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Final IP guidelines may await next administration

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Department of Justice headquarters in Washington, DC (Credit: Sebmol)

It is unclear whether the antitrust agencies will finalise updates to their intellectual property licensing guidelines before the end of the Obama administration, a Department of Justice official said yesterday.

Frances Marshall, assistant chief of policy at the DoJ's antitrust division, said the date will depend on the number of comments the DoJ and Federal Trade Commission receive regarding their proposed update, and how long it takes them to integrate those suggestions.

The DoJ and the FTC revealed their proposed revision of the 21-year-old guidance last month, although the agencies have not put forward a new approach to how antitrust law should apply to standard-essential patent issues – a topic that has been hotly debated among technology companies and the antitrust agencies for years.

Speaking yesterday at the International Bar Association's annual conference in Washington, DC, Marshall said the 1995 guidelines do not have a separate section on standards, and it was the agencies' decision "to not expand the guidelines into guidance on standard-setting activities beyond what is already there."

Marshall said the analytical approach outlined in the original guidelines applies to standard-setting activities and SEPs, echoing comments made by FTC chairwoman Edith Ramirez in 2014. "The same key enforcement principles [found in the 1995 IP Guidelines] also guide our analysis when standard-essential patents are involved," Ramirez said at the time.

For example, Marshall said the DoJ considers whether SEPs give companies market power, and if SEP owners have voluntarily committed to license patents. "And so, at a high level, the guidelines do address standard-setting activities," she said.

Marshall added that there is already a wide variety of guidance that has helped to illuminate the thinking of the DoJ and the FTC on how IP rights and antitrust enforcement should interact.

Earlier this week, the Global Antitrust Institute at George Mason University Law School said the agencies rightly refused to adopt a special brand of antitrust analysis for SEPs in which effects-based analysis would be replaced with unique presumptions and burdens of proof. The institute issued a comment by Koren Wong-Ervin, Joshua Wright, Judge Douglas Ginsburg and Bruce Kobayashi.

They wrote: "SEP holders, like other IP holders, do not necessarily possess market power in the antitrust

sense, and conduct by SEP holders, including breach of a voluntary assurance to license its SEP on fair, reasonable, and nondiscriminatory (FRAND) terms, does not necessarily result in harm to the competitive process or to consumers."

Marshall spoke on a panel along with Nicholas Banasevic, DG Comp's head of unit for antitrust and IT; John H Choi at Shin & Kim in Seoul; and David Blonder, Blackberry's chief regulatory counsel. Noerr partner Alexander Birnstiel and Daniel G Swanson at Gibson Dunn & Crutcher in Los Angeles chaired the panel.