issues); *Sony Electronics v. Soundview Technologies*, 157 F. Supp. 2d 180 (D. Conn. 2001) (denying motion to dismiss where plaintiff alleged conspiracy to fix price of patent license); *Golden Bridge Technology v. Nokia Inc.*, 416 F. Supp. 2d 525 (E.D. Tex. 2006) (alleged per se violation of Sherman Act arising from a boycott ousting a patented technology from an industry standard); 2007 FTC/DOJ Report at 52-53. In addition, so-called “reverse hold-up” can occur where a firm using the SEP delays good faith negotiation of a RAND license.

Nevertheless, SSOs themselves commonly seek to mitigate the threat of patent hold-up by seeking commitments from participants to license SEPs on RAND terms, often as a *quid pro quo* for the inclusion of the patent(s) in the standard.²⁰ A RAND commitment can make it easier to adopt a standard, but the potential for hold-up remains if the RAND commitment is later disregarded, because the royalty rate often is negotiated after the standard is adopted.²¹

Commenters have noted that a RAND commitment does not provide clear guidance on the parameters of a reasonable and nondiscriminatory license.²² In the event that a RAND-encumbered SEP holder and an implementer are unable to negotiate royalty rate and other licensing terms, the SEP holder sometimes seeks an injunction from a district court, or an

²⁰ 2007 Report at 46-47; *see also Microsoft Corp.*, 2013 WL 2111217, at *6 (“In order to reduce the likelihood that owners of [standard] essential patents will abuse their market power, many standard setting organizations, including the IEEE and ITU, have adopted rules relating to the disclosure and

exclusion order from the ITC for infringement of the RAND-encumbered SEP.²³ An injunction or exclusion order could put a substantial portion of the implementers' business at risk. As a result, the threat of an injunction or exclusion order, combined with high switching costs, could allow a patent holder to obtain unreasonable licensing terms that reflect the hold-up value of its patent despite its RAND commitment.²⁴ As mentioned above, this can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process. Of course, the hold-up value that the threat of an injunction or exclusion order can create depends on a number of factors,²⁵ including the likelihood that litigation will be successful and an injunction will issue, relative litigation costs for the parties, as well as the cost of an injunction to the implementer.²⁶

III. The FTC's Recent Advocacy to Mitigate the Potential for Patent Hold-Up

The FTC has advocated for remedies in district courts and at the ITC to mitigate the potential for patent hold-up. Consistent with the proper role of the patent system, remedies that reduce the chance of patent hold-up can encourage innovation by protecting firms investing in

²³ Apple, Inc. v. Motorola Mobility, Inc., 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012) (agreeing, "that from a policy and economic standpoint, it makes sense that in most situations owners of declared-essential patents that have made licensing commitmen

standards-compliant products and complementary technologies. Reducing the risk of hold-up also better aligns the reward from innovation with its true value to consumers.

Last December, the Commission submitted an amicus brief to the Federal Circuit supporting a district court's denial of injunctive relief to a RAND-encumbered SEP holder.²⁷ The Commission took the position that, “[*eBay v. MercExchange LLC*] provides a framework that courts can use to mitigate the risk of patent hold-up.”²⁸

In June 2012, the Commission expressed its view that the ITC could interpret its governing statute to limit the incidence of hold-up generated by an exclusion order based on the infringement of a SEP and the harm to consumers that may result from such orders.²⁹ Section 337's “public interest standard” directs the ITC to consider, among other things, “competitive conditions in the United States economy” and “United States consumers” in deciding whether to grant an exclusion order.³⁰ Noting that the ITC has a range of options available that allow it to

²⁷ Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Neither Party, *Apple Inc. and NeXT Software, Inc. v. Motorola, Inc. and Motorola Mobility, Inc.*, Nos. 2012-1548, 2012-1549 at 7 (Fed. Cir. Dec. 4, 2012) (herein FTC Amicus Brief), available at <http://www.ftc.gov/os/2012/12/121205apple-motorolaamicusbrief.pdf>. Commissioner Ohlhausen did not vote in favor of submitting the brief. Commissioner Wright was not a member of the Commission when the brief was filed.

²⁸ FTC Amicus Brief at 7. Until 2006, permanent injunctive relief was virtually automatic following a district court's finding of infringement. Courts followed a general rule, established by the Federal Circuit, in favor of granting injunctions based on a presumption of irreparable harm. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (citations omitted). In a 2006 decision, *eBay v. MercExchange, L.L.C.*, a unanimous Supreme Court rejected the presumption of irreparable harm and other categorical approaches in favor of a case-by-case application of “traditional equitable principles,” including requiring proof of the patent holder's irreparable harm and the inadequacy of money damages. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

²⁹ Third Party United States Fed. Trade Comm'n'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/2012/06/1206ftcgaming8-e TD. -1.15353 TD\(e\)7.02 0 0 7.02 72 186.q9\(req\).w2\(mmissioner Wri](http://www.ftc.gov/os/2012/06/1206ftcgaming8-e TD. -1.15353 TD(e)7.02 0 0 7.02 72 186.q9(req).w2(mmissioner Wri)

Final Order³⁵ that, among other things: (1) prohibits Google from “revoking or rescinding any [R]AND commitment,” except in very limited circumstances including that all RAND patents covered by the RAND commitment are expired or unenforceable; (2) outlines specific negotiation and dispute resolution procedures intended to protect the interests of potential willing licensees; and (3) allows Google to seek injunctive relief or exclusion orders only in narrowly-defined circumstances.³⁶

Similarly, in *In the Matter of Robert Bosch GmbH* the Commission alleged that, before its acquisition by Bosch, SPX reneged on voluntary commitments to two SSOs to license its SEPs on RAND terms, by continuing injunction actions against competitors using those patents.³⁷ As in *Motorola Mobility*, the Commission found reason to believe that SPX’s suit for injunctive relief against implementers of the standard constituted a failure to abide by the terms of its RAND commitments, and was an unfair method of competition under Section 5 of the F.T.C. Act.

³⁵ Decision and Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 (July 22, 2013), available at <http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf>. Commissioner Ohlhausen also voted against accepting the proposed consent agreement. Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 (January 3, 2013), available at <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

In conclusion, the Commission believes that competition and intellectual property laws work together to promote innovation. Voluntary consensus based standard setting facilitates this purpose; however, including patented technology in a standard creates the potential for patent hold-up. The Commission will continue to advocate before the federal courts and the ITC for policies that mitigate the potential for patent hold-up, and will bring enforcement actions where appropriate.

Thank you for this opportunity to share the Commission's views. We look forward to working with you on this important issue.