



# Department of Justice

FOR IMMEDIATE RELEASE  
MONDAY, FEBRUARY 13, 2012  
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**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.**

WASHINGTON — The Department of Justice's Antitrust Division issued the following statement today after announcing the closing of its investigations into Google Inc.'s acquisition of Motorola Mobility Holdings Inc., the acquisitions by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (RIM) of certain Nortel Networks Corporation patents, and the acquisition by Apple of certain Novell Inc. patents:

“After a thorough review of the proposed transactions, the Antitrust Division has determined that each acquisition is unlikely to substantially lessen competition and has closed these three investigations. In all of the transactions, the division conducted an in-depth analysis into the potential ability and incentives of the acquiring firms to use the patents they proposed acquiring to foreclose competitors. In particular, the division focused on standard essential patents (SEPs) that Motorola Mobility and Nortel had committed to license to industry participants through their participation in standard-setting organizations (SSOs). The division's investigations focused on whether the acquiring firms could use these patents to raise rivals' costs or foreclose competition.

“The division concluded that the specific transactions at issue are not likely to significantly change existing market dynamics.

“During the course of the division's investigation, several of the principal competitors, including Google, Apple and Microsoft, made commitments concerning their SEP licensing policies. The division's concerns about the potential anticompetitive use of SEPs was lessened by the clear commitments by Apple and Microsoft to license SEPs on fair, reasonable and non-discriminatory terms, as well as their commitments not to seek injunctions in disputes involving SEPs. Google's commitments were more ambiguous and do not provide the same direct confirmation of its SEP licensing policies.

“In light of the importance of this industry to consumers and the complex issues raised by the intersection of the intellectual property rights and antitrust law at issue here, as well as uncertainty as to the exercise of the acquired rights, the division continues to monitor the use of SEPs in the wireless device industry, particularly in the smartphone and computer tablet markets. The division will not hesitate to take appropriate enforcement action to stop any anticompetitive use of SEP rights.”

## **BACKGROUND**

### **Google/ Motorola Mobility**

On Aug. 25, 2011, Google entered into an agreement to acquire Motorola Mobility, a manufacturer of smartphones and computer tablets and the holder of a portfolio of approximately 17,000 issued patents and 6,800 applications, including hundreds of SEPs relevant to wireless devices that Motorola Mobility committed to license through its participation in SSOs.

### **Rockstar Bidco**

Rockstar Bidco, a partnership that includes, among others, RIM, Microsoft and Apple, was formed to acquire patents at the June 2011 Nortel bankruptcy auction, and to license and distribute them to certain partners. Nortel's portfolio of approximately 6,000 patents and patent applications includes many SEPs that Nortel committed to license through its participation in SSOs and that are relevant to wireless devices (the Nortel SEPs).

### **Apple/Novell**

Apple also proposes to acquire patents held by CPTN Holdings LLC, formerly owned by Novell, following CPTN's acquisition in April 2011 of those patents on behalf of Apple, Oracle Corporation and EMC Corporation. As a member of the Open Invention Network (OIN), Novell committed to cross-license its patents on a royalty-free basis for use in the open source "Linux system," a defined term in the OIN.

### **Competitive Landscape**

Google, Apple, Microsoft and RIM have each developed mobile operating systems for smartphones and tablets. Apple and RIM manufacture and sell the smartphones and tablets that run on their proprietary mobile operating systems. In contrast, Microsoft licenses its proprietary mobile operating systems, Windows Phone 7 and Windows Mobile, to non-affiliated wireless handset original equipment manufacturers (OEMs). Google, in turn, sponsors Android, a mobile operating system that it distributes to OEMs without monetary charge under an open source license. These operating systems provide platforms for a variety of products and services offered by competing handset and tablet manufacturers, as well as, application developers.

At the end of 2011, Google's Android accounted for approximately 46 percent of the U.S. smartphone operating system platform subscribers and Apple's iOS was used by about 30 percent of subscribers. RIM and Microsoft accounted for approximately 15 percent and 6 percent of the share of smartphone subscribers, respectively.

Apple's iPad is the leading tablet in the market, although the recently introduced Android-based tablets are rapidly gaining share. Thus far, tablets running RIM's and Microsoft's operating systems have a minimal presence in the marketplace.

### **The Importance of Standard Setting in the Wireless Industry**

Today's wireless device industry, which includes smartphones and tablets, relies on complex operating systems that allow seamless interaction with wireless communications technologies while providing audio, video and computer functionalities.

To facilitate seamless interoperability, industry participants work through SSOs collectively to develop technical standards that establish precise specifications for essential components of the technology. For example, wireless devices typically implement a significant number of telecommunication and computer standards, including cellular air interface standards (e.g., 3G and 4G LTE standards), wireless broadband technologies (e.g., WiFi and WiMax) and video compression technologies (e.g., H.264). As with other industries, these standards facilitate compatibility among products and provide consumers with a wider range of products and capabilities than would otherwise be available.

Often, many technologies adopted by the SSOs fall within the scope of existing patents or patent applications. Once a patent is included in a standard, it becomes essential to the implementation of that standard, thus the term “Standard Essential Patent.” After industry participants make complementary investments, abandoning the standard can be extremely costly. Thus, after the standard is set, the patent holder could seek to extract a higher payment than was attributable to the value of the patented technology before the standard was set. Such behavior can distort innovation and raise prices to consumers. A comparable harm may also arise in situations outside of the SSO context where a patent holder’s prior actions, such as open source commitments, lead others to make complementary investments (See [U.S. Department of Justice and Federal Trade Commission, \*Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation and Competition\*, April 17, 2007 at 35-6](#)).

Most SSOs therefore require the owners of patents essential to the proposed standard that are participating in the SSO’s standard-setting activities to make disclosure and licensing commitments with respect to their essential patents. These commitments are intended to reduce the subsequent inappropriate use of the patent rights at issue, and thus prevent disputes that can inhibit innovation and competition. One common licensing requirement is to require SSO members to commit to license patented technologies essential to a standard on reasonable and nondiscriminatory (RAND) terms (for SSOs based in the United States) or on fair, reasonable and nondiscriminatory (FRAND) terms (for SSOs based outside the United States) (collectively F/RAND). In practice, however, SSO F/RAND requirements have not prevented significant disputes from arising in connection with the licensing of SEPs, including actions by patent holders seeking injunctive or exclusionary relief that could alter competitive market outcomes.

## **ANALYSIS**

The division’s investigations regarding the acquisitions of the Motorola Mobility and Nortel SEPs focused on 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 (The division’s analysis was limited to SEPs encumbered by F/RAND commitments). Such hold up could include raising the costs to rivals by demanding supracompetitive licensing rates, compelling prospective licensees to grant the SEP holder the right to use the licensee’s differentiating intellectual property, charging licensees the entire portfolio royalty rate when licensing only a small subset of the patent holder’s SEPs in its portfolio, or seeking to prevent or exclude products practicing those SEPs from the market altogether. In this analysis, the critical issue is whether the patent holder has the incentive and ability to hold up its competitors, particularly through the threat of an injunction or exclusion order. The division’s analysis focused on how the proposed transactions might change that incentive and ability to do so.

The division concluded that each of the transactions was unlikely to substantially lessen competition for wireless devices. With respect to RIM’s and Microsoft’s acquisition of Nortel patents, their low market shares in mobile platforms would likely make a strategy to harm rivals either through injunctions or supracompetitive royalties based on the acquired Nortel SEPs unprofitable. Because of their low market shares, they are unlikely to attract a sufficient number of new customers to their mobile platforms to compensate for the lost patent royalty revenues. Moreover, Microsoft has cross-license agreements in

place with the majority of its Android-based OEM competitors, making such a strategy even less plausible for it.

Apple's and Google's substantial share of mobile platforms makes it more likely that as the owners of additional SEPs they could hold up rivals, thus harming competition and innovation. For example, Apple would likely benefit significantly through increased sales of its devices if it could exclude Android-based phones from the market or raise the costs of such phones through IP-licenses or patent litigation. Google could similarly benefit by raising the costs of, or excluding, Apple devices because of the revenues it derives from Android-based devices.

The specific transactions at issue, however, are not likely to substantially lessen competition. The evidence shows that Motorola Mobility has had a long and aggressive history of seeking to capitalize on its intellectual property and has been engaged in extended disputes with Apple, Microsoft and others. As Google's acquisition of Motorola Mobility is unlikely to materially alter that policy, the division concluded that transferring ownership of the patents would not substantially alter current market dynamics. This conclusion is limited to the transfer of ownership rights and not the exercise of those transferred rights.

With respect to Apple/Novell, the division concluded that the acquisition of the patents from CPTN, formerly owned by Novell, is unlikely to harm competition. While the patents Apple would acquire are important to the open source community and to Linux-based software in particular, the OIN, to which Novell belonged, requires its participating patent holders to offer a perpetual, royalty-free license for use in the "Linux-system." The division investigated whether the change in ownership would permit Apple to avoid OIN commitments and seek royalties from Linux users. The division concluded it would not, a conclusion made easier by Apple's commitment to honor Novell's OIN licensing commitments.

In its analysis of the transactions, the division took into account the fact that during the pendency of these investigations, Apple, Google and Microsoft each made public statements explaining their respective SEP licensing practices. Both Apple and Microsoft made clear that they will not seek to prevent or exclude rivals' products from the market in exercising their SEP rights.

Apple outlined its view of F/RAND in a letter to the European Telecommunications Standards Institute (ETSI) on Nov. 11, 2011, stating among other things:

"A party who made a FRAND commitment to license its cellular standards essential patents or otherwise acquired assets/rights from a party who made the FRAND commitment must not seek injunctive relief on such patents. *Seeking an injunction would be a violation of the party's commitment to FRAND licensing.*" (emphasis supplied)

Microsoft stated publicly on Feb. 8, 2012, among other things:

"This means that Microsoft will not seek an injunction or exclusion order against any firm on the basis of those essential patents."

If adhered to in practice, these positions could significantly reduce the possibility of a hold up or use of an injunction as a threat to inhibit or preclude innovation and competition.

Google's commitments have been less clear. In particular, Google has stated to the IEEE and others on Feb. 8, 2012, that its policy is to refrain from seeking injunctive relief for the infringement of SEPs against a counter-party, but apparently only for disputes involving future license revenues, and only if the counterparty: forgoes certain defenses such as challenging the validity of the patent; pays the full disputed amount into escrow; and agrees to a reciprocal process regarding injunctions. Google's statement therefore does not directly provide the same assurance as the other companies' statements concerning the exercise of its newly acquired patent rights. Nonetheless, the division determined that the acquisition of the patents by Google did not substantially lessen competition, but how Google may exercise its patents in the future remains a significant concern.

For these reasons the division continues to have concerns about the potential inappropriate use of SEPs to disrupt competition and will continue to monitor the use of SEPs in the wireless device industry, particularly as they relate to smartphones and computer tablets. The division's continued monitoring of how competitors are exercising their patent rights will ensure that competition and innovation are unfettered in this important industry.

All three of the transactions highlight the complex intersection of intellectual property rights and antitrust law and the need to determine the correct balance between the rightful exercise of patent rights and a patent holder's incentive and ability to harm competition through the anticompetitive use of those rights.

### **Agency Cooperation**

During the course of its investigation of the Google/Motorola Mobility transaction, the Department of Justice cooperated closely with the European Commission. In addition, the Department of Justice had discussions with the Australian Competition and Consumer Commission, Canadian Competition Bureau, Israeli Antitrust Authority and the Korean Fair Trade Commission. In connection with the investigations relating to the Nortel patent assets, the division worked closely with states of New York and California and with the Canadian Competition Bureau.

### **The Antitrust Division's Closing Statement Policy**

The division provides this statement under its policy of issuing statements concerning the closing of investigations in appropriate cases. This statement is limited by the division's obligation to protect the confidentiality of certain information obtained in its investigations. As in most of its investigations, the division's evaluation has been highly fact-specific, and many of the relevant underlying facts are not public. Consequently, readers should not draw overly broad conclusions regarding how the division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. Enforcement decisions are made on a case-by-case basis, and the analysis and conclusions discussed in this statement do not bind the division in any future enforcement actions. Guidance on the division's policy regarding closing statements is available at: [www.usdoj.gov/atr/public/guidelines/201888.htm](http://www.usdoj.gov/atr/public/guidelines/201888.htm).