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Antitrust Group Urges China To Adjust Approach To IP Abuse

By **Melissa Lipman**

Law360, New York (April 14, 2017, 4:52 PM EDT) -- A George Mason University law school unit has urged the Chinese government to recalibrate long-gestating guidelines applying China's antitrust law to intellectual property to better recognize the rights of patent holders.

The Global Antitrust Institute — run by former Federal Trade Commission member Joshua Wright and former FTC official Koren W. Wong-Ervin — raised a series of concerns on Thursday about draft guidelines on how to apply the country's Anti-Monopoly Law to abuses of IP rights.

The institute pushed China's State Council to consider the pro-competitive benefits of intellectual property development and enforcement, calling for the government to set aside presumptions that charging for expired patents and other conduct will restrict competition in favor of focusing on the specific effects conduct has.

"If the laws governing abuse of IPRs is uncertain or unpredictable, potential innovators will also have weak incentives to innovate," the institute wrote in comments submitted to the government Thursday. "Our specific recommendations below attempt to identify those specific provisions that are unclear, counterproductive, or do not strike a balance between encouraging the use of existing innovations through the AML and the incentives for investment in new innovation."

The Chinese government has been working on guidance about how its nearly 10-year-old competition laws apply to IP rights enforcement for much of the statute's existence.

The country divides competition duties among three agencies — the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce — and all three have worked on draft guidelines in the past. The SAIC put out its own rules in 2014, but all three have now **submitted competing draft guidance** to the State Council, which will have to reconcile the three.

The substance of the rules will be key, as in the past attorneys have had to divine the agencies' approaches to IP-antitrust issues like the limitations on what companies can do with their standard essential patents from negotiated settlements with Qualcomm and InterDigital, among others.

The current version is likely be the last opportunity observers have to comment on the guidance, Wong-Ervin said.

But the institute worried that the existing guidelines still depart from some key principles that govern IP rights in the U.S. and elsewhere, perhaps most notably that owning a patent or other intellectual property grants gives a company or individual the right to exclude rivals from using it.

"The right to exclude is a central feature of IPRs, and economic theory and empirical evidence

show that IPRs incentivize the creation of inventions, ideas and original works," the institute wrote.

The Chinese government should also include the "well-accepted" principle that its antitrust agencies should assess the impact IP enforcement might or has had on competition by comparing the but-for world that would exist without an IP license, according to the group.

"This important analytical approach, which has been used by the U.S. antitrust agencies for the last 20 years, is absent from the draft guidelines," the institute wrote. "The U.S. approach is informative … in large part because the United States has a long history of trying to reconcile the two seemingly inconsistent bodies of law— antitrust and intellectual property—and there is much that can be learned from the mistakes made in the United States and our evolution away from presumptions of illegality."

Likewise, the institute criticized the draft guidance for not recognizing that licensing IP rights generally benefits competition.

The Chinese government should also move away from the presumptions the current draft guidelines seem to create that some activities, like charging licensees for expired or invalid patents or blocking licensees from challenging the validity of claimed IP rights, were inherently or likely anti-competitive, according to the comments.

"We respectfully urge the elimination of such presumptions and recommend that the State Council instead adopt an effects-based approach," the institute wrote. "This approach would benefit Chinese consumers because presumptions that are not appropriately calibrated are likely to capture conduct that is pro-competitive."

The group also warned the Chinese government against what it said appeared to be special rules for standard essential patents. The better approach, according to the comments, would be to examine SEP enforcement on a case-by-case basis.

Even if companies agree to license patents key to industry standards on a FRAND — or fair, reasonable and nondiscriminatory — basis, antitrust enforcers should still examine whether any apparent efforts to get around those promises would in fact harm competition, the group said. Putting special burdens on SEP holders is not only unnecessary, but it also would likely dissuade companies from participating in the standard setting process, the institute said.

More broadly, the group also warned that the guidelines gave the country's enforcers "broad discretion" without offering companies the guidance they need in order to comply with China's rules and continue to innovate.

The guidelines offer a list of factors the Chinese agencies will use to consider different kinds of conduct, but don't explain why each criteria is significant or explain how much each weighs in the decision-making process. The group instead urged the Chinese government to follow the model of U.S. and Canadian antitrust agencies' own IP antitrust guidelines to offer details of how the principles apply to different situations.

--Editing by Katherine Rautenberg.