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FTC's Wright opposes JFTC proposal regarding injunctive relief and SEPs

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Commissioner Joshua D. Wright of the US Federal Trade Commission (FTC) and Judge Douglas H. Ginsburg submitted comments to the Japan Fair Trade Commission (JFTC) arguing against a draft amendment to the Guidelines for the Use of Intellectual Property under Japan's Antimonopoly Act (AMA), according to the [comments](#).

The comments were sent in response to the JFTC's request for public comment. The draft amendment specifies that seeking injunctive relief to enforce a standard essential patent (SEP) encumbered by a commitment to license on fair, reasonable and nondiscriminatory (FRAND) terms against a party that is willing to take a license on FRAND terms may constitute an unlawful exclusion of business activities or an unfair trade practice.

According to the comments, the draft amendment is premised on the assumption that seeking injunctive relief makes it difficult to research and develop products adopting the standards, which in turn deters widespread adoption of standards. Wright and Ginsburg argued that the assumption lacks empirical support.

The letter stated that ordinary contract law makes an AMA sanction unnecessary to deter any instances of anticompetitive patent holdup that might arise. An AMA sanction is likely to reduce incentives to innovate and deter participation in standard setting and these provisions should be deleted.

Wright and Ginsburg noted that should the JFTC decide to retain these provisions, they should at least be amended to limit liability to situations when there is proof that a FRAND-encumbered SEP holder engaged in patent holdup, or that the patent holder used the threat of injunctive relief to demand supra-competitive royalties.

The prospect of AMA liability for a patentee seeking injunctive relief would enable an infringing user to negotiate in bad faith knowing that its exposure is capped at the FRAND licensing rate, and therefore requires an SEP holder to take a below-FRAND rate from an unscrupulous or a judgment-proof infringing user, the letter said.

AMA liability is likely to deter patent holders from contributing their technology to a standards-setting organization (SSO) under FRAND terms if doing so will require them to forfeit their right to protect their intellectual property by seeking an injunction against infringing users, the letter said. According to Wright and Ginsburg, these possibilities do not protect the public interest in competition and innovation, but actually threaten the gains from innovation and standardization.

Read the comments [here](#).

- Agencies

- [US Federal Trade Commission \(FTC\)](#)
- [Japan Fair Trade Commission \(JFTC\)](#)