AIPLA

American Intellectual Property Law Association

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VIA E-MAIL ONLY
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First Anti-Monopoly Bureau
State Administration for Market Regulation
8 Sanlihe Donglu
Xicheng District,
Beijing 100820
People's Republic of China

Re: AIPLA Comments on the June 27, 2022 Draft Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition ("Provisions")

Dear State Administration for Market Regulation Colleagues:

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments on the June 27, 2022 draft Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition issued by the State Administration for Market Regulation ("SAMR").

The American Intellectual Property Law Association is a national bar association of approximately 7,000 members who are primarily practitioners engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective global laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

Because of the limited amount of time to prepare comments, AIPLA submits the following observations on the SAMR regulations related to particular sections of Articles 2, 10, 14, 15, 16, and 18. AIPLA would welcome the opportunity to further discuss the provisions and any of these comments with you. AIPLA is grateful for this opportunity to submit comments.

These comments are believed to be consistent with comments AIPLA submitted on a prior version of these provisions[1].

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[1] AIPLA Comments on the Guidelines for Anti-Monopoly Enforcement against Abuse of Intellectual Property Rights, April 19, 2017 at https://www.aipla.org/docs/default-source/uploadedfiles/documents/advocacy/intl/documents/aipla-comments-china-anti-monopoly-guidelines-4-19-2017.pdf?sfvrsn=8c7a5498_1; and AIPLA Comment Letter on China Anti-Unfair Competition Law, March 23, 2017 at https://www.aipla.org/docs/default-source/uploadedfiles/documents/advocacy/intl/documents/aipla-comments-china-anti-unfair-competition-law-3-23-2017.pdf?sfvrsn=b1a01500_1.

Article 2

AIPLA commends the proposed amendment of Article 2 explicitly recognizing that the Anti-Monopoly Law "does not apply to the behaviours of business operators exercising intellectual property rights in accordance with laws and administrative regulations on intellectual property rights." AIPLA notes that intellectual property rights generally allow the owner to exclude others from using that technology. Thus, intellectual property rights generally preclude others from using the intellectual property. For this reason, AIPLA recommends amending the second clause of Article 2 to state: "**the anti-monopoly law applies to business operators' abuse of intellectual property rights*, beyond the legitimate scope of those intellectual property rights*.**"

Article 10

Proposed Article 10 provides: "A business operator with a dominant market position shall not, without justifiable reasons, impose the following unreasonable restrictive conditions in the process of exercising intellectual property rights to exclude or restrict competition: … (4) Continue to exercise the rights over the intellectual property rights whose protection period has expired or which has been found to be invalid…"

AIPLA generally supports the policy that intellectual property rights should not be enforced beyond their effective term limits; expired patents cannot be used to collect payment after their term is expired. AIPLA recommends that certain scenarios be distinguished within this general policy. AIPLA is concerned that subsection (4) may erroneously be interpreted as prohibiting package licenses (also known as portfolio licenses). These licenses may have substantial pro-competitive benefits. Further, they are dynamic, changing over time. Over the life of a package license, some patents may expire while new patents are granted. The license is effective for all patents that are valid, throughout the term of the license. In addition, different patents within a package may have different values.

As a result, AIPLA does not believe the value of the royalty needs to track the number of active patent assets subsisting at any time. AIPLA acknowledges and supports that license fees cannot and should not be charged after the expiration of the last-to-expire of the assets.[2] AIPLA disagrees that the fees cannot remain at the same, agreed level throughout the term or the license, regardless of the expiration of any one or more of the patent assets in the portfolio. A rule suggesting otherwise would be impractical and inefficient, requiring parties to renegotiate the license frequently. AIPLA recommends that parties be explicitly permitted to establish a license agreement that licenses an entire portfolio of intellectual property rights (IPRs), notwithstanding the fact that certain IPRs may expire or be found invalid during the term of an agreement.

AIPLA suggests deleting factor (4) or modifying it as follows: "(4) In the case of portfolio licensing, whether the undertaking collects a licensing royalty on expired or invalid IPR that

[2] In other words, AIPLA believes that it is within scope to end royalty fees after the last valid, enforceable patent (from which no appeal from a finding of invalidity/unenforceability can be taken) has expired in those agreements where the license fees are paying for granting of rights to implement patent claims to such patents.

were specifically identified by the undertaking, in writing, to be critical to the licensing transaction."

AIPLA respectfully suggests that the amendments clarify that only those patents that are "important" and form the basis of the valuation, as evidenced in writing, are relevant to this factor. In licensing a portfolio of patents, which is common in the industry, the parties typically expect new patents to enter into force during the term of the agreement and old patents to expire or become invalidated during the same term. Parties typically build this assumption of expected and unexpected changes in the composition of assets over time into the terms and conditions of the license and may include additional provisions to address material portfolio changes. Requiring parties to screen each invalid or expired patent in a package license deal is inconsistent with long standing, common industry practice and can be impracticable and inefficient. If a particular IPR is expressly identified by the parties in writing as critical to the licensing transaction, there may be a basis for reconsidering rates if that IPR expires or is invalid and the parties provided for this event in their agreement

Article 14

Proposed amended Article 14 (1) includes a new section providing: "(1) License the joint venture patent at an unfairly high price;" added to the list of prohibited actions when used "to exclude or restrict competition."

AIPLA is concerned that this provision fails to provide adequate guidance as to what constitutes an "unfairly high price" in the context of a patent pool (which is what AIPLA believes is meant by use of the term "joint venture patent").

It is generally recognized that a patent pool, in which participating patent owners can also independently license the patents that they include in the pool of joint venture patents, is a competition-positive venture. Patent pool ventures are designed to enhance, rather than restrict, competition. Article 14 already addresses this pro-competitive feature of patent pools by preventing terms of the joint venture agreement from "[r]estricting the members of the joint venture to license patents as independent licensors outside the joint venture without justifiable reasons." Thus, members of the joint venture patent pool already are forced to compete on price with the joint venture patent pool members in China. If the joint venture license fee request is priced too high, the member-patent owners will be incentivized to license at a price that undercuts that joint venture fee.

AIPLA submits that regulating licensing fees will disincentivize pro-competitive patent pools. The joint venture would risk choosing a price that the licensees consider fair but SAMR may later determine is not. This risk would likely compel patent owners to seek to separately license their patents instead. This would impair market efficiency and preclude realizing the pro-competitive benefits patent pools offer.

AIPLA is also concerned that competition enforcement authorities would regulate price, rather than letting market competition efficiently determine an appropriate price. This artificial limitation on license fees may disrupt the balance between IPR owners and potential licensees. Concerns about enforcement risks could hinder inventors and patentees from seeking to obtain a reasonable return on their investments. [3] Further, price regulation of IPR royalties is extraordinarily difficult because of the myriad factors involved, the parties' respective interests, and the contribution of specific IPR to any specific product. Accordingly, it is appropriate to consider objective factors, such as a history of IP licensing among the parties, comparable fees for other similar licenses, as well as the specific business terms the parties have negotiated. Determination of royalties or license fees should be based on bilateral negotiations as to appropriate compensation, including in connection with SEPs.

Article 14 also includes section 6: "(6) Implementing differential treatment in terms of transaction conditions for joint venture members with the same conditions or licensees in the same relevant market without justifiable reasons."

AIPLA is concerned that this antimonopoly provision appears to impose an overriding obligation of nondiscrimination in fulfilling the FRAND licensing commitment to the benefit of technology users. By accepting terms of participation in a standards development body, including a commitment to FRAND licensing terms for standards-essential patents, the patent holder agrees to adhere not only to license under fair and reasonable terms, but also to the principle of nondiscrimination. AIPLA acknowledges this obligation; yet, the proposed amendments appear to equate "nondiscriminatory" with uniform. AIPLA notes that this interpretation is rigid and not consistent with international norms in the context of FRAND licensing

Where a patent owner has agreed to license its patent(s) on fair, reasonable, and nondiscriminatory terms, non-discriminatory does not mean uniform. Yet, the proposed amendments appear to impose just such an additional requirement. This additional requirement should not be imputed where the patent holder has not voluntarily agreed to it. The proposed amendments' criteria for determining "same conditions" are unclear and may be difficult to implement. Not all licensees are similarly situated, nor do they all value the same terms to the same degree. For example, a licensor might license the same patent(s) differently to licensees at different tiers (for example, wholesaler, retailer, user) or in different markets or different technical fields. "Same conditions" becomes even more complicated when licensees have different patent portfolios in the relevant field to license back, as Chinese agencies have recognized. Geographic scope may also effect licensing terms and conditions. License agreements typically include numerous terms and conditions beyond royalty rate, which may have special or unique value to specific parties. For example, choice of forum, auditing rights, rights to flow rights to spin-offs or acquired entities, and the like, may be of greater or lesser interest to some licensees, confounding the "same conditions" analysis.

For these reasons, AIPLA recommends adding text that highlights that the analysis of whether price is being used anticompetitively must include these multiple factors and that market pricing mechanisms should also be considered, before authorities intervene.

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[3] See MEMO/09/516 European Commission, Commission closes formal proceedings against Qualcomm (24 November, 2009) https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_516 ("The… case has raised important issues about the pricing of technology after its adoption as part of an industry standard. In practice, such assessments may be very complex, and any antitrust enforcer has to be careful about overturning commercial agreements").

Article 15

Article 15 reads: "In the process of exercising intellectual property rights, operators shall not use the formulation and implementation of standards to engage in the following acts to exclude or restrict competition:
(1) Without justifiable reasons, it joins with a business operator with a competitive relationship to exclude a specific business operator from participating in the formulation of standards, or excludes a specific business operator's relevant standard technical solutions;
(2) Without justifiable reasons, jointly excluding other specific business operators from implementing relevant standards with a business operator having a competitive relationship;
(3) agreeing with business operators that have a competitive relationship not to implement other competitive standards;
(4) Other monopoly agreements identified by the State Administration for Market Regulation."

AIPLA commends the evaluation of standards development activities based on a number of considerations. AIPLA is concerned, however, that the substantial pro-competitive benefits of standards were not sufficiently considered and/or acknowledged in the amendments. Standards have facilitated substantial, new economic markets and provide substantial consumer benefits.

Antitrust enforcement authorities worldwide have acknowledged and incorporated these considerations into their respective provisions. AIPLA recommends that these provisions also incorporate these factors favoring the development of standards.

It is well established that standard-development is often procompetitive. It can increase innovation, efficiency, and consumer choice, fostering public health and safety. It can make networks more valuable by allowing products to interoperate. Article 15 recognizes that collaborative standards-development activities may, in some circumstances, harm competition. International norms of a standards provide that development organizations that plan, develop, establish, or coordinate voluntary consensus standards, using procedures that are open, balance of interests of the parties, provide due process and an appeals process, and are based on consensus are analyzed for reasonableness (rule of reason). The antitrust analysis of standards development activities, generally balance procompetitive benefits against anticompetitive harms. Sections 1 and 2 of Article 15 use the language "Without justifiable reasons" but are not explicit that these reasons must consider procompetitive benefits. AIPLA respectfully recommends that the text be explicit that such balancing must consider procompetitive benefits.

Article 15 lists certain factors that may be considered in analyzing whether standards-development activities that implicate intellectual property rights may exclude or restrict competition. A number of these factors address behavior inconsistent with generally accepted practices of voluntary consensus standards development organizations. Globally accepted principles of standards development are promoted by well-recognized, international standards bodies including the International Telecommunication Union (ITU), International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and those accredited by the American National Standards Institute (ANSI) and include as part of their core principles the standards development process should be open and transparent.

With regard to the first factor in Article 15, AIPLA believes it is important to recognize that procompetitive collaborative standards development can also occur in other settings. These include private standards development consortia, where self-selected firms work together to develop technologies and standards to compete with alternative technologies and standards for acceptance in the market. The fact that these collaborations may exclude other undertakings does not necessarily mean these collaborations are anticompetitive, particularly where they are developing competing products or standards. Rather, a case-by-case rule of reason analysis of the procompetitive and anticompetitive effects of such collaborations is required.

AIPLA specifically recommends considering and including in the amended provisions text that would explicitly permit voluntarily forming, participating in, or adopting a standard along with other competing parties, provided the competitors are not agreeing to eliminate or prevent any one of them from developing or adopting a competing standard outside of the joint undertaking.

AIPLA understands the first factor of Article 15 to mean that exclusion of a particular operator's solution is competitively problematic. AIPLA believes this is problematic and may frustrate the purposes of these regulations. Standard-setting necessarily and inherently requires the selection of particular solutions, and the rejection of others. The proposed language could be misconstrued to preclude excluding from the standard other competitors proposed solutions that were not adopted by the standards process

Article 16

Article 16 reads: "(2) After its patent becomes a standard essential patent, it violates the promise of fair, reasonable and non-discriminatory licensing, licenses it at an unfairly high price, refuses to license without justifiable reasons, tying products, implements differential treatment or imposes other unreasonable restrictions."

Fair, reasonable, and nondiscriminatory ("FRAND") commitments are contractual in nature. By contrast, violations of competition law require the infliction of anticompetitive harm. Breach of a contractual FRAND commitment is not, and should not be, sufficient to establish a competition issue. Other, significant, demonstrated anticompetitive harms are required. For example, see *FTC v. Qualcomm Inc.*[4] which adheres to the principle that not every breach of a FRAND commitment is a violation of competition law but, instead, may be appropriately handled in the manner of ordinary contract disputes. AIPLA recommends adding language to this provision that clarifies that Section 2 may be invoked only when the violation of a FRAND promise cannot be reasonably handled by parties in court because it is egregious, and demonstrably affects social order. Additionally, the "refusals to license without unjustifiable reasons" language may be used by incompetent licensees to demand a license where they do not need one. There may be no threatened or potential for an infringement lawsuit by the patent owner (and thus no risk to the incompetent licensee), or because the patent owner is already licensing someone else in the supply chain from which that incompetent licensee receives the needed rights to use the patent claims in question.

[4] *Federal Trade Commission v. Qualcomm Inc.* (Ninth Cir. 2020) available at https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf at 56.

Also, please see previous comments under Article 14 (1) regarding "unfairly high price" and how price considerations may be thoughtfully addressed.

Article 18

Article 18 reads: "The anti-monopoly law enforcement agencies mentioned in these Provisions include the State Administration for Market Regulation and the market supervision and administration departments of all provinces, autonomous regions and municipalities directly under the Central Government."

AIPLA is concerned that explicitly permitting multiple tiers of government to enforce the unfair competition law could result in inconsistent application of the law by various authorities, e.g., at the province or city levels. This may make it impossible for a company operating across different government boundaries to understand or obey the rules across these boundaries. AIPLA recommends leaving enforcement of the law to specific high-level authorities, or providing some mechanism to ensure consistency between different governmental authorities.

AIPLA appreciates the opportunity to comment on these proposed amendments, as well as the First Anti-Monopoly Bureau's consideration of them.

Sincerely Yours,

Patrick J. Coyne

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