

A Hitchhiker's Guide to Antitrust and Intellectual Property Guidelines

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ALMOST 22 YEARS AGO, THE U.S. antitrust enforcement agencies issued their Antitrust Guidelines for the Licensing of Intellectual Property (IPG).¹ Styled as an effort to “assist those who need to predict whether the Agencies will challenge a practice as anticompetitive,”² the decision to memorialize basic enforcement principles for the application of U.S. antitrust law to the licensing of IP has proven to be hugely influential throughout the world. Many jurisdictions have followed the United States in developing guidance for the business community on questions regarding IP rights and antitrust law. Prominent examples include the European Union,³ Canada,⁴ Korea,⁵ and Japan.⁶

In addition, several countries have recently updated their IP/antitrust guidelines to account for conduct that attracted little attention, or was not well understood, when their respective guidelines were first issued. Fair, reasonable, and non-discriminatory (FRAND) licensing of standard-essential patents (SEPs) is one example of a topic addressed in updates. Indeed, the last two years saw a flurry of revisions to account for this and other topics in countries such as Canada, Korea, and Japan, in addition to efforts by China to unify its IP/antitrust guidance.⁷ India, too, entered the debate, publishing its first contribution to the discussion about SEPs and FRAND licensing terms in March 2016.⁸

Not to be outdone, the U.S. agencies proposed their first update to the U.S. IPG in August 2016 and then issued revised guidelines on January 12, 2017.⁹ The updates are modest, however, and could leave the impression that leadership on IP/antitrust guidance has shifted from the U.S. to other jurisdictions.

The revised IPG reaffirm basic principles that have governed the antitrust analysis of licensing agreements for many

years, but offer only minor substantive modifications, primarily to account for changes in law and enforcement practices since 1995. For example, the new guidelines incorporate Supreme Court rulings acknowledging the longstanding agency view that a patent does not necessarily confer market power on the patentee; clarifying that a unilateral refusal to assist competitors generally does not result in antitrust liability; and holding that resale price maintenance agreements are not per se illegal and are evaluated under the rule of reason.¹⁰ The revised IPG also refer to “innovation markets,” a concept introduced in 1995, as “research and development markets” going forward.¹¹ The revised guidelines do not, however, address more controversial current topics at the intersection of antitrust and IP law, such as the antitrust treatment of SEPs or of patent settlements.

Some observers have expressed concern that the U.S. agencies’ reserved approach to guideline revisions may “delay or forestall the issuance of a much-needed major update, and that it might be misinterpreted as a departure from guidance that the Agencies have previously offered.”¹² As these critics also have noted, however, the U.S. agencies have addressed many of the more cutting-edge IP/antitrust topics through mechanisms other than guidelines, including various forms of “secondary guidance,” such as reports,¹³ workshops,¹⁴ and published letters detailing enforcement intentions in specific matters.¹⁵ Accordingly, the concerns appear to be more about U.S. officials’ decision not to integrate previous policy statements into one reference document, than about the U.S. agencies’ substantive leadership on controversial IP/antitrust issues in general.¹⁶ The practical implication is that businesses will continue to consult a range of sources when encountering problems at the intersection of U.S. antitrust and IP law.

While agencies around the world have taken different approaches to providing guidance on IP/antitrust issues to the business community, their efforts nevertheless have created a “common core” of antitrust and IP doctrinal and economic principles about which there is substantial consensus. Outside of this common core, guidance on conduct that implicates both antitrust and IP law varies, both substantively and in terms of whether the guidance is contained in a single source or a patchwork of source materials. This article provides an

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overview of the issues that comprise the common core, the topics about which there is still considerable debate, and the different source materials that competition agencies use to provide guidance.

The Basics: An Emerging “Common Core” of Antitrust and IP Guidance

Most jurisdictions that have issued guidance on the IP and antitrust interface agree on a “common core” of three basic analytical principles.¹⁷

Normal Antitrust Analysis Applies to IP Rights. IP guidelines in most jurisdictions affirm that IP rights are subject to antitrust scrutiny, and that the antitrust analysis of the exercise of IP rights generally follows the analytical approach applicable to other property rights. For example, the U.S. guidelines state that the agencies “apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right.”¹⁸ U.S. courts have endorsed this approach.¹⁹

The EU Technology Transfer Guidelines explain that “[t]he fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention.”²⁰ Accordingly, the factors set forth in the EU TTG for assessing technology transfer agreements closely resemble the factors used to evaluate other types of conduct.²¹ In assessing the competitive effects of restrictive license agreements, the European Commission will consider “(a) the nature of the agreement; (b) the market position of the parties; (c) the market position of competitors; (d) the market position of buyers on the relevant markets; (e) entry barriers; and (f) maturity of the market.”²²

Similarly, guidelines issued by the Canadian Competition Bureau state that “the [Competition] Act generally applies to conduct involving IP as it applies to conduct involving other forms of property.”²³ These principles also are reflected in draft guidance published by the NDRC in China. The first “law enforcement principle” of the draft is that “[i]n the anti-monopoly regulation on the behavior of exercising IPR, the IPR shall be subject to the same regulatory framework as other property rights, and the basic analytical framework of the [Anti-Monopoly Law] shall be followed.”²⁴

Ownership of IP Rights Does Not, on Its Own, Convey Market Power. In their 1995 guidelines, the U.S. agencies observed that while it was unclear whether IP rights confer market power, they would not “presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”²⁵ Eleven years later, the Supreme Court adopted this approach, stating that “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.”²⁶

Other jurisdictions have adopted the U.S. position, expressly or by implication providing that the ownership of

Other topics at the antitrust and IP intersection—often, but not always involving more recent developments—are less universally covered by major guidelines, and jurisdictions have differed in how they have incorporated these topics into primary or secondary guidance.

Prominent unsettled issues today are the innovation market concept, settlements involving IP, standard setting, and conduct of non-practicing entities.

IP rights, and the corresponding rights to exclude, do not, standing alone, convey market power. For example, the EU Technology Transfer Guidelines’ detailed discussion regarding the definition of relevant markets and the calculation of market shares presupposes that patent owners are not presumed to have market power.²⁷ The Korean guidelines concur, stating that “[a]n IPR owner is not immediately deemed to have market dominance simply because an exclusive or monopolistic right to use is granted for the IPR.”²⁸ More recently, draft guidelines issued by China’s NDRC state that an “undertaking shall not be directly presumed to hold a dominant market position in the relevant market only based on the fact that it owns the IPR.”²⁹

Licensing Is Generally Procompetitive and Subject to the Rule of Reason. Many guidelines also affirm the principle that licensing is typically procompetitive and, therefore, subject to a rule of reason or similar balancing analysis. The U.S. IPG have long endorsed this principle, devoting an entire section to the “procompetitive benefits of licensing.”³⁰ The IPG explain that the “Agencies’ general approach in analyzing a licensing restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.”³¹

Similarly, the EU Technology Transfer Guidelines state that even license agreements that restrict competition in some way often produce procompetitive effects that may outweigh the harm to competition.³² The Korean guidelines, too, apply a rule of reason standard in balancing the “effectiveness” of the exercise of an IP right, stating that “[i]f, the effect of increasing efficiency exceeds the anti-competitive effect as the result of the exercise of the IPR, it may be judged that such exercise of IPR is not in violation of the FTL.”³³

The Japanese guidelines emphasize the potential procompetitive benefits of the IP laws, discussing them in the very first section of the guidelines. The IP laws

may encourage entrepreneurs to conduct research and development and may serve as a driving force for creating new

technologies and products based on the technologies. . . . In addition, technology transactions assist in promoting competition by enabling increased efficiency in the use of technology through combinations of different technologies, the formation of new markets for technologies and their associated products, as well as an increase of competing parties.³⁴

Finally, in China, the NDRC draft guidance states that “[w]hen conducting analysis on the behavior of exercising IPR that may eliminate or restrict competition, the enforcement agencies shall give full consideration of the positive effects of exercising IPR on competition and innovation on an ad hoc basis.”³⁵

The Finer Points: Use of “Secondary Guidance” for Developing and Frequently Encountered Questions

Antitrust and IP guidelines are not the only source of guidance about a competition agency’s approach to issues at the intersection of antitrust and IP law. That is especially true in the United States, where multiple sources contain and reflect the agencies’ enforcement perspectives on conduct implicating both antitrust and IP.

First, there is case law.³⁶ The business community and agencies follow and consider relevant judicial precedent, and agencies may adjust their enforcement intentions to account for changes in the case law. The changes to the U.S. IPG provide recent examples. In accord with the Supreme Court’s 2004 decision in *Trinko*, the revisions would make it explicit that “[t]he antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors.”³⁷ The revisions also state that “the Agencies will apply a rule of reason analysis to price maintenance in intellectual property licensing agreements,” a reflection on the Supreme Court’s 2007 decision in *Leegin*.³⁸ Finally, the revised guidelines recognize that *Illinois Tool Works* made clear that a patent does not necessarily confer market power on its owner.³⁹

Secondary Guidance in the U.S. and Abroad. Another mechanism agencies use to convey developing analytical and enforcement principles is to provide “secondary guidance” through reports, speeches, press releases, workshops, and other public documents. These materials often are less formal than guidelines, but nevertheless offer insight into the approach of at least current agency leadership and are important sources for practitioners seeking to predict enforcement intentions. Especially in the United States, where the IPG are more than 20 years old and the recent revisions are modest, this secondary guidance is an important tool for businesses to evaluate questions related to antitrust and IP.

The U.S. agencies generally provide more frequent secondary guidance than other competition agencies. As three former senior agency economists have noted, “The DOJ and FTC have done much to chart the IP Licensing shoals over the past 20 years” by issuing policy statements and similar publicly available materials.⁴⁰

In contrast to the U.S.’s heavy reliance on secondary guidance, other jurisdictions are more likely to update their guid-

lines on a more or less regular basis. For example, the European Union issued its updated technology transfer guidelines in 2010, only six years after they were first issued. Similarly, Canada, Japan, and Korea have all recently updated their guidelines, all of which are much younger than the U.S. IPG.

Why Secondary Instead of “Primary” Guidance?

Agencies have used secondary guidance for multiple purposes. First, they can stimulate debate and develop approaches to new or unsettled questions at the intersection of antitrust and IP law. For example, the FTC’s study on Patent Assertion Entity (PAE) activity⁴¹ does not offer definitive conclusions on all antitrust questions surrounding PAE conduct. To the contrary, the FTC expressly cautioned that the lack of comprehensive PAE data restricted its ability to generalize study findings to the PAE population as a whole but nonetheless proceeded with the study in order to gain a better understanding of how PAEs function and their impact on patent litigation.⁴²

Another purpose of secondary guidance is to provide more specific guidance on questions that are addressed in guidelines at a higher level. One example is the treatment of patent pools. The 1995 U.S. IPG addressed pooling arrangements in general terms,⁴³ but more detailed guidance later became available in DOJ Business Review Letters⁴⁴ and in the 2007 joint DOJ and FTC IP Report.⁴⁵ Taken collectively, these sources of secondary guidance provide a blueprint for the antitrust analysis of patent pools that is now so universally recognized that the revised IPG incorporate by reference this body of secondary guidance in a new footnote of the IPG.⁴⁶

Meanwhile, other jurisdictions have addressed and updated patent pool guidance directly in guidelines. The EU is a prominent example. Patent pools (known as technology pools in EU parlance) were covered in the 2004 Technology Transfer Guidelines.⁴⁷ The 2004 guidelines focused on the nature of the pooled technologies, emphasizing that pools “composed only of technologies that are essential and therefore by necessity also complements” generally did not violate competition law unless “the conditions on which licenses are granted” independently raised competitive concerns.⁴⁸ A separate section of the guidelines discussed the analytical principles applicable to these conditions.⁴⁹

The 2014 EU TTG reorganized and modified EU guidance on patent pools. The substantive rules did not change fundamentally, but the new guidance is noteworthy for the introduction of an antitrust “safe harbor” for patent pools.⁵⁰ Although the EU appears to be the only jurisdiction to have included a safe harbor for patent pools meeting certain criteria, other guidelines contain similar substantive guidance.⁵¹

The Next Frontier: IP and Antitrust Developments Outside the “Common Core”

Much of the guidance discussed in the previous sections covers well-established general principles regarding the antitrust analysis of conduct involving IP rights and addresses

circumstances with which enforcers and the business community are familiar. Other topics at the antitrust and IP intersection—often, but not always involving more recent developments—are less universally covered by major guidelines, and jurisdictions have differed in how they have incorporated these topics into primary or secondary guidance. Prominent unsettled issues today are the innovation market concept, settlements involving IP, standard setting, and conduct of non-practicing entities.

Innovation Markets. The innovation market concept is addressed by most major guidelines, but its treatment varies and continues to evolve.

The 1995 IPG explained that U.S. agencies may analyze the competitive effects of a licensing arrangement “either as a separate competitive effect in relevant goods or technology markets, or as a competitive effect in a separate innovation market.”⁵² The update to the IPG replaced the term “innovation market” with “research and development market,” and defined such a market as “the assets comprising research and development related to the identification of a commercializable product, or directed to particular new or improved goods or processes, and the close substitutes for that research and development.”⁵³ The treatment of research and development markets in the revised IPG is similar to the treatment of innovation markets in the 1995 guidelines. For example, the IPG continues to note that the agencies will “delineate a research and development market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.”⁵⁴

Guidelines in other jurisdictions vary in their treatment of the issue. Some, such as Canada, appear to reject the concept of separate innovation markets. Canada’s guidelines state that “[t]he Bureau does not define markets based on research and development activity or innovation efforts alone.”⁵⁵ Other countries, such as Japan, appear implicitly to reject innovation markets.⁵⁶ Guidelines from a third group of jurisdictions do not reject the innovation market concept but indicate skepticism about its utility or uncertainty about how to evaluate effects on innovation markets. For example, the EU TTG acknowledges that some license agreements “may affect competition in innovation,” but state that there will be a “limited number of cases” where it is “useful and necessary to also analyze the effects on competition in innovation separately.”⁵⁷ Korea’s guidelines, for their part, state that innovation markets may be considered separately from product or technology markets, but do not specify how the innovation market analysis would proceed.⁵⁸

Settlements. Few guidelines expressly touch on issues surrounding settlements involving IP, such as “reverse payment” settlements between branded and generic drug manufacturers.⁵⁹ Indeed, among guidelines reviewed for this analysis, only the EU TTG and the Korean guidelines appear to address settlements at all, and only the EU guidelines address reverse payment settlements. U.S. guidelines remain

largely silent on the topic,⁶⁰ although the FTC in particular has been a vocal participant in the debate about the proper antitrust analysis of brand/generic patent settlements both before and since the Supreme Court’s decision in *Actavis*.⁶¹

Europe’s TTG address settlement agreements in Section 4.3, observing that licensing of technology rights “may serve as a means of settling disputes or avoiding that one party exercises its intellectual property rights to prevent the other party from exploiting its own technology rights.”⁶² However, settlement terms may be subject to antitrust scrutiny “in the same way as other license agreements.”⁶³ The EU TTG discuss “reverse payment” settlements which, as the guidelines note, “often do not involve the transfer of technology rights, but are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of the other party.”⁶⁴ However, the practical value of the guidance is limited by its general nature: the EU TTG merely state that the Commission will be “particularly attentive” to anticompetitive risks where the parties are actual or potential competitors “and there was a significant value transfer from the licensor to the licensee.”⁶⁵

Korea’s guidelines address settlements briefly, acknowledging that while they can be “an effective means of dispute resolution for guaranteeing patent holders’ rights,” certain unfair agreements “may interfere with the welfare of the consumers by sustaining the exclusive authority of the invalid patent and by preventing the entry of competing enterprises into the market.”⁶⁶

Standards Development. The development of standards is discussed in guidance issued by most major jurisdictions, but the level of specificity and depth of discussion varies significantly. The following examples illustrate the evolution of the treatment of standards development in guidance documents over time.

In 2005, Japan issued its Guidelines on Standardization and Patent Pool Arrangements (JSPG), devoting an entire section to standardization activities. Like most guidelines, the JSPG acknowledge the procompetitive benefits of standardization, including consumer convenience and interoperability.⁶⁷ The guidelines go on to enumerate specific conduct that may threaten fair competition, including restricting prices of new products with specifications, restricting development of alternative specifications, unreasonably extending the scope of specifications, unreasonably excluding technical proposals from competitors, and excluding competitors from standardization activities.⁶⁸ The guidelines also discuss the enforcement of patent rights in the context of standard setting, noting that “if a patent holder has taken part in the activities and is endeavoring to have its patented technologies adopted by the specifications, refusing to grant a license will pose a legal problem with the AMA.”⁶⁹

In the United States, neither the 1995 IPG nor the 2017 revisions discuss how the antitrust laws apply to standard setting. The 2007 IP Report, however, dedicates a chapter to collaborative standards development.⁷⁰ Like the 2005 Japanese

guidelines, the report recognizes the potential for competitive harm when an agreement regarding standards “replaces consumer choice and the competition that otherwise would have occurred.”⁷¹ The remainder of the chapter discusses aspects of “holdup”—i.e., circumstances where a holder of an essential patent attempts to extract high royalties based on the mere fact that its technology has been standardized—in the context of joint standard setting and steps that standard-setting organizations can take to avoid or mitigate holdup, such as disclosure rules, FRAND licensing obligations, or ex ante licensing negotiations.⁷²

The EU’s 2010 Horizontal Cooperation Guidelines⁷³ discuss standardization agreements in Section 7. Echoing the approach of other jurisdictions, the guidelines explain that standardization agreements “generally have a positive economic effect,” but can give rise to competitive concerns.⁷⁴ The guidelines then set out specific circumstances that may be anticompetitive.⁷⁵ The EU guidelines also discuss at some length commitments to license on FRAND terms.⁷⁶

Korea’s 2014 guidelines describe conduct which, in the eyes of the Korea Fair Trade Commission (KFTC), might restrict competition.⁷⁷ Examples of such conduct include “avoiding or circumventing licensing on FRAND terms to strengthen market dominance or to exclude competitors” and “unfairly imposing discriminatory conditions when licensing standard essential patents or imposing an unreasonable level of royalty.”⁷⁸ Korea’s revised guidelines (which became effective on March 23, 2016) focus specifically on the exercise of SEPs, distinguishing between SEPs that are incorporated into standards by standards-development organizations while requiring the SEP holder to license such patents on FRAND terms, and so-called de facto SEPs that have become standard through competition in the relevant market.⁷⁹ The KFTC has eliminated provisions that previously applied identical criteria for evaluating SEPs and de facto SEPs, explaining that because SEP holders affirmatively make FRAND commitments but holders of de facto SEPs often do not, it would not be appropriate to treat the two in the same manner.⁸⁰

In its Rules on the Prohibition of Abuses of Intellectual Property Rights, China’s SAIC lists practices that the SAIC believes could raise concerns, including refusing to disclose information on patent rights to the standards development organization and “violating the fair, reasonable and non-discriminatory principle.”⁸¹ Meanwhile, NDRC’s draft guidelines address standard setting in a number of places and include a section on injunctive relief for infringement of SEPs, which states that “if a SEP holder with a dominant position makes use of injunctive relief to force the licensee to accept unfairly high royalties or other unreasonable conditions raised by the SEP holder, it may eliminate or restrict competition.”⁸²

Canada’s original guidelines, issued in 2000, explored standards development only in passing, in the context of an example involving a refusal to license. When the Canadian Com-

petition Bureau updated its guidelines in 2016, however, it included a new section on SEPs “designed to illustrate the analytical framework that would be applied by the Bureau in conducting its review of business conduct involving patents that are essential to . . . industry standards.”⁸³ The draft guidelines specifically address patent holdup as one competition concern resulting from the incorporation of patented technologies into a standard.⁸⁴

Non-Practicing Entities/Patent Assertion Entities. The antitrust analysis of the conduct of non-practicing entities (NPEs), especially of the PAE variety (i.e., NPEs that acquire patents from third parties and seek to generate revenue by asserting them against alleged infringers),⁸⁵ continues to be a hotly disputed topic. Given the relative lack of consensus on analytical principles, it is no surprise that NPEs and PAEs are largely absent from the major guidelines. Only the two most recent guideline revisions—from Korea and Canada—expressly address NPE/PAE conduct.

The Korean guidelines assert that, despite some procompetitive benefits, “NPEs are more likely to abuse patent rights than usual patent holders as they do not manufacture goods so they do not need to have cross licensing with counterparts and do not bear risks of being counter-sued.”⁸⁶ The KFTC Review Guidelines provide examples of NPE conduct that—in the eyes of the KFTC—could restrict competition, including attempts to impose excessive royalties, “unfair” refusals to license, or deception in the “act of filing a patent suit or sending a notice of infringement.”⁸⁷

The Canadian guidelines similarly note that PAEs face different incentives and are not open to infringement counterclaims.⁸⁸ The guidelines express concern that PAEs may use false or misleading claims to extract license fees.⁸⁹ In a hypothetical example involving allegations that a PAE sent false or misleading demand letters, the guidelines explain that the Canadian Competition Bureau would examine whether the letters included representations that were false or misleading in a material respect, whether the representations were made to members of the public, and whether the representations were made to promote a business interest.⁹⁰ To determine whether the representation was false or misleading, the Bureau would examine “both the general impression created by the notice, as well as its literal meaning.”⁹¹

In the United States, the FTC has studied PAEs pursuant to its authority under Section 6(b) of the FTC Act. The FTC’s PAE Activity Study was released in October 2016.⁹² One of its stated goals was to overcome the relative lack of empirical information about PAEs and to “provide a better understanding of the organizational structure and economic relationships of PAEs, as well as their activity and associated costs and benefits.”⁹³ The PAE Activity Study distinguishes Portfolio PAEs from Litigation PAEs, concluding that the former often negotiate broad licenses covering large patent portfolios, while the latter often file infringement lawsuits before securing licenses, which generally are less valuable than the portfolios of Portfolio PAEs.⁹⁴ The PAE Activity

Study makes several recommendations for legislative and judicial reform intended to curb nuisance litigation while “recogniz[ing] that infringement litigation plays an important role in protecting patent rights, and that a robust judicial system promotes respect for the patent laws.”⁹⁵ The study does not translate into immediate public guidance on PAE conduct beyond these recommendations. With more work, however, this could be an area where updates to existing formal guidelines or secondary guidance may become available in the future.

Conclusion

The last two years have been a period of intense activity in the development and revision of guidelines regarding the antitrust treatment of conduct involving IP rights. The available guidelines are important tools for practitioners seeking to analyze potentially restrictive conduct involving IP under the relevant antitrust laws. Knowing the guidelines, however, does not always equate to knowing an agency’s likely enforcement posture, especially in the United States. The reliance that the United States places on “secondary guidance,” such as reports and business review letters, emphasizes the importance of those types of less formal guidance as added resources for navigating the intersection of antitrust and IP law.

As jurisdictions around the world continue to consider new guidance, it remains to be seen whether they will follow the approach taken by the United States, which has paired high-level guidelines with extensive secondary policy statements, or will attempt to address more controversial topics directly through formal guidance. At a minimum, members of the IP and antitrust community can expect to see a “common core” of principles in guidelines around the world, and continued dialogue on emerging topics. ■

Under the Antimonopoly Act (2016) [hereinafter JIPG], www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf.

- 1 U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (1995) [hereinafter 1995 IPG], <https://www.justice.gov/atr/archived-1995-antitrust-guidelines-licensing-intellectual-property>.
- 2 *Id.* § 1.0.
- 3 European Comm’n, Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements (2014) [hereinafter EU TTG], [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0328\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0328(01)); see also European Comm’n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (2010) [hereinafter HG], http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf.
- 4 Canadian Competition Bureau, Intellectual Property Enforcement Guidelines (2016) [hereinafter CIPG], [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/\\$file/cb-IPEG-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/$file/cb-IPEG-e.pdf).
- 5 Korea Fair Trade Comm’n, Review Guidelines on Unfair Exercise of Intellectual Property Rights (2010) [hereinafter KRG]. Recent revisions to Korea’s guidelines entered into force in March 2016. At the time of writing, only a draft of the updated guidelines was available online. See http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401.
- 6 Japan Fair Trade Comm’n, Guidelines for the Use of Intellectual Property

- 7 In December 2016, a former senior official of China’s MOFCOM said that the introduction of uniform guidelines was an urgent task for Chinese antitrust regulators. See MLEX, *Unified IP Antitrust Guidelines a Top Priority for China, Ex-MOFCOM Competition Chief Says* (Dec. 12, 2016). China’s National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), and the State Intellectual Property Office (SIPO) has each developed draft guidelines. The SAIC released Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition in Spring 2015, with an effective date of August 1, 2015. In addition, the Anti-Monopoly Commission under the State Council (AMC) is developing IP guidelines by integrating drafts from four government agencies. SAIC has contributed draft Guidelines on Antitrust Enforcement Against IP Abuse. See CHINAIPR, *SAIC Announces Its Latest Draft of IP Abuse Guidelines*, (Feb. 8, 2016), <http://chinaipr.com/2016/02/07/saic-announces-its-latest-draft-of-ip-abuse-guidelines>. The NDRC issued a draft of its Anti-Monopoly Guideline on Abuse of Intellectual Property Rights on October 22, 2015, and a subsequent draft on December 31, 2015. Drafts from MOFCOM and SIPO are not publicly available. For an overview of recent developments involving IP and antitrust guidelines in China see Koren W. Wong-Ervin, *An Update on China’s Anti-Monopoly Law Guidelines on IP*, LAW360 (Dec. 15, 2015).
- 8 Government of India, Dep’t of Indus. Policy and Promotion, Ministry of Commerce & Industry, *Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms* (2016), http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf.
- 9 See U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (2017) [hereinafter IPG], https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.
- 10 See *infra* note 36 et seq.
- 11 The agencies believe that the new terminology would “more accurately reflect how these markets have been defined in enforcement actions.” See Press Release, U.S. Dep’t of Justice & Fed. Trade Comm’n, DOJ and FTC Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property (Aug. 12, 2016), www.justice.gov/opa/pr/doj-and-ftc-seek-views-proposed-update-antitrust-guidelines-licensing-intellectual-property.
- 12 Letter from Joseph Farrell, Richard Gilbert, and Carl Shapiro, University of California, to Fed. Trade Comm’n and Antitrust Division, U.S. Dep’t of Justice (Sept. 7, 2016), <https://www.justice.gov/atr/file/890491/download>.
- 13 E.g., U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter IPR], www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf; EUROPEAN COMM’N, *Competition, Assessment of Potential Anticompetitive Conduct in the Field of Intellectual Property Rights and Assessment of the Interplay Between Competition Policy and IPR Protection* (2011), http://ec.europa.eu/competition/consultations/2012_technology_transfer/study_ipr_en.pdf.
- 14 E.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, Patent Assertion Entity Activities Workshop (2012), www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop.
- 15 E.g., Letter from Renata B. Hesse, Acting Assistant Att’y Gen., to Michael A. Lindsay, Dorsey & Whitney LLP (Feb. 2, 2015) [hereinafter IEEE], <https://www.justice.gov/file/338591/download>. The Antitrust Division’s Business Review Letters are available at <https://www.justice.gov/atr/business-reviews>.
- 16 In the press release accompanying the revised IPG, the U.S. agencies acknowledged the “desire of some commenters for the guidelines to more specifically address additional IP licensing activities” and noted that “the business community may consult the wide body of DOJ and FTC guidance available to the public—in the form of published agency reports, state-

- ments, speeches and enforcement decisions—which rely on [the IPG’s] analytical framework and further illuminate each agency’s analysis of a variety of conduct involving intellectual property.” Press Release, U.S. Dep’t of Justice & Fed. Trade Comm’n, DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property (2017), <https://www.justice.gov/opa/pr/doj-and-ftc-issue-updated-antitrust-guidelines-licensing-intellectual-property>.
- ¹⁷ See also Press Release, U.S. Dep’t of Justice & Fed. Trade Comm’n, *supra* note 11.
- ¹⁸ IPG, *supra* note 9, § 2.0.
- ¹⁹ See, e.g., *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (“[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.”); see also *In re Papst Licensing, GmbH Patent Litig.*, No. CIV.A.99-3118, 2000 WL 1145725, at *6 (E.D. La. Aug. 11, 2000) (citing U.S. IPG’s guidance on market definition).
- ²⁰ EU TTG, *supra* note 3, ¶ 7.
- ²¹ *Id.* ¶ 159.
- ²² *Id.*
- ²³ CIPG, *supra* note 4, at 6.
- ²⁴ NDRC, Anti-Monopoly Guideline on Abuse of Intellectual Property Rights, Exposure Draft (2015), § I(l)1 [hereinafter NDRC Dec. 2015], [http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/IPR%20Guideline%20\(draft\)%2020151231-EN.PDF](http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/IPR%20Guideline%20(draft)%2020151231-EN.PDF).
- ²⁵ 1995 IPG, *supra* note 1, § 2.2.
- ²⁶ *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006). The amendments to the IPG removed the 1995 expression of uncertainty and replace it with a citation to *Illinois Tool Works*. See IPG, *supra* note 9, § 2.2 n.16.
- ²⁷ See, e.g., EU TTG, *supra* note 3, ¶ 79 et seq.
- ²⁸ KRG, *supra* note 5, § 2.C.
- ²⁹ NDRC Dec. 2015, *supra* note 24, § I(l)2.
- ³⁰ IPG, *supra* note 9, § 2.3.
- ³¹ *Id.* § 3.4; see also, e.g., *Schlafly v. Pub. Key Partners*, No. 94-20512, 1997 WL 564073, at *4 (N.D. Cal. Aug. 29, 1997) (citing the U.S. guidelines and noting that “licensing arrangements are generally considered to be pro-competitive”).
- ³² EU TTG, *supra* note 3, ¶ 174. The EU TTG recognize that while licensing agreements often will be subject to an effects-based analysis, some restrict competition “by their very object” and, therefore, are unlikely to be justified. See *id.* ¶ 14. The EU TTG note that the “hardcore restrictions of competition” set forth in Art. 4 of the Technology Transfer Block Exemption will typically fall into the category of restrictions by object. See Comm’n Regulation (EU) No. 316/2014 of 21 March 2014, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements, Art. 4, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0316&from=EN>.
- ³³ KRG, *supra* note 5, § 2.D.
- ³⁴ JIPG, *supra* note 6, at 2.
- ³⁵ NDRC Dec. 2015, *supra* note 24, § I(l)3.
- ³⁶ Most jurisdictions issue public decisions in cases of antitrust and intellectual property significance, and those decisions often reveal important refinements of the law. See, e.g., *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) (Posner, J., sitting by designation) (explaining that an injunction will rarely be appropriate where a patent holder has made a FRAND commitment, because the commitment “implicitly acknowledged that a royalty is adequate compensation for a license to use that patent” and the patentee therefore cannot establish irreparable harm), *aff’d in part, rev’d in part and remanded*, 757 F.3d 1286 (Fed. Cir. 2014); *Case C-170/13, Huawei Techs. Co. v. ZTE Corp.*, ECLI:EU:C:2014:2391 (ECJ July 16, 2015) (finding that the owner of a FRAND-encumbered standard essential patent can only seek an injunction in certain circumstances); *In re Orange Book Standard*, KZR 39/06, (Bundesgerichtshof—BGH, May 6, 2009) (requiring a defendant to make a licensing offer to the patent holder in order to raise the so-called Orange Book defense of anticompetitive conduct by the patent holder); see also Press Release, European Comm’n, Antitrust: Commission Finds that Motorola Mobility infringed EU competition Rules by Misusing Standard Essential Patents (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-489_en.htm; Press Release, European Comm’n, Antitrust: Commission Accepts Legally Binding Commitments by Samsung Electronics on Standard Essential Patent Injunctions (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-490_en.htm.
- ³⁷ See IPG, *supra* note 9, § 2.1 (citing *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004)).
- ³⁸ See IPG, *supra* note 9, § 5.2 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)).
- ³⁹ See *supra* note 25.
- ⁴⁰ See Letter from Farrell, Gilbert, and Shapiro, *supra* note 12.
- ⁴¹ FED. TRADE COMM’N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016) [hereinafter PAE ACTIVITY STUDY], https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.
- ⁴² FED. TRADE COMM’N, PATENT ASSERTION ENTITIES (PAE) STUDY PARTICIPANT MATERIALS PART B—COLLECTION OF INFORMATION METHODOLOGY (2013), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=47563401>. Other examples of secondary guidance mainly intended to stimulate and advance debate are the various workshops on intellectual property and antitrust questions that the agencies have conducted over the years. See *supra* note 14.
- ⁴³ See 1995 IPG, *supra* note 1, ¶ 5.5.
- ⁴⁴ See Letter from Thomas O. Barnett, Assistant Att’y Gen., to William F. Dolan and Geoffrey Oliver, Jones Day (Oct. 21, 2008), <https://www.justice.gov/atr/response-rfid-consortium-llcs-request-business-review-letter>; Letter from Charles A. James, Assistant Att’y Gen., to Ky P. Ewing, Vinson & Elkins (Nov. 12, 2002), <https://www.justice.gov/atr/response-3g-patent-platform-partnerships-request-business-review-letter>; Letter from Joel I. Klein, Assistant Att’y Gen., to Carey R. Ramos, Paul, Weiss, Rifkind, Wharton & Garrison (June 10, 1999), <https://www.justice.gov/atr/response-hitachi-ltds-matsushita-electric-industrial-co-ltds-mitsubishi-electric-corporations>; Letter from Joel I. Klein, Assistant Att’y Gen., to Garrard R. Beeney, Sullivan & Cromwell (Dec. 16, 1998), <https://www.justice.gov/archive/atr/public/busreview/2121.pdf>; Letter from Joel I. Klein, Assistant Att’y Gen., to Gerrard R. Beeney, Sullivan & Cromwell (June 26, 1997), <https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent>.
- ⁴⁵ *Supra* note 13.
- ⁴⁶ IPG, *supra* note 9, § 5.5, n.81.
- ⁴⁷ European Comm’n, Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements (2004), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(01)&from=EN).
- ⁴⁸ *Id.* ¶ 220.
- ⁴⁹ EU TTG, *supra* note 3, ¶ 223 et seq.
- ⁵⁰ *Id.* ¶ 261. Under the 2014 Guidelines, the creation and operation of patent pools generally does not raise competition concerns if several listed conditions are met. These conditions include well-established principles of patent pooling, such as that pool participation must be open to “all interested technology rights owners;” the pooled IP is licensed into and out of the pool on a non-exclusive basis; or that pool participants “remain free to develop competing products and technology.” *Id.*
- ⁵¹ See KRG, *supra* note 5, § III.4; JIPG, *supra* note 6, at 9, 13; Japan Fair Trade Comm’n, Guidelines on Standardization and Patent Pool Arrangements § 2 (2005) [hereinafter JSPG], http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/Patent_Pool.pdf; CIPG, *supra* note 4, § 7, Example 6.
- ⁵² 1995 IPG, *supra* note 1, § 3.2.3. The 1995 IPG defined an innovation market as consisting of “the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development.” *Id.*
- ⁵³ IPG, *supra* note 9, § 3.2.3.
- ⁵⁴ See *id.*; see also DOJ Press Release, *supra* note 11 (“The proposed update

- retains the concept of ‘innovation markets,’ but refers to them as ‘Research and Development Markets’ to more accurately reflect how these markets have been defined in enforcement actions.”) The addition of pharmaceutical cases in note 40 of the updated IPG may signal that the agencies see the development of new drugs as the main area of application of the innovation market concept.
- ⁵⁵ CIPG, *supra* note 4, at 19.
- ⁵⁶ Japan’s guidelines indicate that “the effect on competition in developing technologies should be evaluated by the effect on competition in the trade of future technologies resulting from such activities or products incorporating the technology.” JIPG, *supra* note 6, at 6.
- ⁵⁷ EU TTG, *supra* note 3, ¶ 26.
- ⁵⁸ KRG, *supra* note 5, § II.3(A)(3).
- ⁵⁹ The relative lack of guidance may be due to the fact that the regulatory environment of some jurisdictions encourages “reverse payment” settlements more than others.
- ⁶⁰ The IPG devote one paragraph to settlements, noting that settlements involving cross-licenses “can be an efficient means to avoid litigation” but may raise competition concerns when the cross-licensing involves horizontal competitors. IPG, *supra* note 9, § 5.5.
- ⁶¹ FTC v. Actavis, Inc., 570 U.S. 756 (2013). For example, in 2010, the FTC released a staff report on the impact of brand/generic patent settlements. FED. TRADE COMM’N, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS: A FED. TRADE COMM’N STAFF STUDY (2010), <https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff>.
- ⁶² EU TTG, *supra* note 3, ¶ 234.
- ⁶³ *Id.* ¶ 237.
- ⁶⁴ *Id.* ¶ 238.
- ⁶⁵ *Id.* ¶ 239. Accordingly, practitioners have to rely on precedent, notably the decisions by the European Commission and the General Court in the Lundbeck case. See Case AT.39226—Lundbeck (June 19, 2013); Case T-472/13, Lundbeck v. Comm’n (Sept. 8, 2016), ECLI:EU:T:2016:449.
- ⁶⁶ KRG, *supra* note 5, § III.6.
- ⁶⁷ JSPG, *supra* note 50, § 2(2).
- ⁶⁸ *Id.*
- ⁶⁹ *Id.* § 2(3).
- ⁷⁰ IPR, *supra* note 13, at 33–53.
- ⁷¹ *Id.* at 34.
- ⁷² *Id.* at 42–52. For other secondary guidance on SEPs and FRAND commitments, see, e.g., U.S. Dep’t of Justice & Patent & Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments (2013), <https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf>.
- ⁷³ HG, *supra* note 3.
- ⁷⁴ *Id.* ¶ 258.
- ⁷⁵ *Id.* ¶¶ 276–281.
- ⁷⁶ *Id.* ¶¶ 282–283, 286–287.
- ⁷⁷ KRG, *supra* note 5, § III.5(A) (“[C]onsultation for the standard setting and the exercise of standard essential patents related to standard technologies can generate pro-competition effects by promoting the use of related technology and enhancing efficiency, thus contributing to the welfare of consumers.”).
- ⁷⁸ KRG, *supra* note 5, § III.5(A)(3), (4).
- ⁷⁹ See *supra* note 5. Several sections of the ABA have commented on the proposed revisions to Korea’s guidelines. See AM. BAR ASS’N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW, INTERNATIONAL LAW, AND SCIENCE & TECHNOLOGY LAW ON TO THE KOREA FAIR TRADE COMMISSION’S REVIEW GUIDELINES ON UNFAIR EXERCISE OF INTELLECTUAL PROPERTY RIGHTS, (2015) [hereinafter ABA KFTC COMMENTS], http://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/advocacy/advocacy-20151030-joint-comments.authcheckdam.pdf.
- ⁸⁰ *Id.*
- ⁸¹ China State Admin. for Indus. and Comm., Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, China State Administration for Industry and Commerce § 13 (2015).
- ⁸² NDRC Dec. 2015, *supra* note 24, § III(II)(6). Several sections of the ABA have commented on NDRC’s draft guidelines. See AM. BAR ASS’N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW, AND INTERNATIONAL LAW ON THE ANTI-MONOPOLY GUIDELINE ON INTELLECTUAL PROPERTY ABUSE (DRAFT FOR COMMENTS) (2016), www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2016_comments.html.
- ⁸³ CIPG, *supra* note 4, at 52.
- ⁸⁴ *Id.*
- ⁸⁵ PAE ACTIVITY STUDY, *supra* note 41, at 1.
- ⁸⁶ KRG, *supra* note 5, § III.7.
- ⁸⁷ *Id.* In view of these broad principles, commentators have urged the Korea Fair Trade Commission to tread carefully in analyzing cases involving NPEs/PAEs, to ensure that actual enforcement is based on solid evidence of harm. See ABA KFTC COMMENTS, *supra* note 79.
- ⁸⁸ CIPG, *supra* note 4, at 39.
- ⁸⁹ *Id.*
- ⁹⁰ *Id.*
- ⁹¹ *Id.*
- ⁹² PAE ACTIVITY STUDY, *supra* note 41.
- ⁹³ Agency Information Collection Activities; Submission for OMB Review; Comment Request, 79 Fed. Reg. 28,715, 28,716 (May 19, 2014).
- ⁹⁴ PAE ACTIVITY STUDY, *supra* note 41, at 3–4.
- ⁹⁵ *Id.* at 9.