



January 20, 2016

Honorable Liu Jian  
Deputy Director  
National Development and Reform Commission  
Price Supervision and Anti-Monopoly Bureau  
No. 38 S. Yuetan Street  
Beijing, China 100824

Via e-mail to: [liujian@ndrc.gov.cn](mailto:liujian@ndrc.gov.cn)

**Re: IPO Comments on Draft Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (Dated December 31, 2015)**

Dear Honorable Liu Jian:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments on the draft Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (the “Guidelines”) dated December 31, 2015. We are pleased that this revised draft appears to try to strike a balance between protecting intellectual property (“IP”) and curbing abuse.

We agree with the use of the “rule of reason” analytical framework for assessing IP abuse. The Guidelines recognize how IP rights are exercised and used in complex business models to facilitate innovation and competition, but can be used in an abusive and non-competitive manner. The rule of reason analysis, which takes into account whether there has been unreasonable restraint of trade based on the particular facts at issue, is appropriate to assess parties’ actions.

We believe that clarity in the Guidelines is critical to help ensure that parties understand the difference between proper conduct and anticompetitive behavior. Ambiguity may result in unintended anti-competitive behavior if a party erroneously believes its behavior to be appropriate. In the following paragraphs, we have noted areas in which the Guidelines are well-reasoned, but misinterpretation could be avoided with some slight modifications.

As noted in our prior comments, we believe that it should be clear that an IP owner has the unfettered right to refuse licensing if the IP owner does not have a dominant market position. In section C(II)2 “Refusal to License,” the revised Guidelines state, “However, where the operators with market dominance refuse to license without proper justification, such conducts may eliminate or restrict competition.” For greater clarity with respect to the treatment of IP owners who do not have a dominant market position, we suggest adding the following sentence: “As a matter of principle, an IPR holder has the right to refuse any licensing request, unless the IP holder has a dominant market position and the refusal to license is without proper justification.” This would help

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ensure that IP owners without market dominance are able to realize the full value of their IPR in their drive to grow their business.

We are not suggesting that a party with a dominant market position may not refuse a licensing request. To the contrary, we believe it would be helpful to clarify that a party with a dominant position can refuse to license with proper justification; for example, if the potential licensee does not engage in licensing discussions, does not make a reasonable offer, or delays unreasonably (similar to the conditions mentioned regarding licensing of SEPs). Another factor should be whether it is a situation in which the underlying patent covers an aspect of a very specific product giving rise to the party being found to have a “dominant market position.” These factors may be added to item (3) to further elaborate on the concept of whether the licensee is willing to engage in a license. Such additional factors will aid in prohibiting behavior by unscrupulous licensees that tends to stifle economic development and business growth.

Further, IPO proposes that the NDRC consider including a statement that “a high market share due to the existence of a patent should not be presumed to be [a] dominant” market position. This is consistent with the Chinese Supreme People’s Court’s approach in *Beijing Qihu Technology Inc v. Tecent Technology Inc*, (Supreme People’s Court of China, 2014) in determining market dominance. Also, clarification in this section that there is no IP abuse in litigating for damages or other remedies would be helpful.

In section B(II)2 entitled “Sole Grant Back,” we believe further clarification would be helpful for proper application of this section. Although the section appears to address only the situation of an exclusive grant-back, we believe that it would be beneficial to state explicitly that “a non-exclusive grant-back shall be presumed to be pro-competitive.” We propose including this statement in section B(II)2 or in another new section to be added. This would help ensure clarity with regard to the presumptively pro-competitive effects of a non-exclusive grant-back.

We also believe it would be useful to state that “an exclusive grant-back arrangement can also have pro-competitive effects.” This statement reflects that an exclusive grant-back arrangement provides a means for the licensee and the licensor to share risks and rewards in a given licensing arrangement. We propose adding this statement before the listed factors B(II)(2.)1-4.

Exclusivity is often a result of commercial negotiations between the licensee and licensor. A primary factor to consider in determining whether such an arrangement has a pro-competitive effect is whether the licensor has offered substantial consideration in return for such exclusive grant-back. The substantial consideration should be evaluated in the context of the entire licensing transaction. Moreover, companies that produce important inventions through significant investment in research and development will want to exploit those inventions in the marketplace, including by licensing the invention to another party to commercialize. If a grant-back provision is presumed to be in violation of antitrust provisions, licensors will be less willing to license their inventions, resulting in reduced economic activity.

Section C(II)5, addresses whether similar licensees may be treated differently by a licensor with market dominance. We believe it would be helpful to add that additional factors should be considered in determining whether discriminatory treatment constitutes an abuse of market

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dominance. Specifically, useful factors may include (1) whether the characteristics of the respective licensees are comparable in terms of sales volume, total revenue, financial strength, or other characteristics; (2) how the characteristics of respective licensees can be relevant in determining whether unfair discrimination exists; and (3) how the respective licensees are required to pay for the license, whether it be by way of payment of a running royalty, an up-front payment, a combination of up-front payment and running royalty, or some other payment arrangement. Depending on the circumstances, different payment arrangements can provide evidence of unfair discrimination in the treatment of licensees.

Section C(II)6 is unclear in that it seems to imply that injunctive relief is reserved only for the owners of standard essential patents. The remedy of injunctive relief, however, is available for the owners of all patents and not merely for owners of standard essential patents. We suggest that section C(II)6 should be changed accordingly.

We again thank the NDRC for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information to assist your efforts in developing the Guidelines.

Sincerely,



Kevin H. Rhodes  
President, Intellectual Property Owners Association