FRAND, SEPs, AND SECTION 5 of the FTC ACT

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On Inauguration Day 2025, FTC Commissioner Andrew Ferguson succeeded Lina Khan in the role of chair of the Federal Trade Commission.[3] Chairman Ferguson's vision of the FTC may well be different his predecessor's in a host of ways, including in his understanding of the scope of the FTC's power to challenge anticompetitive conduct under Section 5 of the FTC Act, which authorizes the FTC to challenge "unfair methods of competition."[4]

Under Chair Khan's leadership, the FTC declared that it would read its "standalone" Section 5 powers quite broadly.[5] And during her tenure, the FTC deployed standalone Section 5 widely, using it to challenge non-compete agreements, transactions alleged to facilitate the exchange of non-public competitively sensitive business information, and more.[6]

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3 FTC, *Andrew N. Ferguson Takes Over as FTC* Chairman (Jan. 22, 2025), https://bit.ly/3PSrQgZ.

4 15 U.S.C. § 45.

5 "Standalone" Section 5 refers to the FTC's power to challenge conduct beyond the reach of other antitrust laws. *See*, *e.g.*, FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* at 1, 16 (Nov. 10, 2022), http://bit.ly/3UUmiD1 (Nov. 2022 Statement); FTC, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://bit.ly/3h4kVmU ("Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."). (This 2015 statement was superseded by the FTC's 2022 statement.)

6 *See, e.g.*, Compl. *In re Prudential Sec., Inc.*, No. 221-0026, 2023 WL 155282, at *4 (FTC Jan. 4, 2023); Compl. *In re O-I Glass, Inc.*, No. 211-0182, 2023 WL 155266, at *2 (FTC Jan. 4, 2023); Compl. *In re Ardagh Grp. S.A.*, 2023 WL 155258, at *2 (FTC Jan. 4, 2023); *see also* Statement of Chair Lina M. Khan, *In the Matters of Prudential Sec., O-I Glass, Inc., and Ardagh Group, S.A.*, 2023 WL 155254, at *2 n.5 (FTC Jan. 4, 2023); Compl. *In the Matter of QEP Partners, LP*, No. 221-0212, 2023 WL 5445806, at *7 (FTC Aug. 16, 2023); *see also* Statement of Chair Lina M. Khan, *In the Matter of EQT Corp.*, 2023 WL 5445805, at *3-4 (FTC Aug. 16, 2023) ("Today's action represents the first time in decades that the Commission has challenged a deal as a standalone violation of Section 5. It should remind market participants that transactions that might not strictly violate Section 7 can still pose a risk to competition that the FTC has a statutory obligation to address."). Under Chair Khan's leadership, the FTC also stated that the improper or inaccurate listing of patents in the Food and Drug Administration's Orange Book may violate standalone Section 5 because, in the FTC's view, "[i]mproper Orange Book patent listings can delay cheaper generic alternatives from entering the market, keeping brand name drug prices artificially high." FTC, *FTC Expands Patent Listing Challenges, Targeting More than 300 Junk Listings for Diabetes, Weight Loss, Asthma and COPD Drugs* (Apr. 30, 2024), https://bit.ly/3AIFIpR. The FTC followed that up with warning letters to companies that it believed had improperly or inaccurately listed patents in the Orange Book. *Id*. "Orange Book" is the popular name for an FDA publication that "identifies drug products approved on the basis of safety and effectiveness by the Food and Drug Administration

Under Chairman Ferguson's leadership, the FTC may not embrace that broad vision for standalone Section 5. Chairman Ferguson has made it clear that in his view, Section 5 covers more than just the conduct prohibited by the Sherman and Clayton Acts.[7] But under his leadership, the FTC might not go too far beyond that scope. A challenge to conduct that is "very closely tied to the sort of conduct that the Sherman and Clayton Acts prohibit" may fit comfortably within Section 5, Chairman Ferguson has stated.[8] But he warns that "[w]hen we are sort of developing new theories of liability," courts will scrutinize whether the FTC has overstepped its bounds.

The new FTC, as a result, may well be more likely to bring the kind of standalone Section 5 cases that have traditionally passed muster . And that's important for companies watching to see how the FTC will respond to allegations of patent hold up by FRAND[9]-committed standard essential patent (SEP) holders. One of the prime ways the FTC has used its standalone Section 5 authority in the past has been to challenge anticompetitive conduct by the holders of FRAND-committed SEPs. Long before the Biden Administration, the FTC was bringing standalone Section 5 challenges against FRAND-committed SEP holders' demands for exclusion orders and injunctive relief. For example, in 2012, a majority of the FTC voted out a complaint against a patent holder that sought injunctive relief against a "willing licensee" of its FRAND-committed SEPs, in *In re Bosch*.[10] And the next year, the FTC did it again, voting out another complaint on similar grounds in *In re Motorola.*[11]

Both of those complaints focused on righting perceived competitive wrongs that can stem from patent "hold up." To understand why the FTC has challenged patent hold up, it helps to understand one of the key underpinnings of today's digital world: interoperability standards. Many electronic devices today depend on interoperability standards to function. Compliance with interoperability standards is how your new devices access WiFi and cellular networks, send data via Bluetooth, and charge via USB or Qi wireless charging—among hundreds of other standardized features.

Interoperability standards are often developed by standard-setting organizations whose membership consists of the innovators and implementers bringing powerful new devices and technologies to market. Members of standard-setting organizations are often asked to voluntarily but irrevocably agree that, if their patented technologies are selected for

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(FDA) under the Federal Food, Drug, and Cosmetic Act (the Act) and related patent and exclusivity information." FDA, *Approved Drug Products with Therapeutic Equivalence Evaluations*, https://bit.ly/4fSTZ3g.

7 *See, e.g.,* Mercatus Center, George Mason Univ., *A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott* (June 13, 2024), https://bit.ly/40F4otV.

8 *Id*.

9 FRAND refers to "fair, reasonable, and non-discriminatory" terms.

10 *In re Robert Bosch GmbH*, 2012 WL 5944820, at *3-4 (FTC Nov. 21, 2012).

11 *In re Motorola Mobility LLC & Google Inc.*, 2013 WL 124100, at *2-3 (FTC Jan. 3, 2013).

incorporation in a standard, they will license those SEPs on "reasonable and non-discriminatory" (RAND) or "fair, reasonable, and non-discriminatory" (FRAND) terms.

Trouble can arise, according to the FTC, if the holder of standard-essential FRAND-committed patents seeks an injunction or exclusion order. As the FTC explained in its 2013 complaint challenging Motorola's effort to seek injunctions and exclusion orders against manufacturers seeking to practice standard-essential, FRAND-committed patents—before a standard is set, "alternative technologies often compete to be included in the standard."[12] But that competition ends when the standard-setting group decides on the patented technology for the standard and the standard becomes widely adopted.[13] The FTC stated that, to preserve the benefits of competition, standard-setting organizations may require their members to agree to license any patents included in the standard on FRAND terms.[14] That aims to let manufacturers negotiate a competitive royalty with patent holders even once the SEP has become irreplaceable, the agency noted.[15]

As the FTC recognized, however, parties' ability to negotiate a FRAND license is undermined if the holder of a FRAND-committed patent seeks an injunction from a U.S. district court or an exclusion order from the International Trade Commission. To quote the FTC: "A licensing negotiation that occurs under threat of an injunction or exclusion order . . . is weighted toward the patentee in a fashion inconsistent with the FRAND commitment" because "[i]n the presence of an injunctive threat, the negotiation between a patentee and the implementer is linked to the implementer's potential lost revenues from the sales of the enjoined products, rather than to the market value of the patent as compared to alternatives."[16] And, the FTC determined, if the implementer passes on the hiked royalty demand in form of higher prices, consumers may suffer.[17]

Which brings us to the facts of the *Motorola* case. According to the FTC's allegations, Motorola was a member of several standard-setting organizations and had committed to license its SEPs on FRAND terms.[18] Motorola sought exclusion orders and injunctions against willing licensees of those patents.[19] In fact, the FTC alleged that the patent holder "used these threats of exclusion orders and injunctions to enhance its bargaining leverage against willing licensees

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12 *In re Motorola Mobility LLC*, 2013 WL 124100, at *2-3. *See also* DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33-56 (2007), https://bit.ly/3Nt3Q2c.

13 2013 WL 124100 at *2-3.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*. at *4.

19 *Id*.

and demand licensing terms that tended to exceed the FRAND range."[20] This, the FTC alleged, would likely raise consumer prices; deprive consumers of standard-compliant products such as mobile phones, tablet computers, and "smart" devices; undermine the standard-setting process; and raise competitors' costs.[21] And there was "no legitimate efficiency justification" that counterbalanced these harms, the agency alleged.[22] This, in sum, amounted to a violation of the standalone Section 5 provision,[23] according to a majority of the FTC.[24] As the FTC Chairman explained, this conduct did not amount to a violation of "the antitrust laws"; it was solely a violation of Section 5's prohibition of unfair methods of competition.[25] The FTC's standalone Section 5 authority, according to the agency, let the agency challenge "opportunistic conduct that takes place after a standard is adopted that tends to harm consumers and undermine the standard-setting process."[26]

The FTC brought a similar standalone Section 5 challenge involving Bosch. Bosch acquired patents from a company that had committed to license its SEPs for free or on "reasonable terms and conditions that are demonstrably free of any unfair discrimination."[27] Yet after the standards were adopted, the FTC alleged, that company sued for infringement and sought injunctive relief from "willing licensees."[28] The FTC alleged that, "by seeking injunctive relief over . . . standard-essential patents," the company "would exclude its competitors from the market" and would "have caused, or threaten to cause, harm to competition."[29]

As a result, the FTC challenged that conduct as a standalone Section 5 violation.[30] The Commission made its point clear: "Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the

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20 *Id*.

21 *Id*. at *5.

22 *Id*.

23 *Id*.; Opening Remarks of FTC Chairman Jon Leibowitz, Press Conference at 3 (Jan. 3, 2013), https://bit.ly/3Cn4tJ3.

24 *Id*. at 2.

25 *Id*. at 3.

26 *In re Motorola Mobility LLC*, 2013 WL 124100, at *45.

27 *In re Robert Bosch GmbH*, 2012 WL 5944820, at *3 (FTC Nov. 21, 2012).

28 *Id*. at *3-4.

29 *Id*. at *4.

30 *Id*. ("The conduct of SPX Service Solutions and SPX Corporation, constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45."); *see also id.* at *28 ("the threat of injunctive relief 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." (quotation marks omitted)). Commissioner Ohlhausen dissented. *Id*. at *30-32.

Commission can and will challenge this conduct as an unfair method of competition under [standalone] Section 5 of the FTC Act."[31]

"[N]ot every breach of a FRAND licensing obligation will give rise to Section 5 concerns," the FTC has cautioned.[32] For example, the agency has explained, "a mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5."[33] But when the breach "tends to undermine the standard-setting process and risks harming American consumers," the FTC has said it will act.[34]

Of course, only the FTC can bring a standalone Section 5 case.[35] Whether the agency will use Section 5 to challenge the kind of patent conduct it has challenged in the past will depend on the philosophy and priorities of the new FTC leadership. But companies today that struggle with threats of injunctions or exclusion orders on F/RAND-committed SEPs may wish to remind FTC leadership of the agency's precedents and practice in this space.

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31 *Id*. at *28.

32 *Id*. at *29.

33 *In re Negotiated Data Sols. LLC*, 2008 WL 258308, at *37 (FTC Jan. 22, 2008).

34 *In re Bosch*, 2012 WL 5944820, at *29. The FTC found it particularly noteworthy that this case involved the "standard-setting context" and a "willing licensee." *Id*. at *27-29.

35 Private litigants cannot bring a standalone Section 5 action. *See In re Robert Bosch GmbH*, 2012 WL 5995560, at *2 (FTC Jan. 1, 2012) ("There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.").