hours, FR 2004C—3.0 hours, FR 2004SI—2.1 hours, FR 2004SD—2.1 hours, FR 2004SD ad hoc—2.0 hours, and FR 2004WI—1.0 hour.

Number of respondents: 21.

General description of report: This information collection is authorized by sections 2A, 12A(c), 14, and 15 of the Federal Reserve Act (12 U.S.C. 225a, 263c, 353–359, and 391) and is required to obtain or retain the benefit of dealer status. Individual respondent data are regarded as confidential under the Freedom of Information Act (5 U.S.C. 552(b)(4) and (b)(8)).

Abstract: The FR 2004A collects weekly data on dealers' outright positions in Treasury and other marketable debt securities. The FR 2004B collects cumulative weekly data on the volume of transactions made by dealers in the same instruments for which positions are reported on the FR 2004A. The FR 2004C collects weekly data on the amounts of dealer financing and fails. The FR 2004SI collects weekly data on position, transaction, financing, and fails for the most recently issued on-the-run Treasury securities (the most recently issued Treasury securities for each maturity class). When unusual trading practices occur for a specific security, this information can be collected on a daily basis on the FR 2004SD for either on-the-run Treasury securities or off-the-run Treasury securities. The FR 2004SD ad hoc collects up to 10 ad hoc data items when critical information is required for additional market surveillance. The FR 2004WI collects daily data on positions in to-be-issued Treasury coupon securities, mainly the trading on a when-issued delivery basis.

Current Actions: On August 20, 2012, the Federal Reserve published a notice in the **Federal Register** (77 FR 50102) requesting public comment for 60 days on the extension, with revision, of the FR 2004. The comment period for this notice expired on October 19, 2012. The Federal Reserve did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, January 8, 2013.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2013–00386 Filed 1–10–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 121–0120]

Motorola Mobility LLC and Google Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement;

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 4, 2013.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Motorola/Google, File No. 121–0120'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/motorolagoogleconsent,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Richard Feinstein or Pete Levitas (202–326–2555), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Proposed Consent Order to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for January 3, 2013), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 4, 2013. Write ''Motorola/Google, File No. 121–0120'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/motorolagoogleconsent* by following the instructions on the web-based form. If this Notice appears at *http://regulations.gov#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Motorola/Google, File No. 121–0120'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 4, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order (''Agreement'') with Motorola Mobility LLC (formerly Motorola Mobility, Inc. (''Motorola''), a wholly-owned subsidiary of Respondent Google Inc.), and Google Inc. (''Google''), which is designed to settle allegations that Motorola and Google violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in unfair methods of competition and unfair acts or practices relating to the licensing of standard essential patents (''SEPs'') for cellular, video codec, and wireless LAN standards. The Complaint alleges that, after committing to license the SEPs on fair, reasonable, and non-discriminatory (''FRAND'') terms Motorola sought injunctions and exclusion orders against willing licensees, undermining the procompetitive standard-setting process. After purchasing Motorola for $12.5 billion in June 2012, Google continued Motorola's anticompetitive behavior.

The Proposed Consent Order has been placed on the public record for thirty (30) days for comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's Proposed Consent Order.

The purpose of this analysis is to facilitate comments on the Proposed Consent Order. This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way. The Agreement has been entered into for settlement purposes only and does not constitute an admission by Motorola or Google that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true.

Background

American consumers rely on standardized technology for the interoperability of consumer electronics and other products. Manufacturers of these products participate in standard-setting organizations (''SSOs'') such as the European Telecommunications Standards Institute (''ETSI''), the Institute of Electrical and Electronics Engineers (''IEEE''), and the International Telecommunication Union (''ITU'') that agree upon and develop standards based on shared technologies that incorporate patents. SSOs and the standards they promulgate have procompetitive benefits; they encourage common technological platforms that many different manufacturers ultimately incorporate into their respective products.[2] Standards foster competition among these manufacturers' products and facilitate the entry of related products. Overall, standards benefit the market by encouraging compatibility among all products, promoting interoperability of competing devices, and lowering the costs of products for consumers.

Many SSOs require that a firm make a licensing commitment, such as a FRAND commitment, in order for its patented technology to be included in a standard. SSOs have this policy because the incorporation of patented technology into a standard induces market reliance on that patent and increases its value. After manufacturers implement a standard, they can become ''locked-in'' to the standard and face substantial switching costs if they must abandon initial designs and substitute different technologies. This allows SEP holders to demand terms that reflect not only ''the value conferred by the patent itself,'' but also ''the additional value—the hold-up value—conferred by the patent's being designated as standard-essential.''[3] The FRAND commitment is a promise intended to mitigate the potential for patent hold-up.[4] In other words, it restrains the exercise of market power gained by a firm when its patent is included in a standard and the standard is widely adopted in the market.[5]

Despite the significant procompetitive benefits of standard setting, particularly the interoperability of technology that arises from efficient and effective standards, standard setting is a collaborative process among competitors that often displaces free market competition in technology platforms. FRAND commitments by SSO members are critical to offsetting the potential anticompetitive effects of such agreements while preserving the procompetitive aspects of standard setting.

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 standard setting, as firms will be less likely to rely on the standard-setting process. Implementers wary of the risk of patent hold-up may diminish or abandon entirely their participation in the standard-setting process and their

[2] As the Supreme Court has recognized, when properly formulated standards ''can have significant procompetitive advantages.'' *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 486 U.S. 492, 501 (1988).

[3] *Apple, Inc.* v. *Motorola, Inc.,* 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (Posner, J., sitting by designation).

[4] As the Commission explained in its unanimous filing before the United States International Trade Commission (''ITC''), incorporating patented technologies into standards without safeguards risks distorting competition because it enables SEP owners to negotiate high royalty rates and other favorable terms, after a standard is adopted, that they could not credibly demand beforehand. The exercise of this leverage is known as patent hold-up. See Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof,* Inv. No. 337–TA–745, available at *www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf; In re Certain Gaming and Entertainment\Consoles, Related Software, and Components Thereof,* Inv. No. 337–TA–752, available at *http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.*

[5] As the Ninth Circuit recently stated, a FRAND commitment is ''a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.'' *Microsoft Corp.* v. *Motorola, Inc.,* 696 F.3d 872, 884 (9th Cir. 2012) (citing *Apple,* 869 F. Supp. 2d at 914).

reliance on standards. If firms forego participation in the standard-setting process, consumers will no longer enjoy the benefits of interoperability that arise from standard setting, manufacturers have less incentive to innovate and differentiate product offerings, and new manufacturers will be deterred from entering the market.

The Proposed Complaint

Motorola sought to exploit the market power that it acquired through the standard-setting process by breaching its promises to license its SEPs on FRAND terms. ETSI, ITU, and IEEE require that firms disclose whether they will commit to license their SEPs on FRAND terms in order for the SSO to decide if the patents should be included in the relevant cellular, video codec, or wireless LAN standards. Motorola promised to license its patents essential to these standards on FRAND terms, inducing ETSI, ITU, and IEEE to include its patents in cellular, video codec, and wireless LAN standards. These commitments created express and implied contracts with the SSOs and their members. In acquiring Motorola and its patent portfolio, Google affirmatively declared that it would honor Motorola's FRAND commitments.[6]

Relying on Motorola's promise to license its SEPs on FRAND terms, electronic device manufacturers implemented the relevant standards and were locked-in to using Motorola's patents. Motorola then violated the FRAND commitments made to ETSI, ITU, and IEEE by seeking, or threatening, to enjoin certain competitors from marketing and selling products compliant with the relevant standards, like the iPhone and the Xbox, from the market unless the competitor paid higher royalty rates or made other concessions. At all times relevant to the allegations in the Proposed Complaint, these competitors—Microsoft and Apple—were willing to license Motorola's SEPs on FRAND terms.

Specifically, Motorola threatened exclusion orders and injunctions in various forums against these willing licensees. Motorola filed patent infringement claims at the ITC where the only remedy for patent infringement is an exclusion order. Because of the ITC's remedial structure, filing for an exclusion order before the ITC on a FRAND-encumbered SEP significantly raises the risk of patent hold-up in concurrent licensing negotiations because an exclusion order may be entered by the ITC before a FRAND rate is reached. Motorola also filed for injunctive relief in various federal district courts, which also raises the risk of patent hold-up.

Had Google been successful in obtaining either an injunction or exclusion order against its competitors' products, it could have imposed a wide variety of costs to consumers and competition. These products could have been kept off the market entirely, diminishing competition and denying consumers access to products they wish to purchase, such as the iPhone and Xbox. Alternatively, Google's conduct might have increased prices because manufacturers, when faced with the threat of an injunction, are likely to surrender to higher royalty rates for SEPs. Other manufacturers, deterred by increased licensing fees, might exit the market altogether, or limit their product lines. In the end, prices would likely rise both because of higher royalties and because of less product-market competition. Ultimately, end consumers may bear some share of these higher costs, either in the form of higher prices or lower quality products.

Consumers would also suffer to the extent that Google's conduct impaired the efficacy of the standard-setting process or diminished the willingness of firms to participate in standard- setting processes. Relatedly, such FRAND violations may diminish the interest of SSOs in using new patented technologies—a step that could reduce the technical merit of those standards as well as their ultimate value to consumers. This could result in increased costs or inferior standards. Innovation by implementers would suffer and consumers would lose the benefits of lower costs, interoperability, and rapid technological development that efficient standard-setting enables.

The Proposed Complaint alleges that Motorola and Google's conduct violates Section 5 of the FTC Act, both as an unfair method of competition and an unfair act or practice.

1. Unfair Method of Competition

Google and Motorola's conduct constitute an unfair method of competition and harms competition by threatening to undermine the integrity and efficiency of the standard-setting process. FRAND commitments help ensure the efficacy of the standard-setting process and that the outcome of that process is procompetitive. Conversely, that process is undermined when those promises are reneged. Motorola's conduct threatens to increase prices and reduce the quality of products on the market and to deter firms from entering the market. Moreover, Motorola's conduct threatens to deny consumers the many procompetitive benefits that standard setting makes possible. Motorola's conduct may deter manufacturers from participating in the standard setting process and relying on standards, and SSOs from adopting standards that incorporate patented technologies.

Consistent with these principles, courts have found that patent holders may injure competition by breaching FRAND commitments they made to induce SSOs to standardize their patented technologies.[7] Each of these cases, brought under Section 2 of the Sherman Act, involved allegations of bad faith or deceptive conduct by the patent holder before the standard was adopted. However, under its stand-alone Section 5 authority, the Commission can reach opportunistic conduct that takes place after a standard is adopted that tends to harm consumers and undermine the standard-setting process.'' [8] For example, in *Negotiated Data Solutions, LLC* (''*N-Data''*),[9] the Commission condemned similar conduct as ''inherently 'coercive' and 'oppressive.' '' [10] The respondent, N-Data, acquired SEPs from a patent holder that had committed to license them to any requesting party for a one-time flat fee of $1,000. After it acquired these SEPs, N-Data reneged on this licensing commitment. ''Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which [were] far in excess of [the $1,000 one-time flat fee].'' [11] The Commission found that N-Data's ''efforts

[6] *See* Letter from Allen Lo, Deputy General Counsel, Google, to Luis Jorge Romero Saro, Director-General, ETSI (Feb. 8, 2012); Letter from Allen Lo, Deputy General Counsel, Google, to Gordon Day, President, IEEE (Feb. 8, 2012) available at *http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/press/motorola/pdf/sso-letter.pdf;* Letter from Allen Lo, Deputy General Counsel, Google, to Hamadoun Toure, Secretary-General, ITU (Feb. 8, 2012).

[7] *See Broadcom Corp.* v. *Qualcomm, Inc.,* 501 F.3d 297, 313–15 (3d Cir. 2007); *In re Rambus, Inc.,* No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), available at *http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf, rev'd on other grounds Rambus* v. *F.T.C.,* 522 F.3d 456 (D.C. Cir. 2008); *Research in Motion, Ltd.* v. *Motorola, Inc.,* 644 F. Supp. 2d 788, 796–97 (N.D. Tex. 2008); *Apple Inc.* v. *Samsung Elecs. Co.,* No. 11–CV–01846, 2012 U.S. Dist. LEXIS 67102, at *27–28 (N.D. Cal. May 14, 2012).

[8] The Commission's investigation did not give it reason to believe that Motorola acted with bad faith or an intent to deceive at the time it first made these FRAND commitments to IEEE, ETSI, and ITU.

[9] *In re Negotiated Data Solutions LLC* (*N-Data*), File No. 051–0094, 2008 WL 258308 (FTC Jan. 22, 2008).

[10] *N-Data,* 2008 WL 258308, at *37 (analysis to aid public comment).

[11] *Id.* at *34–36.

to exploit the power it enjoy[ed] over those practicing the [relevant] standard and lacking any practical alternatives'' were inherently ''coercive'' and ''oppressive'' as these firms were, ''as a practical matter, locked into [the] standard.'' [12] As here, the Commission found that N-Data's opportunistic breach of its licensing commitment had the tendency of leading to higher prices for consumers and undermining the standard-setting process.

Google and MMI's opportunistic violations of their FRAND commitments have the potential to harm consumers by excluding products from the market as a result of an injunction or by leading to higher prices because manufacturers are forced, by the threat of an injunction, to pay higher royalty rates. As explained in *N-Data,* courts have traditionally viewed opportunistic breaches as conduct devoid of countervailing benefits.[13] As Judge Posner has explained, when a promisor breaches opportunistically, ''we might as well throw the book at the promisor. * * * Such conduct has no economic justification and ought simply to be deterred.'' [14] As in *N-Data,* ''the context here is in standard-setting,'' and ''[a] mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5.'' [15]

2. Unfair Act or Practice

Google and Motorola's violations of their FRAND commitments also constitute unfair acts or practices under Section 5 because they are ''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.'' [16] If these practices continue, consumers will likely pay higher prices because many consumer electronics manufacturers will pass on some portion of unreasonable or discriminatory royalties they agree to pay to avoid an injunction or exclusion order. Consumers will not be able to avoid this injury, due to the industry-wide lock-in induced by Motorola's FRAND commitments. Moreover, this practice has no apparent ''countervailing benefits,'' either to those upon whom demands have been made, or to ultimate consumers, or to competition.[17]

The Proposed Consent

The Proposed Consent Order is tailored to prevent Google—through its wholly owned subsidiary, Motorola—from using injunctions or threats of injunctions against current or future potential licensees who are willing to accept a license on FRAND terms. Under this Order, before seeking an injunction on FRAND-encumbered SEPs, Google must: (1) Provide a potential licensee with a written offer containing all of the material license terms necessary to license its SEPs, and (2) provide a potential licensee with an offer of binding arbitration to determine the terms of a license that are not agreed upon. Furthermore, if a potential licensee seeks judicial relief for a FRAND determination, Google must not seek an injunction during the pendency of the proceeding, including appeals. Nothing in the Order limits Google or a potential licensee from challenging the validity, essentiality, claim of infringement or value of the patents at issue, and either party may object to a court action on jurisdictional or justiciability grounds, or on the ground that an alternative forum would be more appropriate. The Proposed Consent Order also does not prevent Google from pursuing legal claims regarding its FRAND-encumbered SEPs other than a claim for injunctive relief, such as an action seeking damages for patent infringement. The Order does not define FRAND but requires Google to offer, and follow, specific procedures that will lead to that determination.

The Proposed Consent Order prohibits Google from revoking or rescinding any FRAND commitment that it has made or assumed unless the relevant standard no longer exists, Google no longer owns the SEPs encumbered by the FRAND commitment, or such SEPs are no longer enforceable. Motorola made FRAND commitments on the understanding that they were irrevocable, and Google, in acquiring Motorola's FRAND-encumbered SEPs, must continue to honor those agreements.

The Proposed Consent Order further prohibits Google and Motorola from continuing or enforcing existing claims for injunctive relief based on FRAND-encumbered SEPs. Google and Motorola are similarly prohibited from bringing future claims for injunctive relief based on FRAND-encumbered SEPs. For both current and future claims for injunctive relief, Google and Motorola must follow specific negotiation procedures, described below, that are intended to protect the interests of potential willing licensees while allowing Google and Motorola to seek injunctions only after the licensee refuses to engage in the negotiation process. However, if a potential licensee indisputably demonstrates that it is not willing to pay Google a reasonable fee for use of Google's FRAND-encumbered SEPs, Google is permitted by this Order to seek injunctive relief.

Outside the processes outlined in the Order, Google is permitted to seek injunctive relief only in the following four narrowly-defined circumstances: (1) The potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's FRAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's FRAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on FRAND terms. The Proposed Consent Order provides

[12] *Id.* at *37. Both Section 5 and common law precedents support the conclusion that parties engage in coercive and oppressive conduct when they breach commitments after those commitments have induced others to make relationship-specific investments and forego otherwise available alternatives. In *Holland Furnace Co.* v. *FTC,* 295 F.2d 302 (7th Cir. 1961), the Commission found a Section 5 violation when furnace salesmen dismantled furnaces for cleaning and inspection and refused to reassemble them until customers agreed to buy additional parts or services. *Id.* at 305. In *Alaska Packers' Ass'n* v. *Domenico,* 117 F. 99 (9th Cir. 1902), the Ninth Circuit likewise found that seamen acted coercively by threatening to strike unless the owners of a fishing vessel agreed to pay them wages higher than those they had negotiated before the vessel set sail. *Id.* at 102–03. In each case, the victims could have turned to alternatives *ex ante* (before their furnaces had been dismantled or their vessel had set sail for remote waters), but were ''locked in,'' and therefore vulnerable to exploitation, *ex post. Id.* at 102 (explaining that, ''at a time when it was impossible for the [vessel owners] to secure other men in their places,'' the seamen ''refused to continue the services they were under contract to perform unless the [owners] would consent to pay them more money''); Neil W. Averitt, *The Meaning of ''Unfair Acts or Practices'' in Section 5 of the Federal Trade Commission Act,* 70 Geo. L.J. 225, 253 (1981) (observing that the consumers in *Holland Furnace,* because they ''could not escape the need to restore their units to service, * * * willingly or not, * * * often had to purchase replacements from the respondent'').

[13] *N-Data,* 2008 WL 258308, at *38 (Analysis to Aid Public Comment).

[14] Richard A. Posner, Economic Analysis of Law 130 (5th ed. 1998).

[15] *N-Data,* 2008 WL 258308, at *37 (Analysis to Aid Public Comment).

[16] 15 U.S.C. 45(n) (1992). Section 45(n) codified limiting principles set forth in the 1980 FTC Policy Statement on Unfairness. *See* Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33–40 (1983), *available at http://www.ftc.gov/bcp/policystmt/ad-unfair.htm,* appended to the Commission's decision in *International Harvester,* 104 F.T.C. at 949, 1061 (1984).

[17] *N-Data,* 2008 WL 258308, at *38 (Analysis to Aid Public Comment).

Google with a form letter, attached to the Proposed Consent Order as Exhibit B, for requesting a potential licensee to affirm that it is willing to pay a FRAND rate for Google's FRAND-encumbered SEPs, and Google must provide a copy of the Proposed Consent Order along with the form letter. Google may not, however, seek an injunction simply because the potential licensee challenges the validity, value, infringement or essentiality of Google's FRAND-encumbered patents.

The Proposed Consent Order provides potential licensees with two avenues for resolving licensing disputes that involve Google's FRAND-encumbered SEPs. The first is a framework for resolution that a potential licensee may voluntarily elect. Under this path, Google and the potential licensee agree to negotiate the terms of the license for at least six (6) months (unless a license agreement is reached sooner); after the negotiation period concludes, Google may offer a license agreement, or, if the potential licensee requests a license after this negotiation period, Google must provide a proposed license within two months of the request. Google's proposed license agreement must be a binding, written offer that contains all material terms and limitations. Under this procedure, the potential licensee either accepts the proposed license or informs Google of the terms that it accept and the terms that it believes are inconsistent with Google's FRAND commitments; for each term that it disagrees with, the potential licensee must provide an alternative term that it believes is consistent with Google's FRAND commitment. The potential licensee may then go to court for a FRAND determination or propose binding arbitration to resolve the disputed provisions of Google's proposed license agreement. If a court decides that it cannot resolve the disputed terms, the parties are to go to binding arbitration to finalize the terms of the license agreement.

In the event that the potential licensee does not choose to pursue the path set forth above for resolving the licensing dispute, Google is nevertheless prohibited from seeking injunctive relief unless it takes the following steps. At least six months before seeking an injunction, Google must provide the potential licensee with the Proposed Consent Order and an offer to license Google's FRAND-encumbered patents containing all material terms; Google's offer may require that the potential licensee in turn offer Google a license for the potential licensee's FRAND-encumbered SEPs within the same standard. If no agreement is reached, at least sixty days before initiating a claim for injunctive relief, Google must offer the potential licensee the option to enter binding arbitration to determine the terms of a license agreement between the parties. The Proposed Consent Order describes the terms and conditions that Google must follow should the potential licensee accept the offer for binding arbitration, although the parties are free to agree to their own terms. Google's license offers will be irrevocable until it makes the offer to arbitrate, and Google's offers to arbitrate will be irrevocable until thirty (30) days after Google files for injunctive relief.

Under these provisions, if the potential licensee seeks a court's determination of a FRAND-license-rate between the parties instead of accepting Google's offer to arbitrate, Google may not file for injunctive relief as long as the potential licensee goes to court within seven (7) months of Google providing a license offer, or within three months of Google's offer to arbitrate. But the potential licensee must, in connection with its court action, provide Google with assurances that it will abide by the license terms set by the court and pay royalties based on a final court determination or Google will be free to seek injunctive relief. The Proposed Consent Order provides Google with a form letter, attached as Exhibit A, for requesting that the potential licensee agree to be bound by the court's FRAND determination.

Under the terms of the Proposed Consent Order, Google retains the option to file for injunctive relief against a potential licensee that itself files a claim for injunctive relief against Google based on the potential licensee's FRAND-encumbered SEPs, unless that potential licensee has followed the procedures similar to those set out by the Proposed Consent Order for Google.

Finally, the Proposed Consent Order prohibits Google from selling or assigning its FRAND-encumbered SEPs to third parties unless those parties agree to assume Google's FRAND commitments, abide by the terms of the Proposed Consent Order, and condition any further sale or assignment of Google's FRAND-encumbered SEPs on the same.

In sum, the Proposed Consent Order improves upon the commitments made by Google in February 2012 to ETSI, IEEE, and ITU to honor Motorola's prior FRAND assurances and limit its pursuit of injunctive relief in connection with Motorola's SEPs by providing clear mechanisms for Google to do so. The Order also clarifies and defines Google's FRAND commitments by prohibiting Google from seeking injunctive relief against implementers who are willing to license Google's SEPs. The Proposed Consent Order also contains standard reporting, notification, and access provisions designed to allow the Commission to monitor compliance. It terminates ten (10) years after the date the Order becomes final.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Richard C. Donohue,

Acting Secretary.

Statement of Commissioner Rosch

A majority of the Commission has voted today to issue a Complaint and Order against Google Inc. (''Google'') to remedy Google's breaking the commitments of Motorola Mobility, Inc. (''MMI'') to license standard-essential patents (''SEPs'') on terms that are fair, reasonable and non-discriminatory (''FRAND''). Google succeeded to MMI's FRAND commitments when it acquired MMI. Google has agreed in a consent decree not to seek an injunction against infringement of those SEPs and instead to license the SEPs on the FRAND terms to which MMI agreed. I concur in the Commission's decision to issue the Complaint and Order against Google. I issue this Separate Statement for four reasons.[18]

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

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

[19] *See, e.g., eBay, Inc.* v. *MercExchange, LLC,* 547 U.S. 388 (2006). The majority expressly acknowledges that in *Microsoft Corp.* v. *Motorola, Inc.,* 696 F.3d 872, 884 (9th Cir. 2012), the Ninth Circuit stated that ''[i]mplicit in such a sweeping promise is, at least arguably, a guarantee that the

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

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

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

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

There is reason to believe that seeking an injunction on a SEP would be a breach of contract actionable as an unfair act or practice.[20] More specifically, when there is a SEP, a FRAND commitment is given by the owner of the SEP in exchange for inclusion of the SEP in the standard, and seeking an injunction instead of a license if there is infringement of the SEP is a breach of that FRAND commitment.

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

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

If seeking injunctive relief were not challenged under the ''unfair acts or practices'' prong of Section 5, that would leave the ''unfair methods of competition'' prong as the only basis of liability. As discussed below, my colleagues and I disagree on which, if any, principles ought to limit liability based on that theory. My dissent to the consent decree in the Bosch case[21] was mainly based on that decree's treatment of ''unfair methods of competition'' as the sole basis of liability and the mischief that might cause.

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

Since that time, I have described several other ''limiting principles'' that should be considered.[22] For example, the requirement that a respondent have monopoly or near-monopoly power provides a limiting principle for the standalone use of Section 5 unfair methods of competition claims that the Commission could defend in an appellate court; it would also not unsettle ''settled principles of Section 2 law'' as defined by the Supreme Court case law under Section 2, *see, e.g., Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc.* v. *McQuillan,* 506 U.S. 447, 458–59 (1993), as well as the language of Section 2 itself. Absent those limiting principles, which are not identified in the Complaint, I think Section 5 is not properly circumscribed.

To be sure, the potential anticompetitive harm that is threatened when injunctive relief is sought for alleged infringement of an SEP may be especially pernicious: a false FRAND commitment not only may cripple competition for inclusion in the standard (so-called ''ex ante competition''); it may also cripple competition among those using the standard (so-called ''ex post'' competition). *See Broadcom Corp.* v. *Qualcom, Inc.,* 501 F.3d 297 (3d Cir. 2007). This may be a limiting principle. But the Complaint does not allege that

patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.'' And in *Apple, Inc.* v. *Motorola, Inc.,* No. 1:11–cv–08540, 2012 U.S. Dist. LEXIS 89960, at *45 (N.D. Ill. June 22, 2012), Judge Posner, sitting by designation as a district court judge, stated that ''I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the '898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?''

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

[21] Robert Bosch GmbH, Docket No. C–4377, FTC File No. 121 0081, *available at http://www.ftc.gov/os/caselist/1210081/index.shtm.*

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

standalone Section 5 actions are limited to especially pernicious practices, let alone the practices at issue here.

Beyond that, the Commission, with its expertise in identifying deception, brings something to the analysis that others cannot bring. As Commissioner and former Chairman Bill Kovacic observed, the FTC is a better competition agency because of its consumer protection mission.[23] The fact that the Commission has a comparative advantage in identifying deception might also be a second ''limiting principle.'' But the Complaint does not allege that either.

The Complaint does allege that Google has monopoly power. (Compl. ¶ 21.) But the Complaint does not allege monopoly power as a limitation on the Commission's use of a standalone Section 5 unfair methods of competition claim. *See* Concurring and Dissenting Statement of Commissioner Rosch, Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), *available at http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf.* This might be understandable if Google faced treble damage liability in a private action under Section 5 as long as there was any chance that Google would face an unlimited standalone Section 5 unfair competition claim. But Section 5 belongs to the Commission and the Commission alone, and even the Commission cannot seek treble damages for a standalone Section 5 unfair methods of competition violation.[24]

Fourth, I object to language in the Agreement Containing Consent Order that is tantamount to a denial of liability. Specifically, Google has refused to admit any facts other than jurisdictional facts and has refused to admit that a violation of the law has occurred. (ACCO ¶¶ 2, 4.) As I have previously explained,[25] the Commission should require respondents either to admit or to ''neither admit nor deny'' liability in Commission consent decrees, and this change should be reflected in the Commission's Rules of Practice. *See* Rule 2.32, 16 CFR 2.32.

Dissenting Statement of Commissioner Maureen K. Ohlhausen

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.[26] I dissented then in large part because I question whether such conduct, standing alone, violates Section 5 [27] and because the *Noerr-Pennington* doctrine [28] precludes Section 5 liability for conduct grounded in the legitimate pursuit of an injunction [29] or any threats incidental to it,[30] 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,*[31] 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.*[32]

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 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.[33] Although I believe strongly the courts and other stakeholders are generally better suited to define the use and treatment of SEPs,[34] if the Commission insists on

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

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

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

[26] *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.*

[27] *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/1210081/121126boschohlhausen statement.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).

[28] *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).

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

[30] *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).

[31] 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.

[32] *See* Complaint ¶¶ 31–32.

[33] 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.'').

[34] 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*

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.[35] By articulating only narrow circumstances when the Commission deems a licensee unwilling (limitations added since *Bosch*),[36] 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.[37]

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.[38] 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.[39]

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.[40] 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.''[41] 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 * * *.''[42]

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.[43] 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 * * *.''[44] 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.[45] 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.''[46] 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

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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).

[35] References to FRAND here encompass ''RAND'' or ''reasonable and non-discriminatory'' terms as well.

[36] 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.

[37] 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 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.*

[38] *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).

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

[40] *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).

[41] *Motorola,* No. 11–cv–178–bbc, slip op. at 5 (W.D. Wis. Nov. 8, 2012).

[42] *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 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.*

[43] Order at 7.

[44] Complaint ¶ 25 (emphasis added).

[45] *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.'').

[46] 15 U.S.C. 45(n).

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.[47]

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.[48] 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.[49] 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.[50] 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.

[FR Doc. 2013–00465 Filed 1–10–13; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of Section 7A of the Clayton Act.

DATES: *Effective Date:* February 11, 2013.

FOR FURTHER INFORMATION CONTACT: B. Michael Verne, Federal Trade Commission, Bureau of Competition, Premerger Notification Office, 600 Pennsylvania Avenue NW., Room 301, Washington, DC 20580, Phone (202) 326–3100.

SUPPLEMENTARY INFORMATION: Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390 (''the Act''), requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). Note that while the filing fee thresholds are revised annually, the actual filing fees are not similarly indexed and, as a result, have not been adjusted for inflation in over a decade. The new thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

Subsection of 7A	Original threshold [million]	Adjusted threshold [million]
7A(a)(2)(A)	$200	$283.6
7A(a)(2)(B)(i)	50	70.9
7A(a)(2)(B)(i)	200	283.6
7A(a)(2)(B)(ii)(i)	10	14.2
7A(a)(2)(B)(ii)(i)	100	141.8
7A(a)(2)(B)(ii)(II)	10	14.2
7A(a)(2)(B)(ii)(II)	100	141.8
7A(a)(2)(B)(ii)(III)	100	141.8
7A(a)(2)(B)(ii)(III)	10	14.2
Section 7A note: Assessment and Collection of Filing Fees[1] (3)(b)(1)	100	141.8

[47] *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.

[48] *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.*

[49] *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).

[50] *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).