

Patent Aggregation: Guidance from the DOJ's Recent Approval Of Three Major Patent Portfolio Acquisitions

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ON FEBRUARY 13, 2012, THE ANTITRUST Division of the U.S. Department of Justice announced the closure of investigations into three high-profile transactions: the acquisition of Motorola Mobility Holdings, Inc. (MMI) and its large portfolio of wireless device patents by Google Inc.; the acquisition of Nortel Networks Corporation patents by Rockstar Bidco—a partnership that included Apple Inc., Microsoft Corp. and Research in Motion Ltd. (RIM); and the acquisition of certain Novell Inc. patents by Apple. The DOJ's press release was notable both for what it said and what it did not say.

The release suggests the DOJ focused on whether the new owners of these patents would have the incentive and ability to repudiate the original owners' previous commitments to license certain standard essential patents (SEPs) under fair, reasonable, and non-discriminatory (FRAND) terms. Apparently satisfied that the answer—at least for now—was “no,” the DOJ allowed the acquisitions to go forward but warned that it would continue to monitor the use of SEPs in the wireless device industry.

In short, the DOJ used admonitions of ongoing oversight to deter what it has apparently concluded amounts to bad behavior. But such an approach raises hard questions. For example, does the threat of future enforcement of FRAND obligations on an acquiring firm actually have teeth in light of courts' application of antitrust law in this area? And why did the DOJ focus only on SEPs that may comprise but a small portion of the portfolios being acquired?

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Such questions will continue to arise as the intersection of patent and antitrust law evolves, especially with respect to the treatment of patents in standards development processes and their downstream implications. In this article, we analyze the DOJ's announcement of the closure of the three investigations against the backdrop of previous agency and private actions concerning alleged misconduct in the standard-setting context. We consider whether the DOJ's approach provides adequate safeguards against future misconduct. We also consider whether large-scale patent acquisitions of this kind have other implications for competition law, especially in light of the growing demand for technology patent portfolios.

The Deals—Details and Public Reaction

The DOJ's investigations focused on three proposed acquisitions that would result in the transfer of major patent portfolios. As outlined below, each portfolio contained patents essential to industry standards or, in one case, open-source technologies.

The first scrutinized acquisition arose from a transaction that the DOJ previously investigated and modified—the April 2011 proposed \$450 million purchase of approximately 882 patents and patent applications from Novell Inc. by CPTN Holdings LLC, a company formed by Microsoft, Oracle Corp., Apple, and EMC Corp.¹ Novell, a member of the Open Invention Network (OIN), had previously committed to cross-license its patents royalty-free for use in the open-source Linux system.² Concerned that the acquisition would negatively impact competition and innovation “in the open source software community,” the DOJ conditioned clearance upon structural changes to the original agreements among the four owners of CPTN that reduced the number of patents included in the deal and affirmed that all of the patents in question would be acquired subject to open-source licenses.³ The DOJ reserved the right to continue to investigate the distribution of the Novell portfolio to the members of CPTN.⁴ Thus, when Apple decided to acquire some of the CPTN-held patents, the DOJ decided to conduct a further investigation.⁵

The second acquisition arose from the bankruptcy auction of approximately 6000 patents and patent applications originally held by Nortel Networks Corp. The portfolio attracted a number of bidders, including Google, whose \$900 million bid was chosen in April 2011 as the “stalking horse” for the July 2011 auction. At the auction, the Rockstar Consortium, a group comprising Apple, Microsoft, RIM, Ericsson, and Sony, acquired the portfolio for a final bid of \$4.5 billion.⁶ Nortel, through its participation in standard-setting organizations (SSOs), had previously committed to license a number of the wireless-relevant SEPs in its portfolio under FRAND terms.⁷

The third transaction was Google's agreement, announced on August 15, 2011, to acquire MMI for approximately \$12.5 billion.⁸ MMI manufactures mobile devices, wireless accessories, and other video and data delivery devices,⁹ and

holds a portfolio of approximately 17,000 patents and 6800 patent applications, a number of which are SEPs included in standards governing wireless devices.¹⁰ Like Nortel, MMI had previously committed to license many of these SEPs under FRAND terms.¹¹

Rockstar's announcement of its deal to acquire Nortel's patent portfolio was met by objections from many quarters. These objections found their clearest expression in the public statement issued by the American Antitrust Institute (AAI).¹² AAI questioned the sheer size of the deal and whether the participants intended to use the patents to raise rivals' costs. AAI characterized the members of the consortium—Apple, Microsoft, and RIM—as “the three main commercial rivals” to Google's open-source Android mobile operating system.¹³ It suggested that their “concerted control” of the Nortel portfolio could increase their incentive and ability to use those patents offensively in a manner that could have a “decisively exclusionary impact on open-source competition in particular.”¹⁴ AAI argued that this risk was exacerbated by the fact that a “significant number” of the Nortel patents had been incorporated or were candidates to become incorporated in industry standards, increasing the risk of future patent holdup because of the “largely undefined and thus largely meaningless” FRAND commitments attached to those SEPs.¹⁵ AAI suggested that the members of the Rockstar consortium should bear the burden to “demonstrate any necessity for their horizontal collaboration to achieve a cognizable efficiency or other legitimate objective” and also to establish the existence of adequate safeguards to mitigate any anticompetitive risks.¹⁶

Perhaps in response to questions of the sort raised in AAI's letter, the main parties to all three transactions made representations about their SEP licensing and enforcement intentions that were made public during the investigations. Microsoft posted a statement on its blog, Google sent a letter to several SSOs that was subsequently made public, and Apple sent a letter to the European Telecommunications Standards Institute (ETSI) that was also made public.

In Microsoft's blog post, the company represented that it “will always adhere to the promises it has made . . . to make its standard essential patents available on fair, reasonable and nondiscriminatory terms.”¹⁷ It further stated that it would not seek an injunction or exclusion order against other firms on the basis of its SEPs, and that it would not require reciprocity as a condition of licensing its SEPs to other firms.¹⁸ Finally, Microsoft promised not to transfer its SEPs to other firms absent an agreement from those firms to adhere to Microsoft's SEP policies.

That same day, Google sent a letter to fourteen different SSOs, including ETSI and the Institute for Electrical and Electronics Engineers (IEEE), in which it promised to “honor MMI's existing commitments to license the acquired MMI Essential Patent Claims on RAND terms, as required by IEEE rules and consistent with MMI's longstanding practice.”¹⁹ Like Microsoft, Google committed to “use its best

efforts” to ensure that any assignees or transferees of the MMI SEPs would be contractually obligated to comply with MMI's existing FRAND commitments.²⁰ Google agreed not to seek injunctive relief on a going-forward basis, at least in disputes over future license revenues, but only if the other party forgoes challenges to patent validity, agrees to a reciprocal process governing injunctions, and escrows the full amount in dispute.²¹ Google also reserved the right to seek remedies against parties that either refuse a license under FRAND terms or breach any licensing term or commitment covering the MMI SEPs.²²

Apple's letter to ETSI²³ began by noting the “lack of consistent adherence to FRAND principles in the cellular standards arena.” It then stated Apple's view that a FRAND commitment to license its cellular SEPs binds not only the party initially making the commitment but also any entity that “otherwise acquired assets/rights from” that party. It defined “appropriate rate” as “one that is reflective of the party's portfolio of cellular standards essential patents and patent applications as compared to the total, industry-wide pool of such patents and applications.” It went on to declare that a party should apply this “appropriate rate” to a common royalty base—no higher than the industry average sales price for a basic voice and data communications device—as opposed to the price of the specific device that uses the patent at issue. Finally, it stated that “[s]eeking an injunction would be a violation of [a] party's commitment to FRAND licensing” of cellular SEPs. Apple made clear that it would forgo seeking injunctions on its cellular SEPs if the other party agreed to these “three basic elements—appropriate royalty rate, common royalty base and no injunctions.”

Agency Approval

Just a few days after the companies' statements on their SEP policies became public, the DOJ issued a press release announcing that all three acquisitions had been cleared without modification. The release highlighted the critical role that those public statements played in the DOJ's clearance decisions.

In the release, the DOJ revealed that its investigations of the MMI and Nortel patent acquisitions were limited in two key ways. First, the DOJ focused only on SEPs in the two portfolios. Second, the analysis was limited to SEPs encumbered by FRAND commitments.²⁴ The DOJ's stated concern was “whether the acquiring firms would have the incentive and ability to exploit ambiguities in the SSOs' F/RAND licensing commitments to hold up rivals, thus preventing or inhibiting innovation and competition.”²⁵

The DOJ concluded that neither transaction was likely to substantially reduce competition among wireless device industry participants. Because of their low market share in mobile platforms, both RIM and Microsoft were deemed unlikely to have the incentive to use injunctions or refusal to license to hold up competitors in that space or to charge supracompetitive royalties. Microsoft, because of its cross-

license agreements with numerous Android-based original equipment manufacturer (OEM) competitors, was viewed as even less likely to engage in such conduct.²⁶ Moreover, Microsoft “made clear that [it] would not seek to prevent or exclude rivals’ products in exercising [its] SEP rights.”²⁷

The DOJ viewed Apple and Google as more likely to be able to use the SEPs to hold up rivals. It noted that Apple might have an incentive to exclude Android-based phones from the market or drive up the cost of production for such devices by raising license fees or pursuing patent litigation. Likewise, it noted that Google might have an incentive to exercise similar tactics against Apple devices. Nevertheless, the DOJ found sufficient Apple’s representations that it would honor preexisting FRAND commitments.²⁸ Furthermore, as to the Novell patents, the DOJ called attention to Apple’s “commitment to honor Novell’s OIN licensing commitments.”²⁹

With regard to the Google-Motorola transaction, the DOJ noted that Google’s commitment to honor existing FRAND obligations and refrain from seeking injunctive relief was “less clear.” But it allowed the transaction to proceed for two reasons—one backward looking and one forward looking. First, it observed that Motorola Mobility already had “a long and aggressive history of seeking to capitalize on its intellectual property,” including “extended disputes with Apple, Microsoft and others.”³⁰ In that light, Google’s acquisition of Motorola’s SEPs was unlikely to “substantially alter current market dynamics.”³¹ Second, the DOJ extended an invitation to parties unhappy with the terms Google offers on a prospective basis, noting that “how Google may exercise its patents in the future remains a significant concern.”³²

Does the Merger Clearance Process Offer the Last Clear Chance for Antitrust Law to Intervene?

The DOJ’s clearance statement implies that it plans to rely on the threat of future enforcement to discipline licensing demands made by parties that acquire SEPs. Enforcement officials sent a clearer signal of such intent in various presentations at the recently completed Spring Meeting of the ABA Antitrust Section. This approach presents a bit of a departure from the structural remedies the agencies have favored in the past. It is not clear whether antitrust law would offer much of a remedy, however, if one of the parties to a cleared transaction subsequently makes unreasonable licensing demands. Some courts have been reluctant to embrace the idea that antitrust law enables enforcement of promises made during a standard setting process.

Prior Agency Efforts to Police the Alleged Misuse of Standard Essential Patents

The FTC has been active in this area, pursuing cases against Unocal, Dell Computer, Rambus, and N-Data for renegeing on commitments made in connection with standard-setting efforts. Only one of these cases—the action against Rambus—was ultimately tested in court, however. And the very visible

failure of the agency’s monopolization claim in that case suggests the DOJ may find it difficult to use antitrust to police licensing behavior on a prospective basis.

The D.C. Circuit rejected the FTC’s effort to turn abuse of a standard-setting process into an antitrust claim in *Rambus, Inc.*³³ In *Rambus*, the FTC had pursued a claim of monopolization under Section 2 of the Sherman Act and Section 5 of the FTC Act on the theory that deception by a participant in the development of a standard amounts to exclusionary conduct.³⁴ The FTC had found that Rambus, while participating in such a proceeding, misrepresented to the SSO that it was not seeking any new patents relevant to a computer memory standard that was under consideration, but then amended several pending patent applications based on information gained through the standard-setting process so that those applications would cover the standard.³⁵ The FTC concluded this was exclusionary conduct, likening it to the conduct found to violate Section 2 of the Sherman Act in the DOJ’s enforcement action against Microsoft.³⁶

The Court of Appeals for the D.C. Circuit reversed. It held that the FTC had “failed to demonstrate that Rambus’s conduct was exclusionary under settled principles of antitrust law.”³⁷ The court noted that “an otherwise lawful monopolist’s end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market.”³⁸ In short, the FTC “failed to demonstrate that Rambus’s conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets.”³⁹ As the court noted, “Even if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws’ reach.”⁴⁰

In the wake of *Rambus*, the FTC changed its approach to these kinds of cases. Rather than pursuing Section 2 monopolization claims based on deception in the standard-setting process, it has relied on its Section 5 unfairness authority. In *Negotiated Data Solutions LLC (N-Data)*, the FTC brought an enforcement action without any allegation of deception or exclusionary conduct during the standard-setting process.⁴¹

N-Data arose out of a representation made by the National Semiconductor Corporation during the development of the 802.3 standard for “Fast Ethernet.” National represented in writing that, if its patented technology were chosen for the standard, it would offer licenses to all requesting parties for a one-time \$1000 fee. IEEE adopted the standard with National’s technology in 1994, and it soon became widely adopted.

Several years later, National assigned several patents, including some SEPs included in the 802.3 standard, to Vertical Networks, a telecommunications company. Vertical was aware of the promise National had made and explicitly agreed to acquire the patents subject to the licenses that National had granted.⁴² Shortly after the acquisition, Vertical appeared to back away from that position. In 2002, it sent a letter to IEEE “supersed[ing]” National’s prior licensing com-

mitments, including those included in the 802.3 standard. Vertical also demanded license fees well in excess of the original one-time \$1000 fee promised by National. In 2003, Vertical assigned the patents at issue to N-Data, a non-practicing entity owned by Vertical's outside patent counsel. N-Data rejected several requests to license the National technology for the original one-time \$1000 fee, and threatened and pursued several actions against companies that refused to pay N-Data's new royalty rates.⁴³

In the analysis that accompanied the consent order, the FTC explained its legal theory. According to the agency, N-Data had engaged in an unfair method of competition by attempting to exploit ownership of Fast Ethernet SEPs. N-Data's efforts were, according to the FTC, "inherently 'coercive' and 'oppressive' with respect to firms that are, as a practical matter, locked into a standard."⁴⁴ The FTC noted that Section 5 can prohibit conduct that does "not violate the letter (or even the spirit) of the antitrust laws" as long as there is some adverse effect on competition. It concluded that this element was satisfied by the "adverse impact on prices" for the relevant technology and the threat posed to "standard-setting at IEEE and elsewhere."⁴⁵ It further noted that "[a] mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5," but activity "that threatens to undermine the standard-setting process or to render it anticompetitive" may be grounds for antitrust liability.⁴⁶

The FTC also alleged that N-Data's refusal to abide by National's original commitment was an "unfair act or practice" because it was likely to cause substantial consumer injury that was not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition.⁴⁷ The FTC alleged that Vertical and N-Data "knowingly renege[d] on National's commitment" after the industry came to rely on it, such that "the value that N-Data was able to extract from market participants was due to the opportunistic nature of its conduct rather than the value of the patents."⁴⁸ Again, the FTC noted that the lock-in effect that resulted from the adoption of National's patent in the standard along with "the established public policy of supporting efficient standard-setting activities" weighed in favor of finding a Section 5 violation.⁴⁹ Moreover, the FTC suggested that a breach of a prior commitment might not satisfy Section 5 "if the commitment were immaterial to the adoption of the standard or if those practicing the standard could exercise countermeasures to avoid injury from the breach."⁵⁰

Although the case against Rambus ultimately failed, the D.C. Circuit left open the possibility that deception of an SSO could form the basis for a Section 2 claim but only upon a showing that the probable effect of that deception was to prevent an SSO from standardizing a different technology.⁵¹ Thus, *Rambus* would not appear to be of much help to an agency seeking to bring a Section 2 action against a patent acquirer that was never involved—and therefore could not have engaged in deceptive conduct—in the standard-setting

process. Indeed, while the FTC had the opportunity to advance such an argument in *N-Data*, it declined, even in the face of comment letters urging it to add a Section 2 claim.⁵²

Private Party Efforts to Date to Enforce Promises Made During the Standard-Setting Process

Private plaintiffs have also struggled to bring monopolization claims based on broken promises made during standard-setting processes. These cases, too, suggest the DOJ may have trouble using antitrust law to enforce FRAND commitments in the future, particularly where the target of the enforcement action is not the party that made the original commitment.

In *Broadcom Corp. v. Qualcomm Inc.*,⁵³ the Third Circuit reviewed the district court's dismissal of Broadcom's antitrust claims based on Qualcomm's conduct with respect to some of its SEPs. Broadcom alleged that Qualcomm falsely induced several SSOs to include Qualcomm patents in various mobile technology standards by promising to license those patents on FRAND terms, and that Qualcomm later demanded non-FRAND royalties from its competitors and customers.⁵⁴ This conduct, according to Broadcom, gave rise to claims under Section 2 of the Sherman Act for attempted monopolization and monopoly maintenance. The district court rejected the claim.

The Third Circuit reversed. It held that a patent holder's intentionally false FRAND commitment on which an SSO relies when including that patent in a standard, combined with the patent holder's later breach of its FRAND commitment, constitutes actionable Section 2 conduct.⁵⁵ The court explained that such deception obscured the actual costs of including a particular patent in a standard and thereby increased the likelihood that the patent holder would gain monopoly power upon the adoption of the standard.⁵⁶ The court made clear, though, that "the alleged anticompetitive conduct was the intentional false promise that Qualcomm would license its [relevant patent] on FRAND terms."⁵⁷

Most recently, in *Vizio, Inc. v. Funai Electric Co.*,⁵⁸ a federal district court in the Central District of California dismissed antitrust claims pursued on a similar theory.⁵⁹ Vizio brought these claims against Funai based on Funai's relationship with a third party, Thomson Licensing S.A. Thomson held several patents relating to digital television broadcasting⁶⁰ and participated in the standard-setting process for a standard governing digital television broadcast signals.⁶¹ As part of that participation, Thomson agreed that it would license its essential patents on FRAND terms.⁶² Two of Thomson's patent claims were then included in the standard adopted by the SSO.⁶³ The standard was adopted by the Federal Communications Commission, and all televisions sold in the United States were required to be compatible with it.⁶⁴ Thomson later assigned two of the patents in question to Funai.⁶⁵ Funai then began charging much higher royalty rates for those patents than specified in Thomson's original FRAND commitment.⁶⁶

Vizio challenged the transfer of the patents under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The *Vizio* court rejected the Section 2 and Section 7 claims, holding that the plaintiff failed to allege harm to competition because the transfer of a patent does not on its own create monopoly power and enforcement of the patent did not harm competition absent allegations of bad faith.⁶⁷ The court also held that the patent acquirer's repudiation of a FRAND commitment made by the patent seller did not constitute harm to competition.⁶⁸ The court distinguished *Broadcom* because *Funai* had not participated in the standard-setting process but had merely acquired a patent from an entity that had.⁶⁹ Instead, the court relied on *Rambus* and its holding that an "otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market."⁷⁰

These cases reinforce the uncertainty over whether the DOJ has a viable avenue to challenge a future repudiation of FRAND obligations by any of the patent acquirers involved in the transactions discussed in the February 13, 2012, closing statement. *Broadcom*, like *Rambus*, addresses deceptive conduct in the standard-setting context, while *Funai* rejects the application of both Section 2 and Section 7 to patent acquirers even where fraudulent repudiation of prior FRAND commitments is alleged.

A Look Ahead

The DOJ seems content to wait and see how the acquirers of these portfolios actually use them before intervening. The DOJ's approach has some practical appeal if the antitrust problem raised by these deals is the one that the DOJ has identified—i.e., unreasonable licensing demands on standard essential patents to which some prior licensing commitment applies. But the speed with which parties to these transactions declared their intention to abide by past licensing commitments suggests that these deals are being driven by other business objectives. And these deals may raise antitrust issues other than the one that the DOJ has purported to answer.

There are some fairly obvious explanations for these acquisitions that have been discussed at length elsewhere. Two raise potential antitrust issues and two do not.

- **Patent pooling.** Bidders in these transactions may be acquiring patents that overlap (i.e., compete) with patents that they already own. Such acquisitions would trigger antitrust concerns to the extent that third parties or agencies had the information and technical expertise necessary to analyze each of the individual patents in the acquired portfolios as well as the patents owned by the purchasers.⁷¹
- **Cheap exclusion.** Bidders in these transactions may simply be looking for means to erect barriers to entry by potentially disruptive technologies. By purchasing patents in concert, the acquiring firms may be laying the groundwork for the exercise of these patents against mutual competitors.⁷² Commentators expressed concern that this goal

motivated the acquisition of the Nortel patents by a consortium of Google's competitors.⁷³

- **Patent clearance.** Bidders in these transactions may be concerned about the royalties that other purchasers would demand if they acquired the patents. This likely explains at least part of the motivation behind these transactions. The acquiring parties effectively reduce their future licensing/litigation expenses by purchasing the patents in bulk. Such an objective would not, on its face, seem to trigger antitrust concerns.⁷⁴
- **Defensive acquisitions.** Bidders in these transactions may be seeking to level the patent playing field. Relative to Microsoft and Apple, Google is a young company with few patents. Microsoft and Apple have filed numerous patent infringement cases against companies related to products and services offered by Google, including the Android Operating System. Google lost the bid for the Nortel portfolio to the Rockstar consortium, but it obtained a large trove of patents in its acquisition of MMI. In approving the deal, the EC characterized Google's rationale for the transaction as creating "patent balance."⁷⁵

There is yet another way of thinking about these acquisitions that does not appear to have received much, if any, public attention. To see it, however, the relationship between patent holders and users must be viewed through the prism of supply and demand. Patent holders can be considered as suppliers of patents and firms that use the technologies in those patents can be considered consumers of those patents. As with any market interaction, the interaction between suppliers of patents and consumers of patents is complicated. The market equilibrium is determined through the interaction of a long list of factors: the costs of securing patents and making them available to users, the existence of substitutes for a given technology (including the viability of litigation as an alternative to licensing), the terms of the license (e.g., royalty-bearing, cross-license, fully paid-up, exclusive, transferable, field of use, etc.), and demand externalities.

It is not possible, at least within the confines of this article, to develop a formal model or even a conceptual framework that captures this complexity. But for purposes of illustrating the impact of patent aggregation on the supply of patents, this complexity can be ignored. Most of the complications identified above affect demand for a given patent. But patent aggregation is a supply-side phenomenon, and the complexities identified above can be assumed away by setting demand for a patent on the part of a consumer as fixed. If the patent holder offers a license at or below a particular price, the consumer will license the patent. If the patent holder demands more than the consumer's reservation price, no deal is struck. Whether the parties reach agreement on a license is, at least on these very simple assumptions, purely a function of the costs that the patent holder faces in reaching a bargain with a given consumer.

Viewed this way, patent aggregation produces supply efficiencies that should enable a given consumer and a given

patent holder to strike a bargain. In this very simple model, these supply efficiencies are realized in the form of a reduction in the fixed costs associated with a given licensing discussion. Realization of these supply efficiencies reduces the price that the patent holder will demand and increases the likelihood that the patent holder and the patent consumer strike a deal.

But more is not always better. Patents are not an unalloyed good. Indeed, they may not be good at all. The frequently claimed harmony that exists between patent law and competition law assumes that the limited monopolies granted by the state apply only to truly innovative technologies.⁷⁶ But if that assumption is false (as it has been false before),⁷⁷ the harmony disappears. The patent system becomes simply one of many means by which private parties can extract rents from one another. As illustrated by the grossly simple model described above, the creation of large patent portfolios aggravates the problem. There are, presumably, some limits on the supply efficiencies that can be captured by the creation of ever larger patent portfolios. But subject to that constraint, those larger portfolios will capture increasing returns on any given patent. This makes each patent more valuable and creates an incentive to obtain more patents, which, of course, further aggravates the rent seeking problem inherent in the existing system.

Conclusion

Antitrust law may not have much of a role to play in policing the quality of patents issued by the patent office. But it seems clear that the aggregation of patents into large portfolios raises access cost and incentive issues that go well beyond the question of whether acquirers of these patents are going to abide by FRAND and RAND commitments made by the prior owners of these patents. Perhaps the next time a large patent portfolio changes hands, the DOJ will use that occasion to explore in more depth whether the acquisition will help or hinder the goals that antitrust law exists to advance. ■

ware. Third, all of the patents were acquired subject to two open-source licenses: the GNU General Public license, version 2; and the OIN License. Fourth, CPTN disclaimed any right to limit which patents are available under the OIN License. Fifth, CPTN and its owners agreed not to make any statements or take other actions to influence Novell or Attachmate to modify the list of patents available under the OIN License.

⁴ *Id.*

⁵ Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2.

⁶ Press Release, Rockstar Consortium, Rockstar Consortium Receives Green Light from Department of Justice: Consortium Forges Ahead with Plans to License Intellectual Property (Mar. 12, 2012), available at http://www.ip-rockstar.com/Press_Releases/RS_PR20120312.pdf.

⁷ Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2.

⁸ Press Release, Google Investor Relations, Google to Acquire Motorola Mobility: Combination Will Supercharge Android, Enhance Competition, and Offer Wonderful User Experiences (Aug. 15, 2011), available at <http://investor.google.com/releases/2011/0815.html>.

⁹ *Id.*

¹⁰ Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2.

¹¹ *Id.*

¹² Letter from Albert Foer to Christine A. Varney (July 6, 2011) [hereinafter Foer Letter], available at <http://www.antitrustinstitute.org/sites/default/files/Nortel%20letter%20to%20DOJ.7.6.11.pdf>.

¹³ *Id.* at 2.

¹⁴ This concern was echoed in a *Wall Street Journal* article that reported on the investigation, speculating that the DOJ was likely concerned with “whether there’s an agreement, implicit or explicit, among the members of the Rockstar consortium to collectively hinder the adoption of Android.” Thomas Catan, *Nortel Patent Probe Picks Up*, WALL ST. J., July 30, 2011, available at http://online.wsj.com/article/SB10001424053111903635604576476430510833852.html?mod=googlenews_wsj.

¹⁵ Foer Letter, *supra* note 12, at 2.

¹⁶ *Id.*

¹⁷ Microsoft’s Support for Industry Standards, Microsoft (Feb. 8, 2012), <http://www.microsoft.com/about/legal/en/us/IntellectualProperty/ip/licensing/ip2.aspx>.

¹⁸ *Id.*

¹⁹ Letter from Allen Lo to Gordon Day (Feb. 8, 2012), at 1, available at <http://www.google.com/press/motorola/pdf/sso-letter.pdf>. Google sent similar letters to a number of other SSOs. Google’s letter explicitly limited its commitments to the SEPs contained in the MMI patent portfolio, noting that the letter “should not be understood to restrict or constrain Google’s rights or freedom of action with respect to any other intellectual property rights.”

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.*

²³ Letter from Bruce H. Watrous, Jr. to Luis Jorge Romero Saro (Nov. 11, 2011), available at <http://www.scribd.com/doc/80899178/11-11-11-Apple-Letter-to-ETSI-on-FRAND>.

²⁴ Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2. Both Apple and Microsoft have filed formal complaints with the European Commission, alleging that Motorola Mobility’s enforcement of its SEPs is in breach of Motorola Mobility’s prior FRAND obligations. See Motorola Mobility Holdings, Inc. Annual Report (Form 10-K) (Feb. 17, 2012), available at <http://>

¹ Press Release, U.S. Dep’t of Justice, CPTN Holdings and Novell Inc. Change Deal in Order to Address Department of Justice’s Open Source Concerns (Apr. 20, 2011) [hereinafter Apr. 20, 2011 (CPTN) Release], available at <http://www.justice.gov/opa/pr/2011/April/11-at-491.html>.

² Press Release, U.S. Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012) [hereinafter Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release], available at <http://www.justice.gov/opa/pr/2012/February/12-at-210.html>.

³ Apr. 20, 2011 (CPTN) Release, *supra* note 1. The announcement outlined five changes to the agreements between CPTN and its owners. First, Microsoft agreed that it would sell back all of the patents it otherwise would have acquired to Attachmate (the company acquiring Novell) but subject to a license back to Microsoft of all of the patents involved in the original deal along with those retained by Novell. Second, EMC agreed not to acquire thirty-three patents and applications related to virtualization soft-

- investors.motorola.com/common/download/sec.cfm?companyId=ABEA-58XVPR&fid=1193125-12-67566&cik=1495569; Dave Heiner, Google: *Please Don't Kill Video on the Web*, Microsoft on the Issues (Feb. 22, 2012, at 5:00 AM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/02/22/google-please-don-t-kill-video-on-the-web.aspx. The European Commission also recently announced that it had opened an investigation into whether Motorola's actions against Apple and Microsoft constitute a failure to abide by its previous FRAND commitments. Press Release, European Commission, Antitrust: Commission Opens Proceedings Against Motorola (Apr. 3, 2012), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/345&format=HTML&aged=0&language=EN&guiLanguage=en>.
- ³² See Feb. 13, 2012 (Google, Apple, MSFT, RIM) Release, *supra* note 2. The European Commission cleared the MMI acquisition on February 13, 2012, applying the same logic—that the acquisition itself “would not significantly change the existing market situation” with respect to the SEPs in the MMI portfolio. Press Release, European Commission, Mergers: Commission Approves Acquisition of Motorola Mobility by Google (Feb. 13, 2012), [available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129&format=HTML&aged=0&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129&format=HTML&aged=0&language=EN&guiLanguage=en). EC Commission Vice President Joaquín Almunia clarified that the EC's determination was based on its assessment that MMI had already been enforcing its SEPs. Vice President Almunia warned, however, that the “decision does not mean that the merger clearance blesses all actions by Motorola in the past or all future action by Google with regard to the use of these standard essential patents,” and that the merger clearance was “without prejudice to the legality under EU antitrust law of Motorola's past and Google's future actions.” Florian Mueller, *Full Text of European Commission Vice President Joaquín Almunia's Statement on Google-Motorola, Foss Patents* (Feb. 14, 2012), <http://www.fosspatents.com/2012/02/full-text-of-european-commission-vice.html>. As noted *supra* note 31, the EU's investigation into Motorola's SEP enforcement activities is ongoing.
- ³³ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).
- ³⁴ Opinion of the Commission at 3, *Rambus Inc.*, FTC Dkt. No. 9302 (Aug. 2, 2006), [available at http://www.ftc.gov/os/adjpro/d9302/060802com_missionopinion.pdf](http://www.ftc.gov/os/adjpro/d9302/060802com_missionopinion.pdf).
- ³⁵ *Id.* at 4–5.
- ³⁶ *Id.* at 34; see also *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001).
- ³⁷ *Rambus*, 522 F.3d at 462.
- ³⁸ *Id.* at 466.
- ³⁹ *Id.* at 467.
- ⁴⁰ *Id.* at 464. There has been considerable criticism of the D.C. Circuit's decision. For example, one article argues that the *Rambus* court failed to recognize that the SSO could have chosen a different proprietary technology (with a FRAND commitment), delayed the adoption of any standard, or declined to adopt a standard, which also would have prevented Rambus from obtaining market power. George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ANTITRUST L.J. 913, 922 (2011). The article also argues that the court failed to recognize how Rambus's participation in the SSO “amplified” the monopoly position conferred by the patent, due to the lock-in effect of the standard's adoption by the SSO. *Id.*
- ⁴¹ Complaint, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Sept. 23, 2008).
- ⁴² Analysis of Proposed Consent Order to Aid Public Comment, *In re* Negotiated Data Solutions LLC, FTC File No. 051 0094 at 4 (Jan. 23, 2008).
- ⁴³ *Id.*
- ⁴⁴ *Id.* at 5.
- ⁴⁵ *Id.* The FTC cited *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), to support its view on the breadth of Section 5.
- ⁴⁶ *Id.* at 6.
- ⁴⁷ *Id.* at 6–7. For a discussion of Section 2 issues not addressed in the FTC's analysis, see M. Sean Royall & Adam J. Di Vincenzo, *The FTC's N-Data Consent Order—A Missed Opportunity to Clarify Antitrust in Standard Setting*, ANTITRUST, Summer 2008, at 83.
- ⁴⁸ *Id.* at 7.
- ⁴⁹ *Id.* at 9.
- ⁵⁰ *Id.*
- ⁵¹ *Rambus*, 522 F.3d at 463–64 (“We assume without deciding that . . . if Rambus's more complete disclosure would have caused [the SSO] to adopt a different (open, non-proprietary) standard, then its failure to disclose harmed competition and would support a monopolization claim.”).
- ⁵² Letter from Donald S. Clark to M. Sean Royall (Sept. 22, 2008), at 1, [available at http://www.ftc.gov/os/caselist/0510094/080923ndsletterroyallldell.pdf](http://www.ftc.gov/os/caselist/0510094/080923ndsletterroyallldell.pdf) (noting that the addition of a Section 2 claim was “not necessary,” despite the suggestions of several commenters).
- ⁵³ 501 F.3d 297 (3d Cir. 2007), *rev'g* *Broadcom Corp. v. Qualcomm Inc.*, 2006 U.S. Dist. LEXIS 62090 (D.N.J. Aug. 31, 2006).
- ⁵⁴ *Id.* at 304.
- ⁵⁵ *Id.* at 314.
- ⁵⁶ *Id.*
- ⁵⁷ *Id.* at 315.
- ⁵⁸ No. CV 09-0174 AHM, 2010 U.S. Dist. LEXIS 30850 (C.D. Cal. Feb. 3, 2010).
- ⁵⁹ *Id.* at *18–19.
- ⁶⁰ *Id.* at *3.
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.* at *3–4.
- ⁶⁵ *Id.* at *4.
- ⁶⁶ *Id.* at *5.
- ⁶⁷ *Id.* at *12–14.
- ⁶⁸ *Id.* at *14–17.
- ⁶⁹ *Id.* at *16–17.
- ⁷⁰ *Id.* at *15. The court allowed the Section 1 claim to proceed based on Vizio's allegation that Funai and Thomson agreed to fix prices by charging a second royalty on the assigned patents, essentially creating two monopolies where only one had previously existed. *Id.* at *18. But this analysis would seem to offer little help to the DOJ in pursuing claims against acquirers that breach FRAND commitments in the context discussed in this article.
- ⁷¹ See HERBERT HOVENKAMP ET AL., IP AND ANTITRUST 14–18 (2d ed. 2011 Supp.) (“Acquisitions by a monopolist of exclusive rights in related patents are presumptively a § 2 ‘exclusionary practice.’”).
- ⁷² Foer Letter, *supra* note 12, at 1–2.
- ⁷³ *Id.*
- ⁷⁴ Fiona Scott-Morton, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Strategic Use of Patents for Competitive Advantage, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Mar. 29, 2012).
- ⁷⁵ Case COMP/M.6381—Google/Motorola Mobility, Comm'n Decision ¶ 118 (Feb. 13, 2012), [available at http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf).
- ⁷⁶ See FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 1–2 (Mar. 2011), [available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf](http://www.ftc.gov/os/2011/03/110307patentreport.pdf).
- ⁷⁷ U.S. competition law and intellectual property law trace their origin to the Statute of Monopolies of 1623. See An Act concerning Monopolies and Dispensations with penall Lawes and the Forfeiture thereof 21 Jac. I, c. 3 (Eng.). The Statute of Monopolies repealed the patents that had been granted by Queen Elizabeth and King James I to basic elements of trade (such as the printing of playing cards), and it limited the grant of future patents to innovations in manufacturing and related technologies. *Id.*