Prepared Statement of
The Federal Trade Commission

Before the
United States Senate Committee on the Judiciary

Concerning
"Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents"

Washington, D.C.
July 11, 2012

Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Commissioner of the Federal Trade Commission (FTC), and I am pleased to testify on behalf of the FTC to discuss the impact on competition of injunctive relief, including an International Trade Commission (ITC) exclusion order, to enforce standard-essential patents.[1] The testimony focuses on standard-essential patents (SEPs) that a patent holder has committed to license on reasonable and non-discriminatory (RAND) terms.[2] Simply put, the FTC is concerned that a patent holder may use the threat of an ITC exclusion order, or an injunction issued in district court, to "hold-up" or demand higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before its IP was included in the standard. Federal district courts have the tools to address this issue, by balancing equitable factors or awarding money damages,[3] and the FTC believes that the ITC likewise has the authority under its public interest obligations

[1] The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

Commissioner Rosch concurs in the submission of this testimony, but, as he has previously stated (see infra note 3), he is of the view that the issuance of injunctive relief, including an ITC exclusion order, is inappropriate where the patent holder has made a RAND commitment for a standard essential patent, even if the patentee has met its RAND obligation. In his view, a RAND pledge appears to be, by its very nature, a commitment to license; if so, seeking injunctive relief would be inconsistent with that commitment. Commissioner Rosch thus submits that if a court concludes that a party, or its predecessor in interest, made a RAND commitment with respect to a SEP, an injunction should be denied for that patent. He finds instructive the Supreme Court's eBay decision, which held that injunctive relief should be granted only when "monetary damages . . . are inadequate to compensate for [the] injury." eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). He also believes that injunctive relief is arguably contrary to the public interest when a cross-license covered by non-SEP patents is sought because injunctive relief would seem to deter innovation in those circumstances.

[2] The Testimony uses the term RAND, but the analysis applies equally to intellectual property that a patent holder has committed to license on fair, reasonable and non-discriminatory (FRAND) terms.

[3] *See, e.g.,* Apple, Inc. v. Motorola, Inc., 2012 WL 2376664, at *12-13 (N.D. Ill. June 22, 2012) (Judge Posner, sitting by designation in the Northern District of Illinois, denied injunctive relief, in part, because a RAND royalty would provide all necessary relief to the holder of a standard-essential patent committed to RAND terms).

to address this concern and limit the potential for hold-up.[4] If the ITC finds that its public interest authority is not flexible enough to prevent hold-up, then Congress should consider whether legislative remedies are necessary.

To explain the Commission's position, this statement (1) outlines the common ground between intellectual property and competition law and the Commission's prior policy work in the IP arena; (2) describes the FTC's definition of hold-up in the standard setting context; (3) explains the potential for divergent outcomes in federal district court and ITC litigation; and (4) highlights concerns that the FTC recently presented to the ITC on this issue.

I. Intellectual Property and Competition Laws Work Together to Promote Innovation

Intellectual property and competition laws share the fundamental goals of promoting innovation and consumer welfare. Patents encourage investments in innovation by enabling the patent holder to prevent others from appropriating the value of its technology without compensation. Because the patent system requires public disclosure, it also promotes the distribution of scientific and technical information that would not otherwise occur. Competition stimulates innovation by creating an incentive for the pursuit of new or better products or processes. Companies may compete to be the first to market with a new technology, or they may invent new, lower-cost, ways to meet existing needs. Competition drives such innovation most effectively if patent law protects the innovator from those that would copy its innovation. Patent law serves its intended purpose if it protects such innovation and does not inadvertently serve as a barrier to it. Modern understanding of these two bodies of law recognizes that intellectual

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[4] *See* Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, *available at* http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.

property and competition law can work together to bring new and better products, technologies, and services to consumers more efficiently and at lower prices.

For almost two decades, the Federal Trade Commission has recognized the tandem role of intellectual property and competition in its policy and enforcement efforts. For example, in 1995, the Commission and the Department of Justice issued enforcement guidelines that recognize that licensing intellectual property can facilitate integration of the licensed property with complementary factors of production, which can benefit consumers through the reduction of costs and the introduction of new products.[5] In 2003, the Commission issued its first major report on the patent system, focusing on the impact of patent quality on innovation and competition.[6] In 2007, the Commission and the Department of Justice jointly issued a report emphasizing the need to account properly for the pro-competitive benefits of patent rights in antitrust analysis and enforcement policy.[7] The 2007 Report addresses the potential for hold-up after technology has been chosen by an SSO, and discusses ways that SSOs can adopt policies to avoid or deter this result.[8] In our latest study in March 2011, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*,[9] the Commission considered how patent

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[5] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), *available at* http://www.ftc.gov/bc/0558.pdf.

[6] Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (2003) ("2003 Report"), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf. Justice Kennedy cited the 2003 Report in his concurrence in eBay v. MercExchange, L.L.C., 547 U.S. 388, 396 (2006).

[7] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights Promoting Innovation and Competition* 46-47 ("2007 Report"), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

[8] 2007 Report, Ch. 2.

[9] Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* ("2011 Report"), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

notice and remedies affect innovation, competition, and consumer welfare. In particular, we recommended a number of reforms to the laws associated with patent notice and remedies to limit the risks to innovation and competition that arise when patents are asserted after substantial investments are made to bring a product to market. We also recommended mechanisms that district courts and the ITC can use to mitigate hold-up when resolving disputes involving SEPs.[10] The 2011 report was based, in part, on a joint hearing co-sponsored by the Commission, the DOJ, and the Patent and Trademark Office.

The FTC's recent statement to the ITC builds on our earlier policy and enforcement efforts, in particular our competitive concerns with companies seeking injunctive relief for RAND-encumbered SEPs, and highlights the critical role that intellectual property and competition play in promoting innovation.

II. Standard Setting Organizations and the Potential for Hold-Up

Firms in the information technology and telecommunications industries frequently face the problem that hundreds, thousands, and sometimes hundreds of thousands of different claimed inventions need to work together in a single device and in multiple devices operating together within a system. They solve this "interoperability" problem through voluntary consensus standard setting conducted by SSOs. SSOs create standards that ensure that devices within a system will work together and communicate with each other in standardized, predictable ways. Such standards can create enormous value for consumers by increasing competition, innovation, product quality, and choice. However, incorporating patented technologies into standards also has the potential to distort competition by enabling SEP owners to use the leverage they acquire

[10] 2011 Report at 191-93 and 239-44.

as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand.

The possibility of patent hold-up derives from changes in the relative costs of technologies as a result of the standard setting process.[11] Prior to adoption of a standard, alternative technologies compete to be included in the standard, on the basis of features, quality, or price. Often there are a number of technologies, with similar attributes, available for inclusion in the standard; and while it may be possible for SSO members to negotiate licenses for SEPs before a standard is adopted, this is not a realistic option for many firms that may implement the standard. Instead, more often SSO members delay this decision and require that the owner of the technology agree to license SEPs on RAND terms as a *quid pro quo* for the inclusion of their patents in a standard. This makes it easier to adopt a standard, but also creates the potential for hold-up because it defers the negotiation on price until after the standard is adopted. Once a standard is adopted, an entire industry begins to make investments tied to the standard. Because it may not be feasible to deviate from the standard unless all or most other participants in the industry agree to do so in compatible ways, and because all of these participants may face substantial switching costs in abandoning initial designs and substituting a different technology, an entire industry may become locked in to a standard. This gives a SEP owner the ability to demand and obtain royalty payments much higher than might have been available prior to adoption of the standard because these rates need not be based on the true market value of its patents, but instead on the costs and delays of switching away from the standardized technology. In other words, as Judge Posner noted, “once a patent becomes essential to a standard, the

[11] Joseph Farrell et al., *Standard Setting, Patents and Hold-Up*, 74 ANTITRUST L.J. 603, 607-08 (2007).

patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."[12] This is one form of "hold-up."

Hold-up and the threat of hold-up can deter innovation by increasing costs and uncertainty for other industry participants, including other patent holders.[13] The threat of hold-up also may reduce the value of standard setting, leading firms to rely less on the standard setting process and depriving consumers of the substantial pro-competitive benefits of standardized technology.

RAND commitments are designed to mitigate the risk of patent hold-up, and encourage investment in the standard.[14] After a RAND commitment is made, the patent holder and the company that wants to implement the technology will typically negotiate a royalty or, in the event they are unable to agree, may seek judicial determination of a reasonable rate. A patent holder may also seek an injunction from a district court, or an exclusion order from the ITC. A royalty negotiation that occurs under threat of an injunction or an exclusion order may be weighted heavily in favor of the patent holder in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patent holder to obtain unreasonable licensing terms despite its RAND commitment, whether or not the invention is highly valuable on its own, because implementers are locked into practicing the standard. This is an even bigger problem when the hold-up creates a very high cost for a very small component of the overall product. In these ways, the threat of injunctive relief, including an exclusion order, may allow the holder of a RAND-encumbered SEP to realize

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[12] Apple, Inc. v. Motorola, Inc., 2012 WL 2376664, at *11 (N.D. Ill. June 22, 2012).

[13] *See generally* 2011 Report and 2007 Report.

[14] 2007 Report at 46-47.

royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives.[15] This can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process.

III. Differences Between Injunction Analysis in Federal District Court and Exclusion Orders in the ITC

Until 2006, permanent injunctive relief was virtually automatic following a district court's finding of infringement. Courts followed a general rule, established by the Federal Circuit, in favor of granting injunctions based on a presumption of irreparable harm.[16] In a 2006 decision, *eBay v. MercExchange, L.L.C.*, a unanimous Supreme Court rejected the presumption of irreparable harm and other categorical approaches in favor of a case-by-case application of "traditional equitable principles,"[17] including requiring proof of the patent holder's irreparable harm and the inadequacy of money damages. Under *eBay*'s equitable analysis, it may be difficult for RAND-encumbered SEP holders to show that money damages are inadequate because they have already committed to license their intellectual property on RAND terms.

In a recent decision, Judge Posner, sitting by designation in the Northern District of Illinois, applied *eBay*'s equitable analysis to find that a patent holder would not be entitled to an injunction for infringement of a FRAND-encumbered SEP. "I don't see how, given FRAND, I would be justified in enjoining [the alleged infringer] from infringing the [patent-in-suit] unless

[15] *See Apple, Inc*., 2012 WL 2376664, at *12 (quoting the FTC's explanation of the potential economic and competitive impact of injunctive relief on disputes involving SEPs).

[16] Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (citations omitted).

[17] eBay v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). The Court listed four factors that a patent holder must satisfy to obtain an injunction: "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.*

Apple refuses to pay a royalty that meets the FRAND requirement."[18] He continued, "[b]y committing to license its patents on FRAND terms, [the patent holder] committed to license the [patent--in-suit] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent."[19] The patent holder, therefore, could not satisfy *eBay*'s requirement that money damages would provide inadequate relief.[20] Because a FRAND royalty would adequately compensate a patent holder, Judge Posner determined that an injunction was not warranted in that case.[21]

Although all federal district courts must follow the equitable *eBay* injunction analysis, the ITC, another venue in which patentees may litigate, does not.[22] That discrepancy has generated concern that the ITC now is attracting litigation by patent holders that are less likely to meet the requirements to obtain an injunction in federal court, potentially leading to hold-up and any related consumer harm.[23]

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[18] *Apple, Inc*., 2012 WL 2376664, at *12; *see also eBay*, 547 U.S. at 400 (Kennedy, J., concurring) (noting that hold-up results when "an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent."); and Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 313-14 (3d Cir. 2007) (citing Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5, 10-11 (2005)) (commenting that lock-in creates the potential for anticompetitive effects and that "[i]t is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power").

[19] *Apple, Inc*., 2012 WL 2376664, at *12.

[20] *Id*. at *13 (citing *eBay*, 574 U.S. at 391-92).

[21] *Id*.

[22] Spansion, Inc. v. Int'l Trade Comm'n, 629 F.3d. 1331, 1359 (Fed. Cir. 2010) ("Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that *eBay* does not apply to Commission remedy determinations under Section 337.").

[23] Use of the ITC as a venue for patent challenges has tripled in the last ten years. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 68 (2008). Sixty-five percent of those cases proceed simultaneously in federal

The ITC is a quasi-judicial, independent federal agency established by Congress with a wide range of trade-related mandates, among them intellectual property-based import investigations. Patent holders that believe imported products infringe their patents may file a complaint with the ITC under Section 337 of the Tariff Act of 1930. The statute prohibits unfair methods of competition, including patent infringement, from goods imported into the United States.[24] The ITC has *in rem* jurisdiction over the imported goods, which allows patent holders to bring cases against foreign defendants that might otherwise be outside the jurisdiction of U.S. district courts. After finding patent infringement, the ITC may issue a cease and desist order and an exclusion order. A cease and desist order prohibits a defendant from selling infringing imported articles out of U.S. inventory.[25] An exclusion order directs the U.S. Customs Service to bar infringing articles from entry into the United States.[26] ITC cease and desist and exclusion orders are subject to review by the President, or his designee the United States Trade Representative, and appealable to the Federal Circuit. The ITC cannot award monetary damages for past infringement.

Section 337 provides a mechanism by which the ITC can limit the incidence of hold-up generated by an exclusion order and the harm to consumers that may result from such orders. It allows the ITC to consider "the public health and welfare, competitive conditions in the United

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district court. *Id*. at 64. *See also* 2011 Report at 239-240 ("Expanded use of the ITC and the parallel proceedings in district courts have led some commentators to raise concerns about inconsistent results in individual cases and incoherent development of patent policy.").

[24] 19 U.S.C. § 1337(a)(1)(A)-(B).

[25] 19 U.S.C. § 1337(f).

[26] Limited exclusion orders block importation of infringing articles by "persons determined by the Commission to be violating" Section 337. General exclusion orders ban the importation of any infringing goods, but such orders are available only in narrow circumstances. 19 U.S.C. § 1337(d)(1), (2); Kyocera Wireless Corp. v. Int'l Trade Comm'n, 545 F.3d 1340, 1356-58 (Fed. Cir. 2008).

States economy, the production of like or directly competitive articles in the United States, and United States consumers" in deciding whether to grant an exclusion order.[27] However, the ITC has rarely used this provision to deny an exclusion order.[28] Assertion of a patent against a standard in the presence of a RAND commitment, however, creates a particularly important scenario for considering the public interest, and Section 337's language should allow consideration of how an exclusion order can cause hold-up, distort "competitive conditions" by forcing negotiation under the shadow of switching costs, impair innovation, and harm "United States consumers." By incorporating these economic concepts into its remedy analysis, the ITC would move that analysis closer to that required in district courts by *eBay* and promote the beneficial and efficient operation of intellectual property and competition law.[29]

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[27] 19 U.S.C. § 1337(d)(1).

[28] Our research has revealed only three cases in the past 35 years in which the ITC has denied an exclusion order on public interest grounds. Those cases involved issues of public health or broad public interest. *See* Certain Fluidized Supporting Apparatus, Inv. No. 337-TA-182/188 (1984) (holding that it was not in the public interest to exclude specialized hospital beds for burn patients, when the domestic producer could not supply alternative beds within a reasonable time); Certain Inclined-Field Acceleration Tubes, Inv. No. 337-TA-67 (1980) (citing overriding public interest in basic atomic research using imported acceleration tubes that were superior to the domestic alternative); Automatic Crankpin Grinders, Inv. No. 337-TA-60 (1979) (finding that it was not in the public interest during the energy crisis of the late 1970s to exclude an automobile engine component that improved fuel economy, when domestic industry was unable to meet domestic demand); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 567-68 (2009). More recently, the ITC limited an exclusion order in a setting where exclusion would decrease the effectiveness of first responders during an emergency. Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, including Cellular Telephone Handsets, Inv. No. 337-TA-543 (2007).

[29] Commentators have highlighted the need to harmonize the remedial standards in the two venues. *See* Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 HARV. J.L. & TECH. 457, 486-90 (2008); Kumar, *supra* note 19, at 574-78.

IV. Potential Harm to Competition Arising from Exclusion Orders for Infringement of a RAND-Encumbered SEP

Consistent with the requirement of Congress that the FTC and ITC consult in 337 investigations,[30] on June 6, 2012, the FTC responded to the ITC's request for statements on the public interest in two Section 337 investigations.[31] The FTC explained the potential economic and competitive impact of injunctive relief for infringement of RAND-encumbered SEPs. Although the FTC rarely weighs in on ITC proceedings, it filed this statement because these investigations appear to present an issue of first impression for the ITC: the competitive implications of granting an exclusion order for infringement of a SEP that the patent holder has committed to license on RAND terms.[32]

The FTC agrees that an appropriately granted exclusion order preserves the exclusivity that forms the foundation of the patent system's incentives to innovate, and the threat of an exclusion order can provide a significant deterrent to infringement.[33] RAND-encumbered SEPs, which include commitments to license, require additional considerations before evaluating whether the exclusion order is appropriate because they present considerably different issues than patents that are not encumbered by a commitment to license. A RAND commitment provides evidence that the SEP owner planned to monetize its IP through broad licensing on

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[30] 19 U.S.C. § 1337(b)(2).

[31] The FTC did not take a position on the facts of the investigations, or whether the ITC should issue remedies. The FTC also did not address whether seeking an injunction or exclusion order for RAND-encumbered SEPs would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1-2.

[32] In its recent statement to the ITC, the FTC acknowledged that "the [ITC] has consistently held that the benefit of lower prices to consumers does not outweigh the benefit of providing complainants with an effective remedy for an intellectual property-based Section 337 violation." Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same, Inv. No. 337-TA-617, Comm'n Op. at 16 (Apr. 2009). *See also* 19 U.S.C. § 1337(d)(1), (f)(1).

[33] *See* 2003 Report at 223-28.

reasonable terms rather than through exclusive use – and thus would not likely be irreparably harmed by money damages.[34] Consistent with the proper role of the patent system, remedies that reduce the chance of patent hold-up can encourage innovation by increasing certainty for firms investing in standards-compliant products and complementary technologies. Reducing hold-up also better aligns the reward from innovation with its true value to consumers. Remedies that reduce hold-up improve the working of the standard setting system and prevent the price increases associated with patent hold-up without reducing incentives to innovate.

ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation. The FTC expressed concern to the ITC that a patent holder can make a RAND commitment as part of the standard setting process, and then seek an exclusion order for infringement of the RAND-encumbered SEP as a way of securing royalties that may be inconsistent with that RAND commitment.

The ITC has a statutory obligation to consider "competitive conditions in the United States economy . . . and United States consumers[,]"[35] and to refrain from imposing Section 337 remedies in conflict with the public interest. The FTC proposed a range of remedies that would be consistent with this obligation. For example, the ITC could find that Section 337's public interest factors support denial of an exclusion order if the holder of the RAND-encumbered SEP has not complied with its RAND obligation, which would include a duty to negotiate with

[34] *Cf.* 2011 Report at 234-35 (“A prior RAND commitment can provide strong evidence that denial of the injunction and ongoing royalties will not irreparably harm the patentee.”).

[35] 19 U.S.C. § 1337(d)(1), (f)(1).

potential licensees in good faith.[36] In the Initial Determination of Investigation No. 337-TA-752, the ITC administrative law judge found that, "the royalty rate of Motorola of 2.25%, both as to its amount and the products covered, could not possibly have been accepted by Microsoft."[37] While this approach may leave the patent holder without a remedy in the ITC, a remedy in district court would remain available. Alternatively, the ITC could delay the effective date of its Section 337 remedies until the parties mediate in good faith for damages for past infringement and/or an ongoing royalty for future licensed use, with the parties facing the respective risks that the exclusion order will (i) eventually go into effect if the implementer refuses a reasonable offer or (ii) be vacated if the ITC finds that the patent holder has refused to accept a reasonable offer.[38] The FTC urged the ITC to follow the requirements of Sections 337(d)(1) and (f)(1) and consider the impact of patent hold-up on competitive conditions and United States consumers in cases that address RAND-encumbered SEPs.

After the FTC filed its statement, the ITC indicated that it is particularly interested in the public interest issues concerning RAND commitments and exclusion orders. In late June, the ITC issued a Notice of Review in one of its investigations.[39] The Notice seeks briefing from the

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[36] *See* 2011 Report at 243 ("Assertion of a patent against a standard, especially a patent subject to a RAND commitment, creates a particularly important scenario for considering the public interest in deciding whether to grant an exclusion order" before the ITC).

[37] Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Initial Determination at 300 (May 2012); *see also id*. at 303 ("[T]he evidence supports Microsoft's conclusion that Motorola was not interested in good faith negotiations and in extending a RAND license to it.").

[38] There is precedent for such an approach at the ITC. In December 2011, the ITC found that HTC infringed valid Apple patents. "Based on consideration of competitive conditions in the United States economy," the ITC delayed the effective date of the exclusion order for four months "to provide a transition period for U.S. carriers." Certain Personal Data and Mobile Communications Devices and Related Software, Notice of the Comm'n's Final Determination Finding a Violation of Section 337 at 3 (Dec. 2011).

[39] Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Therof, Notice of Commission Decision to Review In Part A Final Initial Determination

parties on eight RAND-related topics, including whether: (1) “the mere existence of a RAND obligation preclude[s] issuance of an exclusion order[;]” (2) a patent owner that has refused to offer or negotiate a license on RAND terms should be able to obtain an exclusion order; and (3) a patent owner should be able to obtain an exclusion order if it has offered a RAND license, and that license has been rejected by the alleged infringer.[40]

The FTC believes that the ITC has the authority under its public interest obligations to resolve all of these questions, and to deny an exclusion order if the holder of the RAND-encumbered SEP has not complied with its RAND obligation. If, instead, the ITC finds that its public interest authority is not flexible enough to allow this analysis, then Congress should consider whether it should amend Section 337 to give the ITC more flexible authority to prevent hold-up.

Thank you for this opportunity to share the Commission’s views. We look forward to working with you on this important issue.

Finding a Violation of Section 337 at 4-5 (June 2012). Briefing by the parties on these questions is due on July 9, 2012. *Id*.

[40] *Id*.