

## **ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT**

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

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

promoting interoperability of competing devices, and lowering the costs of products for consumers.

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 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,

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-

(“*N-Data*”),<sup>8</sup> the Commission condemned similar conduct as “inherently ‘coercive’ and ‘oppressive.’”<sup>9</sup> 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].”<sup>10</sup> The Commission found that N-Data’s “efforts 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.”<sup>11</sup> 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

## 2. Unfair Act or Practice

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 circ

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