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WLF Charges That FTC Supervision Of Patent Suits Violates *Noerr-Pennington*

(In re Motorola Mobility LLC and Google Inc.)

The Washington Legal Foundation (WLF) this week urged the Federal Trade Commission (FTC) to cease its efforts to prevent certain patent holders from filing lawsuits seeking to prevent others from using their patents. In particular, WLF urged the FTC to withdraw a complaint filed against Motorola Mobility LLC and Google Inc., in which the FTC asserted that Motorola and Google engaged in “unfair methods of competition” when they filed patent infringement lawsuits seeking injunctive relief.

In formal comments filed with the FTC, WLF charged that the Commission’s complaint violates the *Noerr-Pennington* doctrine, which provides that efforts to influence public officials do not violate the antitrust laws even when the efforts are designed to eliminate competition. WLF noted that the doctrine is founded on the First Amendment right to petition the government for redress of grievances. WLF filed in response to the FTC’s request for comments on its proposed Consent Agreement with Motorola and Google.

“Patent holders often will not be entitled to enforce their patents by enjoining their competitors from using the patented invention. A court often will require them instead to accept a court-approved royalty for use of the invention,” said WLF Chief Counsel Richard Samp after filing WLF’s comments. “But the availability of injunctive relief is something for the courts to decide. The FTC is off base when it attempts to prevent patent holders from even asking the courts for an injunction,” Samp said.

The case concerns the enforcement of Standard Essential Patents (SEPs). Consumers are well served when all the products in a particular field (*e.g.*, consumer electronic products) are interoperable. For example, consumers want cell phones made by competing manufacturers to be able to work together. Accordingly, manufacturers of these products often participate in Standard Setting Organizations (SSOs). These organizations agree upon and develop standards based on shared technologies that incorporate patents. The patents so designated are referred to as SEPs. Before they designate a patented technology as the industry standard, many SSOs require the patent holder to commit to licensing its technology to all comers on FRAND (“fair, reasonable, and non-discriminatory”) terms. In the absence of such a commitment, the patent holder might be able to demand unreasonably high royalty payments from a competitor, who has little choice but to continue using SEPs once they have been named the industry standard.

Motorola holds several SEPs for consumer electronic products. In patent infringement litigation initiated by Motorola (and continued by Google after it acquired Motorola in June 2012), they alleged that their competitors had refused requests to pay reasonable royalties for use of their pat-

ents. The lawsuits sought injunctive relief against continued use of the SEPs. The FTC alleges that Motorola and Google were using the threat of injunctive relief as a means of extracting unreasonably high royalty payments from their competitors. It further alleges that the fear of such injunctions is likely to cause defendants to settle the litigation by agreeing to pay an unreasonably high royalty, and that the costs of those royalties will stifle innovation and cause higher prices for consumers.

WLF argued that while Motorola and Google may never be able to obtain injunctive relief from courts, they have a First Amendment right to ask the courts for such relief. WLF noted that in a line of cases dating back more than 50 years (referred to as the *Noerr-Pennington* doctrine), the Supreme Court has held that asking the government to adopt favored policies can never be deemed to violate the antitrust laws, no matter how anti-competitive the favored policies may be. The FTC argues that Motorola and Google implicitly waived their First Amendment right to petition the courts for injunctive relief, by promising the SSOs (in return for the SEP designation) to offer licenses on FRAND terms. WLF argued that no waiver can be deemed to have occurred; WLF noted that Motorola's FRAND commitment said nothing about seeking injunctive relief or waiving constitutional rights. WLF cited numerous Supreme Court decisions stating that constitutional rights should never be deemed waived unless there is an explicit statement to that effect.

WLF also argued that any abuses by SEP holders (*i.e.*, efforts to extort high royalties by threatening claims for injunctive relief) are unlikely have significant impact because courts have generally been quite reluctant to grant injunctive relief in such cases. Courts repeatedly have noted that patent holders are not entitled to injunctive relief in the absence of evidence that a damage award would not serve as adequate compensation for their damages, and that signing a FRAND commitment is a strong indication that the patent holder does not believe that damages would be inadequate. WLF argued that once defendants come to realize that they are highly unlikely to face injunctions, they are unlikely to agree to pay higher-than-reasonable royalties.

WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly litigates in support of private property rights, including the rights of owners of intellectual property.

For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's comments is posted on its web site, www.wlf.org.