

Separate Statement of Commissioner Thomas Rosch Regarding
Google's Standard Essential Patent Enforcement Practices

In the Matter of Google Inc., FTC File No. 121-0120

January 3, 2012

A majority of the Commission has voted to issue a Complaint and Order against Google Inc. ("Google") to remedy Google's breach of 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.

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.) The allegation is superfluous.

simply a breach of a commitment to license 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 give 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); 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); *C. Penny Co.*, 109 F.T.C. 54 (1987) (consent decree resolving similar concerns). None 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.³ 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 *Bay, 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 course. See *id.* at 393-94. But a SEP was not involved in that case.

that a royalty is adequate compensation for a license to use that patent. How could it do otherwise?”

³ 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 in *Esanston Northwestern Healthcare Corp.*, Docket No. 9315 (Apr. 28, 2008) (requiring disputes to be resolved through final offer arbitration, sometimes referred to as “baseball arbitration”). In the event that a licensee refuses to comply with a federal court order or other neutral arbitrator’s order defining those terms, I think it is appropriate to enforce the court’s order against the licensee. (Compl. ¶ 16.)

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

well as the language of Section 2 itself. ~~As~~ ~~but~~ 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~~ ~~is~~ threatened when injunctive relief is sought for alleged infringement of an SEP ma

2, 4.) As I have previously explained,⁸ the Commission should require respondents either to admit or to “neither admit nor deny” liability. Commission consent decrees, and this change should be reflected in the Commission’s Rules of Practice. See Rule 2.32, 16 C.F.R. § 2.32.

⁸ See Dissenting Statement of Commissioner 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>