AIPLA
American Intellectual Property Law Association

April 19, 2017

Mr. Qiu Yang
Office of the Anti-Monopoly Commission
Of the State Council of the People's Republic of China
No. 2 East Chang'an Avenue, Beijing
P.R. China
100731

邱阳先生
中华人民共和国国务院反垄断委员会办公室
中国北京东长安街 2 号
100731

By Email to: qiuyang@mofcom.gov.cn

**Re: AIPLA Comments on the Guidelines for Anti-Monopoly Enforcement against Abuse of Intellectual Property Rights (Draft for Comments)**

**主题：美国知识产权法律协会(AIPLA)对《关于滥用知识产权的反垄断指南(征求意见稿)》的意见**

Dear Mr. Qiu,
尊敬的邱先生，

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments on the draft Guidelines for Anti-Monopoly Enforcement against Abuse of Intellectual Property Rights ("IPRs") issued by the Office of the Anti-Monopoly Commission of the State Council of the People's Republic of China ("*Guidelines*").

美国知识产权法律协会（"AIPLA"）感谢此次机会就中华人民共和国国务院反垄断委员会办公室关于《关于滥用知识产权的反垄断指南(征求意见稿)》（"指南"）提出我们的意见。

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers 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.

美国知识产权法律协会是一个全国性律师协会，拥有大约14,000 名会员，主要由各界律师组成，来自律师事务所、企业团体、政府机构、及学术机构。AIPLA 成员广泛代表各界个人、企业及机构，其业务直接或间接涉及专利、商标、版权、商业秘密、及反不正当竞争法，以及影响知识产权的其它法律领域。我们的会员既代表知识产权所有权人，也代表知识产权使用者。我们的使命包括帮助建立和维护公平有效的全球法律政策，以促进奖励发明创造，同时平衡公众利益，达到良性竞争、费用合理、和基本公正。

As an initial matter, AIPLA commends the efforts of the State Council to consolidate prior work performed by other agencies, including the National Development and Reform Commission of the State Council (NDRC), State Intellectual Property Office (SIPO), and State Administration for Industry and Commerce (SAIC). This provides greater certainty and predictability for entities doing business in China. AIPLA has submitted comments previously with respect to those efforts, and appreciates that the current Guidelines reflect changes which are consistent with AIPLA's comments, including moving generally towards a rule of reason standard.

首先，AIPLA 赞赏国务院集中完善各部门事先工作成果的努力, 这些部门包括国务院国家发展和改革委员会，国家知识产权局和国家工商行政管理局。这为在中国开展业务的企业提供了更大的确定性和可预测性. AIPLA 之前也对这方面的努力提交了意见，并感谢目前《指南》中与 AIPLA 的意见相一致的修改, 包括朝遵循“合理法则”这一标准的方向做出的努力。

AIPLA remains concerned, however, that the Guidelines, including in its preface, appears to suggest that liability may be found for enforcement of IP rights in China where it may tend to exclude competition. The very nature of intellectual property rights is to exclude others from practicing the subject matter of the claimed invention. AIPLA suggests that further amendments making clear that the exercise of intellectual property rights, even to exclude a competitor, will not violate the antimonopoly law unless the conduct involves activity that monopolizes or has a tendency to monopolize a relevant market and to injure competition, as distinct from excluding individual competitors. It is also important to recognize that patents are necessarily territorial rights granted by individual governments that are enforceable only in the country where they are issued. Consequently, the Guidelines should not infringe on the right of each sovereign country to determine whether particular exercises of IPR impact competition within their respective jurisdictions and should not attempt to regulate competition or the use of IPRs beyond their borders. AIPLA hopes that its substantive comments will be useful to the State Council as it finalizes the Guidelines.

然而，AIPLA仍然担心，《指南》, 包括其序言, 似乎表明在在中国行使知识产权可能会排除竞争的情况下就可能违法. 知识产权的本质就是排除其他人实施要求保护的发明。AIPLA建议进一步修改明确说明行使知识产权的行为, 即使排除某个竞争对手，也不违反反垄断法，除非该行为涉及垄断或倾向于垄断相关市场并且损害竞争，由别于排除个别竞争对手。同样重要的是要认识到，专利是各国政府授予的只能在授予国家执行的区域性权利。因此，《指南》不应侵犯每个主权国家确定其各自管辖范围内知识产权影响竞争的具

体行为的权利，不应试图规范超出境外的竞争或使用超出境外的知识产权. AIPLA希望其实质性意见将在国务院最终对《指南》定稿时有所帮助。

**Article 1. The Analytical Principle**
**第一条 分析原则**

["To analyze whether the undertaking abuses the intellectual property right to exclude and restrict the competition, the following basic principles should be followed:
(1) adopt the same regulatory standards as for other property rights, and follow the basic analytical framework of the AML;
(2) consider the special characteristics of intellectual property rights;
(3) not presuming that the undertaking has a market dominance in the relevant market because it has intellectual property rights;
(4) Consider the positive impact of the relevant behavior on efficiency and innovation, on a case-by-case basis."]

["分析经营者是否滥用知识产权排除、限制竞争，遵循以下基本原则：
（一）采用与其他财产性权利相同的规制标准，遵循《反垄断法》的基本分析框架；
（二）考虑知识产权的特点；
（三）不因经营者拥有知识产权而推定其在相关市场具有市场支配地位；
（四）根据个案情况考虑相关行为对效率和创新的积极影响。"]

COMMENT: AIPLA commends the Guidelines for bringing Chinese enforcement standards more closely into alignment with international norms of antitrust enforcement. The analytical principles, in particular, appeared to be comparable to the rule of reason analysis employed in the United States and comparable analyses employed in the European Union. In particular, AIPLA commends (3) for noting that market dominance should not be presumed merely due to the existence of intellectual property rights.

评论: AIPLA 赞同此条《指南》使中国的执法标准变得更符合国际反垄断的执法准则。特别是所列出的分析原则似乎与美国采用的理性分析规则和欧盟采用的可比分析方法相当。AIPLA 也特别赞同其中的第三条分析原则所指出的经营者的市场主导地位不仅仅因为其拥有知识产权而被推定。

**Article 2. The Framework of Analysis**
**第二条 分析思路**

["....The abuse of intellectual property by the undertaking to exclude or restrict competition may be the exercise of intellectual property rights, or may be related to the exercise of intellectual property rights. Usually based on the characteristics of the undertaking's behavior and the form of expression, to determine whether that may constitute a monopoly...."]

["… 经营者滥用知识产权，排除、限制竞争的行为，可能是行使知识产权的行为，也可能是与行使知识产权相关的行为。通常根据经营者行为的特征和表现形式，认定可能构成的垄断行为。 …]

COMMENT: AIPLA commends the development of an analytic framework governing antimonopoly law analysis. Specifically, identifying the relevant market, analyzing the impact of the challenged conduct on competition in the relevant market, and analyzing the procompetitive benefits of the challenged conduct are all appropriate steps and are consistent with international norms of antimonopoly enforcement.

However, AIPLA notes that as recognized in Article 1, IPRs do not necessarily confer market power and proof of dominant market position should be based on evidence of market power, apart from the existence of the intellectual property right. The essence of an IPR is the right to exclude. AIPLA recommends that this right should not be curtailed merely because the IPR holder is found to have market power. AIPLA respectfully recommends that it should not be sufficient to establish liability under the Guidelines merely to exercise an IPR, even for an undertaking that has market power, and even where the exercise of IPRs may exclude an infringing competitor. In order to be held liable, an undertaking must have a dominant market position, must abuse its position to eliminate or restrict competition, and also must be using the IPR in a manner not contemplated by the IPR laws and administrative regulations, as provided in Article 55 of the AML.

评论: AIPLA 赞同开发一个管理反垄断法的分析框架。具体来说，确定相关市场, 分析被质疑行为对于相关市场竞争的影响，以及分析被质疑的行为的有利竞争的益处，这些都是合理的步骤，并且也都符合反垄断执法的国际准则。

但是，AIPLA 注意到，如第一条所认识到的，知识产权并不一定赋予市场支配地位。而且, 要决定经营者是否有市场支配地位，除了考虑此经营者是否拥有知识产权以外，还应考虑市场势力方面的证据。知识产权的本质是排他性。 因此，AIPLA 建议，这一权利不应该仅仅因知识产权持有人具有市场势力而被削减。 AIPLA 恭敬地建议，即使是经营者具有市场势力，并且其行使知识产权可能排除了一些侵权竞争者，也不能仅仅因其行使了知识产权就依照此《指南》来判定其滥用了知识产权。例如《反垄断法》的第 55 条所指出的，要判定经营者滥用了知识产权，此经营者必须具有市场支配地位，必须滥用其市场支配地位来排除或限制竞争，并且必须未依照知识产权的法律、行政法规所规定的方式使用了知识产权。

**Article 4. Analysis of Factors to be Considered for Excluding and Restricting Impact**
**第四条 分析排除、限制影响的考虑因素**

["(1) To assess the competitive situation of the relevant market, the following factors can be considered: the characteristics of the industry and the development of the industry; the main competitors and their market share; market concentration; the difficulty of market entry; the market position and the degree of dependence on intellectual property of the transaction parties; related technology updates, development trends and research and development. To calculate the market share of the undertaking in the relevant technology market, according to the particular case, consider the share of the goods in the relevant market using the technology, the proportion of the license fee income of the technology in the total license fee income of the relevant technology market, and the number of alternative technologies…."]

[“（一）评估相关市场的竞争状况，可以考虑以下因素：行业特点与行业发展状况；主要竞争者及其市场份额；市场集中度；市场进入的难易程度；交易相对人的市场地位及对相关知识产权的依赖程度；相关技术更新、发展趋势及研发情况等。计算经营者在相关技术市场的市场份额，可根据个案情况，考虑利用该技术生产的商品在相关市场的份额、该技术的许可费收入占相关技术市场总许可费收入的比重、具有替代关系技术的数量等。…]

COMMENT: AIPLA appreciates the attempt in paragraph (1) of Article 4 to identify different potential methods for determining market shares in technology markets. However, with regard to the suggested method of looking to the proportion of license fees to total license fees in the relevant technology market, AIPLA notes that there are many potential problems with such an approach that may make it an unreliable basis on which to calculate market share. For example, such an approach would not account for non-monetary consideration in a license agreement, such as patent transfers or cross-licensing arrangements. Moreover, such an approach would omit existing substitute technologies that are not currently being licensed, or are being licensed on a royalty-free basis, or industries in which competing patent holders may not actively enforce their exclusive rights against each other. For these reasons, AIPLA suggests that a licensing fee-based approach to calculating market share for technology markets may not be reliable or appropriate.

评论: AIPLA 支持第 4 条第（1）段落中所指出的关于决定技术市场的市场份额的种种可能方法。然而，AIPLA 注意到，其中所建议的关于决定技术的许可费收入占相关技术市场总许可费收入的比重的方法可能存在许多潜在问题，使它可能成为计算市场份额中的不可靠的基础。例如，此方法不考虑许可协议中的非货币性因素，比如专利转让或交叉许可等方式。此外，此方法还将忽略目前还未获得许可证或免版税的现有其它具有替代关系的技术，以及一些竞争性专利持有人可能不会积极执行排他性权利。由于这些原因，AIPLA 建议，采用基于许可费用的方法来计算技术市场的市场份额也许并不可靠或合适。

**Article 5. Conditions for Meeting Positive Effect**
**第五条 满足积极影响的条件**

[“In general, the positive impact of the undertaking’s behavior on innovation and efficiency needs to meet the following conditions: ...”]
[“通常情况下，经营者行为对创新和效率的积极影响需同时满足下列条件: …]

COMMENT - AIPLA commends the acknowledgement that any positive effects from the challenged conduct should be considered. The Guidelines, however, appear to impose a higher standard of proof of positive effects than the approach of considering a number of factors for potential negative effects. The specific factors identified appear to be pertinent and AIPLA recommends that they be characterized as factors that may be considered, rather than facts that must be proved. The Guidelines are unclear as to whether all of the factors must be present or whether the presence of any one or more of the factors is sufficient to establish that the challenged conduct has a smaller effect than alternatives.

评论: AIPLA 赞同此《指南》所指出的应当考虑被质疑行为的任何积极影响。 然而，此《指南》似乎在证明积极影响上采用的标准比考虑潜在负面影响的方法中所采用的标准更

高。此《指南》中列出的具体因素似乎都是相关的，因此，AIPLA 建议将这些因素作为应当考虑的因素，而不是作为必须要证明的事实。此《指南》没有清楚指出，是否所有列出的这些因素都必须存在，还是只要存在其中的任何一个或多个因素就足以证明被质疑的行为比其它替代方案具有更小的影响。

**Article 6. Joint Research and Development (R&D)**
**第六条 联合研发**

["Joint R & D refers to business undertakings jointly research and develop products or technology, and the use of R & D results. To analyze the effect of joint R & D on excluding and restricting the relevant market competition, you can consider the following factors...."]
["联合研发是指经营者共同研发技术、产品等，及利用研发成果的行为。分析联合研发对相关市场竞争产生的排除、限制影响，可以考虑以下因素: …]

COMMENT: AIPLA commends the Guidelines for acknowledging the potential benefits of joint research and development activity. The factors, however, appear to treat any restrictions as negative, and fail to balance the procompetitive benefits with any anticompetitive effects of the joint research efforts. Certain restrictions that are reasonably related to the purposes of the joint R&D may be necessary to make the joint activity workable and acceptable to the participating parties, and should only be subject to AML challenge if, on balance, they have an anticompetitive effect on competition in the relevant market.

评论: AIPLA 赞同此《指南》所指出的联合研发行为的潜在好处。 然而，这些因素似乎将任何的限制都视为负面的，并没有合理地平衡联合研发行为所带来的有利于竞争的益处和不利于竞争的影响。为了使得联合研发可行并被参与者接受，与联合研发的目的合理相关的某些限制可能是必要的。并且，只有那些在相关市场上相对于其所带来的有利于竞争优势而言有更多不利竞争影响的限制，才应受制于《反垄断法》。

**Article 7. Cross Licensing**
**第七条 交叉许可**

[" … To analyze the effect of cross-licensing on excluding and restricting the relevant market competition, you can consider the following factors:
(1) whether it is an exclusive license;
(2) whether it constitutes a barrier for a third party to enter the relevant market;
(3) whether to exclude, and restrict the downstream market competition."]
["… 分析交叉许可对相关市场竞争产生的排除、限制影响，可以考虑以下因素：
（一）是否为排他性许可；
（二）是否构成第三方进入相关市场的壁垒；
（三）是否排除、限制下游相关市场的竞争。"]

COMMENT: AIPLA is concerned that the Guidelines may be unduly restrictive of cross-licensing. Cross-licensing is critical in many industries and may avoid litigation. Attempts to

place artificial limitations on an undertaking's ability to determine terms such as exclusivity would upset the critical balance between willing parties, without giving due regard to the interests of IPR owners. Factor (1) does not recognize that there may be pro-competitive effects from exclusive cross-licensing arrangements. Moreover, factor (2) should be removed as the creation of a barrier to a third party in and of itself should not be deemed anticompetitive. Factor (3) appropriately reflects any anticompetitive concern.

AIPLA also respectfully requests that Article 7 be amended to clarify that the cross-licensing would be unlawful only where it is established by objective evidence that the cross-licensing parties have market power in a properly defined relevant market, that the cross-licensing has caused actual anticompetitive harm, and that such harm outweighs any procompetitive justification.

评论: AIPLA 担心此《指南》可能会过度地限制了交叉许可。交叉许可在许多行业里是至关重要，并且交叉许可也许可以避免诉讼。试图人为地限制经营者在决定诸如排他性等条款方面的能力，会破坏自愿的双方之间很重要的平衡关系，而且没能充分地考虑知识产权所有者的利益。因素（1）没有认识到独家交叉许可也可能会产生有利于竞争的影响。此外，由于构建第三方进入相关市场的壁垒本身并不应该被视为反竞争行为，所以建议应当删除因素（2）。因素（3）有效地反映了反竞争方面的担忧。

AIPLA 还恭敬地建议修改此《指南》的第 7 条，以澄清交叉许可只有在特定情况下违法，即只有在通过客观证据证明了，此交叉许可在正确定义的相关市场具有市场势力，以及此交叉许可事实上已经造成了反竞争的影响，并且这种不利影响已经超过其产生的任何有利于竞争的影响。

**Article 8. Exclusive Grant-Back**
**第八条. 独占性回授**

["Grant-back refers to that the licensee grants the licensor back a license for subsequent improvement based on the licensed intellectual property right or new achievement obtained by using the licensed intellectual property right. The grant-back is exclusive if only the licensor or its designated third party has the right to implement grant-back improvements or new achievements. Usually, exclusive grant-back is more likely to exclude and restrict competition in the relevant market. To analyze the effect of the exclusive grant-back on excluding and restricting the relevant market competition, you can consider the following factors ...(4) whether the exclusive grant-back damages the licensee's incentive to improve...."]

（"回授指的是被许可人就被许可的知识产权所作的后续改进，或者通过使用被许可的知识产权所获得的新成果授权给许可人。只有当许可人或其指定的第三方有权实施回授的改进或新成果时回授才是独占性的。通常，回授更倾向于在相关市场中排除并限制竞争。为了分析独占性回授对于排除和限制相关市场竞争产生的影响，可以考虑以下因素……（4）独占性回授是否损害被许可人进行……改进的积极性"）

COMMENT: AIPLA is concerned that the Guidelines appear to unduly restrict the use of grant-back provisions. Nonetheless, with the exception of factor (4), the factors identified appear to be

pertinent to the scope and may be relevant to the effects of the grant-back on competition. The focus on "incentives to improve," in paragraph (4), however, appears to invoke potential innovation markets that may not actually exist. AIPLA also respectfully requests that Article 8 be amended to clarify that the grant-back would be unlawful only where it is established by objective evidence that the licensor has market power in a properly defined relevant market, that the grant-back has caused actual anticompetitive harm, and that such harm outweighs any procompetitive justification.

评述：AIPLA 担心《《指南》》似乎不当地限制了回授条款的使用。尽管如此，除了第（4）点因素，其他确定的因素似乎跟回授范围是相关的，并且可能跟回授对于竞争的影响相关。然而，第（4）项中的"改进的积极性"似乎援引了可能实际并不存在的潜在创新市场。AIPLA 还请求修改第 8 条以明确只有有客观证据确定许可人在经恰当定义的相关市场中具有市场力量时、回授已经造成实际的反竞争损害、并且该损害大于任何促进竞争时，回授才会是非法的。

**Article 10. Standard Development**
**第 10 条. 标准制定**

["The standard-development referred to in this Guideline refers to the common standards for intellectual property rights in a certain area that are jointly developed by the undertakings. Competitive undertakings participating in the standard development may exclude and restrict competition, the specific analysis can consider the following factors:
(1) whether or not to exclude other specific undertakings;
(2) whether or not to exclude the related program of a particular undertaking;
(3) whether it is agreed not to implement other competitive standards;
(4) whether there is a necessary and reasonable restraint mechanism for the intellectual property rights involved in the exercise of the standard."]

（"本指南所称标准制定，是指经营者共同制定的在一定范围内通用的知识产权的标准。具有竞争关系的经营者参与标准制定可能排除和限制竞争，具体分析时可以考虑以下因素：
（1）是否排除其他特定经营者；
（2）是否排斥特定经营者的相关方案；
（3）是否约定不实施其他竞争性标准；
（4）对行使标准中所包含的知识产权是否有必要、合理的约束机制。"）

COMMENT: AIPLA commends the evaluation of standards development activities based on a number of considerations. AIPLA is concerned, however, that the Guidelines fail to consider or acknowledge the substantial benefits of standards. Standards have facilitated substantial economic markets and substantial consumer benefits.

评述：AIPLA 赞扬基于多方面考虑来评估标准制定行为。然而，AIPLA 担心《指南》没有考虑或认识到标准的重大好处。标准大大有利于经济市场和消费者利益。

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

全球反垄断执法机构已经认识到并在各自的指南中纳入了这些考虑因素，因此 AIPLA 建议本《《指南》》也应当纳入有利于标准制定的这些因素。

It is well established that standard-development is often procompetitive, leading to increased innovation, efficiency and consumer choice, fostering public health and safety and making networks more valuable by allowing products to interoperate. However, it is also possible as recognized by Article 10 that collaborative standards-development activities may, in some circumstances, harm competition. Under U.S. law, the conduct of a standards development organization that plans, develops, establishes or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, and appeals process and consensus is analyzed under the antitrust rule of reason to the extent that the conduct constitutes standards development activities as defined by the law.[1] The antitrust analysis of conduct by other types of collaborative standards development, or of other categories of standards development activities, is governed by normal antitrust principles that generally treat conduct subject to a rule of reason analysis.

公认的是，标准制定通常是促进竞争的，其促进创新、提高效率并且扩大了消费者的选择，促进公共卫生与安全，通过协调产品使网络更具价值。然而，也可能如第 10 条所认识到的，在某些情况下，协同的标准制定活动可能会损害竞争。在美国法律中，标准制定组织通过纳入开放性、利益平衡、适当程序、上诉程序和一致性特征的程序来计划、制定、确立或协调自愿达成共识的标准，只要这些行为构成法律定义的标准制定行为,这些行为就会在合理的反垄断规则下分析[1]。 其他类型的协同的标准制定行为的反垄断分析，或者其他类别的标准制定活动的反垄断分析按照常规的反垄断原则的理性原则进行分析。

Article 10 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 those factors address behavior that would be inconsistent with generally accepted practices of voluntary consensus standards development organizations. Globally-accepted principles of standardization development promoted by such well-recognized, international standards bodies such as the American National Standards Institute (ANSI), International Telecommunication Union (ITU), International Organization for Standardization (ISO), and the International Electrotechnical Commission (IEC) include as part of their core principles the concepts that the standards development process should be open and transparent.[2] With regard to the first factor in Article 10, AIPLA believes it is important to recognize that procompetitive collaborative standards development can also occur in other settings, such as through private standards development consortia, where self-selected firms work together to develop technologies and standards to compete with alternative technologies and standards for

[1] See Standards Development Organization Advancement Act of 2004, 15 U.S.C. §4301 note, and 15 U.S.C. §4302.
1. 参见 2004 年出台的《标准制定组织推进法》，《美国法典》第 15 卷第 4301 部分和《美国法典》第 15 卷第 4302 部分。

[2] [Note: from 2010.09.04 – AIPLA Resolutions, page 5]
2.注：摘自 2010 年 9 月 4 日-《AIPLA 决议》第 5 页

acceptance in the market. The fact that those collaborations may exclude other undertakings does not necessarily mean that those collaborations are anticompetitive, particularly where competing products or standards also exist or are being developed. Rather, a case-by-case analysis of the procompetitive and anticompetitive effects of such collaborations is necessary before it can be concluded whether they raise antimonopoly concerns.

第 10 条列举了在分析涉及知识产权的标准制定活动是否可能排除或限制竞争时可能考虑的一些因素。一部分这些因素解决了会与通常被允许的自愿达成共识的标准制定组织的做法不一致的问题。标准化制定的全球公认的原则是由一些公认的国际标准机构推进的，例如，美国国家标准学会（ANSI）、国际电信联盟（ITU）、国际标准化组织（ISO）和国际电子技术委员会（IEC），这些原则包括作为其部分核心原则的概念，即标准制定过程应当是公开且透明的[2]。关于第 10 条的第一条因素，AIPLA 认为应当意识到促进竞争的协同标准制定也可以发生在其他环境中，例如通过私有标准制定联合企业，即自主选择的公司共同制定技术和标准来与其他技术和标准进行竞争以被市场接受。这些合作可能排除其他经营者，这一事实不一定意味着这些合作是反竞争的，尤其是当竞争产品或标准还存在或者正处于开发或制定中时。相反地，在能够得出这种合作是否会引起反垄断担忧的结论之前，对这种合作的促进竞争和反竞争影响进行逐案分析是必要的。

Similarly, if the second factor in Article 10 is intended to mean that the exclusion of a particular solution is competitively problematic, then AIPLA is concerned with this part as standard-setting necessarily involves the selection of particular solutions and the rejection of others.

同样，AIPLA 担心如果第 10 条第二条因素旨在意味着排除特定的解决方案是有竞争性问题的，因为设定标准必然涉及到选择特定的解决方案和排除其他的。

With regard to the fourth factor, AIPLA does not support an approach that would require all standard-development organizations (SDOs) to adopt a single prescribed intellectual property rights/licensing and disclosure policy, but instead favors SDOs having the flexibility to formulate their own policies and procedures. After careful negotiation among many skilled lawyers representing varied and disparate interests, well-known SDOs have not all reached the same conclusions and have not all agreed to adopt the same IP policy approaches. Each SDO's IP policy should be tailored to what is optimal for that organization and its membership.[3]

关于第四条因素， 对于需要所有标准制定组织（SDO）采用单一规定的知识产权/许可和披露政策而非支持 SDO 灵活地制定其政策和程序的方法，AIPLA 是不支持的。经过代表不同利益的多个专业律师之间的仔细协商，并不是所有知名的 SDO 都实现了同样的结论且认同采纳同样的知识产权政策方法。每个 SDO 的知识产权政策应当根据对于该组织及其成员的最优选择进行调整[3]。

[3] [Note: from 2015.02.13 – AIPLA Letter to EC on Patents and Standards, page 3]
3. 注：摘自 2015 年 2 月 13 日——AIPLA 关于专利和标准致 EC 的信函第 3 页

**Article 11. Other Restrictions**
**第十一条 其他限制**

["The undertaking may impose the following restrictions when licensing intellectual property rights:
(1) Restrictions on the field of use of intellectual property;
(2) restricting sales channels, sales range or trading partners of the goods provided by the use of intellectual property rights;
(3) limiting the number of goods provided by the use of intellectual property by the undertaking;
(4) restricting the use of competitive technologies or the provision of competitive goods by the undertaking.
To analyze the effect of the above restrictions on excluding and restricting the relevant market competition, you can consider the following factors:
(1) the content, extent and manner of implementation of the restriction;
(2) the characteristics of goods provided by the use of intellectual property rights;
(3) the relationship between restrictions and intellectual property licensing conditions;
(4) whether it contains a number of restrictions;
(5) whether other undertakings have the same or similar restrictions if the intellectual property owned by other undertakings involves technology with alternative relationships."]

（"当许可知识产权时，经营者可以施加以下限制：
（1）限制知识产权的使用领域；
（2）限制销售渠道、销售范围或使用知识产权的商品的交易对象；
（3）限制通过使用经营者所提供的知识产权产生的商品的数量；
（4）限制使用相竞争的技术或由经营者提供的相竞争的商品。
为了分析对于排除和限制相关市场竞争的上述限制条款的影响，可以考虑以下因素：
（1）限制的内容、程度及实施方式；；
（2）利用知识产权提供的商品的特点；
（3）限制条款和知识产权许可条件之间的关系；
（4）其是否包含多条限制；
（5）如果其他经营者所有的知识产权涉及具有替代关系的技术，那么其他经营者是否实施相同或相似的限制条件。"）

COMMENT: AIPLA respectfully submits that Article 11, addressing conduct involving restrictions other than restrictions specifically addressed elsewhere in the Guidelines, is too vague as written and does not take into account harm to competition or consumers. Each of the recited restrictions may provide certain efficiencies under certain circumstances, and Article 11 does not recognize that possibility. Moreover, based on extensive experience with the practices, each should be evaluated under a rule of reason analysis, not prohibited *per se*. AIPLA respectfully suggests that Article 11 be amended to clarify that the stipulated practices would be unlawful only where it is established by objective evidence that they cause anti-competitive harm in a properly defined relevant market and that the harm outweighs any procompetitive justification.

评述：第11条解决的是涉及除《指南》其他部分中所具体解决的限制之外的限制的行为，AIPLA恭敬的指出第11条的内容过于含糊并且没有考虑到对于竞争或消费者所造成的损害。

每项限制在某种情况下可能提升特定的效率，而第11条没有认识到此可能性。而且，基于丰富的实践经验，应当在理性分析规则下对每项限制进行评估，而不是禁止其本身。AIPLA 建议修改第11条以明确只有通过客观证据确定所规定的做法在恰当定义的相关市场中造成了反竞争的损害并且该损害大于任何促进竞争的正当理由时，其才是非法的。

An important factor in analyzing limitations on the scope of licensed IPR is whether the license agreement restricts competition that likely would have occurred in the absence of the license. This overarching principle encourages the licensing of IP by permitting IPR holders to grant limited rights to exploit their intellectual property that might not otherwise be exploited. Field-of-use, territorial, and other limitations in IPR licenses may be procompetitive by allowing a licensor to exploit its property efficiently, giving a licensee an incentive to invest in products embodying the licensed IPR and to develop additional applications for the licensed property.

在分析对于被许可的知识产权范围的限定时，一重要因素是许可协议是否限制了在不存在该许可时可能出现的竞争。通过允许知识产权所有者授予有限的权利来使用其本可能不能够使用的知识产权，该总原则鼓励进行知识产权许可。通过允许许可人有效地利用其财产、激励被许可人投资应用被许可的知识产权产品和开发被许可财产的额外应用，知识产权许可中的使用领域、地区和其他限定可以促进竞争。

Factor (4) suggests that the more restrictions that exist, the more problematic the license may be; but it does not indicate in any way whether or how many of those restrictions, or the interrelationship of those restrictions, need to be anti-competitive to be relevant in the analysis. Absent some evidence of some interrelationship that creates anticompetitive effect, the number of restrictions should not itself be an issue.

第（4）项因素建议限制越多，则许可可能产生的问题越多；但没有任何说明是否存在这些限制、这些限制的数目、或这些限制的相互关系需要反竞争才能在分析中具备相关性。由于缺乏产生反竞争影响的一些相互关系的一些证据，限制条件的数量本身不应当构成问题。

**Article 12: Safe Harbor Rules**
**第 12 条. 避风港原则**

["(1) The total market share of the competing undertakings combined in the relevant market does not exceed 20%;
(2) the market share of any non-competing undertaking in any relevant market affected by an agreement involving intellectual property rights does not exceed 30%;
(3) if the undertaking's share in the relevant market is difficult to obtain, or the market share cannot accurately reflect the undertaking's market position, but in the relevant market in addition to the technology controlled by the parties of the agreement, there are four or more alternative technologies that are independently controlled by other undertakings and can be obtained at a reasonable cost."]

（"（1）在相关市场中的具有竞争关系的经营者的总市场份额不得超过 20%；

（2）受到涉及知识产权的协议所影响的不具有竞争关系的经营者在任何相关市场中的市场份额不得超过 30%；
（3）如果经营者在相关市场中的份额难以获得，或者市场份额不能够准确反映经营者的市场地位，但是在除协议方所控制的技术之外的相关市场中，存在由其他经营者独立控制的并且能够以合理价格获得的四个或四个以上的其他技术”）

COMMENT: AIPLA commends the Guidelines for inclusion of safe harbor rules. These revisions bring the Guidelines into closer conformity with international norms of antitrust enforcement. AIPLA supports establishment of a "20 percent" share safe harbor for competitors. Article 12 also sets forth a "30 percent" safe harbor for non-competing (e.g., vertical) relationships. Given the generally procompetitive and efficient nature of vertical contracts, AIPLA suggests that a more lenient safe harbor (50 percent) would be appropriate. In addition, AIPLA recommends including a statement clarifying that failing to qualify for a safe harbor in no way infers or presumes that an arrangement is likely to be anticompetitive.

评述：AIPLA 赞扬《《指南》》包含了避风港原则。这些修改使得《指南》更贴近反垄断执法的国际规范。AIPLA 支持为竞争者确立“20%”份额的避风港。第 12 条还为非竞争关系（例如纵向关系）情况提出“30%”的避风港。由于纵向合同通常具有促进竞争和高效的性质，因此 AIPLA 建议适当的更宽松的避风港（即 50%的避风港）。此外，AIPLA 建议纳入说明以明确即使没有以任何方式满足避风港资格则也不可以推论或假设某协议可能是反竞争的。

**Article 13. Affirmation of Intellectual Property Rights and Dominant Market Position**
**第 13 条.知识产权和市场支配地位的认定**

["Undertakings having intellectual property rights does not mean that they must have a dominant market position. Whether an undertaking having intellectual property rights has a dominant position in the relevant market should be analyzed according to the factors and circumstances regarding affirmation or presumption of dominant market position stipulated in the provisions of Article 18 and Article 19 of the Anti-Monopoly Law. Combined with characteristics of intellectual property rights the following factors can also be considered...."]

（“经营者拥有知识产权，并不意味着其必然具有市场支配地位。拥有知识产权的经营者在相关市场上是否具有支配地位的认定，应依据《反垄断法》第 18 条和第 19 条规定的认定或推定市场支配地位的因素和情形进行分析。结合知识产权的特点，还可具体考虑以下因素：……”）

COMMENT: AIPLA commends the Guidelines for recognizing that intellectual property rights do not necessarily confer market power. AIPLA commends the Guidelines for requiring proof of market power which brings the Guidelines more closely into alignment with international standards of antitrust enforcement.

Although the enumerated factors may be helpful, they are not a substitute for valid economic analysis of the challenged conduct. Specifically, the determination of market power should be based on competent economic evidence regarding the relevant product market. AIPLA

recommends that this framework not be ignored in favor of reliance on one of more of the enumerated factors.

评述：AIPLA 赞扬《指南》认识到知识产权并不一定赋予市场力量。AIPLA 赞扬《指南》要求提供市场力量的证明，这使得《指南》更接近于反垄断执法的国际标准。
尽管所列举的因素可能有帮助，但它们不是对受到质疑的行为的有效经济分析的替代。具体为，确定市场力量应当基于关于相关产品市场的充足的经济证据。AIPLA 建议不应当忽视此构架，以利于依赖于更多的列举因素之一。

Moreover, AIPLA respectfully recommends that it should not be sufficient to establish liability under the Guidelines merely to exercise an IPR, even for an undertaking that has market power, and even where the exercise of IPRs may exclude an infringing competitor. In order to be held liable, an undertaking must have a dominant market position, must abuse its position to eliminate or restrict competition, and also must be using the IPR in a manner not contemplated by the IPR laws and administrative regulations, as provided in Article 55 of the AML.

再者，AIPLA 建议在依据《指南》确立责任时，只针对行使知识产权是不够的，即便经营者具有市场力量、以及行使知识产权可能排除侵权竞争者。为追究责任，如《反垄断法》第 55 条所规定的，经营者必须具有支配地位、必须滥用其地位以排除或限制竞争，并且必须以知识产权法和行政条例不考虑的方式使用知识产权。

AIPLA agrees with the position reflected in Article 13 that an undertaking owning IPRs, by itself, should not be presumed to be in a dominant market position. Article 17 of the AML defines a "dominant market position" to mean a

> "market position that enable the undertakings to control the price or quantity of products or other trading conditions in the relevant market or to impede or affect the entry of other undertakings into the relevant market."

AIPLA 认同第 13 条所反映的立场，那就是经营者拥有知识产权本身不应当被认为其处于市场支配地位。《反垄断法》第 17 条定义了"市场支配地位"意思是"经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位"。

AIPLA agrees with the draft Guidelines that the existence of a dominant market position as defined above must be evaluated on a case-by-case basis taking into account various factors, including those set out in Article 17 of the AML, and additional factors listed in Article 13. We note that AML Article 18(6) permits the consideration of "other factors relevant to the determination of the undertaking's dominant market position" and therefore recommend that Article 13 be revised to make clear that other relevant factors may also be considered.

AIPLA 认同《指南》草案，即必须逐案评估如上定义的市场支配地位的存在并考虑不同因素，包括《反垄断法》第 17 条提出的因素和第 13 条列举的额外因素。我们注意到《反垄断法》第 18 条第 6 项允许考虑"与认定该经营者市场支配地位有关的其他因素"，因此建议修改第 13 条使其明确还可以考虑其他相关因素。

Whether the owner of a standard essential patent (SEP) has a dominant market position must be evaluated on a case-by-case basis in light of the same definition in AML Article 17. The mere ownership of a SEP does not presume to create a market dominant position. Article 13 sets out five additional factors that should also be considered in that evaluation. AIPLA recommends that a sixth factor be added to that list: "the extent to which legal, regulatory or contractual restrictions other than the AML, constrain the ability of the SEP holder to control the price or quantity of products in the relevant market or impede the entry of other undertakings into the relevant market." If such legal, regulatory or contractual restrictions prevent a SEP holder from controlling the royalty for its SEPs above competitive levels or impeding the entry of other undertakings into the market, then a dominant market position may not exist.

必须按照《反垄断法》第 17 条中的相同定义逐案评估标准必要专利（即 SEP）的所有人是否具有市场支配地位。只拥有 SEP 不意味着产生市场支配地位。第 13 条提出了在此评估中同样应当考虑的 5 项附加因素。AIPLA 建议在其中增加第六点因素："《反垄断法》以外的法律、法规或合同限制约束 SEP 所有者控制产品在相关市场中的价格或数量的程度或约束 SEP 所有者阻碍其他经营者进入相关市场的程度"。如果该法律、法规或合同限制使 SEP 所有者不能够将其 SEP 的使用费控制在竞争水平之上或者不能阻碍其他经营者进入市场，则市场支配地位可能并不存在。

**Article 14. Licensing Intellectual Property Rights at Unfairly High Price**
**第十四条 以不公平的高价许可知识产权**

["Undertakings having dominant market position may abuse their position, licensing intellectual property rights at unfairly high price to exclude and restrict competition. To analyze whether this constitutes abuse of dominant market position, the following factors may be considered:
(1) method of calculating the license fee, and the contribution of IP to the value of the relevant commodity;
(2) promises made by the undertaking regarding licensing intellectual property rights;
(3) history of IP licensing, or comparable license fee standard;
(4) licensing conditions leading to unfairly high price, including restrictions on the geographical area or scope of the goods;
(5) whether a package license charges fees for expired or invalid intellectual property rights."]

["具有市场支配地位的经营者，可能滥用其市场支配地位，以不公平的高价许可知识产权，排除、限制竞争。分析其是否构成滥用市场支配地位，可以考虑以下因素：
（一）许可费的计算方法，及知识产权对相关商品价值的贡献；
（二）经营者对知识产权许可作出的承诺；
（三）知识产权的许可历史或者可比照的许可费标准；
（四）导致不公平高价的许可条件，包括限制许可的地域或者商品范围等；
（五）在一揽子许可时是否就过期或者无效的知识产权收取许可费。"]

COMMENT: AIPLA is concerned that the Guidelines fail to provide adequate guidance as to what constitutes an unfairly high price. Attempts to place artificial limitations on an undertaking's ability to seek license fees would upset the critical balance between IPR owners and potential licensees, without giving due regard to the interests of owners. Excessive pricing concerns in IPR licensing should arise, if at all, only in the most exceptional

circumstances. Permitting undue enforcement risks undermining innovation incentives because it will deter inventors and patentees from obtaining a reasonable return on their investment. Price regulation of IPR royalties is also extraordinarily difficult because of the myriad of factors that might be considered by each counterparty, and the complex contribution that IPR may have for a specific product. Accordingly, competition law should consider objective factors such as Art. 14(3) and rely upon the results of bilateral negotiations for reaching proper royalties, including in connection with SEP royalties.

评论：AIPLA担心本《指南》未能提供足够指引说明何者会构成不公平高价。试图人为的限制经营者寻求许可费的能力会扰乱知识产权人与潜在被许可人间的关键平衡而未适当考虑权利人的利益。在知识产权的许可中若有价格过高的问题的话，其应仅出现在最特殊的情况下。允许非适当执法将有破坏创新动机的风险，因为它将阻碍发明人和专利权人获得合理的投资回报。由于每个交易对手可能会考虑到各种因素，并且因为知识产权可能对一特定产品有复杂贡献，知识产权许可费的价格管理也非常困难。准此，竞争法应考虑客观因素，如第14（3）条，并取决双边谈判的结果来达成适当的许可费，包括针对SEP的许可费。

The enumerated factors (1) through (4) appear to be pertinent to the value of the license. Paragraph (5), however, implicates package or portfolio licenses. These licenses may have substantial pro-competitive benefits, and AIPLA does not believe that the value of the royalty needs to track the number of assets that are subsisting at any time. AIPLA acknowledges and supports the position that license fees cannot be charged after the expiration of the last-to-expire of the assets but disagrees that the fees cannot remain at the agreed level with the expiration of any one or more of the assets in the portfolio. AIPLA recommends that the parties be permitted to establish a license agreement for their respective convenience which licenses an entire portfolio of IPRs, notwithstanding the risk that certain IPRs may expire or be found invalid during the term of the agreement. AIPLA suggests deleting factor (5) or modifying it as follows: "(5) In the case of portfolio licensing, whether the undertaking collects a licensing royalty on expired or invalid IPR that were specifically identified by the undertaking, in writing, to be critical to the licensing transaction."

列举的因素（1）至（4）似乎与许可的价值有关，而第（5）款涉及一揽子许可或许可组合。这些许可可能具有相当促进竞争的好处，而 AIPLA 不认为许可费价值需要时刻盯着存在资产的数量。 AIPLA 认知并支持在最后到期资产的过期后不能收取许可费的立场，但不同意在组合中任何一个或多个资产过期时许可费却不能维持在已商定的水平。AIPLA 建议允许双方可为其各自的便利而订立许可协议，以便许可整个知识产权组合，尽管在协议期限内某些（组合内的）知识产权可能会到期或被宣告无效。 AIPLA 建议删除因素（5）或修改之为如下：「（5）在许可组合的情况下，经营者是否以书面方式明确对经营者确定的过期或无效的知识产权收取许可权利金对许可交易至关重要。」

This factor needs to be clarified that only those patents that are "important" and form the basis of the valuation, as evidenced in writing, are the patents relevant to the factor. In licensing a portfolio of patents, which is very common in the industry, the parties typically expect new patents to enter and old patents to expire. The parties may build this expectation into the rates, and may include provisions to address large changes. Requiring parties to screen each invalid or

expired patent in a package license deal is not in line with common practice, and is unreasonable and inefficient. However, if the expired or invalid IPR was specifically identified by the parties in writing as critical to the licensing transaction, then there may be a basis for reconsidering rates if the parties had provided for that in the agreement.

该因素需要澄清，只有那些 “重要”并构成估值基础的专利,如书面证明,才是与该因素相关的专利。在许可专利组合时，这在行业中是非常普遍的, 各方通常预期新专利会出现和旧专利会到期。双方会将此预期考量纳入费率中，并可能包括解决巨大变化的条款。要求各方在一揽子许可的交易中筛除每个无效或过期的专利并不符合常规做法，也是不合理和低效的。然而，若过期或无效的知识产权经双方以书面形式明确确定为对许可交易至关重要，如果双方在协议中规定了这点，则可能作为重新考虑费率的依据。

AIPLA notes that the opening premise should be that patent owners can offer a license on terms they wish to provide. Absent some licensing obligation the patent owner has entered into, they should be allowed to maintain exclusivity or license as they wish, provided the terms do not expand beyond the scope of the patent rights and have anticompetitive effects on the market. Practically, if the patent owner charges unreasonably high rates, others will reject the offer and the parties will negotiate if they are interested in arranging a deal. Targeting licensors with abuse charges because an offer is not considered reasonable (by a prospective licensee) may chill and reduce incentives for the development and/or licensing of patented inventions.

AIPLA 指出，开放前提应该是专利权人可以根据他们希望提供的条款来授与（他人）许可。在没有专利权人签订的许可义务时，只要条款不超出专利权范围并对市场未有反竞争性的影响，就应允许他们保持其所欲的排他或授与许可（的地位）。实际上，如果专利权人收取不合理的高利率，他人会拒绝该许可要约，而且若双方有兴趣作成交易，双方将进行谈判。以要约不被（潜在的被许可人）认为合理而形成浮滥收费的理由来对付许可授与人可能会浇冷并减少对专利发明的开发和/或许可的动机。

AIPLA has concern about the last paragraph of Article 14 that suggests that the overall license fee on standard-compliant products—i.e., what is often termed a “royalty stacking” issue—should be considered in determining whether the royalty on a SEP is deemed to be “unfairly high” so as to constitute an abuse of dominant market position. Specifically, AIPLA does not believe that any analysis of “unfairly high pricing” of technology licenses should rely on alleged or theoretical royalty stacking concerns, but should rely on specific evidence that a royalty stacking issue exists for the particular standard essential patent and standard at issue.[4] Such evidence should include evidence that the specific standard at issue has been impeded by royalty stacking.[5] Without any evidence, there is no reason to assume that royalty stacking inherently affects every SEP licensing negotiation.[6] AIPLA is not aware of any evidence that the possibility of royalty stacking has inhibited access to or the adoption of any standard.[7] The fact

[4] 2014.09.22 – AIPLA Amicus Brief Microsoft v. Motorola, at 4; *Ericsson v. D-Link*, 773 F.3d 1201, 1234 (Fed. Cir. 2014) (“Certainly something more than a general argument that [royalty stacking is a] possibilit[y] is necessary.”; evidence of royalty stacking may include evidence of other license fees a standard implementer is required to pay).
[5] Id. at 18.
[6] Id. at 19.
[7] Id. at 19.

that a standard may incorporate a large number of patented technologies does not, in and of itself, support the devaluing of those patents to a level most advantageous for implementers.[8]

AIPLA 担心第 14 条的最后一款，其表明对标准符合产品的整体许可费－即经常被称为”许可费堆叠”问题－应该在决定是否 SEP 的许可费被视为「不公平高」以至于构成滥用市场支配地位时被考量。具体来说，AIPLA 不认为任何对技术许可的「不公平高价」的分析应取决于所指称的或理论上的许可费堆叠问题，而应取决于具体证据表明许可费堆叠问题存在于特定标准必要专利和系争标准[4]。此类证据应包括特定系争标准被许可费堆叠所阻碍（之事实）[5]．若没有任何证据，则没有理由来假定许可费堆叠当然地影响每个 SEP 的许可协商[6]。 AIPLA 不知道有任何证据表明许可费堆叠可能抑制了任何标准的取得或采用。一件标准可能包含大量专利技术之事实本身并不支持贬低这些专利的价值达到对实施者最有利的水平。

Further, the fact that many patents may be declared potentially essential to a standard does not mean that all of those patents actually are essential to the standard. Further, not all patents that are essential to a standard contribute the same value to the standard or to a particular licensed product. Moreover, not all SEP holders assert their patents or seek royalties for a license to their SEPs. Thus, one cannot merely count the number of patents declared as potentially essential to a standard as evidence of actual royalty stacking concerns or the value of a particular SEP to a particular licensed product at issue.

此外，许多专利可能被宣告为对一件标准必要之事实并不意味着所有这些专利实际上对该标准皆是必不可少的。此外，并非所有对标准必要的专利对该标准或特定的许可产品都具有相同贡献。另外，并非所有 SEP 拥有人都维护其专利或通过许可其 SEP 来寻求许可费。因此，不能仅仅计算宣称对标准属潜在必要之专利数量作为实际许可费堆叠担忧的证据或特定 SEP 对特定系争许可产品价值的证据。

If a patentee has contributed a valuable piece of technology to the standard, the standards bodies' intellectual property rights ("IPR") policies are explicitly intended to preserve a reward of adequate compensation for that contribution—regardless of the number of other SEPs that may also contribute to the standard.[9] Such IPR policies help alleviate royalty stacking concerns by seeking FRAND or similar assurances from patent holders.[10] Accordingly, an SEP patent

---

[8] Id. at 19; Ericsson, 773 F.3d at 1234 (Fed. Cir. 2014) ("The mere fact that thousands of patents are declared to be essential to a standard does not mean that a standard-compliant company will necessarily have to pay a royalty to each SEP holder.").

[4] 2014.09.22 – AIPLA Amicus 简报 微软诉摩托罗拉 4; *Ericsson v. D-Link*, 773 F.3d 1201, 1234 (Fed. Cir. 2014)(" 当然，这不仅仅是一个普遍的观点，即[许可费堆叠是一种]可能性]是必要的;" 有关许可费堆叠的证据可能包括标准实施者需要支付的其他许可费的证据）。

[5] 同上 18.

[6] 同上 19.

[7] 同上 19.

[8] 同上 19; Ericsson, 773 F.3d at 1234 (Fed. Cir. 2014) ("成千上万的专利被宣布为标准的必要条件的事实并不意味着符合标准的公司必需给每个 SEP 持有人支付使用费.")

[9] Id. at 19

[9] 同上 19

[10] *Ericsson*, 773 F.3d at 1209 (Fed. Cir. 2014) ("Royalty stacking can arise when a standard implicates numerous patents, perhaps hundreds, if not thousands. If companies are forced to pay royalties to all SEP holders, the royalties

holder's compliance with an SDO's IPR Policies and the patent holder's express licensing commitments thereto should help alleviate royalty stacking concerns.

若专利权人为该标准贡献了一项有价值的技术，则标准组织的知识产权政策明确地旨在保留对此贡献的适当补偿之报酬－不论其他对标准亦有贡献之 SEPs 数量为何[9]。这种知识产权政策通过寻求专利权人的 FRAND 或类似保证来帮助减缓许可费堆叠问题[10]。因此，SEP 专利权人遵守 SDO 的知识产权政策和专利权人对其的明确许可承诺将有助于减缓许可费堆叠问题。

**Article 15. Refusal to License Intellectual Property Rights**
**第十五条 拒绝许可知识产权**

["Refusal to license is one way for the undertaking to exercise its intellectual property rights. However, when an undertaking having a dominant market position refuses to license intellectual property rights without a justifiable reason, especially when its intellectual property rights constitute necessary facilities for production and business activities, it may constitute abuse of the dominant market position, and exclusion and limitation of competition. In the specific analysis, the following factors can be considered...."]

[“拒绝许可是经营者行使知识产权的一种表现形式。但是，具有市场支配地位的经营者，尤其是其知识产权构成生产经营活动的必需设施时，其没有正当理由拒绝许可知识产权，可能构成滥用市场支配地位，排除、限制竞争。具体分析时，可以考虑以下因素 …]

COMMENT: AIPLA commends that the Guidelines acknowledge that the intellectual property rights owner may refuse to license. AIPLA remains concerned, however, that the Guidelines specifically contemplate that intellectual property rights may be an "essential facility," precluding the owner from refusing to license. Intellectual property rights by their nature are innovations, and the alternative approaches to the intellectual property remain available.

评论：AIPLA 赞扬该《指南》认知到知识产权拥有者可以拒绝许可。然而，AIPLA仍然关注的是，《指南》明确地考虑到，知识产权可能是 “必需设施”，其排除权利人之拒绝许可。知识产权本身就是创新，而知识产权的替代方案依然存在。

According to Article 15, for IPR that constitutes an essential facility, refusal to license may lead to an "abuse of dominant market position." We suggest deleting the reference to "essential facility" from this Article. In China, the AML does not include any reference to the necessary or essential facility concept. And in the US, the "Essential Facility Doctrine" has never been used in determining an antitrust obligation for refusal to license intellectual property. The U.S.

---

will 'stack' on top of each other and may become excessive in the aggregate. **To help alleviate these potential concerns**, SDOs [standard development organizations] often seek assurances from patent owners before publishing the standard. IEEE, for example, asks SEP owners to pledge that they will grant licenses to an unrestricted number of applicants on 'reasonable, and non-discriminatory ('RAND') terms.") (emphasis added)

[10] *Ericsson*, 773 F.3d at 1209 (Fed. Cir. 2014)(" 当标准涉及许多专利时，可能会出现许可费堆叠，也许数百甚至数千。如果公司被迫向所有 SEP 持有人支付许可费，则许可费将“叠加”在彼此之间，可能会累积过多. **为了减轻这些潜在的问题**，SDO [标准开发组织]在出版标准之前经常寻求专利所有人的保证。例如，IEEE 要求 SEP 所有者保证，他们将以”合理和非歧视性的条件（‘RAND’）”向无限制数量的申请人发放许可证.)(重点加上去的)

Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko* made it clear that it has "never recognized" the doctrine of essential facilities. The U.S. Court of Appeals for the Federal Circuit, which specializes in intellectual property, stated in *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1326 (Fed. Cir. 2000), that there is "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent".

根据第15条，对于构成基本设施的知识产权，拒绝其许可可能导致”滥用市场支配地位”。我们建议删除本条所谓 “必需设施”一词。在中国，反垄断法没有提到所谓必要或必需设施的概念。而在美国， “必需设施原则” 从未被用于确定对于拒绝知识产权许可的反垄断义务。美国最高法院在 “Verizon 通讯公司诉Curtis v. Trinko法律事务所” 一案中明确表示，其 “从未承认” 所谓必需设施原则。专精于知识产权审理的美国联邦巡回上诉法院在 “独立服务组织反托拉斯诉讼（203 F.3d 1322,1326（Fed。Cir。2000））」中陈述，「没有报导的案件指出有法院对因单方面拒绝出售或许可专利而科予反垄断责任。」

Article 15 also follows a more restrictive approach than other Guideline articles which suggested better workability in making analyses. For example, Article 14 provides “[w]hen analyzing whether this constitutes an abuse of dominant market position, *the following factors shall be considered:* …”, and Article 18 provides “When analyzing whether the discriminatory treatment granted by the undertaking constitutes an abuse of dominant market position, *the following factors shall be considered*: ….” However, Article 15 seems more conclusive by possibly suggesting that dominant market position and refusing to license the IPR, may be deemed as constituting an abuse of dominant market position. Therefore, it is suggested to change this article according to the format/style of other articles like “When analyzing whether refusing to license the IPR without good reasons by an undertaking having dominant market position constitutes an abuse of dominant market position to exclude or restrict competition, the following factors may be considered: ….”

较《指南》的其他条款提供了分析时更佳的可操作性，第15条亦采取了更具限制性的做法。例如，第14条规定，「分析是否构成滥用市场支配地位，应考虑以下因素：....」，第18条规定：「分析是否经营者所给予的歧视性待遇构成了滥用市场支配地位，应考虑以下因素：....」但是，第15条似乎更具结论性的暗示具有市场支配地位（本身）和拒绝许可知识产权可能被视为构成滥用市场支配地位的行为。因此，建议根据其他条款的格式/样式来修正本条如 “当分析一具有市场支配地位的经营者在没有正当理由拒绝许可知识产权是否构成滥用市场支配地位以排除或限制竞争，可以考虑以下因素：....”

Furthermore, a patent owner’s right to exclude and decide whom to license is a fundamental patent right. A compulsory licensing requirement is counter to that basic patent right, which is encapsulated in Art 11 of China’s patent law. Article 15 would deny certain IPR holders the right to exclude, even though the IPR holders do not engage in any conduct inconsistent with IPR laws and administrative regulations. Such an improper compulsory licensing requirement is contrary to the principles stated in the Preface of the draft Guidelines and would be the result of unreasonable governmental scrutiny of a patent owner exercising its right not to license someone. Accordingly, AIPLA suggests that, before there is a review of this basic right to refuse to license someone, there must be proof that there is an injury to competition and consumers.

此外，专利权人排除和决定谁将被许可的权利是一项基本专利权利。强制许可的要求与该基本专利权利相抵触，而该权利是纳入中国专利法第 11 条之中。即使知识产权权利人未从事与知识产权法律和行政法规不符的行为，第 15 条会否决某些知识产权权利人的排除权。这种不正当的强制许可要求违反了《指南》草案序言中陈述的原则，而且会造成政府对专利权人行使其权利不授与许可予某人一事来进行不合理审查的结果。因此 AIPLA 建议，在对该拒绝许可之基本权利进行审查之前，必须有所证明市场竞争和消费者受到了伤害。

**Article 16. Tying Involving Intellectual Property Rights**
**第十六条 涉及知识产权的搭售**

["Tying involving intellectual property rights refers to the licensing or assignment of intellectual property rights conditioned on the acceptance of licensing or assignment of other intellectual property rights, or acceptance of other commodity. Package licensing of intellectual property rights may also be a form of tying. An undertaking with a dominant market position may, without justification, exclude or restrict competition through the above tying action. The same factors are generally considered in the analysis of whether tying of intellectual property rights constitutes abuse of market dominance, and in the analysis of tying of other goods."]

[“涉及知识产权的搭售，是指知识产权的许可、转让，以经营者接受其他知识产权的许可、转让，或者接受其他商品为条件。知识产权的一揽子许可也可能是搭售的一种形式。具有市场支配地位的经营者，没有正当理由，可能通过上述搭售行为，排除、限制竞争。分析涉及知识产权的搭售是否构成滥用市场支配地位，与分析涉及其它商品的搭售一般考虑相同的因素”]。

COMMENT: AIPLA supports the effort to directly address the issue of tying which may be pro-competitive or anti-competitive, depending on the circumstances. However, AIPLA is concerned regarding the Guidelines' treatment of tying involving intellectual property rights. Tying essentially involves using market power for one product to force the customer to purchase another product that may be unwanted. The Guidelines appear to move treatment of tying arrangements involving intellectual property further from international norms of antitrust enforcement. Experience has shown that tying should be considered under a rule of reason analysis, and that tying of intellectual property is not even implicated unless the licensee has requested a license to a subset of IPRs, which request has been refused. Even if a licensor ties or bundles IPRs, this does not mean that the tying is anticompetitive. AIPLA thus recommends that the Guidelines be clarified to state that tying would be unlawful only where it is established by objective evidence that the IPR holder is using market power in a tying market to cause an anticompetitive effect in the market for the tied product.

评论：AIPLA 支持直接解决搭售问题的努力，该搭售根据情况可能是有利或反竞争的。然而，AIPLA 对《指南》中涉及知识产权的搭售的处理方式感到担忧。搭售基本上涉及到使用一个产品的市场支配力强制客户购买另一种可能不需要的产品。 《指南》似乎将涉及知识产权的搭售安排的处理从国际反垄断执法准则中移开。经验表明，搭售应当在合理原则的分析下考量，并且，除非被许可人已请求部分知识产权的许可而该请求已被拒绝，否则不应被隐喻为产生了知识产权的搭售。即使许可人搭售或捆售知识产权，这并不意味

着搭售是反竞争的。因此，AIPLA 建议澄清《指南》，陈述只有通过客观证据证实知识产权人在搭售市场上使用市场支配力以造成对该被搭售产品在市场上有反竞争效果时，搭售才是非法的。

The Guidelines also appear to be moving the treatment of portfolio licensing from a favored status to a form of tying, and to equate the tying of goods with the tying of intellectual property rights. AIPLA recommends that the Guidelines reconsider this approach. Due to the nature of innovation, it is fundamentally more difficult to establish market power over intellectual property rights than it may be to establish market power in a relevant product market for goods. Moreover, the Guidelines fail to acknowledge the substantial procompetitive benefits that may flow from portfolio licensing. AIPLA recommends that portfolio licenses not be treated as a form of tying.

《指南》似乎也对许可组合的处理从一种嘉惠地位转移为一种搭售形式，并将货物搭售与知识产权的搭售相提并论。 AIPLA 建议《指南》重新考虑这种做法。有鉴于创新的本质，相较于在货物的相关产品市场上建立市场支配力，在知识产权方面建立市场支配力基本上更为困难。此外，《指南》未能认知可能源于许可组合的相当促进竞争的好处。 AIPLA 建议不视许可组合为一种搭售形式。

**Article 17. Additional Unreasonable Transaction Conditions Involving Intellectual Property Rights**
**第十七条 涉及知识产权的附加不合理交易条件**

["An undertaking having a dominant market position may, without justification, impose the following additional transaction conditions in transactions involving intellectual property:
(1) requiring exclusive grant-back from transaction counterparty;
(2) prohibiting transaction counterparty from challenging the validity of the undertaking's intellectual property rights, or prohibiting transaction counterparty from suing the undertaking for intellectual property infringement;
(3) restricting the use of competing technology or goods by counterparts;
(4) claiming right on expired or declared invalid intellectual property rights;
(5) requiring cross-licensing from transaction counterparty without providing reasonable consideration;
(6) forcing or prohibiting transaction counterparty trading with a third party, or restricting transaction conditions between transaction counterparty and a third party."]

[“具有市场支配地位的经营者在与知识产权有关的交易中可能在没有合理理由的情况下附加下列限制条件：
（1）要求交易相对人进行独占性回授；
（2）禁止交易相对人对该经营者的知识产权的有效性提出质疑，或者针对其提起知识产权侵权诉讼；
（3）限制交易相对人利用竞争性的技术或者商品；
（4）对过期或者被宣告无效的知识产权主张权利；
（5）在没有合理交易条件的情况下向交易相对人要求交叉许可；
（6）强迫或禁止交易相对人与第三方进行交易，或限制交易相对人和第三方之间的交易条件。”]

COMMENT: Article 17 applies to conduct involving transaction conditions including grant backs or cross-licensing, waiver of validity challenges, post-expiration consideration and competition restrictions. AIPLA is concerned that the Guidelines separately treat the enumerated provisions, several of which have been discussed in other sections of the Guidelines. As noted above, many of these restrictions normally do not implicate antimonopoly concerns, nor do they threaten to injure competition. AIPLA recommends that they not be singled out as restrictions that would invoke heightened scrutiny of a challenge license agreement. Moreover, based on extensive experience with the practices, each should be evaluated under a rule of reason analysis, not prohibited *per se*. At a minimum, AIPLA respectfully requests that this Article be amended to clarify that the stipulated practices would be unlawful only where it is established by objective evidence that they cause actual anticompetitive harm in a properly defined relevant market and that harm outweighs any procompetitive justification.

评述：第 17 条适用于涉及包括回授或交叉许可、放弃质疑有效性、考虑过期知识产权和限制竞争在内的交易条件的行为。AIPLA 担心《指南》对所列举的条款进行分别处理，《指南》的其他部分已讨论过其中的几项。如上所述，很多这些限制通常不会引起反垄断担忧，也不会招致损害竞争。AIPLA 建议不应当将其作为会引起重点审查质疑的许可协议的限制条件逐个列举。此外，基于丰富的实践经验，应当根据理性分析规则对每项进行评估，而非禁止其本身。AIPLA 请求至少将该条修改为明确为只有客观证据确定其在恰当定义的相关市场中造成实际反竞争损害并且该损害大于任何促进竞争时，所规定的做法才会是非法的。

**Article 18. Discriminatory Treatment Involving Intellectual Property Rights**
**第十八条 涉及知识产权的差别待遇**

["In a transaction involving intellectual property rights, an undertaking having a dominant market position may, without justification, impose different licensing terms on transaction counterparties with substantively the same conditions to exclude and restrict competition. When analyzing whether the implementation of the discriminatory treatment by an undertaking constitutes abuse of dominant market position, the following factors can be considered: …."]

[“在涉及知识产权的交易中，具有市场支配地位的经营者，没有正当理由，可能对条件实质相同的交易相对人实施不同的许可条件，排除、限制竞争。分析经营者实行的差别待遇是否构成滥用市场支配地位，可以考虑以下因素：…]

COMMENT: AIPLA is concerned that the antimonopoly Guidelines appear to impose an overriding obligation of nondiscrimination by all licensors. The underlying premise of the patent is that the patentee may exclude others from its patented technology. This provides the inventor with an incentive to invest in risky innovation efforts. If the patent holder wishes, it may license others. If it wishes to license a small company or wishes to limit the quantity the licensee may sell, that is a decision for the patent owner to preserve its ability to stay in the market. If the patent owner wishes to license a partner or a non-competitor under terms differing from those offered to a competitor, that again should be the patent owner's decision. If the patent owner makes an offer unacceptable to the prospective licensee, that party may counteroffer or seek alternative technologies. This useful dynamic is recognized by laws and basic patent principles globally. See, for example, the landmark U.S. case of *Georgia Pacific v US Plywood*, 318 F. Supp. 1116 (SDNY 1970), listing reasonableness factors including “customer versus

competitor." Moreover, there may be instances in which disparate terms are urged by the licensee or by the circumstances themselves. Forcing patent owners to provide the same terms for all prospective licensees is generally contrary to patent fundamentals and is counterproductive.

评语：AIPLA 担心反垄断准则似乎强加了所有许可人无歧视的首要义务。专利的基本前提是专利权人可以将其他人从其专利技术中排除。这激励发明人去投资有风险的创新努力。如果专利持有者愿意，可以许可他人去做。如果专利持有者希望许可一家小公司或希望限制被许可人可能出售的数量，这是专利持有者保留其在市场上的能力的决定。如果专利所有者希望根据给提供给竞争对手的条款不同的条款来许可合作伙伴或非竞争对手，这也应该是专利所有人的决定。如果专利所有者向潜在被许可人提出不可接受的报价，该方可能会还价或寻求替代技术。这个实用的动态理论是全球法律和基本专利原则所认可的。例如，格鲁吉亚太平洋诉美国胶合板 （*Georgia Pacific v US Plywood*, 318 F. Supp. 1116 (SDNY 1970)）的里程碑美国案例，列出了“客户与竞争对手”之间的合理性因素。此外，可能有被许可人或情况本身会提出不同的条款的情况。迫使专利所有人为所有潜在的被许可人提供相同的条款一般是违反专利基础并适得其反。

There may be occasions where the patent owner agrees to license its patent(s) on a reasonable and non-discriminatory basis in which other considerations apply. But the State Council should be careful in not imputing such a requirement. In any event, the criteria for determining "substantively same conditions" are often unclear and difficult to implement. 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 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. Moreover, geographic scope may also have an effect on licensing terms and conditions. To be sure, license agreements include numerous terms and conditions beyond royalty rate, which may have special value to the parties that affects the quid pro quo. 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 parties, influencing the "same conditions" analysis.

有时专利所有人同意在合理和非歧视的基础上许可其专利，这其中其他考虑也适用。但国务院要小心，不排除这样的要求。无论如何，确定“实质上相同条件”的标准往往不清楚，难以实施。例如，许可人可以将相同的专利授权给不同级别的被许可人（例如批发商，零售商，用户）或不同的市场或领域。当相关领域的许可证持有者在不同的专利组合中获得许可后，“相同条件”变得更为复杂，正如中国机构所认可的那样。此外，地理范围也可能对许可条款和条件产生影响。可以肯定的是，许可协议包括超出专利费率的许多条款和条件，这可能对影响等价交换的各方具有特殊价值。例如，对论坛的选择，审计权利，流动权利分配或被收购实体的权利等可能对某些方有更大或更小的兴趣，都会影响“相同条件”的分析。

The pro forma use of "non-discrimination" may undermine the vitality and value of patents and may be counterproductive (as a disincentive to innovate) and must be carefully applied even when the licensor accepted an obligation to license on a non-discriminatory basis. AIPLA respectfully recommends that imposition of a duty of nondiscrimination in the licensing of

intellectual property is not appropriate. Rather, the specific discriminatory acts should be considered in the overall framework of the antimonopoly law, namely, whether the party challenged has market power in a relevant product market, the conduct has anticompetitive effects that injure competition rather than disadvantaging an individual competitor, and there are no procompetitive justifications that outweigh the anticompetitive effects.

形式上使用“不歧视”可能会破坏专利的活力和价值，并可能适得其反（作为创新的阻碍），即使许可人在非歧视性基础上接受许可的义务，也必须认真应用。 AIPLA 恭敬地建议在知识产权许可中实行非歧视义务是不合适的。 相反，应该在反垄断法的总体框架下考虑具体的歧视行为，即有争议的一方是否在有关的产品市场上具有市场能力，这种行为是否具有损害竞争的反竞争的作用，而不是危害单个竞争对手，而且没有超过反竞争效应的促进竞争的理由.

**Article 23: Behavioral Conditions Involving Intellectual Property Rights**
**第二十三条　涉及知识产权的行为性条件**

[“The behavioral conditions involving intellectual property rights are determined on a case-by-case basis, and the proposed restrictive conditions may involve the following:
(1) Intellectual property licensing. The license is usually exclusive, and does not include usage area or geographical restrictions.
(2) Maintaining independent operation of the intellectual property rights related business. Related business should possess the conditions for effective competition within a certain period of time.”]

[“涉及知识产权的行为性条件根据个案情况确定，限制性条件建议可能涉及以下内容：
（一）知识产权许可。该许可通常是排他性的，并且不包含使用领域或者地域限制。
（二）保持知识产权相关业务的独立运营。相关业务应具备在一定期间内进行有效竞争的条件。”]

COMMENT: AIPLA understands that Article 23 is addressing the types and form of restrictive conditions involving IPR that may be proposed by the relevant parties to remedy the competitive concerns of a concentration.

评语：AIPLA 理解，第 23 条阐述涉及知识产权限制性条件的种类和形式，这可能由相关的方面提出的纠正集中的竞争的顾虑。

With respect to Article 23(3), AIPLA supports the concept that a specific licensing commitment that a patent owner has made to a standard setting organization, such as a specific FRAND commitment, should survive the transfer of that patent to a different entity. Importantly, because different standards bodies have different rules, the relevant licensing commitment that follows the patent should remain as the specific licensing commitment that the patent owner made to the standard’s body. AIPLA has concerns about conditioning approval of a concentration on the parties’ agreement to agree to license their non-standard essential patents on FRAND terms and conditions, particularly if the transfer or assignment of those patents as part of the transaction does not raise any additional competitive concerns over the situation prior to the transaction.

There should not be a requirement to comply with a FRAND or other commitment that the patent owner has not voluntarily made.

关于第 23 条第（3）款，AIPLA 支持这样的概念：专利所有人对标准制定机构作出的特定许可承诺，如具体的 FRAND 承诺，应该在将该专利转让给不同实体后也有效。 重要的是，由于不同的标准机构具有不同的规则，和专利相关的许可承诺应保留为专利所有人对那个标准机构的具体许可承诺。 AIPLA 担心集中于当事方的合同条款的批准，当事方同意在 FRAND 条款和条件下同意许可其非标准必要的专利，特别是如果转移或转让这些专利作为交易的一部分不会引起任何额外的对交易前的情况的竞争担忧。不应该要求专利所有者遵守没有自愿作出的 FRAND 或其他承诺。

With regard to Article 23(4), AIPLA recognizes that when a commitment by the parties to license their IPR is made to remedy competitive concerns with the transaction, some clarity regarding the conditions on which the IPR will be licensed may be desired. AIPLA is concerned, however, with the suggestion in Article 23(4) that a reasonable license fee should be based on a specific calculation method, payment method and negotiation conditions. Requiring a specific calculation in all cases may deprive the negotiating parties of the benefit of flexibility they require to reach agreement under their specific circumstances. The negotiation of a reasonable royalty should be left to the parties.[11] The royalty fees agreed to in license agreements are often the result of complex and multifaceted commercial negotiations between the parties addressing far broader cross-licenses, portfolio licenses, and other business issues between specific parties.[12] Fundamentally, all licensing terms have value, whether in monetary or non-monetary terms, and negotiating parties cannot consider monetary terms in isolation.[13] A determination of what constitutes a reasonable royalty rate should be based on market factors and depends not only on all of the other terms and conditions that the parties must negotiate as part of a license or cross-license involving specific patents, but also whether other patents or IPR will be part of the agreement.[14] Indeed, AIPLA is unaware of a formula or other detailed framework that can value a patent outside of the specific transaction at issue.[15] AIPLA, therefore, recommends that Article 23(4) be revised to clarify that parties to the concentration need not necessarily specify the exact royalty terms or calculation method, but will be permitted to negotiate license agreements, including the financial terms, based on arm's length negotiations.

关于第 23（4）条，AIPLA 认识到，当双方当事人许可知识产权的承诺是为了纠正对交易的竞争担忧时，可能需要明确知识产权获得许可的条件。但是，AIPLA 担心第 23（4）条建议的合理的许可证费用应基于具体的计算方法，付款方式和谈判条件。要求在所有情况下进行具体计算可能会剥夺谈判各方在其具体情况下达成协议所需的灵活性的好处. 合理

[11] 2016.02.09 – AIPLA Comments to NDRC at 9.
[12] 2015.10.14 – AIPLA Response to NDRC at 12.
[13] 2015.10.14 – AIPLA Response to NDRC at 12.
[14] 2016.02.09 – AIPLA Comments to NDRC at 10.
[15] 2016.02.09 – AIPLA Comments to NDRC at 10.
[11] 2016.02.09 – AIPLA 对 NDRC 的评语 9.
[12] 2015.10.14 – AIPLA 对 NDRC 的答复 12.
[13] 2015.10.14 – AIPLA 对 NDRC 的答复 12.
[14] 2016.02.09 – AIPLA 对 NDRC 的评语 10.
[15] 2016.02.09 – AIPLA 对 NDRC 的评语 10.

使用费的谈判应留给双方[11]。许可协议中商定的使用费率通常是双方在涉及更广泛的交叉许可证，组合许可证和特定各方之间的其他业务问题的复杂多面商业谈判中产生的[12]. 从根本上说，所有许可条款都有价值，无论是货币性还是非货币性，谈判各方都不能单独考虑货币条款[13]. 确定什么构成合理的使用费率应该以市场因素为依据，不仅取决于当事人必须协商的所有其他条款和条件，作为涉及具体专利的许可证或交叉许可证的一部分，而且还涉及其他专利或知识产权将成为协议的一部分[14]. 事实上，AIPLA 不清楚在特定的交易之外估计专利价值的公式或其他详细框架[15]. 因此，AIPLA 建议修改第 23（4）条，以澄清集中各方不一定必须明确指定使用费条款或计算方法，但将允许根据公平原则谈判许可协议，包括财务条款。

**Article 25: Patent Pool**
**第二十五条 专利联营**

["Patent pool can generally reduce transaction costs, improve licensing efficiency, and have the effect of promoting competition. However, patent pool may possibly also exclude and restrict competition, the following factors can be considered during particular analysis:
(1) the market share of the undertaking in the relevant market, and its control over the market;
...
(7) whether the undertakings, through the pool, license patents at unfairly high price, or impose tying, additional unreasonable transaction terms, or discriminatory treatment , etc."]

["专利联营一般可以降低交易成本，提高许可效率，具有促进竞争的效果。但是，专利联营也可能排除、限制竞争，具体分析时可以考虑以下因素：
（一）经营者在相关市场的市场份额及其对市场的控制力；
.....

（七）经营者是否通过联营以不公平高价许可专利、搭售、附加不合理交易条件或者实行差别待遇等。"]

COMMENT: AIPLA commends Article 25 for acknowledging and recognizing the many procompetitive benefits of patent pools. The Article should be clarified, however, to recognize that a two party cross-licensing arrangement is not a patent pool.

评语：AIPLA 赞许第 25 条确认和承认专利联营的许多促进竞争的益处。 但是，这条条款应该澄清一点，双方交叉许可安排不是专利联营。

Furthermore, subsections 25(1), 25(5) and 25(7) appear misguided and AIPLA recommends that they be deleted from the draft. With regard to Article 25(1), AIPLA notes that a successful patent pool by its very nature is likely to have a large market share in a relevant technology market. Such large market share is what generates the pool's recognized procompetitive benefits that include reduction of transaction costs, clearance of blocking positions, and avoidance of

costly infringement litigation.[16] With regard to Article 25 (5), the text seems to be in conflict with Article 25(2) which rightfully recognizes the general undesirability of including substitutable technologies in a pool. Conversely, Article 25(5) appears to erroneously favor pools that involve substitutable technologies, and also may erroneously imply that pools must be open to all, a broad position inconsistent with international norms that pooling arrangements generally need not be open to all who would like to join.

此外，第 25（1），25（5）和 25（7）条出现误导，AIPLA 建议将其从草案中删除。 关于第 25 条第（1）款，AIPLA 指出，成功的专利联营本身就可能在相关技术市场上占有很大的市场份额。 如此巨大的市场份额是产生专利联营的公认的竞争优势，这包括减少交易成本，清除阻碍职位以及避免昂贵的侵权诉讼[16]. 关于第 25 条第（5）款，案文似乎与第 25 条第（2）款有所抵触，第 25 条第（2）款正确地承认在专利联营中包括可替代技术的不可取性。 相反，第 25 条第（5）款似乎错误地赞同涉及可替代技术的专利联营，也可能错误地意味着专利联营必须对所有人开放，这个广泛的立场与国际规范不一致，专利联营的安排通常不需要向所有愿意加入的人开放。

Finally, Article 25(7) may be misread to suggest that a pool involves an illegal tying arrangement between IPR rights of various undertakings. The Article should be clarified to remove the word "tying."

最后，第 25（7）条可能被误解为表示一个专利联营涉及各种经营者的知识产权之间的非法搭售安排。 该条应澄清，删除“搭售”一词。

**Article 26: Injunctions**
**第二十六条　禁令救济**

["Injunction means that the undertaking owning the intellectual property right requests the court or the relevant department to issue an order restricting the use of the relevant intellectual property rights.
Injunction is a remedy enjoyed by a patentee of a standard essential patentee according to law to protect its legal rights. A patentee of standard essential patent having dominant market position uses application for injunction to force licensee to accept unfairly high license fees or other unreasonable licensing conditions, which could exclude and restrict competition. During specific analysis, the following factors can be considered:
(1) the behavior of the negotiating parties in the negotiation process and the actual intentions reflected therefrom;
(2) the commitment to injunction by the relevant standard essential patent;
(3) licensing terms proposed by the negotiating parties in the course of the negotiation process;
(4) the effect of the application for injunction on the licensing negotiations;

[16] *See Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Department of Justice and the Federal Trade Commission, at 30 (2017), available at http://www.ftc.gov/system/files/documents/public_statements/1049793/ip_Guidelines_2017.pdf.
[16] 参见知识产权许可反托拉斯准则， 美国司法部和联邦贸易委员会， 30 (2017), 网址是 http://www.ftc.gov/system/files/documents/public_statements/1049793/ip_Guidelines_2017.pdf.

(5) the effect of the application for injunction on the competition of the downstream market and consumer interests."]

{"禁令救济，是指拥有知识产权的经营者请求法院或者相关部门颁发限制使用相关知识产权的命令。
禁令救济是标准必要专利权人依法享有的维护其合法权利的救济手段。拥有市场支配地位的标准必要专利权人利用禁令救济申请迫使被许可人接受其提出的不公平的高价许可费或者其他不合理的许可条件，可能排除、限制竞争。具体分析时，可以考虑以下因素：
（一）谈判双方在谈判过程中的行为表现及其体现出的真实意愿；
（二）相关标准必要专利所负担的有关禁令救济的承诺；
（三）谈判双方在谈判过程中所提出的许可条件；
（四）申请禁令救济对许可谈判的影响；
（五）申请禁令救济对下游相关市场竞争和消费者利益的影响。"]

COMMENT: The proposed Guidelines raise concerns in at least two areas: (1) an SEP patent holder seeking an injunction and (2) competition law review of negotiated licensing terms.

评语：拟议的《指南》至少在两个方面引起关注：（1）寻求禁令的 SEP 专利持有人和（2）谈判许可条款的竞争法审查。

AIPLA commends the Guidelines' acknowledgment that the availability of injunctive relief is a critical aspect of enforcing the exclusive rights granted by intellectual property rights. AIPLA is concerned, however, that the Guidelines indicate that injunctive relief may not be available for standard essential patents. Specifically, the Guidelines indicate that the patentee of a standard essential patent having a dominant market position may be under greater scrutiny with respect to the availability of an injunction, absent any proof of an effect to injure competition. AIPLA recommends that the Guidelines be revised specifically to note that the ultimate standard remains that the party being challenged has market power in a relevant market, has engaged in conduct that may eliminate or restrict competition in a relevant market, and that the conduct has in fact injured competition, as opposed to merely disadvantaging a competitor, and there are no pro-competitive justifications that outweigh the potential anti-competitive effect. Absent proof of these factors by competent evidence, the enumerated factors should not be used to establish liability.

AIPLA 赞同《指南》承认提供禁令**救济**是执行知识产权授予的专有权利的关键方面。然而，AIPLA 担心的是，该《指南》指出，禁令**救济**可能不适用于标准必要专利。具体来说，《指南》表明，在没有任何有损于竞争效果的证据的情况下，具有主导市场地位的标准必要专利的专利权人可能会受到更多的监督。 AIPLA 建议修订《指南》，专门注明最终标准保留在受到质疑的一方在有关市场上具有市场能力，从事可能排除或限制相关市场竞争的行为，事实上损害竞争的行为，而不是仅仅使竞争对手处于不利地位，而且没有超过潜在的反竞争效应的有利于竞争的理由。没有证明这些因素的有力证据，列举的因素就不应用于确定责任。

With respect to Article 26(1) and (3), the entirety of the circumstances surrounding the parties behavior and proposed licensing terms during negotiations should be considered. For example, the opening offer of licensing terms by a patent owner or prospective licensee should not alone give rise to concerns outside the context of the entire negotiation.

关于第 26 条第（1）款和第（3）款，应当考虑到谈判期间各方的行为和提出的许可条款的全部情况。 例如，专利所有人或潜在被许可人的许可条款的开放提议不应该单独引起整个谈判背景之外的担忧。

With respect to Articles 26(4) and (5) about an SEP owner applying for an injunction, the mere seeking of an injunction against implementers of an SEP should not on its own constitute an antitrust violation.[17] It would be against good public policy to deny patent holders the full range of enforcement options provided by the patent law of the relevant jurisdiction.[18] Moreover, the availability of injunctive relief is a matter of discretion for the court or other tribunal hearing a complaint.[19] Thus, the specific FRAND or other standards body commitment at issue and the actions of both parties in negotiating toward a FRAND license may be considered by a court or other tribunal before deciding whether to grant injunctive relief, thus accommodating concerns of unwarranted injunctions.

关于申请禁令的 SEP 业主的第 26 条第（4）款和第（5）项，仅仅寻求针对 SEP 的实施者禁令不应构成反垄断违法行为[17]. 否定专利持有人有关司法管辖区专利法所提供的全面执法选择是违反公共政策的[18]. 此外，提供禁令救济是法庭或其他法庭审理投诉的酌情决定的问题[19]. 因此，法院或其他法庭在决定是否给予禁令救济之前，可以考虑特定的 FRAND 或其他的标准机构承诺以及双方就 FRAND 许可证进行谈判的行为，从而容纳无理禁令的担忧。

With respect to Article 26(3) about the licensing terms exchanged between the parties, any review of proposed licensing terms should be made with an understanding that there is no fixed methodology or set of terms applicable to all parties to assess an offer or counter-offer made in negotiating a FRAND license. Rather, royalty fees negotiated in license agreements are often the result of complex and multifaceted commercial negotiations between the parties addressing far broader cross licenses, portfolio licenses, and other business issues between specific parties.[20]

关于各方交换的许可条款的第 26 条第（3）款，对所提议的许可条款进行任何审查，都要理解在谈判一个 FRAND 许可时没有固定的方法或一套适用于所有各方评估报价或反报价的条款。相反，在许可协议中谈判的使用费通常是各方之间在解决更广泛的交叉许可证，组合许可证和其他业务问题的复杂和多方面的商业谈判的结果[20].

[17] 2016.02.09 – AIPLA Comments to NDRC at 6.
[18] 2015.10.14 – AIPLA Response to NDRC at 20.
[19] 2015.10.14 – AIPLA Response to NDRC at 20.
[20] 2015.10.14 – AIPLA Response to NDRC at 12.
[17] 2016.02.09 – AIPLA 对 NDRC 的评语 6.
[18] 2015.10.14 – AIPLA 对 NDRC 的答复 20.
[19] 2015.10.14 – AIPLA 对 NDRC 的答复 20.
[20] 2015.10.14 – AIPLA 对 NDRC 的答复 12.

Fundamentally, all licensing terms have value, whether in monetary or non-monetary terms, and negotiating parties cannot consider monetary terms in isolation.[21] A determination of what constitutes a FRAND rate depends not only on all of the other terms and conditions that the parties must negotiate as part of a license or cross-license involving specific patents, but also whether other patents or IPR will be part of the agreement.[22] Indeed, AIPLA is unaware of a formula or other detailed framework that can value a patent outside of the specific transaction at issue.[23]

从根本上说，所有许可条款都有价值，无论是货币性的还是非货币性的，谈判各方都不能单独考虑货币条款[21]. 确定什么构成 FRAND 率不仅取决于当事各方必须作为许可证的一部分或涉及具体专利的交叉许可协商的所有其他条款和条件，而且还涉及其他专利或知识产权是否成为协议的一部分[22]. 事实上，AIPLA 不知道可以在特定交易之外对专利价值进行评估的公式或其他详细框架[23].

Thus, Article 26(3) should consider the flexibility that parties need when considering licensing terms proposed during licensing negotiations. Nothing in the FRAND commitment imposes a substantive limit on royalties or requires that they be calculated in any particular way, provided they are "reasonable."[24] The traditional SDO approach of leaving the definition of FRAND terms to bilateral negotiations generally has been successful.[25] Thousands of FRAND license agreements have been reached through such a process.[26]

因此，第 26（3）条应考虑到在许可谈判中考虑许可条款时，各方需要灵活性。 FRAND 承诺中没有对特许权使用费强加限制或要求以任何特定方式计算，只要它们是"合理的"[24] . 留给双边谈判的 FRAND 术语的定义的传统的 SDO 方法一般都是成功的[25]. 通过这样的一个过程达成了数千个 FRAND 许可协议[26].

Finally, AIPLA suggests that Article 26 be formed as a guideline rather than a conclusive provision. The entirety of the circumstances presented in a specific case should be considered, which may go beyond the specific factors listed in this Article. For example, concerns about injunctive relief may be addressed if, although not required, a patent owner has offered to enter expedited, binding arbitration to enter a global license.

最后，AIPLA 建议将第 26 条作为《指南》而不是确定的条款。 应当考虑在具体案件中出现的的整体情况，这可能超出本条列出的具体因素。 例如，如果,尽管不需要,专利所有人提出进入加速，具有法律约束力的仲裁以进入全球许可，可以解决关于禁令**救济**的担忧。

---

[21] 2015.10.14 – AIPLA Response to NDRC at 12.
[22] 2016.02.09 – AIPLA Comments to NDRC at 10.
[23] 2016.02.09 – AIPLA Comments to NDRC at 10.
[24] 2015.10.14 – AIPLA Response to NDRC at 18.
[25] 2016.02.09 – AIPLA Comments to NDRC at 6; 2015.10.14 – AIPLA Response to NDRC at 19.
[26] 2016.02.09 – AIPLA Comments to NDRC at 6; 2015.10.14 – AIPLA Response to NDRC at 19.
[21] 2015.10.14 – AIPLA 对 NDRC 的答复 12.
[22] 2016.02.09 – AIPLA 对 NDRC 的评语 10.
[23] 2016.02.09 – AIPLA 对 NDRC 的评语 10.
[24] 2015.10.14 – AIPLA 对 NDRC 的答复 18.
[25] 2016.02.09 – AIPLA 对 NDRC 的评语 6; 2015.10.14 – AIPLA 对 NDRC 的答复 19.
[26] 2016.02.09 – AIPLA 对 NDRC 的评语 6; 2015.10.14 – AIPLA 对 NDRC 的答复 19.

*  *  *

AIPLA appreciates the opportunity to provide these comments in response to the Anti-Monopoly Guidelines against Abuse of Intellectual Property Rights. Please contact us if you would like us to provide additional information on any issues discussed above.

AIPLA 感谢这次对关于滥用知识产权的反垄断指南提供上述意见的机会。如果您希望我们就以上所讨论的问题提供进一步信息和意见，请与我们联系。

Sincerely Yours,
此致

Mark L. Whitaker
President
American Intellectual Property Law Association
马克 • 惠特克
美国知识产权法律协会会长