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# Widening Scrutiny of Google's Smartphone Patents

By **STEVE LOHR**

For more than a year, the Federal Trade Commission has been conducting a broad antitrust investigation into the way Google runs its Internet search and search advertising businesses. But in recent months it has added another investigation into Google's competitive behavior.

This time, the focus is on phones — specifically, on patents that apply to lucrative smartphone technology, and the conduct of Google's Motorola Mobility subsidiary.

The F.T.C. issued subpoenas in June seeking information from Google and smartphone rivals including Apple and Microsoft, and it questioned representatives of the companies as recently as a few weeks ago, said people briefed on the investigation.

Google owns patents covering communications and data-handling technologies that are crucial for the basic operation of smartphones and tablets — what are known as standard-essential patents. The investigators are scrutinizing the company's policies for licensing these patents and suing other companies that it claims are infringing on them, said these people, who spoke on the condition that they not be identified.

Google's Motorola unit pledged to technology standards organizations that it would license the patents to others on "fair and reasonable" terms to stimulate the growth of the industry, benefiting all companies.

Bloomberg reported in June that the F.T.C. had opened an investigation in this area. Since then, the agency inquiry has progressed, and the use of standard-essential patents has been an issue in several court cases and before Congress.

Google said in a statement on Tuesday: "We take our commitments to license on fair, reasonable and nondiscriminatory terms very seriously, and we are happy to answer any questions."

Standard-essential patents, antitrust experts say, are the modern, high-tech equivalent of certain vital railway lines in the 19th century, like the Eads rail terminal and bridge


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Mississippi in St. Louis, the subject of a historic antitrust decision in 1912. Essential patents, like rail bridges, can become anticompetitive bottlenecks if the corporate owner withholds access to the technology or demands unreasonably high payment.

In Senate testimony in July, Edith Ramirez, an F.T.C. commissioner, speaking of the potential abuse of standard-essential patents, said, “Holdup and the threat of holdup can deter innovation by increasing costs and uncertainty for other industry participants, including other patent holders.”

Google is by no means the only smartphone company with standard-essential patents. But when it agreed to buy Motorola Mobility for \$12.5 billion, Google picked up 17,000 patents, including a large trove of important patents relating to wireless devices that Motorola had committed to license.

The Google move was partly to defend itself and the smartphone makers that use its Android software, after rivals had already loaded up on patents.

A few months earlier, Apple and Microsoft led a six-company consortium that outbid Google and paid \$4.5 billion for 6,000 patents sold by Nortel Networks, a bankrupt telecommunications company.

In the smartphone patent wars, Apple has relied on its patents on design and the way a person interacts with a mobile device, which are not standard-essential patents.

The F.T.C. investigation indicates that it is keeping an eye on the patent buildup by major high-tech companies. “It’s part of the larger concern that the amalgamation of these giant patent arsenals harms competition,” said William E. Kovacic, the former chairman of the F.T.C. who is now a professor at George Washington University.

“The worry,” said Mr. Kovacic, “is that the new Googles and new Apples will bump into too many patent tollbooths.”

The F.T.C. is not the only agency that has raised concerns about Google’s stewardship of standard-essential patents. The Justice Department, when it approved Google’s acquisition of Motorola and the consortium’s purchase of Nortel’s patents earlier this year, issued a statement praising the “clear commitments” by Apple and Microsoft to license standard patents on fair terms. It also noted their pledge not to try to use such patents to seek court injunctions to stop shipments of rivals’ products.

“Google’s commitments,” the Justice Department statement said, “were more ambiguous and do not provide the same direct confirmation of its standard-essential patent licensing policies.”

In June, Judge Richard A. Posner, a prominent federal appeals court judge in Chicago, dismissed a case between Apple and Motorola, finding the patent claims on both sides lacking. Judge Posner said Google's Motorola unit could not try to calculate a royalty rate on a standard-essential patent based on "the holdup value — conferred by the patent's being designated as standard-essential."

"Motorola," Judge Posner wrote, "has provided no evidence for calculating a reasonable royalty."

The greatest potential abuse of a standard-essential patent is to get a court injunction to block a product from a market, said Carl Shapiro, a former chief economist in the Justice Department's antitrust division.

Conventional patents can be used to stop shipment of an infringing product. But in the case of standard-essential patents, "you have made promises to license and that changes the game," he said. "You've agreed to attenuate your property rights to expand the industry as a whole."

Companies should not be allowed to use standard-essential patents as weapons, said Mr. Shapiro, a professor at the University of California at Berkeley. They should be barred from using such patents to seek market-blocking injunctions, and then pricing disputes should be left to the courts to decide what is fair, he said.