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FTC's Wright opposes portions of Canadian IP guideline draft

(Government Press Release (edited)) Confirmed

US Federal Trade Commission (FTC) Commissioner Joshua D. Wright and Judge Douglas H. Ginsburg submitted comments to the Canadian Competition Bureau questioning parts of the draft update to the Intellectual Property Enforcement Guidelines, according to the [comments](#).

The comments were sent in response to the bureau's draft stage 2 update of the guidelines.

Reverse payment settlements

The comments addressed product switching in the context of pharmaceutical patents and the settlement of patent infringement litigation between competitors, or "reverse payment settlements".

Product switching occurs when a brand name manufacturer seeking to switch demand from drug Product A, with expiring patent protection, to drug Product B, which has a longer term of patent protection, by withdrawing Product A from the market. A "hard" switch removes Product A from the market and the formulary list, so generic companies cannot automatically substitute their products. A "soft" switch is when the brand name company aggressively attempts to persuade doctors and patients to switch to Product B through rebates and discounts, while allowing Product A to remain on the market.

Wright and Ginsberg recommended against imposing a competition law sanctions on product switching without clear evidence that Product B represents a sham innovation with zero or negative consumer benefits. The comments urged the bureau to revise the guidelines to specify that absent such evidence, the bureau will treat product substitution as exempt from the "mere exercise" of a patent right.

According to Wright and Ginsberg, it is also unclear whether the balancing contemplated by a rule prohibiting anticompetitive product switching is realistic. Wright and Ginsburg asked the bureau to distinguish between a "hard" switch and a "soft" switch in its guidelines.

Wright and Ginsburg also discouraged imposition of criminal liability and the use of a per se approach for reverse payment settlements. The comments noted that this approach threatens to over-deter procompetitive conduct. According to the commenters, the bureau's reliance on intent evidence is misplaced; the proper focus of competition law is on the competitive effects.

FRAND

Additionally, Wright and Ginsburg touched on the issues of renegeing on a commitment to license a standard-essential patent (SEP) on fair, reasonable and non-discriminatory (FRAND) terms and seeking injunctive relief against infringement of a FRAND-encumbered SEP. The comments also addressed the issues of deceptive failure to disclose patents essential to a standard, or "patent ambush".

The comments argued that competition law is not a suitable instrument for micromanaging product design and innovation. Imposing competition law liability on new product introductions requires competition agencies and courts to weigh the benefits to consumers from the innovation against any costs to consumers arising from loss of competition. Wright and Ginsburg noted that agencies and courts are ill-equipped to make such

determinations.

Wright and Ginsburg recommended that the bureau revise its guidelines regarding patent ambush to specify that liability will be imposed only when there is proof of certain elements, such as when the patent holder's or applicant's conduct causes an adverse effect on competition in the relevant market.

Wright and Ginsburg urged the bureau against imposing a competition law sanction for the breach of a FRAND agreement, and recommended that certain sections of the guidelines be deleted. Alternatively, the bureau was urged to specify that liability will be imposed only when there is proof that the SEP holder engaged in deceptive conduct that resulted in the unlawful acquisition of market power and that a different technology would have been incorporated into the standard had it not been for the SEP holder's deception.

The commenters further recommended against the bureau imposing a competition law sanction for seeking injunctive relief and urged that any suggestion to that effect be deleted in its entirety from the updated guidelines. Wright and Ginsburg noted that if the bureau decided to retain the competition law sanction for the seeking of injunctive relief, the commenters urged the bureau to amend its guidelines to limit liability to situations when there is proof that a FRAND-encumbered SEP holder engaged in patent holdup, or used the threat of injunctive relief to demand supra-competitive royalties.

View the comments [here](#).

- Agencies

- [Canadian Competition Bureau](#)
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