

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
In the Matter of Motorola Mobility LLC and Google Inc.
FTC File No. 121-0120
January 3, 2013

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.¹ I dissented then in large part because I
available at <http://www.ftc.gov/os/caselist/1210081/121126boschohl>

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).

³ *See* Eastern R.R. Presidents Conference

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.⁸ Although I believe strongly the courts and other stakeholders are generally better suited to define the use and treatment of SEPs,⁹ if the Commission insists on 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.¹⁰ By articulating only narrow circumstances when the Commission deems a licensee unwilling (limitations added since *Bosch*),¹¹ 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

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.¹³ 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.¹⁴

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.¹⁵ 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.”¹⁶ 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”¹⁷

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>.

¹³ 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).

¹⁴ *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 29 (W.D. Wis. Oct. 29, 2012).

¹⁵ Compare *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-17

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.²³ 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.²⁴ 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.²⁵ 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.

²³ *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>.

²⁴ *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 [intesiotema