



21 April 2017

Commissioner Wu Zhenguo
State Council Anti-Monopoly Commission Office
2 East ChangAn Street
Beijing 100731
P.R.China

Via email: qiuyang@mofcom.gov.cn

Re: IPO Comments on Draft Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights (Dated 23 March 2017)

Dear Commissioner Wu Zhenguo:

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 23 March 2017. We restate the IPO comments on the NDRC draft dated 31 December 2015, as further Guidelines have been drafted. A copy of our prior comments is attached for the State Council’s convenience.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO’s membership includes about 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans 50 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current intellectual property issues; providing information and educational services; and disseminating information to the general public on the importance of intellectual property rights.

We continue to 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 might 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.

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IPO would suggest further clarification around the determination of a dominant market position. Although Article 13 provides initial guidance, IPO believes there would be a benefit to adding an evaluation of ability to raise prices above competitive levels. Additionally, there would be a benefit to adding an evaluation of the ability to reduce output for a significant period of time.

In Article 7, IPO believes it should be made clear that a cross license by itself is not a restriction on competitive activity. The owner of an IPR may use different means of compensation when licensing an IPR. One such means includes cross-licensing, and is in no way representative of anti-competitive activities.

In Article 10, we believe the Guidelines should make clear that private standardization is not prohibited. Moreover, the Guidelines should make clear the potential pro-competitive effects of standardization. Private standards provide useful specifications to the public, and can be viewed on a case by case basis under a rule of reason analysis to assess competitive affect.

In Article 13, IPO suggests a clarification related to the second clause regarding standard essential patents (SEP). IPO believes imposing FRAND-like obligations for *de facto* standards is not necessary. IPO would instead suggest clarification and delineation between obligations for SEPs subject to FRAND commitment, and other patents that might cover popular technologies but which have not been the subject of a voluntary FRAND commitment.

We again thank the China State Council 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,



Mark W. Lauroesch
Executive Director



2016年1月20日

尊敬的刘健处长
国家发展和改革委员会
价格监督检查与反垄断局
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知识产权所有者协会关于2015年12月31日发布的《关于滥用知识产权的反垄断指南》草案的建议和意见

尊敬的刘健处长：

知识产权所有者协会很荣幸有机会就2015年12月31日发布的《关于滥用知识产权的反垄断指南》（“指南”）草案提供建议和意见。我们高兴地看到该草案修订稿试图在保护知识产权和遏制滥用知识产权行为之间寻找平衡。

我们赞同采用基于“合理原则”的分析框架来评估滥用知识产权行为。指南认可了在复杂的商业模式中行使和运用知识产权能起到促进创新和竞争的作用，但同时也存在滥用知识产权从而排除限制竞争的可能。在评估相关方行为时，基于合理原则进行分析并根据具体情况考虑是否对贸易存在不合理限制是恰当的。

我们认为指南的明确性对于帮助相关方理解正当行使知识产权行为和反竞争行为的区别非常关键。如存在歧义，可能会因相关方错误地认为其行为正当合理而导致非故意的反竞争行为。指南的论证严谨充分，但如就我们在下文中提及的各处稍作修改，可避免对指南内容的错误理解。

如我们在对此前一版指南草案的建议中所述，我们认为指南应明确说明不具有市场支配地位的知识产权权利人有权不受限制地拒绝许可。在第三部分第（二）条第2款“拒绝许可”中，指南修订稿指出，“但是，具有市场支配地位的经营者的无正当理由拒绝许可，可能排除、限制相关市场的竞争”。为进一步就不具有市场支配地位的知识产权权利人问题加以明确，我们建议加上以下这句话：“作为一项原则，知识产权权利人有权拒绝任何许可申请，除非该知识产权权利人具有市场支配地位并且无正当理由拒绝许可。”加上这句话有助于确保不具有市场支配地位的知识产权权利人在拓展业务时能实现其知识产权的全部价值。

我们并非提出具有市场支配地位的知识产权权利人不能拒绝许可申请。恰恰相反，我们认为指南最好明确指出，具有市场支配地位的知识产权权利人具备正当理由时可拒绝许可。举例来说，如潜在被许可人没有就许可进行磋商，没有提供

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合理报价，或者无故拖延（类似于提及的标准必要专利许可条件），具有市场支配地位的知识产权权利人可拒绝许可。另一个需要考虑的因素为，专利权人是否因其专利保护某种特定产品的某一特征而被认定为具有“市场支配地位”。可在第（3）项中补充上述内容以对被许可人是否具有接受许可意愿的概念进一步加以阐述。在指南中补充上述内容，有助于防止不负责任的被许可人实施抑制经济发展和企业成长的行为。

此外，我们建议国家发展改革委考虑添加“不应依据因专利享有的高市场份额推定市场支配地位”的表述。这和中国最高人民法院在2014年北京奇虎科技有限公司诉腾讯科技（深圳）有限公司案中采取的认定市场支配地位的方法一致。另外，最好在这部分内容中明确指出，就损失赔偿或其他救济进行诉讼不构成知识产权滥用。

我们认为，在第二部分第（二）条第2款“独占性回授”中，进一步明确相关内容将有助于该款规定的正确应用。虽然该款似乎仅涉及独占性回授的情形，但我们认为，明确指出“推定非独占性回授有利于竞争”会很有帮助。我们建议在第二部分第（二）条第2款或要添加的其他章节中加入上述表述，以便对推定非独占性回授具有促进竞争效果的内容加以明确。

此外，我们认为最好说明“独占性回授安排可能也会存在促进竞争的效果”。该等表述表明，独占性回授安排为许可人和被许可人分担许可安排下的风险和回报提供了一种方法。我们建议在第二部分第（二）条第2款列举的四个因素之前添加上述表述。

独占通常是许可人和被许可人经商业谈判达成的结果。判断该等安排是否具有促进竞争的效果时，许可人是否就该独占性回授提供实质性对价是需要考虑的一个主要因素。应结合整项许可交易对实质性对价问题进行评估。此外，公司在通过大量研发投入作出重要发明后，将希望在市场上以向其他方许可发明等方式利用该等发明实现商业化。如推定回授条款不符合反垄断规定，将降低许可人许可其发明的意愿，从而导致经济活动的减少。

第三部分第（二）条第5款就具有市场支配地位的许可人是否可对条件类似的被许可人实施差别待遇作出规定。我们认为，最好补充说明判断差别待遇是否构成滥用市场支配地位时需考虑的其他因素。具体来讲，有助于判断差别待遇的因素可能包括：（1）相关被许可人在销量、总收入、财力等方面的特点是否具有可比性；（2）相关被许可人特点与判断是否存在不正当差别待遇之间的关联；以及（3）相关被许可人需以何种方式支付许可费用，是按提成方式支付、还是采用入门费、入门费加提成或其他支付安排。根据具体情况，不同支付安排能证明对被许可人的不正当差别待遇。

第三部分第（二）条第 6 款似乎表明只有标准必要专利权人才享有禁令救济，因此其内容不够明确。禁令救济是为所有专利权人提供的救济手段，并非仅针对标准必要专利权人。我们建议对第三部分第（二）条第 6 款进行相应修改。

我们再次感谢国家发展改革委听取我们的意见。我们期待与国家发展改革委进行进一步讨论，也希望能有机会提供其他信息以协助国家发展改革委制定和完善指南。

此致！



Kevin H. Rhodes
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January 20, 2016

Honorable Liu Jian
Deputy Director
National Development and Reform Commission
Price Supervision and Anti-Monopoly Bureau
No. 38 S. Yuetan Street
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Via e-mail to: 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