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FTC Ends Google Investigation With a 'Slap on the Wrist'

On January 3, 2013, the Federal Trade Commission (FTC) ended its highly publicized and wide-ranging investigation into Google Inc.'s business practices with an enforcement action that has been described by some as a "slap on the wrist."[1] The enforcement action was limited to an order under which Google will not seek injunctions or exclusionary orders to enforce patent rights that are essential to certain technology standards if Google has committed to license those patents under fair, reasonable and non-discriminatory (FRAND) terms. The FTC took no formal action against Google with respect to its Internet search practices and closed its investigation with a voluntary commitment by Google to modify some of these practices. Commissioners Rosch and Ohlhausen wrote separate statements critical of the majority's views.

Google Escapes Formal Remedies for Search Conduct

The FTC considered whether Google's Internet search practices were actionable under Section 5 of the FTC Act, 15 U.S.C. ¶ 45. This statute allows the FTC to challenge "unfair methods of competition" that might not rise to the level of a Sherman Act violation. The most high-profile complaint investigated by the FTC was that Google unfairly preferred its proprietary content on its search results page and demoted the content of competitors in those results. Specifically, some "vertical" websites and search engines, which focus on narrowly defined categories of content such as shopping or travel, complained they were harmed unfairly by changes to Google's search results page that prominently displayed Google's own content and pushed links to the vertical websites farther down the page. They also complained that Google changed its search algorithms so competing content would be demoted in search results.

In a clear victory for Google, the commission unanimously concluded that the "totality of the evidence" indicates that it is "plausible" that the search display changes were adopted "to improve the quality of its search results," and that any negative impact on actual or potential competitors resulted from a lawful "vigorous rivalry." While acknowledging that changes to the search algorithm demoted competing vertical properties, such as comparison shopping websites, the resulting elevation of merchant websites in the results also could be viewed as improving the quality of search results. Noting that "product design is an important dimension of competition," the FTC concluded that an enforcement action under these circumstances would require the FTC or a court "to second guess a firm's product design decisions where plausible procompetitive justifications" were evidenced. Despite significant outside pressure from Google's competitors, the commission declined to challenge conduct that was arguably pro-competitive.

However, the commission disagreed over whether Section 5 reached two other allegations: that Google "scraped" or misappropriated the content of competing websites (*e.g.*, restaurant reviews from Yelp), passing this content off as its own, and that it placed unreasonable restrictions on advertisers using tools provided by third parties to manage advertising campaigns on Google and competing search engines,

1 Claire Cain Miller & Nick Wingfield, *An Antitrust Master Plan*, N.Y. Times, Jan. 4, 2013, at B1.

a practice called "multi-homing." Chairman Leibowitz and commissioners Brill and Ramirez, making a majority of the commission, expressed "strong concerns" about Google's "scraping" conduct, and Leibowitz and Brill also expressed "strong concerns" about the "multi-homing" conduct. In an unusual move, the FTC resolved these concerns not through a consent agreement, but by accepting a letter from Google committing to allow websites to opt-out of the scrapping and to drop the advertising restriction.

At the heart of the commission split over the scraping and multi-homing conduct was a difference over the appropriate scope and application of Section 5. Chairman Leibowitz, a strong proponent of the broad use of Section 5, emphasized the "unique combination of broad jurisdiction and limited remedies" afforded the FTC by Section 5 to challenge a wide array of potentially unfair conduct. In contrast, Commissioners Rosch and Ohlhausen stated they did not believe this conduct was actionable under the antitrust laws and cautioned that using Section 5 to challenge this conduct would be an unwarranted expansion of Section 5 untethered to any limiting principles.

In addition to the split over whether this conduct was actionable, the commission disagreed over whether it was appropriate to agree to Google's voluntary commitment to change its conduct rather than require a consent order. Commissioners Leibowitz and Brill characterized Google's letter of commitment as "enforceable," perhaps because in the letter Google states that it "agrees that a material violation of these commitments would be actionable under Section 5." Yet the majority of the commission expressly objected to the form of the resolution, which Commissioner Rosch called nonbinding and "very bad precedent." Indeed, there is little precedent for promises of future conduct to be accepted in the form of a voluntary letter. Moreover, unlike a consent decree, resolution via private commitment provides no formal opportunity for public comment. One can expect that future subjects of FTC investigations will seek to offer such letters, although the high-profile and specific circumstances of the Google investigation makes the present case unique.

FTC Sets Limits on Seeking Injunctions Relating to Standard-Essential Patents

As it did in its recent consent order with Robert Bosch GmbH,[2] the FTC used Section 5 to place limitations on Google and Motorola's ability to seek injunctive relief in patent infringement suits that involve standard-essential patents (SEPs) that are subject to a commitment to license the SEPs on FRAND terms.

The commission alleged that Motorola had promised standard setting organizations (the SSOs were ETSI, ITU and IEEE) that it would license its patents essential to standards for cellular, video codec and wireless LAN technologies on FRAND terms, thereby inducing the SSOs to incorporate Motorola's patents into the standard. In connection with its acquisition of Motorola Mobility and its patent portfolio, Google affirmatively declared that it would honor Motorola's FRAND commitments. According to the commission, Motorola and Google breached those commitments to the SSOs by seeking to enjoin implementers of its SEPs, including certain of its competitors (Apple and Microsoft), from marketing products compliant with some or all of the relevant standards. Google allegedly used the threats of exclusion orders at the International Trade Commission and injunctions in federal court to enhance its bargaining leverage against "willing licensees" and demand licensing terms that "tended to exceed the FRAND range."

A majority of the commissioners found this conduct to constitute "unfair methods of competition" and, in an expansion from *Bosch*, concluded that it also constituted "unfair acts and practices" in

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2 *In the Matter of Robert Bosch GmbH*, Docket No. C-4377, available at http://www.ftc.gov/os/caselist/1210081/index.shtm.

violation of Section 5. Unlike some federal court precedents requiring a finding of deception in the standard setting process as necessary to form the basis of unlawful conduct under Sherman Act Section 2, the FTC continues to be prepared to use Section 5 to challenge "opportunistic behavior" that exploits the leverage afforded by having a patent essential to a standard. The commission previously has asserted that seeking injunctive relief against "willing licensees" of a FRAND-encumbered SEP is a breach of the commitment to the SSO and an abuse of the standard setting process. In this case it has expanded its view of a breach to include seeking exclusion orders before the ITC, potentially nullifying a SEP holder's right to seek an exclusion order by exposing the holder to Section 5 liability. Commissioner Ohlhausen dissented, noting that any legitimate attempt to obtain an injunction from a court is likely protected petitioning conduct under the *Noerr-Pennington* doctrine.

Under the settlement, Google is barred from seeking injunctive relief for SEPs except under specific circumstances, such as the potential licensee's refusal to enter into a license or to accept the license terms set in arbitration or court. These circumstances provide some guidance on when a potential licensee can be considered "unwilling" such that pursuit of an injunction should not expose the SEP holder to Section 5 liability. The settlement also contains a detailed process for Google to follow to negotiate a FRAND license. The commission believes this process, which provides for binding arbitration or going to court for a determination of FRAND terms when the parties cannot agree on a FRAND license, could serve as a "template for the resolution of SEP licensing disputes across many industries." Because there is no clear definition for or methodology to arrive at a FRAND license term, channeling parties into arbitration could help them obtain clarity on the scope of FRAND.

While the FTC action resolves Google's issues with U.S. enforcement, the European Commission is yet to act. It is widely speculated that the EC could impose tougher sanctions.

While the FTC's action related to SEPs is consistent with its actions in Bosch, questions still remain unanswered on the exact bounds and parameters of Section 5 as applied to monopolization cases. When faced with a dominant player like Google in search, going forward it remains unclear where Section 5 starts and where it ends in relation to Section 2 of the Sherman Act. Also, acceptance of a letter agreement in this circumstance, particularly given the criticism of such by members of the Commission itself, likely means such agreements are not going to be readily accepted in other circumstances. This was clearly a unique circumstance with a novel remedy.

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