



Office of the Secretary

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

July 23, 2013

Re:

A. Scope of Section 5 Unfair Methods of Competition Authority

Some commenters express concern that prohibiting injunctions through a consent order alleging unfair methods of competition could harm competition by reducing incentives to innovate and to participate in standard setting.² By making a FRAND commitment, a SEP holder voluntarily chooses to license its SEPs to all implementers of the standard on fair and reasonable terms. The Commission does not believe that merely requiring firms to abide by the licensing commitments they willingly make to SSOs will reduce incentives to innovate or to participate in standard setting.

By contrast, the breach of a FRAND commitment risks substantial harm to the competitive process and consumers. This risk justifies the Commission using its authority – as it has for nearly 20 years – to prevent misuse of the standard-setting process. As the Commission has discussed previously, if companies cannot rely on a FRAND commitment to ensure access to SEPs on FRAND terms, they are less likely to invest in implementing the standard, which can harm competition, innovation and consumers. Such harm is precisely what the Commission was authorized to prevent, and precisely what this Order is intended to remedy.

The Order strikes a balance. It enables Google and implementers to negotiate a FRAND rate while protecting both parties from opportunistic behavior that is inconsistent with the FRAND agreement. An implementer can negotiate licensing terms without facing the threat of an injunction,³ but Google is not barred from responding to an implementer that misuses the protections in the Order to delay rather than facilitate entering into a FRAND license.⁴ In addition, Google has recourse if an implementer refuses to take steps to obtain a FRAND license, or to enter into a license after a FRAND rate is determined. Like any other licensor, Google also has the right to seek treble damages for willful infringement.

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The Commission disagrees with commenters who argue that the Commission's actions in this case are outside of its authority to challenge unfair methods of competition under Section 5 and lack a limiting principle. As reflected in the Commission's recent statements in *Bosch* and the Commission's initial Statement in this matter, this action is well within our Section 5 authority, which both Congress and the Supreme Court have expressly deemed to extend beyond the Sherman Act.⁵ Furthermore, Commission action in the instant case is limited to conduct in the standard-setting context, which has been a focus of Commission enforcement activity for many years because of the significant risks and benefits to competition inherent in the standard-setting process.

B. Response To Comments Regarding the *Noerr-Pennington* Doctrine

Some commenters express concern that the conduct alleged in the Complaint, and remedied through the proposed Consent Order, is covered by the *Noerr-Pennington* doctrine ("*Noerr*"), which protects the First Amendment right

C. Response To Comments Regarding the “Defensive-Use” Exception In Order

Several comments address the provision of the Order that allows Google to respond if a SEP holder violates its own FRAND commitment by seeking to enjoin the use of its SEPs in Google products.⁸ Some commenters support this provision because, as one commenter notes, it “attempts to deter firms from seeking injunctions on their SEPs against Google products and permits Google to defend its products, still subject to its RAND obligations.”⁹ However, one commenter expresses concern that the provision is overreaching, will encourage future litigation in violation of FRAND commitments, and can be interpreted as Commission support for incorporating so-called “defensive use” exceptions into FRAND commitments.

We believe this provision is reasonable and consistent with the remedial goals of the Order. Without this provision, the Order would prohibit Google from responding to Potential Licensees who violate their own FRAND commitments by seeking to exclude or enjoin Google products that incorporate the Potential Licensee’s SEPs.¹⁰ This provision is specifically tailored to the circumstances of this matter and its inclusion in the Order does not indicate a particular view about defensive-use exceptions generally.

D. Response To Comment Regarding Existing Claims For Injunctive Relief

Some commenters question whether the Order requires Google to immediately withdraw all pending legal claims that seek injunctive relief. It does not.¹¹ The Order instead protects Potential Licensees against whom Google has pending litigation by prohibiting Google from obtaining or enforcing injunctions or exclusion orders in the pending litigations. This prevents Google from misusing pending litigation to escape the procedures required by this Order, but does so without impeding the resolution of related allegations and claims, which could slow resolution of these matters and waste judicial resources.

⁸ This provision is contained in Paragraph IV.F.

⁹ “Comment Regarding the Proposed Consent Order,” International Center for Law & Economics (submitted Feb. 22, 2013).

¹⁰ Contrary to suggestions by commenters, the provision is not triggered by all injunction actions against an Android OEM based on alleged infringement of an SEP. Rather, the provision only allows Google to seek an injunction in response to an action for infringement against an Android OEM if the SEP holder seeks an injunction and alleges that software or another product supplied by Google to the OEM infringes the relevant SEPs.

¹¹ An Order is interpreted by its terms alone, and those terms are not modified by ancillary documents or statements made by the Commission or Commission staff. *See, e.g.*, Analysis to Aid Public Comment at page 1 (“This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way.”).

E. Response To Failure To Provide Supporting Facts

Some commenters express concern that documents and other information supporting the Commission's decision to issue the Order have not been made public. As is its typical process, during the course of this investigation, the Commission reviewed public and non-public information from Google and numerous third parties to reach its conclusions. However, the Commission is not at liberty to publicly divulge or discuss most of this information because it is confidential, competitively sensitive, and not subject to public disclosure by statute.

F. Modifications

After careful review of the comments and further consideration of the Order, the Commission has determined that the public interest is best served by issuing the Order in final form with certain modifications. Google has consented to these modifications, which are discussed below:

Paragraph I

The following changes have been made to definitions in the Order:

Binding Arbitration (I.D) and Qualified Escrow Agent (I.W). Subparagraphs I.D(1)-(3) now describe how binding arbitration will proceed if a Potential Licensee does not timely select a Qualified Arbitration Organization, and ensure that negotiation for the selection of arbitrators and the location for the arbitration can occur after the Qualified Arbitration Organization is selected. Further, the escrow provision in subparagraph I.D(4) has been modified and the term "Qualified Escrow Agent" added to ensure that the arbitrator has sufficient authority to set all necessary escrow terms and conditions and that escrow funds are properly held and accounted for.

License Agreement (I.Q). The term no longer includes draft or proposed agreements. The Order now refers to non-final agreements as proposed License Agreements throughout.¹²

Offer to Arbitrate (I.P and new Exhibit D). The Order now requires Google to provide an Offer to Arbitrate substantially in the form of new Exhibit D. This will ensure consistent Offers to Arbitrate that comply with the Consent Order and fairly inform the Potential Licensees about the arbitration process.¹³

¹² As a result, references to proposed License Agreements were edited in paragraphs I.Q and III.C(2).

¹³ For example, the form Offer to Arbitrate makes clear to Potential Licensees that the Order does not preclude them from challenging infringement, or raising defenses such as validity and essentiality during the arbitration process. It is important to highlight that the Order, including the arbitration provision, does not negate or alter traditional burdens of proof, or deprive implementers of their rights to seek judicial review, challenge infringement, or raise defenses such as validity, exhaustion, and essentiality. Moreover, the Order does not presume infringement by the imple13.2(plo)-4.7(itio)fr.1497 03f-22 durotion, and I.ur-4.8(rg(t)10.2(h)-on)-5(Tcr)-.5(ap)4.h(and)-.0028 Tw[(arb)-4.s1((()5muTb

Qualified Arbitration Organization (I.T and new I.DD). The WIPO Arbitration and Mediation Center has been added as a Qualified Arbitration Organization. This addition is in response to several comments noting that many Potential Licensees are international companies and recommending that a non-US based arbitration association be added to the list of Qualified Arbitration Organizations.

Qualified Recipients (I.W). This definition has been modified to define a qualified recipient as either outside counsel representing a Potential Licensee on matters relating to FRAND Patents or both the chief executive officer and (if known) legal counsel or Google's primary contact of the licensee. These changes further ensure that Google sends notices required under the Order to those with the knowledge and ability to protect the interests of the Potential Licensee.¹⁴

Third Party (I.CC). This definition now states that only wholly owned subsidiaries and majority-owned and controlled subsidiaries and joint ventures of a given Third Party are included within the definition and, thereby, clarifies that other affiliates of such Third Party are not included within the definition.

Paragraph II

Changes to paragraph II.A. clarify that Google can revoke or rescind a FRAND commitment only if the relevant standard has been finally rescinded or revoked¹⁵ and doing so will not interfere with Googl

